

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6228/19
Applicant: Brian Pemberton
Respondent: Westpac Banking Corporation
Date of Determination: 17 March 2020
Citation: [2020] NSWCC 80

The Commission determines:

1. The respondent is to pay the applicant weekly compensation of:
 - (a) \$1,941.47 from 28 June 2019 to 27 September 2019, and
 - (b) \$1,634.93 from 28 September 2019 to date and continuing.
2. The respondent is to pay the applicant's s 60 expenses.
3. I remit the matter to the Registrar for referral to an Approved Medical Specialist to assess the applicant's permanent impairment as a result of a psychological injury deemed to have been suffered on 28 February 2017.
4. The documents to be sent to the Approved Medical Specialist are:
 - (a) Application to Resolve a Dispute and supporting documents, and
 - (b) Reply.

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

Catherine McDonald
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 CATHERINE McDONALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Brian Pemberton was employed by Westpac Banking Corporation (Westpac) as a Commercial Credit Manager Local.
2. Mr Pemberton ceased work on 16 February 2017. He claims weekly compensation from 28 June 2019, being the date after payments of salary continuance insurance ceased. He claims s 60 expenses and permanent impairment compensation.
3. There is no dispute that Mr Pemberton suffered a psychological injury in the course of his employment with Westpac nor that he has been totally incapacitated for work in the period for which he claims compensation.
4. Westpac defends the claim on the basis that Mr Pemberton's injury was wholly or predominantly caused by reasonable action taken with respect to discipline or performance appraisal. That is the only issue to be determined.

PROCEDURE BEFORE THE COMMISSION

5. The matter was listed for conciliation conference and arbitration hearing on 20 January 2020, when Mr Morgan of counsel appeared for Mr Pemberton and Ms Hogan of counsel appeared for Westpac. Because of extensive conciliation and negotiation, the hearing did not conclude on that day and was stood over to 17 February 2020, when the hearing concluded.
6. The parties agreed that Mr Pemberton's pre-injury average weekly earnings were \$2,043.65.
7. 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.

EVIDENCE

8. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute and supporting documents (ARD);
 - (b) Reply, and
 - (c) Statement of Bradley Anderson handed up at the conciliation conference.
9. There was no oral evidence.

Mr Pemberton's evidence

10. Mr Pemberton provided a statement to Westpac's insurer dated 28 February 2019. He said that he was diagnosed with depression in 1997¹, made a claim for compensation and had three months off work.
11. Mr Pemberton said that he had been "counselled to in relation to my work performance just before I went off work on 9 and 16 February 2017 by Sharon Kenna and David Larkham."²

¹ [21].

² [51]

12. His role at the time he ceased work was Commercial Credit Manager Local, based at Barangaroo which he took up in late 2015 or early 2016. His previous role as Commercial Credit Manager Central “was the role that I experienced my current health concerns.[sic]³”

13. He described his duties:

“My normal duties for the role of Commercial Credit Manager Central were not to go out to localised area centres and performing the work of the credit person that was away at that time. However I would pick up their roles and do them. That could include the site manager or credit manager.”

14. When describing his injury, he said:

“I was in the role of Commercial Credit Manager Central for about 5 years, I am not sure of the dates, when on 27 January 2015¹ made a note about how I was feeling. I recorded that I felt like on invisible person and not being part of a team. I felt like I didn't belong anywhere. There was so many things going on I was doing very long hours and travelling a lot. I would sometimes get lost going to the different sites or get lost coming home.”

15. Mr Pemberton said he saw Dr A Keller, psychiatrist, from about 2014 and he no longer had emails and notes from that period.⁴

16. He recalled driving to Wollongong during a storm and being fearful driving down Mt Ousley. Even though he was looking for a permanent role, he declined a transfer to Wollongong unless there was “more money so I could stay overnight if there was fog or rain.”⁵ He said that he made a file note on about 28 March 2015 when he was “really hitting the wall” when he felt other staff were mocking him when “having a go at” another staff member.

17. On 3 April 2015, he recorded another file note:

“to say that no one actually knows what I do and that it was no wonder I didn't feel part of a team. I just couldn't move forward and this feeling was impacting my mental health. I can only guess that I had a meeting with Doug Walker who changed my title to a relief officer which I disputed and he changed it back. I made another note on 3 April also recording that I had a meeting where I was told that I had done nothing wrong and that I was a valued employee.

I raised my concerns regarding the driving to Wollongong, the higher duties award and the extra hours that I was doing but I never raised that I had any issues with my mental health because of my concern with the stigma on that and the fear that it would affect any future roles.”⁶

18. Mr Pemberton described other file notes that he recorded on 4 April 2015⁷, 16 January 2016⁸, 18 July 2016⁹. On 9 February 2017 he recorded another file note because he was feeling upset, was not sleeping and was confused. He said:

“What happened was I was called for an informal performance discussion. I wasn't given 24 hours' notice or told that I could bring a support person to the meeting. The meeting that I attended had David Larkham and Sharon Kenna. I was told that there had been a number of instances where I had

³ [40].

⁴ [62].

⁵ [63].

⁶ [67]-[68].

⁷ [69].

⁸ [70].

⁹ [71] –[72].

allegedly breached my credit approval authority limit, known as CAL. David discussed one with me but I kind of blanked out. I was able to answer some but not others. I didn't know what the meeting was about to begin with. I remember one thing that Sharon said to me and that was how I could guarantee Sharon that I would not make a mistake again. I remember I just couldn't answer. I think I may have even asked if they wanted me to resign."

19. Mr Pemberton sent an email to David Larkham after he received the notes of the meeting. He said:

"I acknowledged the seriousness of the situation but advised that I could not really give him a suitable answer as to how or why the breaches had occurred. I offered a bit of background on my loan history with clients and explained my work processes. I went through the different accounts that I could remember that had been raised and offered explanations. I ended my response advising that I still wanted to remain working and that I wanted to prove that I was a good bank officer and could do the work required of me."

20. He attended another meeting on 16 February 2017. He recorded a file note about the meeting and said it

"made me more confused about the process or way things were being discussed. I wasn't sure if I was being formally counselled or whether we were just working out a process of moving forward. I was not aware or advised that notes were being taken and was only provided with a copy of the meeting notes from 9 February. In those meeting notes it seemed to me that it was one sided and not all issues were written down. I acknowledged that I unconsciously acted outside my CAL authority but I understand it was the process of not submitting the correct CAL level to confirm the approval. It was not about the decisions themselves..."¹⁰

21. Mr Pemberton was then "put on special leave." He did not return to work and receive payments under a salary continuance insurance policy from 22 June 2017 for about two years.

