WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **6712/18**
Applicant: **Mathew Outram**
Respondent: **Insurance Australia Group Services Pty Ltd**
Date of Direction: **12 December 2019**
Citation: **[2019] NSWWCC 402**

The Commission determines:

Findings

1. The applicant sustained a psychological injury pursuant to s 4 of the *Workers Compensation Act 1987* deemed to have occurred on 17 August 2017.

2. The respondent's action with respect to performance appraisal were not reasonable within the meaning of s 11A of the *Workers Compensation Act 1987*.

3. The respondent's actions with respect to transfer were reasonable within the meaning of s 11A of the *Workers Compensation Act 1987*.

4. The action with respect to transfer was not the whole or predominant cause of the psychological injury.

5. The respondent's defence pursuant to s 11A of the *Workers Compensation Act 1987* fails.

Orders

6. The respondent pays the applicant's section 60 expenses on the basis of a general order.

7. The matter is remitted to the Registrar for referral to an Approved Medical Specialist as follows:

   Date of Injury: 17 August 2017 (deemed)

   Body parts: Psychological Injury

   Method of Assessment: Whole Person Impairment

8. The following documents are referred to the Approved Medical Specialist:

   (a) Application to Resolve a Dispute and attachments (excluding pages 96 to 155); and

   (b) Reply and attachments.

JOHN HARRIS
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 JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Mathew Outram (the applicant) was employed by Insurance Australia Group Services Pty Ltd (the respondent).

2. The applicant commenced employment with the respondent in 2010 as a Senior Case Manager involved in workers compensation cases for what is known as "CGU". He was seconded to the position of "Technical Advisor" from 2015 to 30 April 2017 and then returned to his substantive position of Senior Case Manager.

3. The applicant's supervisor prior to December 2016 was Matthew Beer. His supervisor from December 2016 to 30 April 2017 was Ms Bernadette Brennan. When the applicant returned to his role as Senior Case Manager on1 May 2017 his supervisor was Ms Lynette Strang.

4. This applicant claims medical expenses and permanent impairment compensation pursuant to the provisions of the *Workers Compensation Act 1987* (the 1987 Act).

5. The respondent served notices pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) disputing the applicant's claim for any compensation and raising a defence pursuant to s 11A of the 1987 Act.[1]

6. The matter was the subject of a previous Arbitral decision[2] and Presidential decision[3]. The Presidential decision revoked the Arbitrator's decision and remitted back for hearing before a different Arbitrator. The formal orders of the Deputy President were:

    1. The Arbitrator's Certificate of Determination dated 18 March 2019 is revoked.

    2. The matter is remitted for re-determination by another Arbitrator.

7. The case as it was argued before me was different from the manner in which it was originally argued.

8. The matter was listed for telephone conference before me on 9 October 2019 when I issued directions setting out the matters in dispute in accordance with what was agreed by the solicitors (the Direction). Counsel agreed at the hearing that the Direction properly articulated the issues in dispute.[4] The Direction stated:

    1. The following liability issues are in dispute:

        (a) Whilst psychological injury pursuant to s 4 is admitted, the causes of the s 4 injury are in issue.

        (b) The section 11A defence which is based on:

        (i) When the applicant was transferred in April/May 2017 from technical advisor to senior case manager; and

        (ii) Performance appraisal relating to the meeting culminating on 17 August 2017.

[1] Application, p 533 and p 545
[2] *Outram v Insurance Australia Group Services Pty Ltd*, unreported, 18 March 2019
[3] *Insurance Australia Group Services Pty Ltd v Outram* [2019] NSWWCCPD 44 (Presidential decision)
[4] *Outram v Insurance Australia Group Services Pty Ltd,* 4 November 2019 (T1), p 1

9. As is evident from these issues, the parties agreed that the applicant had suffered a psychological injury deemed to have occurred on 17 August 2017. The first issue was the causes of the injury. The second issue was whether the two separate actions, that is the cessation of the secondment (the transfer) and the performance appraisal **culminating** in what is known as a "grievance meeting" on 17 August 2017 (the performance appraisal) established the respondent's s 11A defence.

PROCEEDINGS BEFORE THE COMMISSION

10. The matter was listed for an arbitration hearing on 4 November 2019 and 2 December 2019 when Mr de Meryck of counsel appeared for the applicant and Mr Robiason of counsel appeared for the respondent.

11. The Commission is required to provide a "brief statement" of reasons: s 294(2) of the 1998 Act. Despite the criticisms by Wood DP of the voluminous nature of the evidence, the same documents were filed in the re-hearing. Some of the documents relating to a different worker were excluded.[5]

12. In these circumstances I advised the parties that I would not look at materials not the subject of submission. Counsel accepted this course.[6] Despite the unnecessary voluminous material, the issues were reduced due to proper concessions made by learned counsel.

13. Mr de Meryck accepted that the transfer was both reasonable and action that fell within the meaning of that word in s 11A of the 1987 Act.

14. Mr Robiason accepted that he was required to establish both the ingredients of the transfer (which was accepted by the applicant) and the performance appraisal in order to prove that the actions by the respondent under s 11A wholly or predominantly caused the psychiatric injury.

15. For the reason subsequently provided, I am not satisfied that the respondent's action with respect to the performance appraisal were reasonable. Accordingly, as the respondent's counsel properly conceded, it could not establish its s 11A defence because the psychological injury was not wholly or predominantly caused by the transfer.

EVIDENCE

16. The following documentation was admitted into evidence for the purposes of considering these issues:

    (a) Application to Resolve a Dispute and attachments (Application) excluding pages 98 to 155; and

    (b) Reply and attachments (Reply).

17. There was no application by either party to adduce oral evidence.[7]

18. The evidence upon which the parties made submissions below differs markedly from what was discussed in the Presidential decision. This difference principally arises because of the applicant's concession that the cessation of the secondment on 30 April 2017 (the transfer) was reasonable. Accordingly, it became unnecessary to refer to a great deal of material on this issue which was the subject of both submissions and substantial discussion in the Presidential decision.

[5] Pages 98 to 155 of the Application
[6] Discussion with counsel on day 2
[7] T1 pg 14, T2, pg 3

Applicant's statements

19. The applicant provided a statement dated 8 August 2018 where he addressed the matters he considered led to injury. Some of these incidents were, to adopt the words of his counsel, "fairly general", such as the allegation that he was subject to being "systemically bullied" by the acting branch manager from 28 December 2016 to 22 August 2017.[8]

20. The applicant stated that in a meeting on 28 December 2016 Ms Brennan was "inappropriate and intimidating" in relation to his role and "she refused to speak to me regarding specific concerns".[9] At that time Ms Brennan could not advise the applicant of the outcome of his secondment and purportedly did not afford him "due process".

21. The applicant attended his general practitioner, Dr Singh, in January 2017. He said he was then suffering from sweaty palms, a heavy chest, heart palpitations and constant fear.[10]

22. In March 2017 several of the work colleagues were engaged in "friendly banter on Facebook". The friendly banter was not specified by the applicant. Ms Brennan thought it was inappropriate and blocked the applicant as a Facebook contact.[11]

23. The applicant had ongoing hip issues and sought a functional assessment of his work site. He asserted that this request was initially ignored and then delayed by Ms Brennan.

