WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: **3545/19**
Applicant: **Young Goh**
Respondent: **Westpac Banking Corporation**
Date of Determination: **1 November 2019**
Citation: **[2019] NSWWCC 354**

The Commission determines:

1. Award for the respondent.

A brief statement is attached setting out the Commission's reasons for the determination.

Cameron Burge
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the **Registrar**

STATEMENT OF REASONS

BACKGROUND

1. Mr Young Goh (the applicant) commenced working with Westpac Banking Corporation (the respondent) on a contract basis as an actuarial senior pricing consultant in May 2016. The original six-month contract was extended to a year, and in May 2017, the applicant was offered a permanent job by Rashi Bansal, chief actuary. He accepted the offer and was employed as senior manager, group pricing based at Barangaroo. His duties were to provide actuarial advice to the respondent in relation to its group insurance portfolio.

2. As part of his employment, the applicant underwent quarterly, half yearly and annual performance reviews. The applicant's last review was undertaken in April 2018 by his manager, Ms Aoife Beirne. In the applicant's words, it did not go well.

3. In his statement, the applicant sets out a number of issues which he had in his relationship with Ms Beirne, principally surrounding what the applicant describes as "the GST issue." The applicant describes matters and problems in April and May 2018 which he described as a "particularly intense time for me and my team." At approximately that time and in response to feedback from various stakeholders, Ms Beirne placed the applicant on an informal performance improvement plan (IPIP). She emailed the plan to the applicant on 3 May 2018 and sought his input. The applicant says in his statement that human resources (HR) found the IPIP inadequate, and it had to be re-drafted. I note the HR Department also found a formal complaint of bullying and harassment by the applicant against Ms Beirne as unfounded.

4. Once the IPIP commenced, the applicant said that one-on-one meetings between he and Ms Beirne were stepped up and he felt she was unsupportive of him. I note Ms Beirne provides details surrounding the one-on-one meetings in her statement from paragraph 47. Around this time, the applicant began consulting his general practitioner in relation to his feelings surrounding problems at work.

5. On 1 June 2018, Ms Beirne informed the applicant she had not seen improvement, and was considering placing him on a formal improvement plan. According to Ms Beirne, on 5 June 2018 a further meeting took place at which the applicant advised her he had a complaint about the manner in which she addressed him. According to Ms Beirne, at the meeting on 5 June 2018, the applicant advised her he had a complaint about the manner in which he addressed her. Details of this meeting and its aftermath are set out below under the heading "Lay evidence."

6. After a number of further meetings and discussions with Ms Beirne, on 21 June 2018 the applicant raised the formal grievance in relation to her which is referred to above. He took a week away from work from 22 June 2018 to 29 June 2018, then took a further week's annual leave. The applicant undertook additional sick leave between 11 September 2018 and 30 September 2018. From the time the formal grievance was raised, the applicant's meetings with Ms Beirne ceased. The respondent's HR department dismissed the applicant's complaint, and on or around 5 October 2018, the applicant then raised a grievance against the manager of HR.

7. Broadly speaking, the applicant believed he was being bullied and harassed by Ms Beirne, who he says never provided him with positive feedback. He described her as micromanaging and her manner of addressing him and disagreeing with propositions which he put as "aggressive and belittling."

8. On 28 September 2018, the applicant submitted a claim form in relation to a psychological injury. On 22 November 2018, the respondent issued a section 74 notice disputing liability on the basis the applicant did not suffer an injury within the meaning of section 4 of the *Workers Compensation Act 1987* (the 1987 Act) and relying on section 11A of the 1987 Act on the basis that if the applicant did suffer an injury, it was wholly or predominantly caused by the reasonable actions of the respondent in relation to discipline, performance appraisal, promotion or termination. The respondent also placed in issue the question of any incapacity suffered by the applicant and his entitlement to section 60 medical expenses.

9. On 8 March 2019, the applicant's solicitors requested a review of the respondent's decision and on 22 March 2019, a section 78 notice was issued relying upon section 11A of the *Workers Compensation Act 1987* (the 1987 Act). I note that at the hearing of this matter, the only issue in question relating to liability was section 11A.

10. On 6 May 2019, the respondent wrote to the applicant asking for medical information to explain his absence from work. It was the third such letter requesting that information. When the applicant did not respond, on 14 May 2019, the respondent terminated the applicant's employment in writing.