22. In October 2018, a return to work was considered, supported by Mr Pemberton's psychiatrist, Dr Keller. He was offered a position at Concord West, which Dr Keller did not support. A certificate of capacity was provided on 1 February 2019.

23. Mr Pemberton summarised the issues before going on with his statement:

"To summarise my work-related issues, I was working in what I believed was a centrally-based role but then was required to travel to sites to relieve staff that were away. This travel caused me concern, especially travelling to Wollongong which I raised with the senior managers. I was also putting in deals after discussing the deal with the senior manager of that area and then finding that when my deals were being reviewed by my senior Manager Credit, Doug Walker, there would be disagreements and when asked why I did a deal in that way I would advise that this was the way the senior manager credit from that area discussed with me. Doug would then confront that senior manager credit that I had discussed that deal with and that would then cause embarrassment to me and in the end I just kept my mouth shut and just took the criticism. It was an ongoing conflict of opinion. I also did St George and Westpac deals but I didn't have access to the St George or even Westpac imaging systems which meant I had to ring up the sales manager and ask them to email me the relevant

¹⁰ [77].

documents to the deals. This was an ongoing issue. I was also not being appropriately compensated for the higher duties that I was performing, which I also raised with my senior managers. I was also working long hours without compensation. Then I was called into a meeting to discuss and answer to serious breaches. I was then off work for a period of time and began to discuss my return to work to a safe and suitable environment but the return to work plan was in conflict with my doctor's instructions and this has caused me further distress. I cannot return to work until I feel that I am in a safe environment.

Why I didn't go through workers comp earlier is because I went on salary continuance which was recommended to me by the bank. I only went on workers comp recently because they were pushing me to return to work at Concord under the same conditions which originally caused me to be off work. ..."¹¹.

24. With respect to travel, Mr Pemberton said that he often asked to go to Wollongong a few days before the Local Credit Manager went on leave because he was always behind and Mr Pemberton wanted the queue to be up to date before he filled in however the hours were long and "the worry about nearly running into either trees or other cars was increasing with each drive."¹² He was also sent to Wetherill Park, Penrith and Campbelltown. He left home very early to ensure he found the location and parking to start work before 8 am and had to drive home in the dark after a long day "often taking over 2 hours because I became disoriented in the dark. I would be tired and my anxiety would be high."¹³

25. Mr Pemberton described other issues which arose in his employment and said that once he went on special leave "I went down into a very dark place" and :

"It was just a culmination of the issues that I was going through that led me to start special leave and lodging my current claim."¹⁴

26. Mr Pemberton prepared a statement with the assistance of his solicitors dated 28 October 2019. He said:

"In 2014, I was experiencing increased stress, depression and anxiety due to the conditions of my work as a Commercial Credit Manager Centralised. I was experiencing panic attacks which lead to depression and anxiety at work & whilst driving, I would feel like I didn't belong and that no one cared about me, my efforts or the hours I was required to work.

I would feel an obligation to perform to my best so as not let anyone down."¹⁵

27. Mr Pemberton said that he took time off on sick leave in November 2014 and saw Dr Keller in January 2015. Dr Keller prescribed medication. Mr Pemberton said:

"I consulted Dr Keller again in December 2016. I believe I had been going fairly well at that stage and continued to see Dr Keller for my medication. I continued to take Venlafaxine 300 mg and Dr Keller and I agreed that I would remain on that dosage pending further review.

Unfortunately, it was shortly after this that my condition came to the front as I had been making some processing errors in my employment with Westpac and was placed on "special leave" & I deteriorated further."¹⁶

¹¹ [93]-[94].

¹² [99].

¹³ [101]-[102].

¹⁴ [124].

¹⁵ [12]-[14].

¹⁶ [22]-[23].

28. Mr Pemberton described his treatment. He set out his responses to the statements prepared on behalf of Westpac. In response to Sharon Kenna's statement he said:

"In regards to the meetings with Ms Kenna and Mr Larkham, they did not have anything to do with my depression and anxiety. That is really the tip of the iceberg. The reason I brought it up in my statement was because this is when I had advised Ms Kenna and Mr Larkham that I was seeing a doctor."¹⁷

29. Mr Pemberton completed a claim form on 4 February 2019 which was submitted with a number of annexures which do not appear with it in the ARD. He said that the injury "did not occur on a particular date, but over a period of time, climaxing in February 2017 when the bank sent me on special leave pending a doctor's report."

30. In a note labelled Annexure A ¹⁸ which appears to be part of the claim form, Mr Pemberton listed the main issues leading to his injury:

"There were a number of issues, the main ones being-

- Traveling around to the different Sydney locations & down to Wollongong a number of times over a 5 year period.
- Panicking when traveling to Wollongong through heavy rain & fog going down Mt Ousley
- Panicking when returning home from Wollongong when logs were across the road going up Mt Ousley.
- Panicking when getting lost at night & not knowing where I was & how to get home
- Because I was working in different locations where different SMC were in charge of these locations, these were the SRM's who I discussed deals with & agreed upon. However, when the SRM who hindsights my deals didn't like the solution he (Doug Walker) would ask me why it was completed the way it was & when advised, it was how it was discussed with the other SMC he would then question them on why or it not the Westpac way to do it. I felt this caused friction when discussing further deals with the SRM.
- Working longer hours at the centres to ensure all outstanding reviews & reports were completed, even when the local CCM didn't follow them up, so I wouldn't have complaints against me.
- Not being paid higher duty allowance when at the centres.
- Because I was working for both Westpac & St George I did not have full access to all systems needed & had to use workarounds by asking managers to forward the information e.g. Didn't have access to imaging of documents or account details under either Westpac or St George systems to be able to check details.
- Having a stand up argument with Andrew Stapleton about Le Sands, not being able to sleep, then sending Brian Harris an e-mail before walking out.
- Because of the position I had CCM Central I was moved from 1 SMC to another every couple of months.
- When it came time to do my appraisal the last SMC would complete it based only on the period I was reporting to them
- On my last appraisal when David Larkham presented it to me he couldn't even tell me who completed it nor interested as I had only just recommenced reporting to him. He wanders why I don't feel part of the team.
- I didn't have a permanent job.
- I felt isolated
- I wasn't part of a team
- I was a nothing, the invisible person.

¹⁷ [81].

¹⁸ ARD page 77.

-I started forgetting things & it was hard to concentrate
-I had to talk myself into going to work believing this would lead to a permanent roll
-I couldn't trust the SRM' s because they would say one thing & then do something else."

