WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **978/19**
Applicant: **Kerry Sullivan**
Respondent: **TAFE NSW**
Date of Determination: **6 August 2019**
Citation: **[2019] NSWWCC 270**

The Commission determines:

1. The respondent has failed to establish on the balance of probabilities that the applicant's primary psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of it with respect to performance appraisal and discipline and its defence under section 11A(1) of the *Workers Compensation Act 1987* fails accordingly.

2. No orders are made in relation to the applicant's claim for weekly benefits in view of her stated intention to challenge the respondent's work capacity assessment dated 25 November 2016 following the expiry of the transitional review period defined in Schedule 6, Part 19L, clause 6(4) of the *Workers Compensation Act 1987*.

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

Anthony Scarcella
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 OFANTHONY SCARCELLA, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Ms Kerry Sullivan, is a 64-year-old woman who was employed by TAFE NSW as a Head Teacher at the Leeton campus.

2. Ms Sullivan alleges in her Application to Resolve a Dispute (ARD) that, whilst employed by the respondent, she sustained a primary psychological injury

> "due to the nature and conditions of her employment including but not limited to a build up of events beginning from 2012 when there was a restructure, managing 13 staff and overhearing her manager being interviewed by an investigator after a complaint had been made against her by a staff member."[1]

   The deemed date of injury is pleaded as 13 April 2016.

3. On a date presumably shortly after 13 April 2016, Ms Sullivan submitted a claim for weekly benefits compensation and reasonably necessary medical treatment and related expenses pursuant the *Workers Compensation Act 1987* (the 1987 Act). In this regard, I note that the respondent's insurer, Allianz Australia Insurance Limited as agent for NSW Self Insurance Corporation (Allianz), commenced paying Ms Sullivan weekly benefits compensation from 13 April 2016.[2]

4. On 25 November 2016, Allianz issued a Dispute Notice pursuant to section 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) purporting to decline liability for weekly benefits compensation effective from 2 December 2016 pursuant to section 11A of the 1987 Act on the ground that Ms Sullivan's downgrade in capacity as certified by her general practitioner, Dr Dan Pettersson, was due to the respondent's investigation into allegations of misconduct. A further ground was stated to be that, as Ms Sullivan had not been at her place of employment and had been job seeking, her downgrade was not related to her original workplace injury.[3]

5. It appears from the available evidence that the respondent did not act on its Dispute Notice dated 25 November 2016. Instead, also on 25 November 2016, Allianz issued a Notice of Work Capacity Decision (WCD) pursuant to section 43 of the 1987 Act to reduce Ms Sullivan's weekly benefits payments from $1,571.26 to $371.26 from 4 March 2017.[4] Such reduction in benefits was reflected in Allianz's List of Payments dated 1 September 2017.[5] The reduction was based on Ms Sullivan having a current capacity to work 40 hours per week in suitable employment as an Education Advisor or Career Development Officer at $1,200 per week as assessed by Rehab Management on 7 October 2016. There was no evidence that Ms Sullivan sought an internal review of this WCD or a Merit Review thereafter.

6. The respondent submitted that, in October 2018, Allianz issued a Notice of WCD. Any such WCD is not in evidence. However, it appeared from the Allianz List of Payments dated 27 May 2019 attached to Mr Tanner's written submissions dated 7 June 2019, that Ms Sullivan's weekly benefits increased to $1,600 per week from 24 October 2018, which would make Allianz's calculation of her pre-injury average weekly earnings (PIAWE) to be $2,000.

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[1] ARD Part 4 at page 5
[2] ARD at page 274
[3] Reply at pages 1-5
[4] Respondent's Application to Admit Late Documents dated 23 April 2019 at pages 1-6
[5] Respondent's Application to Admit Late Documents dated 23 April 2019 at page 8

7. On 17 January 2019, Allianz issued a Notice of WCD pursuant to section 43 of the 1987 Act pursuant to a work capacity assessment conducted on the same date. The decision was made that Ms Sullivan had no current work capacity and was to be assessed under section 38 of the 1987 Act as she had been paid for 145 weeks at that point. Ms Sullivan's PIAWE was stated to be $2,000. The decision was declared to be effective from 28 January 2018. The latter date is likely to have been a typographical error and it is likely that it should have read 28 January 2019.