11. The applicant's solicitors served on the respondent additional material by way of a report of Dr Canaris, independent medical examiner (IME) in support of a review of the insurer's decision to decline liability, following which on 10 July 2019, the respondent issued a section 287A review notice relevantly denying liability in relation to section 11A. The applicant's solicitors then commenced these proceedings on 15 July 2019.

ISSUES FOR DETERMINATION

12. The parties agree that the following issue remains in dispute:

    (a) whether the applicant's accepted psychological injury was wholly or predominantly caused by the reasonable actions of the respondent with respect to discipline and/or performance appraisal.

PROCEDURE BEFORE THE COMMISSION

13. The parties attended a hearing on 12 September 2019. On that occasion, Mr B Carney of counsel appeared for the applicant and Mr F Doak of counsel for the respondent. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

14. The applicant had retained two IMEs. At the hearing, he elected to rely on the report of Dr Canaris. Accordingly, the opinion of Dr Teoh will not be taken into consideration.

EVIDENCE

Documentary evidence

15. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) Application to Resolve a Dispute (the Application) and attached documents;

    (b) Reply and attached documents, and

(c) Applicant's Application to admit late documents (AALD) dated 10 September 2019 and attached documents.

Oral evidence

16. There was no oral evidence called at the hearing.

SUBMISSIONS

The respondent's submissions

17. Mr Doak submitted there was no controversy that Ms Beirne's actions fall within the definition of discipline, as that term was discussed in the decision of *Kushwaha v Queanbeyan City Council* [2002] NSWCC 25 (Kushwaha). He noted the definition of discipline is the process of drawing the worker's performance to their attention. Mr Doak submitted that whilst the concept of performance appraisal was narrower and the IPIP falls within that definition, the whole process at issue is really one relating to discipline.

18. Mr Doak noted the applicant was employed on a full-time basis to his eventual position in May 2017 after applying unsuccessfully for the role of director, which Ms Beirne was successful in obtaining. He submitted Ms Beirne as the applicant's supervisor was someone who the applicant did not trust, and he erroneously formed the view that the IPIP meant she was out to get him.

19. Mr Doak submitted there was no objective evidence this was the case, and all of the evidence put forward by the witnesses for the respondent would indicate in fact it was attempting to assist the applicant in the workplace. He submitted the applicant's idea there was a vendetta against him is without any objective foundation.

20. In September 2017, Ms Beirne went on maternity leave and the applicant's performance review was undertaken by Mr Katon, who identified some issues with the applicant's performance despite him receiving a bonus. Mr Doak submitted that by 2018, it was apparent the applicant had issues with both his performance and that of the team he was leading and for which he was responsible.

21. On 31 January 2018, the applicant was called to a meeting to discuss his performance which was based on "feedback from stakeholders." Mr Doak submitted this meeting arose because the people in receipt of the applicant's pricing of products were not happy. He noted that the applicant continued to have discussions relating to his performance up until he took leave in June 2018. In her meetings with the applicant, Ms Beirne stressed that he needed to be up to date with his work, however, the applicant apparently went on leave in June 2018 without finalising his workload. Mr Doak noted Ms Beirne provided the applicant with guidance in ways to address and improve his performance issues, and as was established by the evidence attached to the Reply, she attempted to help the applicant obtain extra resources to help with the workload. Mr Doak submitted this was contraindicative of any vendetta against him on the part of Ms Beirne.

22. Mr Doak referred to the documents attached to page 56 of the Reply concerning feedback from Ms Crowe by way of complaint concerning the applicant and his team's performance. He submitted that it was thoroughly appropriate for the applicant's supervisor, Ms Beirne to deal with that feedback and the IPIP was a consequence of feedback of this nature.

23. Mr Doak noted the IPIP was not a document which Ms Beirne established by herself, but was a document put together with the assistance of a number of people in management.

24. Several meetings concerning the IPIP took place in or around May 2018. In providing his feedback and self-assessment in the lead up to the IPIP being established, the applicant stated the problem with his performance rested with Ms Beirne rather than with him. It was at this point she consulted with HR and the applicant was placed on the IPIP.