31. The file notes to which Mr Pemberton referred in his statement to Westpac's investigator appear in the ARD, with covering notes addressed to Daniel, who I was told was an officer of Mr Pemberton's union to whom they were later forwarded. On 3 April 2015 Mr Pemberton wrote that he "can't keep moving around. I need a job, a place to call home and feel part of a team." On 31 January 2016, he wrote that he believed he "went backwards this week. I still want to work but it is difficult at present. Still believed I have failed by allowing work related matters to get the better of me."

32. On 27 January 2015, Mr Pemberton wrote in a file note:

"I feel that I have been let down.

Do you know what it feels like to be the invisible person, not being part of the team just someone who doesn't belong anywhere?

It seems that the work I do amounts to nothing, it's like I'm not value adding why am I here, what's the point?

I travelled all over Sydney & down to Wollongong. Often working longer hours than the permanent CCM's to ensure that the queues were brought under control & so there wouldn't be any complaints from managers or Heads of. When I'd leave a Centre the queue would be in a better position than when I arrived.

...

They dangle the carrot, without actually making promises of a position I was always told there are positions coming up within the next 6 months but I was never considered.

...

As much as I want to work, I feel that I'm not wanted, I'm past my used by date."

33. On 28 March 2015, Mr Pemberton wrote:

"Now they are mocking me to my face.

Yesterday, they made sure that I was in ear shot when they brought up about driving Mt Ousley in a thunder storm, laughing about me I just don't understand?

Did I not jump higher enough when they said to jump.

Is it because ????????????????????

They have won, but I don't understand why they wanted to break me."

34. He prepared notes on 3 April 2015 and on 4 April 2015 when he wrote:

"...

What is expected of me?

Return to health a priority

Stay working

Find another position I want to do

Enjoy work"

35. In a long note dated 22 January 2016, Mr Pemberton wrote:

"I am the invisible man, I don't feel a part of the team I feel that I don't belong. I have no permanent place, position or until recently a computer. When I finish at a Centre I have to enquire where I'm to go next & if it's Concord I have to ask if there is a computer for me to use.

...

It seems that I have been placed in a position that I can't achieve & I feel that I am still in this position."

36. Mr Pemberton's email to David Larkham dated 14 February 2017 appears in the ARD. Mr Pemberton said:

"Since this has been brought to my attention & I've had time to digest the seriousness of the situation

I can not really give you a suitable answer as to what or why this has happened, I should have known, I have not intentionally done this nor have I gained anything from doing this & I believed I was doing the right thing by the Bank.

I hope you do take into account my length of time in the Bank & Credit with your decisioning of me."

37. Mr Pemberton provided a response with respect to specific files.

Westpac's evidence

38. Sharon Kenna is Westpac's Chief Credit Officer Commercial Banking NSW. She was Mr Pemberton's "one up People Leader."

39. She said that the Wollongong role was offered to Mr Pemberton because Westpac thought the travel would be easier for him. In response to his request, she told him that the bank would not pay for accommodation in bad weather. She did not recall when the conversation occurred but said that when Mr Pemberton "said that he did not feel comfortable that was fine."

40. Ms Kenna disagreed that Mr Pemberton had to travel to a lot of different locations or that he was undertaking higher duties whilst at Concord. She did not remember any conversation about long hours, though she did recall that Mr Pemberton started work early.

41. Ms Kenna described the process that took place in February 2017. Part of Westpac's compliance oversight is a "hind sight review" by a manager over a random sample of files in which decisions were made by that manager's team. In January 2016, David Larkham did a hindsight of one of Mr Pemberton's files and discovered a breach of his approval authority. Mr Larkham told Ms Kenna that he had identified a breach and some other things that hadn't been "covered off." Ms Kenna instructed Mr Larkham to undertake a wider review of Mr Pemberton's files for the previous 12 to 15 months and errors were identified in 12 files. An "informal meeting" was arranged for 9 February 2017.

42. Ms Kenna said that she and Mr Larkham "listed the issues David had found and asked Brian to go away and think about the various types of breaches that we had seen in the files." She noted that most people working in credit will accidentally breach their authority and that one or two minor breaches or one more material breach in a year for one officer was "probably within the normal operating environment." Ms Kenna and Mr Larkham told Mr Pemberton that the issues were serious and that they would need to talk to HR about next steps.

43. Ms Kenna said that Mr Pemberton seemed taken aback at the number of files in which errors had been found and “to be fair some of the files were from a while back”. She said that the purpose of the meeting was to inform Mr Pemberton about the list of files and their observations and to say that they believed “it was a more serious issue than just having a minor breach in the normal course of business.” Ms Kenna said that Mr Pemberton’s written response didn’t cover the issues.
44. Mr Pemberton asked if he should resign. Ms Kenna said:
- “We told him ‘no’ and that was not the intention of the meeting but we did need to be able to understand if he was very clear on the files that he decisioned. “
45. A further meeting took place on 16 February 2017. Ms Kenna said she told Mr Pemberton that they could not let him return to his role, given their knowledge of the errors which had occurred. Westpac agreed for Mr Pemberton to take several weeks of special leave
- “so that he could gather his thoughts and think about what he wanted to do. All the while I would have been saying that we couldn’t just put him back into his role and make him operate autonomously until we had a clearer understanding that the controls were there and that he was confident with what he was doing and knew what the parameters were.”¹⁹
46. Ms Kenna’s statement also dealt with Mr Pemberton’s proposed return to work in late 2018 but that evidence is not relevant to the issue which I am required to determine.
47. David Larkham is Westpac’s Executive Manager Credit Assurance but when he worked with Mr Pemberton his title was Senior Commercial Credit Manager. He said that in late January 2017 the bank’s audit team picked up a decision in which Mr Pemberton had breached his authority. He agreed that happens from time to time. Shortly afterward, Mr Larkham undertook a hind sight review of Mr Pemberton’s work and found another breach. He then looked at the previous 15 months’ files and found over 10 breaches which “prompted a performance discussion” on 9 February 2017. He said that Mr Pemberton was “sent an email invitation to attend a meeting.”²⁰ He described the meeting as a performance discussion.
48. At a further meeting on 16 February, Mr Larkham asked Mr Pemberton to elaborate on a comment at the previous meeting that he was still “seeing a doctor in relation to Wollongong.” Mr Pemberton told him that he commenced seeing a doctor over his anxiety about driving in the fog and rain to Wollongong and that he had also contacted “Access” over the issue. Mr Larkham said:
- “I asked Brian for any other issues that we should be aware of which has impacted his ability to perform his duties. Brian advised that he has been suffering memory losses for some time but has not shared this information with anyone from the bank. He also stated that he loses concentration...Brian said he thinks he can still do his job.”
49. Mr Larkham said that “it was only in the second meeting that Brian’s health issues came out and he said that he had been seeing a doctor for 18 months.”
50. Douglas Walker was Senior Manager Credit when he worked with Mr Pemberton at Concord before August 2015. He said that Mr Pemberton was required to “decision” applications in accordance with his delegated authority and to escalate those outside his authority to Mr Walker with a recommendation to approve or otherwise. He “vaguely” recalled a time when Mr Pemberton was asked to work at Wollongong and raised with Mr Walker that “weather conditions weren’t great.” Mr Walker’s statement appears to have been prepared in response to questions and contains many references to things he does not recall.