24. On 7 April 2017 the applicant was advised by Ms Brennan that his role as Technical Advisor would cease on 30 April 2017. He asserted that Ms Brennan told him "that it was a business decision, and not related to my performance, as I had been performing well."[12]

25. The applicant was declined leave to care of his daughter on 13 April 2017 and 24 April 2017. His request was refused because a co-worker was on leave. The applicant stated that this refusal was "unreasonable and unfair" and that he felt that Ms Brennan "was deliberately playing games with me, at the expense of my personal life."[13]

26. The applicant's new workstation was installed on 28 April 2017 for use on 1 May 2017. He said his place of work was isolated and that he felt that this was "another game" by Ms Brennan. He stated that he felt "downgraded, isolated and on the outer".[14]

27. The applicant stated that he was sent an email by Ms Brennan on 5 May 2017 where it stated that "there were no performance issues in relation to me". This evidence is not in accordance with what is contained in that email. The email is set out at paragraphs 40-42 of these Reasons.

28. The applicant attended his annual preliminary performance rating meeting in July 2017 with his manager, Lynette Strang. He stated that his rating was then described as "solid" and that the next steps were "for her to log this rating and at my next performance review we would discuss the remuneration in relation to this rating."[15]

[8] Application, p 549
[9] Application, p 549
[10] Application, p 550
[11] Application, p 550
[12] Application, p 551
[13] Application, p 551
[14] Application, p 552
[15] Application, p 552

29. The applicant stated:[16]

> "32. 1n July 2017, I attended my annual preliminary performance rating meeting with my manager, Lynette Strang, who described my rating as 'solid.' We spoke about a few key issues of my performance and she was happy with that rating. The next step was for her to log this rating and at my next performance review we would discuss the remuneration in relation to this rating.
>
> 33. Despite this protocol, when I had my second meeting with Lynnette, she had a strange look on her face. She said that Bernie had overwritten my performance to 'inconsistent performer'. I was shocked because this was the first time I had heard about this rating, and did not follow the correct policy and procedure in regards to performance reviews.
>
> 34. It is protocol that if a grievance review is requested then the seeker of the review would have been informed formally of the issues in question so as to prepare a case to present. In this instance, I was ambushed with these false accusations at this stage of the meeting.
>
> 35. I was not aware of why my performance review had been changed; this was not protocol or procedure previously. I was completely blind-sided by the issues when rather I should have been informed and prepared. It was too late to change the review in regards to relevant remuneration in line with the performance rating."

30. As Mr De Meryck submitted, there is a gap in the evidence between paragraphs 33 and 34 of the applicant's signed statement set out at paragraph 29 above. This gap is to be read with the applicant's earlier unsigned statement provided to the insurance investigator. Whilst it was unsigned and not relied upon in the prior Presidential decision, the parties agreed that it was before me.

31. The earlier unsigned statement repeats that the applicant received initial strong feedback from Ms Strang which was then downgraded to one of "inconsistent performer" following input from Ms Brennan. The applicant was advised that he could put in a grievance request to contest the performance appraisal.

32. It is accepted that the performance appraisal does not set out the reasons why the applicant was classified as an inconsistent performer.[17]

33. The applicant then lodged a grievance of which only one page is before the Commission.[18]

34. The applicant attended the grievance meeting in respect of his performance appraisal. Ms Brennan, Mr Bunt, a team manager, the applicant and a union delegate (by telephone) attended the meeting. The applicant's version of what occurred was as follows:[19]

> "64. The meeting opened with Bernadette talked for about the first 5 minutes. She firstly addressed some formalities associated with the meeting before then going on to summarise the points raised ln my grievance email. She then started to give the purported reasons in relation to the downgrading of my performance ratings. She noted a number of areas in which she alleged that I was not performing to standard. One related to me allegedly not conducting reviews of cases of reasonable excuse. A second related to me allegedly not making any work

[16] Application, p 552
[17] See Reply, p 228
[18] Reply, p 241
[19] Application, pp 717-8

capacity decisions for March and April 2017. A third related to me allegedly not displaying the required behaviours as per an off-site management meeting which had taken place sometime in 2016. I cannot remember the details of the fourth allegation.

65. As Bernadette spoke, I could not believe what I was hearing. I had carried out the reasonable excuse cases as required and on an ongoing basis during the period referred to. It is the case that I had not completed any work capacity decisions In the period she had referred to, but this had been due to the many staff absences and departures taking place at the time. ln addition, it is not normally someone in my position that would attend to these matters. Instead, I would normally be reviewing, editing and signing off on work capacity decisions made by case managers working under me. The entire business was undergoing substantial changes at the time and was dealing with high levels of staff departures. It was unreasonable from my point of view to suggest that I was not performing this aspect of the work sufficiently.

66. Once Bernadette had finished speaking, I asked her how she could retrospectively apply these allegations when nothing had been raised with me previously. I also Indicated to her that if I was to be rated as an 'inconsistent performer,' then the same should apply to her. I asked her to provide me with the points she had raised in writing as well as asking her to provide me with evidence that she was relying on.

67. I would acknowledge that I was upset and emotional by this stage of the meeting. My tone of voice was heightened, although I was not yelling.

68. At this point, Bernadette said, 'This meeting's not going to resolve anything.' I said to her, 'No. It's not.' I then got up to leave the room.

69. I would acknowledge that as I left the room, I grabbed the handle of the door and pulled it down forcibly to open it before storming out. I let the door go as I did this without actually closing it myself and walked towards the lift."

35. The applicant left work and attended his general practitioner the next day. A workcover certificate was obtained certifying the applicant unfit for work.

Mr Bunt

36. Mr Bunt attended the grievance meeting on 17 August 2017 and provided a statement dated 28 September 2017.[20] His evidence was that he provided a file note of the meeting. I repeat the summary of this file note quoted from the Presidential decision.[21]

"60. Mr Bunt's detailed file note of what occurred at the meeting on 17 August 2017 was in evidence. Mr Bunt recorded the names of the attendees, who included the Union advocate, Mr Lachlan Daly, who was noted as being the respondent's support person.

61. Mr Bunt recorded that Ms Brennan identified the primary purpose of the meeting, and set out the general expectations of the meeting, which were that:

[20] Reply, p 134
[21] Presidential decision at [60]-[65]

(a) all issues raised by the respondent would be addressed, although may not result in an agreement, or may require further action before re-convening;

(b) all attendees would be polite, respectful and professional, and not use inappropriate language or raised voices, and

(c) each person had a right to ask for a break or terminate the meeting if they felt uncomfortable.

62. Mr Bunt detailed an interjection by Mr Daly that he would only speak if there was an issue of procedural fairness, to which Ms Brennan replied that she was not an expert on procedural fairness, but the purpose of the meeting was to provide feedback about the respondent's performance rating.

63. Mr Bunt noted that Ms Brennan went through the reasons for the inconsistent rating, in accordance with her run sheet of reasons. Those included overall performance, culture/behaviour/continuous improvement, financial results by way of leadership and lack of output in respect of work capacity decisions. Mr Bunt recorded that Ms Brennan then asked for feedback from the respondent. Mr Bunt noted that the respondent replied in an aggressive tone, and referred to the rating as entirely 'rubbish', that Ms Brennan was a liar, had provided him with no feedback over the year, and had not taken into account his feedback. The note included that the respondent asserted Ms Brennan should be rated as the lowest rating.