25. At a meeting on 5 June 2018 concerning the applicant's performance, he read out a statement saying he was being bullied by Ms Beirne. She responded by email on 6 June 2018, and Mr Doak submitted those emails fly in the face of the applicant's evidence, and ought to be preferred as the emails are contemporaneous records of what was going on rather than a statement which was signed in anticipation of legal proceedings.

26. Mr Doak submitted there was no suggestion Ms Beirne designed and implemented the IPIP either arbitrarily or capriciously. He noted here was no criticism of Ms Beirne's email regarding the plan at the time it was sent to the applicant and submitted the contents of the email were both accurate and contradict the applicant's view that the whole plan was imposed upon him by Ms Beirne.

27. In relation to the statement of Declan Egan, co-worker and subordinate of the applicant, Mr Doak submitted the Commission should have careful regard to that document. This was not to suggest Mr Egan was fabricating any evidence, but rather because he received direction from the applicant and his view as to the nature and extent of the relationship between the applicant and Ms Beirne would therefore be tainted by only having the applicant's version of it.

28. In summary, Mr Doak submitted there was a clear process to attempt to improve the applicant's performance, however, it was unsuccessful. He submitted the evidence was one way, namely there were problems with his performance and Ms Beirne was trying to assist him in remedying those issues. He took the commission to the decision in *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255 (Heggie), and the requisite steps required to weigh up the reasonableness or otherwise of a respondent's actions in terms of section 11A, and emphasise the test was an objective one.

29. Mr Doak submitted the test was not what could have been done differently by the respondent, but whether its actions in their totality were reasonable. He said it was necessary to weigh up the rights and actions of both the employee and the employer. Mr Doak submitted it was not unreasonable for the respondent to act as it did, be it by way of the actions of Ms Beirne or management in general. He said the performance improvement plan was neither draconian nor capricious. Whilst the applicant may have seen the IPIP differently, that is human nature but is irrelevant in terms of the Commission assessing the reasonableness or otherwise of the actions taken by the respondent.

30. In terms of the question of whether the injury was wholly or predominantly caused by the disciplinary actions of the respondent, Mr Doak noted the medical experts in the matter did not seem to address this question, but rather whether those actions were reasonable. Mr Doak submitted that Dr Canaris, IME for the applicant, seems to accept the applicant's issues were wholly and predominantly caused by the respondent's actions in that he concerns himself with the reasonableness or otherwise of those actions, which he presumably would not do were there other causative factors.

31. In terms of capacity, Mr Doak submitted (appropriately in my view) that the evidence is suggestive of the fact the applicant suffered and continues to suffer from incapacity for employment.

The applicant's submissions

32. Mr Carney submitted there was no issue the applicant and Ms Beirne had difficulties in their relationship, and that those issues related to her micromanagement of the applicant. He noted that Ms Beirne drew to the applicant's attention negative feedback from stakeholders, however, the only one mentioned by name was Ms Crowe, in February 2018. Mr Carney noted that when that allegation was tested in the documents found from page 81 of the Reply, the email from Ms Crowe dated 13 January 2018 said she had no feedback to provide in relation to the applicant for over 12 months.
33. Mr Carney submitted that Ms Beirne's complaints to the applicant in relation to deadlines and quality of work were unsubstantiated, particularly when Ms Crowe's evidence attached to the Reply is suggestive that from October 2017, she was not dealing with the applicant, and accordingly it is unreasonable in 2018 to base the IPIP on Ms Crowe's alleged difficulties with him.

34. Mr Carney relied upon Mr Egan's statement to the effect that Ms Beirne's conduct was what led to the delay in a number of deadlines. Mr Carney also relied to Mr Egan's evidence to the effect that personality clashes between the applicant and Ms Beirne were an issue.

35. In summary, Mr Carney submitted the applicant's requests in relation to the difficulties he was having with Ms Beirne were reasonable, and it was not reasonable for the respondent to deal with any issues in the way in which they did. Mr Carney submitted that in applying the test in *Hegny*, the Commission would have regard to the contemporaneous written responses to alleged problems, and would find those responses were unreasonable in that if the respondent had taken the trouble to examine the alleged issues, it would have acted differently and found that a number of the alleged problems were not in fact substantive.