¹⁹ [39].

²⁰ [19].

51. Mr Walker said:²¹

“I have always found Brian a little but highly strung. He lacked confidence and didn’t take feedback well. He may have had the perception that we might have been having a go at him when delivering feedback. I certainly didn’t agree with all of his decisions that he made but it’s not in my character to demean anyone. I tried to present feedback in a constructive way and I certainly never sensed any resentment with our working relationship. ...Sometimes when you try to help someone and try to develop their skills, such as sending him to Wollongong and requiring him to perform at a local site it takes them out of their comfort zone.”

52. Brad Anderson’s statement was not attached to the ARD and was handed up at the hearing. Mr Anderson is a Senior Manager Commercial Credit.

53. Mr Anderson described Mr Pemberton’s role. As a Commercial Credit Manager Central he was required to “pick up transactions in the workflow system, underwrote credit transactions, manage credit risk, approve new transactions and continuation of existing transactions.” He was required to “engage with account managers on deal to understand if there were any gaps in their submissions and gather additional information to help him make his credit decision.”

54. He said that Mr Pemberton worked from Concord West in that role. When he became a Commercial Credit Manager Local

“he wasn’t assigned to a particular business to support.. When Brian was in the decentralised model he would go wherever he was required. If there was more workflow in a particular business he would then go and pick up that workflow to support that particular team.”

55. Mr Anderson said that there was opportunity for Mr Pemberton to “go out and sit in a business centre.” Mr Anderson remembered Mr Pemberton working at Penrith, Metro East and Bankstown. He was aware that Mr Pemberton had an issue with travelling when he was offered the role in Wollongong. When Mr Pemberton told Mr Anderson about some issues with travelling he “advised that these were opportunities and if he wanted to be part of a team then he needs to understand these opportunities would come along.”

56. Mr Anderson said that Mr Pemberton was not entitled to be paid higher duties when he covered positions locally and that he had never raised the issue.

57. Mr Anderson was not involved in the “performance discussions” in February 2017. The remainder of his statement deals with the attempts to return Mr Pemberton to work.

Medical evidence

58. Mr Pemberton saw Mr B Kemp, psychologist in 1996 on the referral of his general practitioner. Mr Kemp reported to Dr Nelson on 6 February 1996 and said:

“Brian complains of finding it difficult to cope with the changes in his occupation as a Bank Manager for Westpac, changes which are reflected in the finance industry generally. He reports some mild depression at times with anxiety, including nausea and dry retching.

...

There appear to be two elements in the emotional response Brian has in regard to the work changes. Firstly, he feels angry that his long-standing expectations of permanent employment and steady progression have not been met; secondly, he feels anxiety at the possibility of retrenchment and the possibility of having to find an alternative. The resentment he feels regarding the changes in the industry are likely to exacerbate the anxiety he experiences.”

²¹ [27].

59. A further report from Mr Kemp confirms that Mr Pemberton's condition improved.
60. On 27 January 2015, Dr Keller reported to Dr Nelson. Dr Keller described the treatment in 1996 and said that Mr Pemberton took medication for some time before it was "weaned and ceased and then has a long sustained remission with no further episodes of depression until last year." Dr Keller said:

"Triggers for the current episode appear to be multiple. They include chronic dissatisfaction with his role at work over the past four years where he has been a relieving credit manager with Westpac. He reports that the problem with this is that he feels like "the invisible man ... I don't belong to a team and if I didn't show up one day, nobody would even know". He also dislikes the long travel to various parts of Sydney and further south to Wollongong, particular driving at night which he finds difficult and even dangerous. He has also had further incidents at work where he has questioned his performance and felt accountable for some things that have gone wrong and affected other members of staff.

...

It would appear that it was an accumulation of all these issues which led to him experiencing a "breakdown" which caused him to abruptly take leave from work in November last year.

...

Brian appears to have a range of personality vulnerabilities which would predispose him to develop depression, including obsessional and perfectionistic traits and a proneness to taking on a sense of excess responsibility when things go wrong.

...

In summary, Brian appears to have experienced a moderate relapse of a recurrent major depressive disorder and since increasing his antidepressant medication and taking a break from work, and having a holiday with the family he has made a partial response. He reports that his mood now is approximately 7/10 and he appears to be on the road to recovery."

61. On 24 March 2015, Dr Keller told Dr Nelson that he noted a gradual improvement after several consultations. He expected Mr Pemberton's depression to slowly resolve and that he would require prophylactic medication for at least two years and possibly longer.
62. On 1 December 2015 Dr Keller reported that Mr Pemberton had no ongoing symptoms of depression and that he was in a stable position at work which he enjoyed. He recommended Mr Pemberton remain on medication for another six months.
63. Dr Keller reviewed Mr Pemberton and reported on 8 December 2016, having not seen him for about nine months. He said:

"Given that Brian has been relatively euthymic for an extended period, I feel that his current medication appears to be effective. He is reluctant to start to reduce his dose at this stage and I would support this action, I provided a prescription for the venlafaxine and will review him again in six months' time."

64. On 23 February 2017, Dr Keller wrote:

I have reviewed Brian twice in the last couple of weeks following a deterioration in his mood, which has coincided with some problems at work. Brian reported that there had been a couple of incidents that occurred in his role as a commercial credit manager with Westpac, that related to overstepping his financial delegation without prior authorisation from his manager. This appears to have resulted in him being placed on "special leave" for an indeterminate period, having disclosed that he was seeking care from a specialist and is now required to provide a medical report saying that he is fit to return to work.

Brian has reported some cognitive difficulties, that have emerged over the last month or so. These include a general sense of being absent minded, forgetful and concentration difficulties in the workplace. These may have led in part to errors of judgment in the workplace.”