64. Mr Bunt further recorded that Ms Brennan then advised the respondent that the meeting was to talk about his performance, not anyone else's rating and invited the respondent to provide her with evidence that she could review. Mr Bunt noted that during this conversation, the respondent spoke over the top of Ms Brennan, saying that the meeting was garbage. According to the note, Ms Brennan then indicated that, given the respondent's behaviour and responses, it was apparent that there would be no resolution, so the meeting was terminated. Ms Brennan invited the respondent to escalate the matter to People Connect for an independent review. Mr Bunt reported that the respondent said he was never going to agree with the rating, and stormed out of the room, slamming the door on his way out.

65. Mr Bunt then noted Ms Brennan's reaction, which was that she expressed a need to collect her thoughts, commented that such behaviour was inappropriate, and asked Mr Bunt to locate the respondent."

Ms Brennan

37. Ms Brennan provided a detailed statement dated 3 October 2017. I set out the summary of this statement from the Presidential decision which I adopt.[22]

"35. In the statement provided, Ms Brennan referred to the meeting held in December 2016 between her and the respondent. Ms Brennan said that the meeting was more likely to have occurred on either 15 or 23 December 2016, and not 28 December 2016 as asserted by the respondent. Ms Brennan confirmed that at that meeting, the continuation of the respondent's secondment was discussed, and the respondent was given the option of either returning to his substantive role or performing in the seconded position, which was to be extended. Ms Brennan said she also repeated the instruction from Mr Beer, who had been the appellant's Branch Manager, that the respondent was required to put forward a

[22] At [35] – [51]

strong business plan if he wanted management to consider whether the respondent's seconded role should be made permanent. Ms Brennan recalled that she had to repeat herself several times, as the respondent appeared unaccepting of the options presented.

36. Ms Brennan referred to an allegation made by the respondent that she was 'moving the goal posts,' and that he had been meeting and exceeding the requirements of the seconded position. Ms Brennan advised that the feedback provided to her by Mr Beer, in his capacity as the respondent's former manager, was that the respondent needed to improve his interpersonal skills, his working relationship with his team, and to further develop the case managers' abilities in making work capacity decisions. Ms Brennan added that the respondent needed to achieve consistency in his approach to internal case conferencing.

37. Ms Brennan described the discussion as a normal conversation, conducted in a professional manner. Ms Brennan said that the respondent's tone was initially appropriate, but that it became dismissive. Ms Brennan said she understood the respondent to be disappointed that the secondment role was not to become permanent.

38. Ms Brennan recalled an informal discussion with the respondent in December 2016 about the respondent considering whether to re-mortgage his home. Ms Brennan said that he appeared to be exploring the prospect of being appointed permanently in the seconded position. Ms Brennan stated that she explained to the respondent that he was being paid at a higher rate because he was in the seconded role, but that he should, as a precaution, make any financial decisions based on his base salary because there was no indication that the secondment role would become permanent. Ms Brennan also offered the respondent access to the employee assistance program, which could provide financial and related counselling.

39. Ms Brennan stated that she thought it was on 14 March 2017 that she approved the ergonomic assessment requested by the respondent, which was immediately upon receipt of the respondent's request. She added that the assessment was conducted on 21 March 2017 and as soon as she received the report, she approved it. She said the chair arrived in a couple of days, and the desk soon after that.

40. Ms Brennan said that there was a delay in setting up the desk due to issues with communication between Procare and IAG Building Facilities, as both groups were affected by a restructure. Ms Brennan said that while this was outside of her control, she instructed her personal assistant to keep the respondent informed and she also touched base with the respondent by telephone and in person to let him know any updates as they came in. Ms Brennan stated that the desk was to be set up by IAG Building Facilities, who were based in Sydney.

41. Ms Brennan advised that she had a hand over conversation with Ms Strang when the respondent commenced under Ms Strang's management, during which Ms Strang asked where the respondent's ergonomic desk should be placed. Ms Brennan told Ms Strang that she should liaise with IAG Building Facilities.

42. Ms Brennan said that she had no recall of the respondent having raised an issue with her about being excluded from his team, but if he had, she would have addressed the issue.

43. Ms Brennan recalled that the respondent had indicated to her that he did not expect the desk to be approved, but Ms Brennan told him that regardless of whether the respondent's hip condition was work related, the appellant had an obligation to ensure his ergonomic welfare at work.

44. Ms Brennan denied smiling at the respondent and using the word 'terminating' at the meeting in April 2017 (which she said actually took place on 7 April 2017) when communicating to the respondent that the secondment was ending. Ms Brennan advised that when she met with the respondent, the respondent indicated that he was dreading the conversation about the end of his secondment, but did not tell Ms Brennan why that was. Ms Brennan said that she proceeded to tell him that the meeting was a courtesy to let him know that the secondment was ending and that he would be returning to his former role, working under Ms Strang, who would discuss with him the work he would be covering.

45. In relation to the allegation that she refused the respondent's leave request, Ms Brennan referred to her email dated 5 May 2017. Ms Brennan also referred to that email in relation to the respondent's complaints about the further extension of the secondment, and to the allegation that she referred to the respondent as 'going by the book' (which she denied).

46. Ms Brennan reported that her relationship with the respondent deteriorated from the time of the meeting on 7 April 2017. Ms Brennan said that the respondent would not interact with her at the same level as before, and would barely respond when she greeted him. Nonetheless, she said, she continued to greet him and attempted to interact with him. Ms Brennan denied having looked away whenever she saw the respondent.

47. Ms Brennan referred to the performance rating downgrade in July 2017. She explained that Ms Strang had only been the respondent's direct manager for about 12 weeks of the 52-week period that was to be reviewed, and that as she was the respondent's previous manager, she had input into his performance review. Ms Brennan said that as part of that process, prior to Ms Strang meeting with the respondent, she met with Ms Strang and discussed the respondent's performance. Ms Brennan said that her input was then incorporated into the final performance review results, which would be communicated to the respondent by Ms Strang. Ms Brennan described the process of what normally occurred during the performance review. She said that the employee would normally have a meeting with their manager (in this case Ms Strang) to generally discuss their performance, then the information would be collated along with any other relevant information (in this case, Ms Brennan's input) following which the performance ratings would be provided to the staff member. Ms Brennan said that normally the staff ratings would not be discussed at the first meeting, but she could not comment on what occurred in the first meeting between the respondent and Ms Strang.

48. Ms Brennan acknowledged that the respondent lodged a grievance in respect of his performance rating.

49. In relation to the meeting on 17 August 2017, Ms Brennan relied on her file note, which she said accurately reflected what occurred in the meeting that day. Ms Brennan added that after she communicated the performance-based issues to the respondent, he became agitated and his tone became aggressive. She said that he responded by saying that if he was rated as a 'two', then the leadership team should be rated as scoring 'one'. Ms Brennan replied that the purpose of the meeting was to discuss his performance, not that of the other staff. Ms Brennan said that during the meeting, the respondent kept interjecting and not letting her finish what she was saying. Ms Brennan described the respondent's demeanour as angry, agitated, red in the face and aggressive. Ms Brennan said the respondent's body language made her feel uncomfortable, and when she told him that his responses and tone indicated that there would be no resolution that day, the respondent agreed. Ms Brennan terminated the meeting. She said that the respondent, still looking angry and agitated, left the room, and she saw the door slam shut.