36. In summary, Mr Carney submitted the respondent has been unable to provide proven instances sufficient to give rise to a performance improvement plan for the respondent, and accordingly the development of that program and the respondent's actions surrounding the applicant's alleged performance issues were completely unreasonable.

The respondent's submissions in reply

37. Mr Doak submitted that the evidence in relation to stakeholders being dissatisfied with the applicant went further than simply Ms Crowe, and an examination of the documentation reveals that the emails were directed a number of stakeholders within the business. Moreover, Mr Doak referred to the documents at page 60 of the Reply in which the general manager indicated the applicant's work was not satisfactory, and that when Ms Beirne raised the general manager's comments with the applicant, he replied, "I thought it went well."

38. In summary, Mr Doak submitted the overwhelming propensity of the contemporaneous evidence supports the respondent's claim that its actions in relation to the applicant's performance were reasonable and accordingly the defence under section 11A is made out.

LAY EVIDENCE

39. Portions of the lay evidence have been set out under the heading "Background" above. I do not propose to repeat that evidence here, however, it has been taken into account in reaching this determination. To the extent there is other lay evidence not set out above, it will be summarised in this portion of the reasons.

40. The applicant's evidence is that he perceived Ms Beirne's approach to discussing matters with him as "like a verbal assault." He said she "barraged" him with question after question, and did not provide any positive feedback whatsoever. The applicant stated that once he was

placed on the IPIP, he felt he could never hope to pass it, as he perceived Ms Beirne would always find ways to fault him. He said they met frequently, and her feedback was negative towards him. He described the one on one meetings as counter-productive, as they took a lot of his time during a period when he was very busy. He also relied on the evidence of Mr Egan, a subordinate, as to the effect of his meetings with Ms Beirne upon the team and the applicant.

41. Ms Beirne broadly confirmed the history of concerns with the applicant's employment. She confirmed receipt of feedback from stakeholders and the fact there were regular meetings, though she said they were in an attempt to improve the applicant's performance. After the applicant was placed on the IPI, Ms Beirne said his performance was not improving, and she was contemplating placing him on a formal Performance Improvement Plan (PIP). According to Ms Beirne, at the meeting on 5 June 2018, the following happened:

> "I came into the room. He said that he had prepared a written statement and wanted to read it to me. I didn't take any notes. I was really taken aback by his tone and his accusations in his statement. It was quite long. He talked about me not following the processes from HR for performance improvement, that he hadn't been given coaching. He said that he found the performance management process very stressful and that if I did not cease it he would lodge a formal complaint against me. I was quite taken aback by his aggressive tone. I asked him if he felt safe and if he wanted to continue with the conversation.
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> 63. I said that if he felt he had cause for complaint he should raise it. I reiterated the reasons for the PIP and gave him some examples. I also refuted some of his statement allegations. I said that I was shocked. He didn't enter into any further conversation. suggested that we end the conversation. I asked him to send his statement to me as I wanted to escalate to Rashi.
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> 64. I spoke to Rashi immediately after that meeting as I was quite shaken. I wasn't sure what to do next. we got in touch with HR. AS I had spoken to HR about the informal and formal PIP process so I had a contact and could forward on the concerns with Young's conversation on 5 June.
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> 65. Young sent me his statement by email with a lot less detail of what he had read to me in the meeting, but of a similar vein, on 6 June. I responded that I noted that he had softened the language and reduced it to some extent. I mentioned that I did not find that he was performing to the level expected of a senior manager. I acknowledged the conversations that I had had with him and also mentioned that I had checked on his welfare. I can provide that email.
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> 66. We continued on with work as normal. I still had one on ones and we still went through the processes but I couldn't follow up on the PIP.
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> 67. I spoke to HR and Rashi about the concerns that Young had raised. We agreed that the best decision was to extend the performance management and try to address his concerns. We arranged that he could have an internal support person at the PIP meetings with me and Rashi suggested that she would be his support person but Young didn't want that. Young suggested to have stake holders from the business but that was inappropriate. HR didn't want to get involved at that stage as it was informal. Rashi suggested a colleague who was suitably removed from the situation and that lady agreed to do that.