8. The ARD dated 21 February 2019 was registered in the Commission.

9. The Reply dated 22 March 2019 was received in the Commission.

ISSUES FOR DETERMINATION

Matters previously notified as disputed

10. The issues in dispute were notified in a Notice pursuant to section 74 of the 1998 Act dated 25 November 2016.

Matters not previously notified

11. Section 11A of the 1987 Act had been raised as an issue in the Allianz section 74 Dispute Notice dated 25 November 2016, albeit not acted upon. Injury was not raised as an issue in the said Dispute Notice. During the conciliation phase, injury was not raised as an issue in dispute.

12. During the protracted conciliation phase, it became clear that the period during which Ms Sullivan was claiming weekly benefits had been the subject of three WCDs and the issue arose as to whether the Commission had jurisdiction to determine any dispute about a work capacity decision made by an insurer.

13. The respondent's written submissions dated 17 June 2019 sought to put injury in dispute.

14. Following the parties' initial written submissions, the following issues were in dispute:

    (a) Whether Ms Sullivan suffered a primary psychological injury by way of a disease process within the meaning of section 4(b) of the 1987 Act.

    (b) Whether the respondent's defence pursuant to section 11A(1) of the 1987 Act has been made out, namely, whether it has established that Ms Sullivan's primary psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to performance appraisal and/or discipline.

    (c) Whether the Commission has jurisdiction to determine Ms Sullivan's dispute about the insurer's work capacity decision dated 25 November 2016 and if so, her entitlement to weekly payments for total or partial incapacity within the meaning of section 33 of the 1987 Act arising from her primary psychological injury and whether she had a current work capacity to work in suitable employment within the meaning of section 32A of the 1987 Act during the period claimed.

    (d) Whether the respondent has failed to adopt the appropriate Wage Price Indexation prescribed by the Workers Compensation Benefits Guide from 1 October 2016.

15. In Ms Sullivan's written submissions in reply dated 21 June 2019, noting the provisions of Practice Direction 15, she sought, quite properly, to amend her application to confine the claim for weekly compensation to a correction of the rates of compensation payable pursuant to the various work capacity decisions in accordance with the relevant indexation as specified in Annexure B of her written submissions dated 7 June 2019 pursuant to section 37 of the 1987 Act from 1 October 2016 to 12 October 2018 and pursuant to section 38 of the 1987 Act from 13 October 2018 to date and continuing with the respondent to receive credit for payments made to date. Accordingly, issue (c) referred to above no longer requires determination.

PROCEDURE BEFORE THE COMMISSION

16. The parties attended a conciliation conference/arbitration in Griffith on 27 May 2019. Mr Craig Tanner of counsel appeared for Ms Sullivan and Mr Ross Hanrahan of counsel appeared for the respondent.

17. During the lengthy conciliation phase the issues appeared to have been narrowed significantly. However, discussions suddenly terminated, and time did not permit the making of oral submissions. Accordingly, the following directions were issued at the conclusion of the conciliation phase:

> "1. The applicant is to lodge and serve by 7 June 2019 written submissions on the issues remaining in dispute.
>
> 2. The respondent is to lodge and serve by 14 June 2019 written submissions in reply.
>
> 3. The applicant is to lodge and serve by 21 June 2019 any further written submissions in reply.
>
> 4. At the conclusion of the time allowed for submissions the dispute will be determined 'on the papers'."

18. 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

Documentary evidence

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

    (a) ARD dated 21 February 2019 and attached documents;

    (b) Reply dated 22 March 2019 and attached documents;

    (c) Respondent's Application to Admit Late Documents dated 23 April 2019 and attached documents;

    (d) Applicant's Application to Admit Late Documents dated 17 May 2019 and attached documents.

    (e) The Allianz List of Payments dated 27 May 2019 attached to Mr Tanner's written submissions dated 7 June 2019.

Oral evidence

20. Neither party sought leave to adduce oral evidence from or to cross-examine any witness.

SUBMISSIONS

21. Pursuant to a direction dated 27 May 2019, the parties made written submissions. As I am no longer required to determine the issue as to whether the Commission has jurisdiction to determine Ms Sullivan's dispute about the insurer's work capacity decision dated 25 November 2016, there is no need for me to refer to the submissions that related to that issue.