50. Ms Brennan indicated that she was upset and shocked, and asked Mr Bunt to follow the respondent and make sure that he was alright. She attempted to contact Mr Dustin Bartley, her manager, but was unable to reach him. Ms Brennan said that two other managers, who had heard the door slam shut, came to enquire as to her well-being.

51. Ms Brennan said that the respondent left work and returned on 21 August 2017. She had no contact with him on that day, and then she became aware that the respondent had gone off work and lodged a workers compensation claim."

38. Given the issue of reasonableness of the applicant's performance appraisal, it is necessary to quote two paragraphs from Mr Brennan's statement. Ms Brennan stated:[23]

"38. Lyne returned from extended leave from around 10 April 2017. She had only been Mathew's direct manager for approximately less than 12 weeks of the 52 relevant to his performance review appraisal at that time. As such, and given that I had been his manager between December 2016 and April 2017, I had input into this performance review process. As part of this process, I met with Lyne and discussed my view of his performance (I am not sure of the date that we met in this regard, but it would have been shortly prior to Lyne's meeting with him in July 2017). My information was then incorporated into the final performance review results which would then have been communicated to him by Lyne.

39. In terms of the performance review process, normally the staff member's manager (in this case Lyne) would meet with the staff member (Mathew) and have a general discussion about their performance. This information would then be collated along with other information provided as relevant (in this case, by me), after which the performance ratings would be provided to the staff member. It would not be normal process for the performance ratings to be discussed or confirmed in any way with the staff member in the initial meeting. I cannot comment directly on the contents of Mathew's meetings with Lyne in this regard."

Other Documentation

39. The applicant forwarded an email to Ms Brennan on 24 April 2017 seeking a response to a number of issues relating to the cessation of the technical advisor secondment on 30 April 2017. In particular the applicant requested advice why in December 2016 his technical advisor secondment was extended to April 2017 "rather than proceeding with a permanent

[23] Reply, pp 208-209

role after successfully meeting the criteria put forward in October 2017 [sic 2016] to proceed" and why the technical advisor secondment was concluding on 30 April 2017.[24]

40. Ms Brennan replied to the applicant on 5 May 2017 which responded to the matters raised by the applicant.[25] She advised that there were never any guarantees that the secondment would result in a permanent appointment and that the secondment was offered "in order to allow you to progress your skills". Ms Brennan stated:

> "We want to emphasis that the decision to not make your secondment position permanent was based purely on business needs and has nothing to do with your performance."

41. Ms Brennan advised that the secondment was extended to 30 April 2017 because the applicant had several periods of absences and the respondent wished to give him "as much length of time as possible in order for you to build your skills in this area".

42. In respect of the cessation of the secondment, Ms Brennan wrote:

> "As we advised to you in our conversation on 7 April 2017, unfortunately, we have no choice but to conclude your secondment as of 30 April 2017 because as you are aware, CGU is intending to exit the NSW Workers Compensation Scheme. Accordingly, there is simply no role as Technical Advisor available for you any longer."

43. Ms Brennan also replied to the assertion of unfairness in respect of declining leave on 13 April 2017 and 24 April 2017 and noted:[26]

> "I also informed you that I would reconsider the request if you spoke to the Team Managers and they were happy for you to take that Leave. You failed to do so."

44. An email dated 6 April 2017 from Ms Brennan to the applicant advised that the desk had arrived and "rehab" had been contacted to assist in setting it up.[27]

45. The applicant completed a claim form on 31 August 2017 where he asserted that the tasks he was doing leading up to injury were:[28]

> "Normal tasks leading up to my requested performance grievance meeting".

46. In the claim form the applicant asserted that the cause of the injury was "bullying and harassment from Branch Manager".

Medical evidence

47. In a short report dated 18 August 2017 the General Practitioner, Dr Gaurav Vijay noted the applicant was "feeling anxious and depressed due to ongoing workplace issues."[29]

48. The applicant was referred to Helen Kelson, Psychologist who provided a report dated 25 September 2017 following three counselling sessions.[30] The psychologist referred to the applicant's description of a "succession of workplace incidences" where he reported "his professional conduct and work performance had been brought into question" and he had felt isolated from his colleagues.

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[24] Reply, p 62
[25] Reply, p 66
[26] Reply, p 68
[27] Reply, 223
[28] Application, p 527
[29] Application, p 20
[30] Application, p 21

49. The clinical notes of Ms Kelson for 1 September 2017, whilst a little difficult to follow, record that the applicant reported the following matters:[31]

    (a) that he acted as Technical Officer since October 2015 which was not made permanent;

    (b) there was uncertainty at work and he was told in March 2017 that there were no jobs at the end of the year;

    (c) there was strain at work with Ms Brennan since a meeting in December 2016;

    (d) the termination of the secondment was a "kick in guts", and
    (e) the current performance manager gave him a positive performance review which was changed.

50. Ms Kelson then opined that the applicant's anxiety and depression was in the severe range. In a subsequent report dated 17 October 2017. The psychologist diagnosed the applicant with an adjustment disorder with mixed anxiety and depressed mood.[32]

51. In a further report dated 19 March 2018, following the last of five counselling sessions, Ms Kelson opined that the anxiety and depression was in the extremely severe range and suggested referral to a psychiatrist for medication review.[33]

52. The clinical notes of the general practitioner show a history of medication for a psychological condition. In March 2017 the applicant was prescribed Zoloft 50 mg which was changed to 30 mg of Cymbalta in April 2017.[34] The dosage increased to 60 mg of Cymbalta on 8 May 2017[35] although the dosage was reduced on 22 August 2017.[36]

Medico-Legal opinions

Dr Thomas Oldtree Clark

53. Dr Clark provided a report dated 4 July 2018. Although he was provided with various materials the prior medical history does not refer to any psychological condition. Dr Clark refers to a build-up in pressures at work with a diagnosis of major depressive disorder.

54. Dr Clark was provided with the report of Dr Vickery dated 11 October 2017 and clinical notes of Charlestown Medical and Dental Centre and provided a supplementary report dated 4 December 2018.[37]

55. Dr Clark was asked and answered the following question:[38]

    "***On page 5, question 4 of your report, you were asked about the relationship between the 'psychiatric condition' and the 'subject incident'. Would you please explain what you understood was meant by the phrase 'subject incident.'***

    The condition found on examination is a Major Depressive Disorder. The 'subject incident,' which precipitated the Major Depressive Disorder, was the behaviour of

[31] Application, p 86
[32] Application, p 24
[33] Application, p 39
[34] Application, p 174
[35] Application, p 173
[36] Application, p 162
[37] Application, p 16
[38] Application, p 17

the new manager. This was Ms Bernadette Brennan who, he said, has always had a bullying style, an over-exacting, nit-picking manner. She maintained he did not meet her standards and would never say that he was right when he did meet them, he said."