68. We had set up a meeting on 14 June 2018. There had been about a 2 week break to work ou1 next steps and to try to find out who we could get to be his support person. Young understood that there was a need to continue with the informal performance management. I sent him on invite advising that the purpose was to discuss his performance management. Young's support person. Diane Wong, who is the business manager for our CFO, attended that meeting with Young. He said that he had been recording feedback that I had given him. I had asked him to prepare for this meeting. He said that he needed help and coaching and agreed that I could do it. I told him that it was not appropriate for someone at his level to be given constant feedback like I had been. He said he had been intimidated by my manner so he was afraid to ask for help. He said that he does learn from me. What he asked for me was to call out his success more. He said that he was still talking with his psychologist from Access. We agreed on the PIP centred around his work for the week. I said that I would try to call out good progress.
69. Diane was quite positive at the outcome of that meeting with Young's level of engagement.

70. When it came to the next meeting the following week he emailed me two hours before to say that Diane would not be needed at that meeting as he had someone else. I asked who that was and he said 1hat it was someone external. I consulted with Rashi and HR and they said that it was not appropriate for someone external to the business to come in on an informal meeting. I sent a message to Young to ask for more details of who the person was. I guess Rashi followed up to say that it wasn't appropriate to have someone external to come to the meeting at short notice. He said that in that case he would remove himself from the meeting and that his doctor had granted him a week's leave. He didn't communicate that to me.

71. It was around that time that Young then submitted a formal complaint against me. That week of sick leave proceeded [sic] annual leave that he had booked."

42. Mr Egan's statement is to the effect Ms Beirne's meetings with the applicant had a negative effect on him, and also that some delays were caused to the team by Ms Beirne requiring the applicant answer very detailed and specific questions concerning tasks which the team had to carry out. I place less weight on Mr Egan's statement than those of the other witnesses, as Mr Egan's views on the relationship between Ms Beirne and the applicant are informed only by information relayed to him by the applicant. I do not say that as a criticism of Mr Egan, rather it is an observation as to the source of his evidence.

43. Ms Bansal, chief actuary of the respondent, also provided a statement. She said she did not notice any issues in the relationship between Ms Beirne and the applicant when the latter was in a contract role. She noted both Ms Beirne and the applicant applied for the role of director, and that Ms Beirne was successful in that process. She said "I told Young that he as unsuccessful and told him that Aoife had been successful. Young told me that he accepted my decision and understood the reasons, and was looking forward to working with Aoife." The applicant secured the position of Senior Manager and would report to Ms Beirne.

44. From paragraph 21 of her statement, Ms Bansal said:

"I offered Aoife her role and she went on maternity leave straight after that for a few months. Aoife came back In November 2.017 and commenced her role.

22. BT has a program called BT blue which is a recognition program. Aoife Is a two time BT blue winner and that Is very rare. She Is a very hard working and has a great work ethic.

23. Whilst Aoife was on maternity leave Andrew Katon stood In as the Acting Director. During the time that Andrew was in the acting role I was on leave myself and I did not keep in contact with the business due to my health Issues.

24. When t returned to work I had a catch up with everyone and Andrew said and Aoife both said to me that he had some concerns with Young's performance and the level that he was expecting not the level that Young was at. Young came to us with a lot of experience, probably 20 years' experience and had a lot of industry knowledge but he wasn't able to really showcase that. The quality of his work was poor and his engagement with the business was also poor.

25. I also got alarming feedback from the business about the quality of Young's work. I had a catch up with Tracey Crowe in the first week of coming back to work and she told me how difficult It had been dealing with Young. Tracey told me the quality of his work was so poor, she had lost total trust In him, and she really needed me to do something about it.

26. Andrew told me that he had spoken to Young about his performance issues. Andrew was like the babysitter of that acting role whilst Aoife was on mat leave. I can't say that Andrew started any active performance management with Young but he did tell me that he had discussions with Young about his performance...

29. The first time that Young raised any issues with myself was on 1 June 2018 when he said to me that he felt that he was being harassed by Aoife and he didn't want to continue going through with the PIP and he thought it was an unfair process and it wasn't working. He never said anything negative to me about Aoife before that. I asked Young why he thought it was unfair and to give me some examples. He was not able to give me an examples [sic] and just kept repeating his that it was an unfair process and he wants the performance Improvement to stop now otherwise he would make a complaint to HR. I said to him again to give me some examples but he was unable to. I told him that he can if he wishes to go to HR and make a complaint and that was absolutely up to him but unless he could give me some sort of idea of what he meant by the performance improvement plan being unfair then It made it very difficult for me to do anything especially as I had received feedback on his performance first hand from his stakeholders.