Ms Sullivan's submissions

22. Ms Sullivan's written submissions dated 7 June 2019, through her counsel, Mr Tanner, may be summarised as follows:

    (a) The dispute raised by Allianz in its Dispute Notice dated 25 November 2016 was misconceived and without substance.

    (b) Ms Sullivan's injury is deemed to have been received (pursuant to section 15 of the 1987 Act) on 13 April 2016 when she became incapacitated as a result of adverse treatment in the workplace and sought medical treatment.

    (c) If the respondent wished to raise a dispute pursuant to section 11A of the 1987 Act, it was required to establish that Ms Sullivan's injury on 13 April 2016 was wholly or predominantly caused by disciplinary action at that time. The dispute Allianz purported to record in the Dispute Notice dated 25 November 2016, referred to the "downgrade" in Ms Sullivan's capacity for employment as documented in Dr Pettersson's certificate dated 3 November 2016, which was a subsequent development distinct from the injury of 13 April 2016.

    (d) The dispute is unsubstantiated by any forensic medical report in support of the relevant elements of section 11A of the 1987 Act. Accordingly, an award in favour of Ms Sullivan should be entered in respect of the section 11A defence.

    (e) Ms Sullivan seeks an award that incorporates the relevant Wage Price Indexation applicable to weekly compensation payments payable pursuant to the various work capacity decisions from 1 October 2016 to date.

The respondent's submissions

23. The respondent's written submissions dated 17 June 2019, through its counsel, Mr Hanrahan, may be summarised as follows:

    (a) The respondent relied on its Dispute Notice dated 25 November 2016, which raised, at least, one dispute which gives the Commission power pursuant to section 289 of the 1998 Act to consider the matter and exercise the exclusive jurisdiction granted to it under section 105 of the 1987 Act to determine the matter in dispute.

(b) By November 2016 and well after the further events described by Ms Sullivan in her evidentiary statement (ARD at page 11 at [7] concerning a case conference, a question arose as to her entitlement, if any, to weekly payments for incapacity after 20 July 2016 in the light of the downgrade of her capacity in Dr Pettersson's certificate dated 3 November 2016. Dr Pettersson commented that Ms Sullivan was unable to seek work due to her time commitment with the investigation. Other certificates offered the same comments relevant in the context of both injury and capacity.

(c) The certificate described an incapacity that resulted from the time required by the Ms Sullivan to deal with an investigation. It is also clear that the complaints made by Ms Sullivan after 13 April 2016, that is, between July 2016 when the return to work program was ceased and 16 July 2017 when the outcome of the investigation was announced, were caused by anxiety felt by Ms Sullivan in having to respond to the earlier investigation about complaints made concerning her by, at least, one of her co-workers, but also herself complaining about her manager, in July 2016.

(d) Since 25 November 2016, the respondent has asserted that any relevant incapacity resulted from other non-compensable causes of injury. The Dispute Notice issued two days after the purported downgrade asserting that such further incapacity was the result of a TAFE investigation into allegations of misconduct which was not compensable under section 11A of the 1987 Act. The Dispute Notice contained a sufficiently clear reference to section 11A of the 1987 Act. Further, it is tolerably clear that the reference to "misconduct" in the Dispute Notice was a reference to the words of section 11A of the 1987 Act concerning the respondent's responsibility for "performance appraisal and/or discipline".

(e) Ms Sullivan's injury was wholly or predominantly caused by reasonable action of the respondent with respect to performance appraisal and/or discipline, with respect to the initial incident and when she "overheard" her manager's investigation interview on 12 April 2016. Query whether also managing 13 staff during a "build up" of events since 2012, played any part in causing the injury.

(f) Ms Sullivan's pleaded injury is one from which she had been certified prior to 30 June 2016 as having sufficiently recovered to be "fit for pre-injury duties" and did not deal with subsequent causative events.

(g) Ms Sullivan's additional incapacity, although pleaded to result from a deemed date (13 April 2016), was in fact a result of events occurring after that date including the factual investigation interview on 12 May 2016; Dr Pettersson's response to her complaint about her manager in July 2016; and the time spent in responding to "the investigation".