56. In respect of dosage Dr Clark stated that 60 mg of Cymbalta was "a standard dose".[39]

Dr Graham Vickery

57. Dr Vickery recorded a prior psychological history of relating to a stressful de-facto relationship break-up in 2009 with court proceedings in relation to access issues with the youngest daughter.[40] The applicant was then treated with antidepressant medication and remained on a low dose.
58. The history of presenting complaints related to the extension and cessation of the secondment, the breakdown of the relationship with Ms Brennan including being blocked on Facebook, the delay in providing occupational therapist equipment and the performance appraisal. Dr Vickey diagnosed an adjustment disorder with anxiety and depressed mood.

59. The history recorded by Dr Vickery in respect of the performance appraisal was a change of rating from "solid" to "inconsistent" and the submission by the applicant of a grievance in relation to the changed rating. The applicant questioned why the matters which led to the adverse rating were not raised before.[41]

60. Dr Vickery did not accept that there was "objective evidence" of bullying and felt that the whole or predominate cause of the psychological injury were the actions with respect to transfer and performance appraisal[42] based on the "history provided".[43]

Submissions

61. The applicant submitted:

    (a) The clinical notes show that the aggravation of psychiatric symptoms occurred in about March 2017 when the applicant requested a change in medication from Zoloft to Cymbalta which then increased in dosage in May 2017.[44]

    (b) Around this time Ms Brennan blocked the applicant from Facebook following friendly banter between co-workers and his request to undergo a functional assessment regarding his work-related hip claim was either ignored or delayed.[45] Eventually the ergonomic equipment was set up in a manner which had the effect of ostracising the applicant from the workplace.[46]

    (c) The applicant had a discussion with Ms Brennan in early April 2017 about the cessation of his secondment. His evidence of a conversation is slightly different to the terms of the email.[47] However the terms of the email "is not an indication per se that there was nothing wrong with the applicant's performance".[48]

    (d) There were growing tensions between the applicant and Ms Brennan including the request to look after his daughter as a single parent.[49]

[39] Application, p 17
[40] Reply, p322
[41] Reply, p 324
[42] Reply, p 330
[43] Reply, p 328
[44] T1, pp 7-8
[45] T1, p 8
[46] T1, p 9
[47] T1, pp 10-11
[48] T1, p 13
[49] T1, p 14

(e) In July the applicant attended a preliminary performance meeting with Ms Strang when he was given a solid rating by his manager. At a second meeting this was changed to one as an inconsistent performer[50], changed at the request of Ms Brennan.[51]

(f) The applicant asserts that this was in breach of protocol in that normally you would be informed of the issues so that you can prepare a response.[52] The chronology is set out more fully in the earlier statement.

(g) The applicant described the grievance meeting as being "met with a barrage of conclusions about why he was given this rating rather than an opportunity to persuade or address the rating itself".[53]

(h) The applicant stated that Ms Brennan suggested four deficiencies. One was the assertion that he made no work capacity decisions is explained on the basis that there was minimal staff.[54] He started to feel overwhelmed in the meeting, was under threat despite not actually hearing that he had done anything wrong.[55]

(i) The applicant also stated that he carried out reasonable excuse cases as required.

(j) Ms Brennan's only statement responds to the applicant's unsigned statement. She acknowledged there was an issue with the ergonomic chair but there wasn't a delay.

(k) Ms Brennan confirms there was a deterioration in the relationship and that she rated the applicant differently to Ms Strang. She then refers to the grievance meeting which was the first time the basis of the downgrade was communicated.[56]

(l) There was a two-stage process for the performance appraisal and one would have thought that the preliminary one was to give you notice of where it was going.[57]

(m) The applicant submits that the manner in which the performance appraisal was undertaken was in breach of the protocol.[58]

(n) The submission on cause of Injury is that "this is not just a simple case of hitting it all on that last moment of decompensation during that meeting".[59] This was a developing problem and Ms Brennan agrees that there was tension between herself and the applicant.

(o) The changes on the medication indicates that this is a "rolling problem that has developed".[60] The claim form supported the applicant's interpretation that the causes of injury were multifactorial.[61]

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[50] T1, p 17
[51] T1, p 18
[52] T1 p 18
[53] T1, p 22
[54] T1, p 25
[55] T1, p 26
[56] T1, p 32
[57] T1, p 33
[58] T1, p 34
[59] T1, p 37
[60] T1, p 40
[61] T1, p 41

(p) Dr Clark addressed the causes of injury in his first report[62] which was a "truncated or shorthand version of wrapping up all of those various different elements and complaints that the applicant made into a generalised complaint of … unfair treatment, bullying and harassment … and a deteriorating relationship".[63]

(q) Ms Kelson, treating Psychologist, refers to the causes of psychological injury as being a "succession of workplace incidents".[64]

(r) Dr Clark does not discuss the seriousness of the relevant actions and was not as detailed although was briefed with the relevant materials.[65]

(s) Dr Clark did not record the applicant's long and pre-existing history of requiring antidepressant medication even though he was supplied with the materials.[66]

(t) Dr Vickery does not explain why the transfer and performance review was the predominant cause of injury but has "cherrypicked that out".[67] It was conceded that the doctor had recorded a "more fulsome history than Dr Clark".[68]

(u) Ultimately there is a commonsense element to causation. Psychological injury can involve a series of steps and it is often not possible to isolate the effects of a single step in determining the whole or predominate cause.[69] Dr Clark took the view that the deteriorating relationship with Ms Brennan ultimately led to the development of a psychiatric injury.

62. The respondent submitted that the s 11A actions relied upon were the predominate cause of injury.[70] One could not look at the question of aggravation without knowing what the psychiatric baseline is or was.[71]

63. The respondent submitted:

(a) The grievance meeting before Ms Brennan was run properly for a number of reasons. These included the manner in which Ms Brennan addressed the applicant, the right to have a break up at any time if required, the right to respond and having a support person in attendance;

(b) Notes of the meeting were made by Mr Bunt and Ms Brennan which set out what occurred. They provide a reliable and contemporaneous account of the grievance meeting;

(c) There was nothing untoward in the grievance meeting. The use of the word "ambushed" was emotive and did not properly describe what occurred in this meeting;

(d) The applicant was the one who became upset in the meeting and there is no suggestion that Ms Brennan was rude or aggressive;

[62] T1 , p 43; Application, p 17
[63] T1, p 43
[64] T1, p 44
[65] T1, pp 42 and 61
[66] T1, p 64
[67] T1, p 62
[68] T1, p 63
[69] T1, p 65
[70] T1, p 71
[71] T1, p 71

(e) Oral notice was better than written notice or at least there was nothing unreasonable about the fact that the applicant was advised orally about the reasons for his downgrade in his appraisal. The manner of doing this was in fact more reasonable because it was personable in a situation where the applicant had a support person;

(f) Accepted that the two matters raised by Mr de Meryck were not the subject of contrary evidence by Ms Brennan and Ms Strang had not provided a statement. In these circumstances there was no contrary evidence to the applicant's evidence that two of the four matters relied upon by the respondent were wrong;

(g) Accepted that the protocol for prior notice was as set out in paragraphs 38 and 39 of Ms Brennan's statement although there is nothing to suggest that this was a written protocol;

(h) Accepted that the applicant had no notice prior to the grievance meeting of why he had received a grading of inconsistent performer; and

(i) Mere deficiencies in the performance appraisal process did not make it unreasonable and this required an examination of the overall process.