30. I offered to write an email to his stakeholders to ask her to provide him with feedback which I did. I then asked Tracey, Andrew and Suzanne to provide Young with written feedback. Tracey replied back to me that she had done it so many times and provided him with feedback about his work on the errors that he was making. She didn't know what else to do. Suzanne said she had had a chat to Young and had very frank discussions with him. He may not have been given written feedback at the time but I've been told that he was provided with very clear feedback.

31. Young seemed to think that his work was all fine. I just wanted to reiterate to him that there was feedback that he had received and that I had received from his stake holders and that the quality of his work had been very poor, he was not able to manage the team, and he was not able to provide good quality advice to the business."

45. Ms Bansal then set out the feedback received from stakeholders and the details of a meeting between the applicant and the General Manager at which the latter indicated he was unhappy with the presentation by the applicant. She stated she offered to be the applicant's support person at the IPIP meetings with Ms Beirne to make sure they were conducted fairly. According to Ms Bansal, the applicant initially accepted this offer, but then recanted. Ms Diane Wong then sat as support person for the applicant in one meeting, however, thereafter the meetings ceased as the applicant lodged a formal complaint and also commenced a series of absences owing to sick and recreational leave.

DISCUSSION

Section 11A

46. There is no issue the applicant suffered a psychological injury in the course of his employment with the respondent. The respondent, however, raises a defence under section 11A of the 1987 Act which, if successful, is a complete defence to the applicant's claim.

47. Section 11A(1) provides:

> "No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers."

48. "Psychological injury", in the context of section 11A(1), is defined in subsection (3) in the following terms:

> "A psychological injury is an injury (as defined in section 4) that is a psychological or psychiatric disorder. The term extends to include the physiological effect of such a disorder on the nervous system."

49. An employer which seeks to make out a defence pursuant to section 11A carries the onus of establishing that defence: *Pirie v Franklins Ltd* [2001] NSWCC 167; (2001) 22 NSWCCR 346 (*Pirie*); and *Department of Education and Training v Sinclair* [2005] NSWCA 465; (2005) 4 DDCR 206 (*Sinclair*). It was otherwise prior to amendment of section 11A from 12 January 1997: *Ritchie v Department of Community Services* [1998] NSWCC 40; (1998) 16 NSWCCR 727.

50. "Wholly" and "predominantly" are separate concepts and a finding of one or the other needs to be considered. In *Smith v Roads and Traffic Authority of NSW* [2008] NSWWCCPD 130 (*Smith*) the arbitrator made a finding that the subject injury was "wholly" or "predominantly" caused by action taken by the respondent employer. Snell ADP said at [62] that the concepts "wholly" and "predominantly" are different concepts and if such findings were to be made "it needed to be one or the other".

51. The phrase "wholly or predominantly caused" has been held to mean "mainly or principally caused". The test of causation to be applied is that described in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; (1994) 10 NSWCCR 796; *Ponnan v George Weston Foods Ltd* [2007] NSWWCCPD 92; *Temelkov v Kemblawarra Portuguese Sports and Social Club Ltd* [2008] NSWWCCPD 96 (*Temelkov*).

52. In *Hamad v Q Catering Limited* [2017] NSWWCCPD 6 (15 March 2017) (*Hamad*), the respondent employer was unable, on the available evidence and in the absence of any medical evidence dealing appropriately with the topic, to discharge its onus in proving the worker's psychological injury resulted 'wholly or predominantly' from its reasonable action to be taken or proposed to be taken with respect to discipline.

53. The effect of the decision in *Hamad* is that reliance on factual material alone will not always be sufficient to make out a section 11A defence. Where factual evidence is adequate, it is often in cases where there is an allegation of a single event which has given rise to psychological injury.