65. Because of a family history of dementia, Dr Keller recommended detailed neuropsychological testing and a cerebral MRI. He noted that Mr Pemberton’s medication remained the same and said “I do not see his current fluctuation in mood as requiring an alternation to this medication.”
66. Dr Keller wrote to Dr Nelson on 21 March 2017 and 9 May 2017. On 21 May, Dr Keller reported that he had prescribed lithium and on 9 May he noted that Mr Pemberton had suffered a deterioration in mood. He said that of neuropsychological testing did not reveal signs of significant brain pathology. His assessment was that Mr Pemberton had severe and persistent Major Depression and recommended considering a trial electro-convulsive therapy (ECT). On 24 May 2017, Dr Keller noted an improvement in Mr Pemberton’s mood and consideration of ECT was deferred.
67. On 22 March 2017, Dr Keller wrote to Ms Kenna at Westpac in response to a request dated 20 February 2017. He said:

Mr Pemberton has a diagnosis of major depression which is a recurrent illness. He had been in remission for an extended period, but suffered a relapse of this condition in recent months. When I saw him in December 2016 his mood was stable with no evidence of depression, but by February 2017 he was experiencing significant depressive symptoms. These included significant negative ruminations about issues that had arisen at work, where he had problems with concentration and making errors which had led to a review of his performance.

68. Dr Keller confirmed that he had been treating Mr Pemberton for two years and that he anticipated that Mr Pemberton would remain on the combination of venlafaxine and lithium for at least six months. Dr Keller said that Mr Pemberton was unfit for work and that any future return to work would need to be graded.
69. On 29 April 2017, Dr J Kearney, psychologist, reported on the neuropsychological assessment he had undertaken on 11 April. Dr Kearney recorded that :

“Records indicate he developed a melancholic depression with suicidal ideation. He took leave from work, and began a course of treatment that included medication and counselling. He recovered from this episode, was weaned off medication, and entered a long period of sustained remission. There were no further episodes until approximately 2014 when a combination of work-related factors, as well as injuries sustained in a fall, appear to have triggered a relapse. Mr. Pemberton has been under the care of Dr. Keller since January 2015. He reports that following a remission of his symptoms, he had experienced a further relapse of depression in early 2017, with symptoms including negative ruminations (in particular regarding work performance), poor concentration, anxiety, loss of motivation, and loss of enjoyment.”

70. After setting out the results of testing, Dr Kearney wrote:

“Whilst there is some variability in cognitive performance, overall, the results of this assessment do not suggest significant cognitive impairment or deterioration. Mr Pemberton’s scores on the DASS placed him in the "extremely severe" range for depression and "mild" range for anxiety; and a recent relapse of Major Depression, accompanied by significant negative rumination, decreased motivation, anxiety, and reduced confidence / self-esteem is noted. Impairment in attention related tasks, and memory performance is frequently reported in Major Depression, in particular during the acute phase of the illness. Further, negative and self-focused rumination can also contribute to attention/concentration difficulties and memory impairments.”

71. In a report dated 9 May 2017, Dr Keller described the results as reassuring. He said that there was little to suggest any cognitive impairment and that the “patchy deficits” which existed were attributable to his severe level of major depression.

72. On 20 September 2017, Dr Keller prepared a report for Mr Pemberton’s income protection claim. The report dealt with questions related to fitness for work rather than the causation of the injury but Dr Keller said:

“In my opinion, the issues impacting on Mr Pemberton's return to work are not specifically linked to his current role with Westpac, or working for his current manager. I do not believe that Mr Pemberton would be fit to return to work with another company or under a different manager. He is fundamentally unfit due to the nature of his illness and the degree of his cognitive impairment, as well as his disturbed mood.”

73. Dr Keller continued to see Mr Pemberton regularly and to report to Dr Nelson. On 21 November 2018, Dr Keller wrote to Mr Anderson at Westpac and said that Mr Pemberton was fit to return to work and noted that Concord was the proposed location. Dr Keller asked Mr Anderson to reconsider the proposed arrangements and said:

“Mr Pemberton reminded me that a similar arrangement had been in place prior to the time when he became unwell at the end of 2016, following which he required an extensive period out of the workplace. He has specific concerns about the arrangement whereby he will not have direct and prompt access to yourself as his authorised manager.”

74. On 9 May 2019, Dr Keller wrote to Mr Pemberton’s solicitors. He noted that Mr Pemberton had a previous episode of severe depression for which he had taken medication before he had a “long period of sustained remission with no further episodes of depression until 2014.” He said:

“Triggers for the current episode for which he was presenting appeared to be multiple. They included what Mr Pemberton described in terms consistent with chronic dissatisfaction with his role at work over the past four years, where he had been working as a relieving credit manager with Westpac. He described feeling like “the invisible man ... I don't belong to a team and if I don't show up one day, nobody would even know”. He also described disliking the long travel to various parts of Sydney and further south to Wollongong, particularly driving at night which he found difficult and dangerous. He also described a number of incidents at work where he questioned his own performance, and felt accountable for things that had gone wrong and affected other members of staff. He was also knocked back on an application for annual leave, which made him upset. He experienced a 'mental breakdown' which caused him to take leave from work in November 2014. He appears to have been recommenced on the antidepressant venlafaxine at that time by his General Practitioner (GP).”

75. Dr Keller said that he reviewed Mr Pemberton on infrequent occasions because his condition was stable but:

“By early 2017, Mr Pemberton had deteriorated significantly which had coincided with problems at work. He described a couple of incidents that occurred in his role as a commercial credit manager that related to him overstepping his financial delegation without prior authorisation from his managers. This resulted in him being placed on “special leave” for an indeterminate period and he was subsequently required to provide a medical report, demonstrating his fitness to return to work.”

76. When asked if Mr Pemberton's employment was a substantial contributing factor to his injury, Dr Keller said:

"In my opinion, Mr Pemberton's depression is related in part to the stressful situation that he found himself in at work. It is also directly related to a number of the issues that occurred in the workplace. In fact, each of the episodes of depression that Mr Pemberton has experienced over a 20 year period have strongly correlated with his work for Westpac Bank. Whilst there may be other contributing stressors, it would appear that work stress has been the major stressor for all of his episodes of depression."

77. Mr Pemberton's solicitors qualified Dr R Rastogi, psychiatrist, who reported on 18 July 2019. The history she obtained is consistent with that set out above. She recorded that anxiety manifested in physical symptoms and that he "initiated EAP sessions and took sick leave in November 2014" and that he had seen Dr Keller in 2015. She said:

"He reported some comprehension and retention problems resulting in overstepping his financial delegation and not following the process without authorisation from his managers. This was picked up by the audit team and he notified them of his psychological condition and treatment. He was placed on special leave in March 2017 for a period till he provided a medical report to ascertain his fitness to work.

Since then he has decompensated psychologically rapidly with magnification of his depressive symptoms and cognitive deficits impacting his problem solving ability."