64. The respondent was advised in submissions on the second day of hearing that I had formed a preliminary view that both the transfer and performance appraisal predominantly caused the psychological injury but that I was not satisfied that the respondent's two s 11A actions, individually, were a predominant cause of psychological injury. I also indicated that my preliminary view was there were other work causes of the psychological injury.

65. The respondent accepted these preliminary views and made no further submissions on this issue. It submitted that other "matters" were minor but contributory and submitted that Dr Vickery had provided an opinion on the relevance of the transfer and the performance appraisal whilst Dr Clark had only provided a general opinion on causation without specifying the appropriate weight that could be attributed to the purported s 11A actions.

66. The respondent also submitted that Dr Clark did not record a history of pre-existing problems and could not make a proper diagnosis of cause when he was seemingly unaware of the pre-existing psychiatric history. The fact that Dr Clark was given the information of a pre-existing condition does not mean that he had considered it as it was not addressed in his report.

67. The respondent conceded that if it failed on establishing the reasonableness of the performance appraisal then its s 11A defence failed because the transfer, of itself, was not a predominant cause of the psychological injury. It noted that this concession was made because Dr Vickery did not express an opinion that the transfer alone was a predominant cause of the injury.

REASONS

68. Section 11A of the 1987 Act relevantly provides:

"(1) 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."

69. The three elements in s 11A which the respondent must prove on the balance of probabilities to establish the defence pursuant to s 11A are whether the psychological injury was:

(a) wholly or predominantly caused;
(b) by reasonable action taken by or on behalf of the employer, and
(c) with respect to one of the matters set out in the section.

70. The test of whether action is reasonable is set out in *Northern NSW Local Health Network Heggie*[72] where the Court approved a previous decision of the Court of Appeal in *Commissioner of Police v Minahan,*[73] specifically where Foster AJA[74] cited with approval the following passage from *Irwin v Director-General of School Education*:[75]

> "This question of reasonableness is one of fact weighing all the relevant factors. The 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 objective of the employer. Whether an action is reasonable should be attended in all the circumstances by a question of fairness."

71. The Court in *Heggie* set out a number of principles in respect of the application of s 11A of the 1987 Act. Sackville JA stated:[76]

> "The following propositions are consistent both with the statutory language and the authorities that have construed s 11A(1) of the WC Act:
>
> (i) A broad view is to be taken of the expression 'action with respect to discipline'. It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation.
>
> (ii) Nonetheless, for s 11A(1) to apply, the psychological injury must be wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer.
>
> (iii) An employer bears the burden of proving that the action with respect to discipline was reasonable.
>
> (iv) The test of reasonableness is objective. It is not enough that the employer believed in good faith that the action with respect to discipline that caused psychological injury was reasonable. Nor is it necessarily enough that the employer believed that it was compelled to act as it did in the interests of discipline.
>
> (v) Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of **that action** that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury. (emphasis in original)

[72] [2013] NSWCA 255 (*Heggie*) at [148]
[73] [2003] NSWCA 239 (*Minahan*)
[74] Sheller and Santow JJA agreeing
[75] *Minahan* at [27] and [42])
[76] At [59], Basten JA agreeing at [1] and Ward JA agreeing at [34]

(vi) The assessment of reasonableness should take into account the rights of the employee, but the extent to which these rights are to be given weight in a particular case depends on the circumstances.

(vii) If an Arbitrator does not apply a wrong test, his or her decision that an action with respect to discipline is or is not reasonable is one of fact."

72. I accept the respondent's submission that individual blemishes within the process did not mean that the whole performance appraisal process was not "reasonable action". This was particularly relevant in the present case where the performance appraisal extended over a period of time culminating in the grievance meeting. This submission is in accordance with the principle was discussed by Spigelman CJ in *Department of Education & Training v Sinclair* in the context of a disciplinary process when his Honour stated:[77]

> "His Honour's analysis, as that of the Arbitrator, appears to assume that any specific blemish in the disciplinary process, however material in a causative sense or not, was such as to deprive the whole course of conduct of the characterisation 'reasonable action with respect to discipline'. In my opinion, a course of conduct may still be 'reasonable action', even if particular steps are not. If the 'whole or predominant cause' was the entirety of the disciplinary process, as much of the evidence suggested and his Honour appeared to assume, his Honour did not determine whether the whole process was, notwithstanding the blemishes, 'reasonable action'. For this alternative reason the appeal should be allowed."

73. In those circumstances I am conscious that the observations of Spigelman CJ in *Sinclair* are particularly pertinent to this claim. Blemishes within the performance appraisal do not mean that the respondent's action with respect to performance appraisal over the entire period was not reasonable.

Issue 1(a)

74. The applicant bears the onus of proof on the balance of probabilities as to the causes of psychological injury.

75. The medical opinion of Dr Vickery supports the view that the loss of the secondment (the transfer) and the performance appraisal involving both the adverse appraisal and the grievance meeting were causes of the psychological injury. The opinion of Dr Clark does not set out precise causes of the injury save as to refer to the generic phrase that the applicant was subject to "bullying".

76. There is other evidence which supports the deteriorating relationship between Ms Brennan and the applicant as causative of injury. The clinical notes of Ms Kelson refer to both the transfer and the performance appraisal as being causative factors. The note by Ms Kelson that the applicant felt that the loss of the secondment was a "kick in the guts" is significant. It is noteworthy that the applicant's medication increased at a time contemporaneous with the transfer back to his substantive position.

77. In my view the transfer was a significant causative event of psychological injury as it was contemporaneous with an increase in medication and something recorded by Ms Kelson at the initial consultation as upsetting to the applicant. However, following that action the applicant continued to work in his substantive position

78. This conclusion is otherwise supported by the email dated 7 April 2017 sent by the applicant to Ms Brennan questioning the loss of his secondment which reinforces my view that the transfer contributed to the cause of the psychological injury.

[77] [2005] NSWCA 465 at 97 (*Sinclair*), Hodgson & Bryson JJA agreeing

79. There is no doubt that the applicant reacted adversely to the performance appraisal which included the grievance meeting. He was obviously upset at that meeting, immediately went off work and certified as psychologically unwell on the following day. The performance appraisal was obviously distressing to the applicant who appears to have considered himself unfairly dealt with in the entire process including by the adverse appraisal.

80. It was accepted by counsel that the performance appraisal was causative of injury. I accept this common submission and Dr Vickery's opinion that the contribution to psychological injury by the performance appraisal involved both the adverse appraisal and his attendance at the grievance meeting.

81. I accept that there were other causes of injury apart from the transfer and the performance appraisal. Mr Robiason accepted that Dr Vickery does not opine that these two s 11A actions were the whole cause of the psychological injury. I otherwise rely on Ms Kelson's clinical note of 1 September 2017 and portions of the applicant's evidence that other matters at work were causative of psychological injury. They include the delay in the provision of equipment, which the applicant felt was targeted at him, the Facebook episode and seemingly the applicant feeling targeted by Ms Brennan in refusing leave of absence to care for his child. Ms Brennan accepted that the working relationship with the applicant had deteriorated over the period.

82. Whilst I do not accept that there was anything close to the suggestion of "bullying" by Ms Brennan, the applicant felt aggrieved and reacted adversely to specific events which were contributory causes of the psychological injury. There was a short delay in the provision of equipment and the applicant was denied leave, although due to the fact that another employee was on leave.