54. In *Hamad*, Deputy President Snell at [88] said:

> "… There may be cases in which causation of a psychological injury can be established without specific medical evidence, for example where there is a single instance of major psychological trauma, with no other competing factors. The need for medical evidence, dealing with the causation issue in s.11A(1) of the 1987 Act, will depend on the facts and circumstances of the individual case. In the current case, as in most, there are a number of potentially causative factors raised in the applicant's statement and the medical histories. Proof of whether those factors, which potentially provide a defence under s.11A(1), were the whole or predominate cause of the psychological injury, required medical evidence on that topic. The extent of any causal contribution, from matters not constituting actions or proposed actions by the respondent with respect to discipline, could not be resolved on the basis of the Arbitrator's common knowledge and experience".

55. In accordance with Deputy President Snell's decision in *Hamad*, medical evidence in a case such as the present one is required which addresses those relative causative contributions before a finding as to whether the reasonable actions of a respondent "wholly or predominantly" caused the injury at issue.

56. In order to successfully raise a defence under section 11A, the respondent must not only show the requisite causal connection between its actions and the applicant's injury, it must also satisfy the Commission that its actions were reasonable. The test in determining reasonableness is objective; that is, it does not matter what the parties to the proceedings thought about the actions of the respondent. Instead, the Commission must objectively weigh up the evidence to determine whether it was reasonable in the circumstances.

57. Considering the meaning of reasonableness, Geraghty J in *Irwin v Director-General of Education* NSWCC 14068/97, 18 June 1998 (*Irwin*) said:

> "…the question of reasonableness is one of fact, weighing all the relevant factors. That test is less demanding than the test of necessity, but more demanding than the test of convenience. The test of 'reasonableness' is objective and must weigh the rights of employees against the object of the employment. Whether an action is reasonable should be attended, in all the circumstances, by questions of fairness."

58. In *Ivanisevic v Laudet Pty Ltd* (unreported, 24 November 1998), Truss CCJ said:

> "In my view when considering the concept of reasonable action, the Court is required to have regard not only to the end result but to the manner in which it was effected."

59. These passages were quoted with approval by Foster AJA (Sheller and Santow JJA agreeing) in *Commissioner of Police v Minahan* [2003] NSWCA 239; 1 DDCR 57 (*Minahan*), where his Honour said:

> "I prefer the construction which has been accorded to it in the decisions in the Compensation Court referred to in this judgment and in his Honour's judgment. The words 'reasonable action', in a statute dealing with Workers Compensation rights of employees should be given a broad construction, unfettered by considerations as to whether the employee can or cannot also bring an action at common law against the employer, founded upon breach of a duty of care." (at [42])

60. In *Ritchie v Department of Community Services* [1998] 16 NSWCCR 727, Armitage J, said:

> "It is apparent that the test in this case is an objective one where one must weigh the consequences of the Respondent's conduct against the reasons given for it. It follows of course from the objective nature of the test that the evidence given by the Applicant as to the perceived unreasonableness of the Respondent's conduct or from the Respondent as to the reasonableness of its conduct from its perspective will not be determinative of this issue."

61. Reasonableness is judged having regard to fairness appropriate in the circumstances, including what went before or after a particular action (Burke J *in Melder v Ausbowl Pty Ltd* [1997] 15 NSWCCR 454). Armitage J in *Jackson v Work Directions Australia Pty Ltd* [1998] NSWCC 45 stated "only if the employer's action in all the circumstances was fair could it be said to be reasonable." (see also *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255 (*Heggie*), where it was held that the reasonableness of a person's actions is assessed by reference to the circumstances known to that person at the time the action is taken.)
62. There seems to be little doubt in this matter that the applicant's injury was wholly caused by the actions of the respondent with regards to performance appraisal and/or discipline. Quite appropriately in my view, Mr Carney did not argue otherwise. The major difference between the parties in this matter instead relates to whether the actions of the respondent were reasonable or not. A subset of that argument is the applicant's contention he was singled out to be bullied and/or harassed by his managers. When one examines the applicant's statement, it is apparent the feedback he received concerning his performance and discipline were the genesis of his injury. There is no suggestion by the applicant in either his lay or medical evidence that the everyday tasks, duties or hours associated with his work were the cause of his injury. On his own case, it was not until his relationship with Ms Beirne deteriorated that the applicant suffered his injury. In my view, that deterioration was caused by Ms Beirne's actions concerning the applicant's performance, and the steps she took to deal with it.