78. Dr Rastogi's opinion was:

"Mr Pemberton had previous episodes of depression and he had achieved full remission on three occasions. His current relapse of depression occurred in 2017 in context of a number of work related incidents whilst working as relieving credit manager with Westpac. He felt displaced with not belonging to team, constant travel to different parts of Sydney that he found extremely overwhelming and distressing contributing to his anxiety, constant questioning of his performance and being accountable for things he was not responsible for. He felt exploited and undermined constantly. He had to deal with different managers whom he was not familiar with and accountable for things that had gone wrong. His annual leave was refused and he was working long hours and felt burnt out. He developed anxiety and fears with ongoing depressive symptoms impacting his cognition and ability to function. The last straw was being placed on special leave for overstepping his financial delegation. He was placed on special leave and multiple continuous attempts to discuss with employer to return to work with restrictions as per his treating psychiatrist in 2018 were unsupported and dismissed causing barriers to his recovery and exacerbation of his condition. This was compounded by his claim being denied on alleged performance issues.

He felt betrayed and there was perceived injustice about how he was treated given he had a good performance history with organization and no past interpersonal issues."

79. When commenting on whether the injury was wholly or predominantly caused by reasonable action taken by Westpac, Dr Rastogi said:

There is documentation provided by his treating psychiatrist that stated Mr Pemberton expressed dissatisfaction whilst working as relieving credit manager where he was not allocated a team, needed frequent travel to locations such as Wollongong and working long hours and travelling till night that he found it extremely dangerous and distressing

causing anxiety and being accountable for things he was not responsible for. In addition his annual leave was knocked down resulting in mental breakdown in 2014. He subsequently resumed work in fixed location. There has been long-standing issues at work and with his employer over a period of time that has taken a toll on his mental wellbeing. He has demonstrated resilience and motivation to return to work with good performance despite relapses.

He moved to Barangaroo in 2016 in permanent position however this was extremely challenging as he had to move his desk every day and it was extremely unsettling. He found it challenging working as a team and reported series of cognitive difficulties mainly memory lapses with significant exacerbation of anxiety. He continued to seek ongoing treatment during this time.

The last straw was overstepping his authority in 2017 that I believe was due to anxiety and cognitive effects from ongoing depression he was experiencing and led to him being on leave in March 2017. The performance issues were the consequence of residual depression he continued to experience since 2016 and he advised his work in 2017 about his psychiatric conditions. Hence, the client's psychological injury is not caused by reasonable action taken by employer for his performance issues as it predates his performance issues."

80. Dr Rastogi assessed 22% whole person impairment.

81. Westpac qualified Dr G Vickery, psychiatrist, who reported on 18 March 2019. Dr Vickery noted the previous claim in 1997 and that Mr Pemberton was "was treated with antidepressant medication for several years as well as some counselling." He diagnosed major depressive disorder "in relation to workplace stressors on the basis of the history provided." He considered that employment was a substantial contributing factor to Mr Pemberton's depressive illness but said:

"The mechanism of injury when he ceased working in relation to performance review as reported by Mr Pemberton is consistent with his current diagnosis and symptoms on the basis of the history provided."

82. Dr Vickery was provided with the statements of Westpac's witnesses. Having considered those statements, he repeated his opinion that the cause of Mr Pemberton's condition was "performance issues."

83. Dr Vickery saw Mr Pemberton again and reported on 23 October 2019. He was provided with other documents which he listed, some of which do not appear in the Reply. His diagnosis remained the same. Rather than being asked about the cause of the condition, Dr Vickery was asked:

"Given the history provided above, do you consider the Claimant's current condition(s), has arisen as a result of the incident in February 2017?"

84. Dr Vickery quoted from Mr Larkham's email dated 16 February 2017 (a copy of which I am unable to locate) and Dr Keller's report dated 22 March 2017 before stating:

"Mr Pemberton's condition arose in February 2017 due to performance issues and has continued as a relapsing and remitting condition."

...

It is my opinion Mr Pemberton ceased work due to performance review and has not returned in spite of several return-to-work options.

...

It is significant that Dr Keller referred to Mr Pemberton not being located near his supervisor however this was not necessary for undertaking his duties and would not be considered the basis on which to make a WorkCover claim for incapacity."

85. When asked if he considered that any other factors might have contributed to Mr Pemberton's level of incapacity, Dr Vickery said that he suffers obstructive sleep apnoea

“which is associated with symptoms of daytime fatigue and hypersomnia, fatigue, irritability, withdrawal, neurocognitive impairment and diminished quality of life.”

86. Dr Vickery agreed that Mr Pemberton had no current work capacity. In a separate report, he declined to assess permanent impairment because Mr Pemberton had not reached maximum medical improvement.

Dispute notices

87. Westpac issued a dispute notice on 1 April 2019. It noted that Mr Pemberton relied on the factors listed in Annexure A to the claim form which are those set out at [27] above.

88. Westpac said that chronic dissatisfaction was not an injury and that a fall at home in January 2015 was the main contributing factor to the injury because it occurred just before the episode of depression. Westpac also relied on the statement in Dr Keller's report dated 8 December 2016 that Mr Pemberton was stable with no recurrence of depressive symptoms.

89. It characterised the meeting on 9 February 2017 as a “performance meeting” and relied on an inaccurate chronology with respect to events after the meeting. Westpac said that it accepted that an injury in the nature of an aggravation had been suffered as a result of the meetings in February 2017 but denied that compensation was payable because the injury was wholly or predominantly caused by reasonable action taken with respect to performance appraisal or discipline.

90. A further notice was issued on 9 September 2019 as a result of a request for review. Westpac maintained its decision and stressed Dr Keller's opinion that Mr Pemberton's condition was stable between 2014 and 2016.

91. On 1 November 2019, in response to the claim for permanent impairment compensation, Westpac denied that Mr Pemberton's condition had reached maximum medical improvement and maintained its previous decisions with respect to the operation of s 11A(1).

SUBMISSIONS

92. The submissions of counsel were recorded and I will summarise them briefly.

93. Mr Morgan argued that the character of the two meetings in early 2017 was a discussion about work. The evidence of both parties suggested that they were informal meetings for which no notice was given and were not for the purpose of discipline and they were not in the nature of a structured performance appraisal.

94. Mr Morgan said that, viewed holistically, the evidence from Mr Pemberton's treating doctors and his own file notes showed that he was “not in a good place” between 2014 and 2017 and that he had suffered injury before the meetings in February 2017. He took me through Mr Pemberton's file notes to argue that they were consistent with the evidence of Mr Pemberton's treating doctors. He noted that Mr Pemberton was still taking medication in early 2017.

95. Mr Morgan argued that I should not accept Dr Vickery's opinion and that Westpac had not discharged its onus in respect of s 11A(1) because all of the evidence pointed to a broader cause than the events of February 2017.