83. My finding is that there were a series of events which contributed to psychological injury including the entire performance appraisal process and the transfer back to the applicant's substantive position. Having accepted the respondent's proper concession that there were other works events causative of psychological injury, I subsequently return to the issue of whether psychological injury was predominantly caused by the transfer and the performance appraisal.

ISSUE 1(b)(i) - The cessation of the secondment (the transfer)

84. It was initially conceded that when the applicant was transferred in April/May 2017 from technical advisor to senior case manager, this probably amounted to a transfer within the meaning of s 11A of the 1987 Act.[78] That concession was then withdrawn[79] although reference was subsequently made to the Court of Appeal decision of *Manly Pacific International Hotel Pty Ltd v Doyle*[80] which Mr de Meyrick accepted was "probably against me*".*[81]

85. It was also conceded by the applicant that there was "nothing unreasonable about transferring" the applicant back to his old position at the end of the secondment.[82]

86. These concessions were properly made. I did not call upon the respondent in respect of this issue.

87. The cessation of the applicant's secondment and his move back to his substantive position as senior case manager is a "transfer" within the meaning of s 11A of the 1987 Act. Transfer has been interpreted by the Court of Appeal to include "a move from one position to another

[78] T1, p 45
[79] T1, p 47
[80] [1999] NSWCA 465 at [31] per Davies AJA, Mason P and Fitzgerald JA agreeing [1], [3] and [32]
[81] T1, p 56
[82] T1, p 45

whether or not there is any change in location": *Manly Pacific International Hotel Pty Ltd v Doyle.*[83]

88. I accept that the change of duties at the end of the secondment clearly fell within the meaning of transfer.

89. The email correspondence from Ms Brennan dated 5 May 2017, portion of the contents of which are set out at paragraphs 39-42 herein, which I accept, show valid reasons by the respondent why the applicant's secondment and move back to his substantive position was necessary and occurred in late April 2017.
90. The applicant has no entitlement to be appointed to a position in which he was temporarily acting. The respondent has set out clear business reasons for its decision including the loss of the workers compensation section. The applicant made no contrary submission in response to these legitimate business reasons.

91. The respondent also provided legitimate reasons why the secondment was extended in late 2016 until 30 April 2017 rather than being made permanent. These reasons include providing the applicant with further experience which he had missed due to unrelated illness.

92. These are all valid reasons and reinforce my clear view that the respondent acted reasonably in respect of the transfer. For these brief reasons, I accept the applicant's concession that the respondent's actions with respect to transfer were reasonable.

ISSUE 1(b)(ii) – The performance appraisal

93. The parties agreed that the s 11A defence related to the entire performance appraisal which culminated in the grievance meeting.[84] The applicant conceded that these events fell within the meaning of performance appraisal in s 11A of the 1987 Act.[85] This concession was properly made. The meaning of performance appraisal was defined by Geraghty J in *Irwin v Director-General of School Education*[86] as:

> "[S]omewhat like an examination, not a continuous assessment. Performance appraisal is more like a limited, discrete process, with a recognises procedure through which the parties move in order to establish an employee's efficiency and performance."

94. The evidence, which I accept, is that Ms Strang was prepared to give the applicant a solid rating. This rating was changed to one of underperforming.

95. I also accept, as was properly conceded by the respondent, that the applicant was not advised of why he received this adverse rating until the grievance meeting.[87]

96. I also accept the applicant's submission, that on the evidence before me, two of the reasons for providing the adverse rating were wrong. The relevant portion of the applicant's unsigned statement, set out at paragraph 34 herein[88] assert that he completed reasonable excuse cases as required and provided reasons why work capacity decisions were not undertaken in this period. In relation to the issue of not doing work capacity assessments, the applicant stated that there were staff absences and he would normally be reviewing, editing and signing off on these. Ms Brennan did not respond to this.[89]

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[83] [1999] NSWCA 465 at [31] per Davies AJA, Mason P and Fitzgerald JA agreeing [1], [3] and [32]
[84] See paragraph 8 herein
[85] T1, p 57
[86] NSWCC, Geraghty CCJ, 14068/97, 18 June 1998, unreported
[87] T1, p 69
[88] Particularly paragraph 65 of the unsigned statement
[89] T1, pp 51-52

97. The applicant's unsigned statement was taken by the investigator qualified by the respondent. The contents of this statement were provided to various employees interviewed by the investigator. Various portions of the applicant's unsigned statement were the subject of specific response.

98. As the applicant submitted and the respondent conceded during its submissions, Ms Brennan did not address the applicant's evidence that two of the reasons that the applicant received for the adverse appraisal were incorrect.[90]

99. The applicant otherwise took issue with the respondent's failure to provide details of the reasons for the adverse appraisal prior to the grievance meeting.

100. Ms Brennan did not address the applicant's assertion that that the manner in which notification was given was in breach of the protocol.[91] Most of Ms Brennan's evidence is in relation to the applicant's inappropriate responses at that meeting, which were basically irrelevant to why the performance downgrade was actually made.[92]

101. Ms Brennan, to the extent that she addressed this point, stated that it was Ms Strang who would have communicated the "results" to the applicant[93] although she properly concedes that she cannot comment on what was said.[94]

102. The applicant submitted that he was "rather ambushed with these things as a precluded decision about him".[95]

103. I specifically asked counsel and was advised that there was no statement from Ms Strang.

104. The respondent submitted that it was more reasonable having an oral communication than doing it in writing because the worker has the benefit of a support person rather than if the matter was dealt with in writing.[96] It was submitted that this was not a "final downgrade" and the applicant was given the opportunity to "bring further evidence and make further arguments so that the issues can be redetermined".[97]

105. However, the respondent accepted that the evidence from Ms Brennan was that Ms Strang should have informed the applicant as to why he had received the appraisal of underperforming.

106. This respondent's submission that the reasons were provided at the grievance meeting does not address and ignores the uncontradicted evidence from the applicant that he should have been advised of the reasons prior to the grievance meeting.

107. The respondent also submitted that there is no evidence that the protocol was in writing and a written protocol, if breached, was more significant than one based on practice. Leaving aside that this submission reverses the onus of proof, I do not accept it for a number of reasons.

108. In my view it defies logic and commonsense why the applicant was not advised why he received an underperforming appraisal at the time and not subsequently during a grievance meeting when the decision had been made.

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[90] T1, p 49
[91] T1, p 49
[92] T1, p 52
[93] Reply, p 208, paragraph 38
[94] Reply, p 209, paragraph 39
[95] T1, p 53
[96] T1, p 69
[97] T1, p 70

109. It would be a waste of time to have a performance appraisal and give a worker an adverse appraisal if the worker was not advised why he or she had received an adverse outcome. The failure to provide the reasons would defeat the entire purpose of the appraisal, that is to appraise the worker and provide guidance as to where he or she can improve. The applicant should have been advised of these matters prior to the appraisal downgrade particularly in circumstances where there was a preliminary report which was positive and the final report was negative.[98]

110. Secondly, the appraisal had serious implications for a worker in terms of what they were going to earn and promotion.[99] The adverse decision had apparently already impacted on the applicant by the time the grievance meeting was held some six weeks later.
111. Further, the applicant had no opportunity to prepare in advance for what was being alleged.