63. One of the issues which plagues this matter as it does others of its kind, is the propensity of the medicolegal practitioners to provide opinions as to what conduct is or is not reasonable in the circumstances of a given case. That is not the role of a medical expert. Rather, as Mr Doak noted in his submissions, a medical expert is well placed to provide an opinion on whether the actions of an employer have wholly or predominantly caused an injury in a worker, but it is not their role to cast opinions on whether the causative conduct was reasonable.

64. In relation to the question of "wholly or predominantly", I have little difficulty finding the actions of the respondent with respect to discipline and performance appraisal were the predominant cause of the applicant's injury, the fact of which is not in dispute. The applicant's own IME, Dr Canaris says as much at page 121 of the Application where he states:

> "Your client reports a very difficult workplace situation in which he appears to have been bullied and harassed by a manager under the guise of performance review. It seems that his attempts to rectify his predicament by appealing to HR and up the line were unsuccessful in that his complaints were considered to be unsubstantiated on investigation."

Dr Canaris then finds the applicant's condition was a "direct consequence of his workplace difficulties."

65. In relation to reasonableness, I note the respondent's conduct must not only be reasonable in terms of its outcome, but also in terms of the processes undertaken. In my view, the conduct of the respondent was reasonable in the circumstances. It is apparent there were issues with the applicant's performance, and those issues were expressed by various stakeholders to his managers, including Ms Beirne. The applicant was given ample opportunity to improve his performance, and clear guidelines to meet in order to do so. He did not meet those guidelines. Moreover, the respondent instigated an investigation of Ms Beirne when the applicant complained about her, and found she had acted appropriately in dealing with him.

66. I accept Mr Doak's submission that the respondent acted appropriately in dealing with the applicant. In examining the lay evidence objectively, I am of the view Ms Beirne and the respondent's management took steps to attempt to guide the respondent to help him improve. Unfortunately, he did not do so.

67. Importantly, the fact the applicant perceived Ms Beirne's conduct towards him as harassment and bullying in the guise of performance appraisal and discipline is irrelevant. Were the Commission required in this matter to determine whether the applicant had suffered an injury, then his individual perception of real events would be relevant. Where a defence is raised under section 11A, however, the test for reasonableness is objective.

68. In his statement, the applicant takes a number of inferences as to Ms Beirne's supposed motivation for his treatment. These include the fact she did not hire him, and that they came from different areas of the business. In my opinion, these inferences are simply not supported by the evidence. Additionally, as noted, I place only limited weight on the evidence of Mr Egan whose statement is useful insofar as it contains observations of the applicant's demeanour, but less so in relation to what went on in the meetings between Ms Beirne and the applicant, which Mr Egan did not attend.

69. I accept Ms Beirne's evidence that she attempted to assist the applicant by focusing on what had been identified as areas requiring improvement such as time management and even attempting to secure additional resources for his team. In my view, given the senior role the applicant had within the respondent's organisation, it was reasonable of Ms Beirne to give consistent and open feedback to the applicant and to place him on an IPIP. I also accept Ms Bansal's evidence as to the feedback provided by various stakeholders surrounding the applicant's performance in his role.

70. I also accept Ms Bansal's evidence that she received concerning feedback about the applicant's performance from a number of sources and stakeholders, and that she attempted to speak with him about those concerns to no avail.

71. In summary, I find the respondent's actions reasonable. Upon receiving concerning feedback, the applicant's managers attempted to rectify the problems by way of informal improvement plans and regular meetings with him. It was only when the feedback given to the applicant in those meetings was unfavourable that his injury arose. Although the applicant describes Ms Beirne's feedback as being "like a verbal assault", his evidence contains no specific allegations against her, other than he did not like her tone and disagreed with the feedback provided. In my view, that is no evidence of the alleged bullying and harassment.

72. The fact the applicant did not cope with the feedback he received is regrettable, but does not render either the content of the feedback or the manner of its presentation unreasonable. On balance, having regard to the totality of the lay and medical evidence in this matter, I find as follows:

(a) the applicant suffered a psychological injury in the course of his employment with the respondent;

(b) the applicant's injury was predominantly caused by the actions of the respondent with regards to performance appraisal and discipline, and

(c) the actions of the respondent with regards to performance appraisal and discipline were reasonable.

73. In light of the above findings, there will be an award for the respondent.