96. The statements of Westpac's witnesses, Mr Morgan argued that they confirmed Mr Pemberton's dissatisfaction and showed that the events to which he responded were real events. He said I would accept Dr Rastogi's opinion with respect to causation.
97. Ms Hogan said that the meeting on 9 February 2017 was the commencement of a disciplinary process and was performance appraisal. She said that elements of Mr Pemberton's statements supported the conclusion that those meetings were the whole or predominant cause of Mr Pemberton's condition.
98. Ms Hogan said that Mr Pemberton's file notes should be given no weight because there was no evidence about when they came into existence.
99. She said that both Dr Rastogi and Dr Keller considered Mr Pemberton's condition was in remission before the events of February 2017.
100. The reasonableness of Westpac's action is supported by the statements of Ms Kenna and Mr Larkham who made clear that Mr Pemberton was being given an opportunity to respond and that it was not the intention of the first meeting that he should resign. Mr Pemberton took the opportunity to resolve in writing and special leave was granted after the second meeting because he was upset. The action taken was not unreasonable in light of the breaches which had been uncovered
101. In reply, Mr Morgan said that Westpac placed considerable store on the acceptance of evidence that Mr Pemberton's condition was in remission. Dr Keller's reports showed that his medication had not been reduced, even when the intervals between appointments became longer.
102. Mr Morgan said that the process undertaken by Westpac was not a disciplinary process but arose from a regular hindsight review. Breaches were uncovered which showed the effects of Mr Pemberton's depressive condition on his cognitive ability, which was supported by Dr Keller's report dated 23 February 2017 and his report to Ms Kenna dated 22 March 2017.
103. Neither counsel took me to any authorities.

FINDINGS AND REASONS

104. Section 11A(1) of the *Workers Compensation Act 1987* (the 1987 Act) 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."

105. In *Chisholm v Thakral Finance Pty Ltd t/as Novotel Brighton Beach*²² Roche DP set out the principles relevant to determining whether s 11A precludes the payment of compensation:

"In a claim for compensation for psychological injury, the Commission has to decide whether the whole or predominant cause of the psychological injury was the employer's action or proposed action with respect to one or more of the actions listed in s 11A(1), and, if so, whether the action or proposed action was reasonable (*Manly Pacific International Hotel Pty Ltd v Doyle* [1999] NSWCA 465; 19 NSWCCR 181 at [4]).

The onus of establishing a s 11A defence is on the employer (*Ritchie v Department of Community Services* [1998] NSWCC 40; (1998) 16 NSWCCR 727; *Department of Education and Training v Sinclair* [2005] NSWCA 465; 4 DDCR 206; (*Sinclair*)).

²² [2011] NSWCCPD 39.

On the causation question, the Commission has held that “predominantly caused” means “mainly or principally caused” (*Ponnan v George Weston Foods Ltd* [2007] NSWCCPD 92).

On the reasonableness question, the Court of Appeal considered the meaning of the words “reasonable action” in *Commissioner of Police v Minahan* [2003] NSWCA 239; 1 DDCR 57, where Foster AJA (with Sheller JA agreeing) cited with approval the following passage from *Irwin v Director-General of School Education* (Unreported, NSW Compensation Court, Matter No. 14068/97, Geraghty CCJ, 18 June 1998) (*Irwin*) where Judge Geraghty said:

‘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.’

The assessment of whether an employer has acted reasonably requires an objective assessment of the conduct involved (*Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138 at [50]).”

Injury wholly or predominantly caused

106. Mr Pemberton’s case is that he had suffered a disease injury as a result of events in the course of his employment well before the meetings in February 2017.
107. I am satisfied on the basis of Dr Keller’s contemporaneous reports, supported by the opinion of Dr Rastogi that Mr Pemberton suffered a major depressive disorder as a result of events at work after 2014 when he took time off on sick leave. Both Dr Keller’s reports and Mr Pemberton’s file notes support that conclusion.
108. I am satisfied that the injury was not a result of the meetings in February 2017. The action taken in February 2017 was neither the whole cause nor the predominant cause of the injury.
109. Mr Pemberton prepared a series of file notes which provide insight into his state of mind on the dates they bear. I do not accept Ms Hogan’s submission that the notes should not carry any weight because there was no evidence about when they came into existence. Mr Pemberton described the creation of the file notes in the statement taken by an investigator on behalf of Westpac. In the dispute notice dated 1 April 2019, Westpac acknowledged that the file notes had been provided as Annexure H to his claim form.
110. As Mr Morgan submitted, the words used in the file notes bear a striking resemblance to those recorded in Dr Keller’s reports at roughly contemporaneous times. To take one example, Dr Keller noted that Mr Pemberton felt like the invisible man in a report dated 27 January 2015 and Mr Pemberton recorded the same sentiment in a file note of the same day.
111. It might be expected that Mr Pemberton kept file notes in the course of his work in commercial credit and that he would make a similar note of matters which were important to him. I am satisfied that the notes were prepared as contemporaneous file notes. Those notes provide insight into Mr Pemberton’s state of mind well before the meetings in February 2017.
112. Mr Pemberton had suffered depression in 1996 as a result of events at work and sought treatment from Mr Kemp. The injury was the subject of a workers compensation claim, as evidenced by Dr Nelson’s notes. He recovered from that episode and returned to work with Westpac.

113. In late 2014, he took time off on sick leave and used Westpac's employee assistance program. There is very little evidence about that period.
114. Mr Pemberton saw his general practitioner Dr Nelson and was referred to Dr Keller who described the triggers for the current episode of depression in his report dated 27 January 2015 being chronic dissatisfaction with the conditions of his work over the previous four years. Dr Keller's reports provide the basis for a conclusion that that episode had not resolved by the time of the meetings in February 2017.
115. One of the important factors in the development of Mr Pemberton's depression was his experience of travel to Wollongong and his perception that his fear of travel in rain and fog was mocked. Westpac's witnesses stressed that there were no repercussions from Mr Pemberton's rejection of a transfer to Wollongong. Mr Pemberton's evidence shows that it was not only travel to Wollongong which contributed to his condition but travel to other locations for long days. His evidence confirms that the issues around the travel and proposed transfer to Wollongong were significant to him, confirmed by Dr Keller's report. Similarly, the evidence of Westpac's witnesses shows that Mr Pemberton was required to work in different locations.
116. While Westpac's witnesses sought to downplay the effect of events before February 2017 - including the proposed transfer to Wollongong - there is no doubt that they occurred. Mr Pemberton's perception of those events was different to other staff who have provided statements but the events were real events.
117. Mr Pemberton's perception of events contributed to his injury. In *Attorney-General's Department v K²³*, Roche DP considered distilled the conclusions from a number of authorities, including *State Transit Authority v Chemler²⁴*:
- (a) employers take their employees as they find them. There is an "egg-shell psyche" principle which is the equivalent of the "egg-shell skull" principle (Spigelman CJ in *Chemler* at [40]);
 - (b) a perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in *Chemler* at [54]);
 - (c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in *Chemler* at [69]);
 - (d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in *Sheridan*);
 - (e) there is no requirement at law that the worker's perception of the events must have been one that passed some qualitative test based on an "objective measure of reasonableness" (Von Doussa J in *Wiegand* at [31]), and (f) it is not necessary that the worker's reaction to the events must have been "rational, reasonable and proportionate" before compensation can be recovered."
118. Dr Keller set out the treatment he provided to Mr Keller in his reports. By the time Mr Pemberton saw Dr Keller, he was taking medication that Dr Nelson had prescribed. Dr Keller did not recommend any change in that medication.