112. The respondent submitted that the failure to advise the reasons "was cured" by the grievance process. There are a number of reasons why this submission is rejected.

113. First, the appraisal had been made and the applicant was required to lodge a grievance. If the decision was wrong then it would be preferable that the mistake was never made rather than having to be rectified through a grievance process.

114. Secondly, I do not accept that the grievance process is a better course than a discussion between the manager and the worker of why a particular assessment was made. The evidence is that Ms Brennan proceeded to speak for a number of minutes explaining the decision. It is not surprising in these circumstances that the applicant was upset, particularly as he believed, and the evidence shows, that two of the matters relied upon by Ms Brennan were wrong. Whether the reasons were oral or in writing, the reasons should have been provided by Ms Strang prior to the grievance meeting. Commonsense would suggest that the reasons should have been given as part of the original appraisal when the applicant was formally advised that he had been underperforming.

115. That conclusion is otherwise consistent with the manner in which the grievance meeting proceeded, that is, Ms Brennan proceeded to outline why the applicant had been given the performance appraisal.

116. The respondent's submission concentrated on the reasonableness of the grievance meeting. I have set out the respondent's submissions which were discussed in some detail in the reasons of the Deputy President. Wood DP stated:

> 161. It is well established through a long line of authorities that the question of reasonableness requires an objective assessment of the action. As Geraghty CCJ said in *Irwin*:
>
> > 'The question of reasonableness is one of fact, weighing all the relevant factors. The test is less demanding than the test of necessity, but more demanding than a test of convenience. The test of 'reasonableness' is objective, and must weigh the rights of employees against the objective of the employer. Whether an action is reasonable should be attended, in all the circumstances, by a question of fairness'.

[98] T1, p 53
[99] T1, p 54

> 162. The Arbitrator's determination that the appellant's actions with respect to performance appraisal were not reasonable was a factual determination. In order to disturb the Arbitrator's finding, it is not sufficient that the Presidential member simply prefers a different outcome. However, relevant to this case, it may be shown that an Arbitrator was wrong by showing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn.[44]
>
> 163. The Arbitrator determined that the respondent ought to have been provided with written reasons in respect of his performance ratings, so that the respondent could have been prepared for the meeting. The Arbitrator did not weigh that factor in the context of the fact that the respondent:
>
> (a) had instigated the meeting by requesting reasons for the downgrade in his performance;
>
> (b) had with him the assistance of a support person, or
>
> (c) was entitled to adjourn the meeting in order to collate evidence in response to the reasons for the downgrade.
>
> 164. In other words, the Arbitrator did not objectively weigh the rights of the respondent against the actions of the appellant, whose objective was limited to providing reasons for the performance assessment, as requested by the respondent. It follows that the Arbitrator reached his conclusion without balancing the rights of the respondent against the objectives of the employment in accordance with the principles enunciated in *Irwin.* The failure to do so flawed the Arbitrator's decision that the appellant's actions were not reasonable, and has resulted in error. It follows that ground two of the appeal succeeds."

117. I am not bound by the manner in which the case was argued at first instance. That decision was revoked. No factual findings were made by the Deputy President which bind me in this determination.

118. The question of reasonableness must be analysed in accordance with the "rights of employees against the objective of the employer".

119. In analysing this issue, the s 11A defence was not limited to the grievance meeting and the parties agreed that the defence was based on performance appraisal process culminating in the grievance meeting. Further, the medical evidence, particularly the opinion of Dr Vickery, did not limit the cause of the psychological injury to the grievance meeting. As I previously noted and accept, the underperforming performance given to the applicant was part of the cause of the psychological injury. This of course occurred prior to the grievance meeting.

120. In these circumstances I do not analyse the s 11A defence in the manner in which it was determined by the Deputy President because the parties had agreed that the actions with respect to performance appraisal were based on the overall process and not limited to the grievance meeting. I do not accept that the respective rights and obligations can be limited to an aspect of the performance appraisal when the defence was not pleaded in that way and was otherwise not the sole causative aspect of the psychological injury within the performance appraisal process. That conclusion is in accordance with the observations of Sackville JA in *Heggie*,[100] that the relevant aspects of the employer's actions causative of injury are examined when determining the s 11A defence.

[100] Set out at paragraph 71(v) herein

121. I am not satisfied that the respondent's actions with respect to the performance appraisal were reasonable as articulated in the respondent's submissions and contained in the Deputy President reasons set out earlier herein.[101] I take into account the reasonable manner in which the respondent acted in the grievance meeting. I accept that there was no discourtesy by the respondent's employees at that time.

122. However, the respondent did not comply with its own protocol of providing reasons to the applicant, in whatever form, prior to the grievance meeting. It is otherwise unreasonable to believe that a system would be in place whereby a worker received an adverse outcome, did not know why, and was then expected to lodge a grievance to find out this answer.

123. I have previously set out that two of the reasons provided by the respondent for the adverse appraisal were wrong.

124. The applicant's evidence that there was missing staff is otherwise consistent with the fact that CGU's workers compensation section was closing down and ultimately ceased at the end of 2017. In these circumstances it is not surprising that the staff at CGU within the workers compensation section were lacking in numbers as employees were looking for employment elsewhere.

125. My finding that two of the reasons given for the appraisal were wrong was not previously argued in this matter and mentioned in the Presidential decision. This submission was made on day one of the hearing by the applicant's counsel. The submission was properly conceded on the second hearing day by the respondent's counsel on the basis that it did not have contrary evidence. It was not as if the respondent had insufficient time to address that submission. The respondent's concession was considered and otherwise appropriately made.

126. The performance appraisal miscarried because the respondent did not provide reasons prior to the grievance meeting as it should have done and otherwise made a defective decision.

127. My strong view is that the respondent has not established the onus of proof that the performance appraisal was reasonable action. This aspect of the s 11A defence fails.

Issue of wholly or predominantly

128. The respondent's s 11A defence on performance appraisal is unsuccessful. Following the rejection of that action, the s 11A defence was limited to the actions with respect to transfer.

129. The respondent's counsel properly conceded that it could not establish the s 11A defence based on transfer alone because it could not establish that the actions with respect to transfer predominantly caused the psychological injury. This concession was consistent with the opinion expressed by Dr Vickery, that is, the issue of predominant cause of psychological injury was dependent on both the action with respect to transfer and the action with respect to performance appraisal.

130. For the avoidance of doubt, I accept that part of Dr Vickery's opinion that the psychological injury was predominantly caused by the transfer **and** the performance appraisal. The opinion expressed by Dr Clark is defective given the absence of reference of the prior condition and his failure to articulate and analyse the effect of the various actions and events. However, I am not satisfied that the psychological injury was predominantly caused by the transfer alone.

[101] See paragraph 114 herein setting out the reasons of the Deputy President (at [163])

131. Accordingly, I find that the respondent has not satisfied its onus on the balance of probabilities that the psychological injury was predominantly caused by its reasonable action with respect to transfer.

FINDINGS and ORDERS

132. It was agreed that if the applicant was successful then the deemed date of injury was 17 August 2017.[102]

133. The findings and orders are set out in the Certificate of Determination.

[102] T1, p 37