(h) Ms Sullivan's counter-allegation against her manager ought not to be regarded to be the same injury as pleaded. This subsequent cause of injury has not been pleaded or relied upon in the ARD. Accordingly, any incapacity resulting from the later events cannot be relied upon in these proceedings.

(i) The Dispute Notice adequately raised a dispute based on section 11A of the 1987 Act with respect to Ms Sullivan's claimed injury and further asserts that there is a liability dispute with respect to any higher rate of incapacity payment. Only the first limb of this dispute may be determined by the commission in exercising its exclusive jurisdiction to determine disputes liability. The second limb, a work capacity decision may not be determined by the Commission.

(j) The Dispute Notice was accompanied by reasons offered for the decision that refer to Ms Sullivan's historical use of the word "downgraded". This is plausibly a reference to section 33 of the 1987 Act. In this respect, the ARD was filed prematurely on 7 March 2019.

(k) The Dispute Notice advised Ms Sullivan that the reason for any so-called "downgrade" as claimed, did not arise in the course of employment because she "had not been at" work and had "been job seeking" prior to 25 July 2016. Neither was it the result of, nor did it result from any compensable workplace injury which was to do with "the investigation".

(l) The certificate issued by Dr Pettersson on 25 July 2016, for the first time, certified Ms Sullivan as having a current capacity to work for 40 hours, with the qualification that such capacity was for employment "other than TAFE". Ms Sullivan interpreted the certificate to mean "not fit to work within TAFE". It appears that as at July 2016, Ms Sullivan was certified fit for full hours, but was unready, unwilling or unable to be placed in suitable employment. In the meantime, she had been "admitting weekly job seeking diaries" and receiving provisional payments of compensation. The provisional payments were reviewed and considered by Allianz in a concurrent WCD dated 25 November 2016. All of the materials relevant to the WCD were not before the Commission.

(m) The reported facts set out in Ms Sullivan's chronology revealed that it was the alleged breach of the undisclosed "terms of agreement" on 20 July 2016 and subsequent events that resulted in her current incapacity (or "downgraded" capacity). These events are not relied on in the current pleading. Accordingly, Ms Sullivan is not entitled to succeed on the present pleadings. Any determination should be limited to the consequences of events occurring before the deemed date of 13 April 2016. Further relevant events are referred to in the evidence but not pleaded as having given rise to injury. Such relevant events suggest, if not a different cause, then at least, a more complex factual scenario, involving an understanding on Allianz's part that the application of section 11A of the 1987 Act was relevant to the determination of all these interwoven issues.

(n) The only question raised by the respondent was whether section 11A of the 1987 Act has application in this case to the injury deemed on 13 April 2016, as well as the subsequent "downgrade", whatever that was intended to mean.

(o) Ms Sullivan's claim for psychological injury deemed to have occurred on 13 April 2016 should be determined along with the respondent's section 11A defence.

(p) No orders should be made with respect to the various claims for incapacity having regard to the three WCDs made by the respondent as the Commission presently has no jurisdiction to decide such disputes. Even if the Commission did have jurisdiction, section 38 of the 1987 Act has not been amended by the 2018 Amendments and Ms Sullivan has received more than 130 weeks of compensation as at 9 October 2018 and accordingly, has received the full entitlement she is able to be awarded by the Commission during the second entitlement period.

Ms Sullivan's submissions in reply

24. Ms Sullivan's written submissions in reply dated 21 June 2019 may be summarised as follows:

(a) The respondent's submissions proceed on the erroneous basis that injury is in dispute and a matter for determination. The Dispute Notice dated 25 November 2016 does not raise any dispute as to injury. It asserted that the "recent downgrade" on 3 November 2016 was not compensable under section 11A of the 1987 Act.

(b) The respondent did not raise any dispute pursuant to section 4 of the 1987 Act regarding injury or whether employment was the main contributing factor to such injury. It paid compensation in acknowledgement that Ms Sullivan had received an injury within the meaning of section 4 and, seven months following the injury, purported to raise a secondary issue pursuant to section 11A of the 1987 Act.

(c) The Dispute Notice does not assert that Ms Sullivan's injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to performance appraisal or discipline.