²³ [2010] NSWCCPD 76.

²⁴ [2007] NSWCA 249.

119. By March 2015, Dr Keller noted an improvement but considered that prophylactic medication would be required at least in the medium term. In December 2015, Dr Keller advised Mr Pemberton to continue on the current dose for another six months.
120. Mr Pemberton remained on the same dose in December 2016. Though Mr Pemberton had been “relatively euthymic for an extended period”, Dr Keller did not support a reduction in the dose of medication and that it appeared to be effective and he planned a review in six months.
121. Dr Keller’s reports shows that in December 2016 Mr Pemberton’s depression was controlled – but it was only controlled by a significant dose of medication and regular review by his psychiatrist.
122. While Dr Rastogi said that Mr Pemberton’s condition was in remission and that he suffered a relapse, she agreed that he suffered residual depression as at February 2017. She said that the last straw was “overstepping his authority in 2017” but the condition predated the performance issues, which were the consequence of Mr Pemberton’s residual depression. Mr Morgan submitted that “a last straw” did not connote that the events was the whole or predominant cause of injury. I agree.
123. Mr Pemberton suffered injury in the nature of a disease as a result of events at work in 2014 and 2015. Based on the long history of treatment which was ongoing in February 2017, I am satisfied that those meetings were the cause of Mr Pemberton’s incapacity but the action taken by Westpac in February 2017 was neither the whole nor the predominant cause of the injury.
124. The defence under s 11A therefore does not succeed. I will make brief comments on the other issues raised.

Reasonable action

125. Ms Hogan said that Westpac’s conduct in calling the meetings was reasonable because they arose from a regular hindsight review, Mr Pemberton was given notice and he was given an opportunity to respond to the matters raised.
126. While those matters are relevant, they do not of themselves lead to a finding that the conduct was reasonable, noting that the concept of reasonableness includes fairness.
127. Westpac carried out a hindsight review as part of its corporate governance and audit responsibilities. It was reasonable that Ms Kenna and Mr Larkham discuss the findings of Mr Larkham’s file review with Mr Pemberton.
128. Mr Larkham said that he sent an email invitation to attend the meeting. Mr Pemberton said that he was not given 24 hours’ notice or told he could bring a support person.
129. There is no evidence about Westpac’s policies in respect of meetings of this kind and insufficient evidence to determine if the way in which the action was taken was reasonable. The fact that action was required or authorised does not of itself determine that the action was reasonable²⁵ and the Commission is “required not only to have regard to the end result but the manner in which it was affected.”²⁶

²⁵ *Greater Southern Area Health Service v Walsh* [2010] NSWCCPD 98.

²⁶ Truss J in *Ivanisevic v Laudet Pty Ltd* (unreported, NSW Compensation Court 24 November 1998)

Discipline

130. In *Kushwaha v Queanbeyan City Council*²⁷, Neilson J said:

“... the primary meaning of "discipline" is learning or instruction imparted to the learner and the maintenance of that learning by training, by exercise or repetition. The narrow meaning of punishment, chastisement is secondary to the primary meaning although this word is often used in this sense in popular speech.

...

I have no hesitation in finding that the process adopted by the respondent, of drawing the applicant's unsatisfactory work performance to her attention, in asking her to improve that performance, of suggesting ways that could achieve that end, of offering assistance and or training was "discipline" using the wider sense of that word.”

131. An investigation which commences a disciplinary process might be action with respect to discipline²⁸. The hindsight review raised issues that required investigation. There is no evidence about what the disciplinary process following that meeting would have been if Mr Pemberton had not been placed on special leave.

132. Mr Pemberton's email response after the first meeting asked Westpac to take his length of time with Westpac into account. That suggests the meeting had a disciplinary flavour.

133. Ms Kenna said that Mr Pemberton asked if he should resign and she told him that was not their intention. Her statement is unsatisfactory in that she said that she “would have been saying that we couldn't just put him back into his role” rather than providing her best recollection of what was said.

134. Again, there is insufficient evidence to determine that the process was discipline. Given the finding I have made with respect to causation of the injury, it is not necessary that I do so.

Performance Appraisal

135. The meetings in February 2017 cannot be described as performance appraisal. In *Irwin*, Geraghty described performance appraisal as:

“somewhat like an examination, not a continuing assessment, Performance appraisal is more like a limited, discrete process, with a recognised procedure through which the parties move in order to establish an employee's efficiency and performance.”

136. The meetings in February 2017 were called because irregularities had been observed as part of the Bank's hindsight process. They did not have the character of annual, or otherwise regular, performance and development review.

ORDERS

137. Mr Pemberton claims compensation under s 36 of the 1987 Act from 26 June 2019 when his salary continuance insurance ceased to be paid and Westpac did not make any submission to the contrary. It was agreed that 95% of pre-injury average weekly earnings is \$1,941.47 and that 80% is \$1,634.92.

138. I make the following orders:

(a) The respondent is to pay the applicant weekly compensation of:

- (i) \$1,941.47 from 28 June 2019 to 27 September 2019, and
- (ii) \$1,634.93 from 28 September 2019 to date and continuing.

²⁷ [2002] NSWCC 25 at [152] and [154].

²⁸ *Northern NSW Local Health District v Heggie* [2013] NSWCA 255 at [59].

- (b) The respondent is to pay the applicant's s 60 expenses.
- (c) I remit the matter to the Registrar for referral to an Approved Medical Specialist to assess the applicant's permanent impairment as a result of a psychological injury deemed to have been suffered on 28 February 2017.
- (d) The documents to be sent to the Approved Medical Specialist are:
 - (i) Application to Resolve a Dispute and supporting documents, and
 - (ii) Reply.