(d) The "downgrade" upon which the respondent bases its denial of liability is a matter which concerns Ms Sullivan's capacity for work, not whether she suffered a compensable injury – that injury being deemed to have been received on 13 April 2016 following a gradual injurious process. The latter is a matter that the respondent did not challenge.

(e) Allianz misunderstood the nature of the section 11A defence. It considered that it was able to rely on the section as a basis to cease paying weekly payments and not challenge whether the injury was compensable in the first place. Further, it is clear that Allianz did not consider that it was denying liability for the injury as it continued the payment of weekly compensation and medical expenses. If it had intended to rely on section 11A of the 1987 Act to extinguish liability for injury, it would have ceased payment of all compensation immediately.

(f) The respondent's understanding that it remained liable to compensate Ms Sullivan and that it was not relying on the section 11A defence is clear from the WCD it issued on the same day as the Dispute Notice dated 25 November 2016. Allianz confirmed its acceptance of liability and Ms Sullivan's ongoing entitlement in the WCD by referring to "your entitlement to weekly payments under the new benefits scheme will reduce from $1,571.26 to $371.26 from 4 March 2017".

(g) There is no evidence that Ms Sullivan's injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to performance appraisal or discipline. The respondent has not tendered an expert report addressing that question, which is not surprising as the insurer has perceived the dispute as being limited to Ms Sullivan's capacity for work.

(i) If the respondent considered that Ms Sullivan had no incapacity resulting from the subject injury, it was bound to raise that issue in a Dispute Notice and failing that, to seek the leave of the Commission pursuant to section 289A of the 1998 Act. The respondent's endeavour to introduce a previously unnotified dispute, without leave, and by way of written submissions three weeks after the hearing, is contrary to the provisions of the legislation and the Commission's practice and procedure. It should not be entertained.

(j) Noting the provisions of Practice Direction 15, Ms Sullivan amends her application to confine the claim for weekly compensation to a correction of the rates of compensation payable pursuant to the various work capacity assessments as set out in Annexure B to her submissions dated 7 June 2019. Ms Sullivan's rights to challenge the respondent's work capacity assessments dated 25 November 2016 are reserved and will be asserted following expiry of the transitional review on 30 June 2019.

(k) The respondent's submission that Ms Sullivan has received more than 130 weeks of compensation as at 9 October 2019 and accordingly, has received the full entitlement she is able to be awarded by the Commission during the second entitlement period is another unnotified dispute. The submission ignores section 38(2) of the 1987 Act which provides for continuing entitlements to weekly compensation after the second entitlement period. In recognition of section 38(2) of the 1987 Act, the respondent has continued to make payments of weekly compensation to Ms Sullivan and in accordance with work capacity assessments that she has no current work capacity.

(l) Ms Sullivan requires the entitlements to be paid in accordance with the relevant indexation as specified in Annexure B of her written submissions dated 7 June 2019 pursuant to section 37 of the 1987 Act from 1 October 2016 to 12 October 2018 and pursuant to section 38 of the 1987 Act from 13 October 2018 to date and continuing with the respondent to receive credit for payments made to date.

FINDINGS AND REASONS

25. I have carefully considered the evidence and the written submissions made by the parties.

26. The case was unusual, in that, by the sudden conclusion of the protracted conciliation phase, it became clear that the real issues in dispute were the following:

(a) The respondent's section 11A defence.

(b) Ms Sullivan's premature claim to review Allianz's WCD made prior to 1 January 2019 and outside the jurisdiction of the Commission.

(c) The respondent's alleged failure to index Ms Sullivan's voluntary weekly benefits from 1 October 2016 to date based on the Wage Price Index.

27. The respondent, in its written submissions dated 17 June 2019, introduced injury as an injury, without seeking leave under section 289A(4) of the 1998 Act.

28. Ms Sullivan, in her written submissions in reply dated 21 June 2019, no longer pressed what I have referred to as her premature claim to review Allianz's WCD dated 25 November 2016.

29. As a consequence, I have dealt with the issues of injury, the section 11A defence and the indexation of Ms Sullivan's weekly benefits.

Issue 1 - Injury

30. In evidence, there is a statement by Ms Sullivan dated 9 April 2019[6] which attaches a chronology of events also dated 9 April 2019 covering the period May 2014 (not 2012, as pleaded) to 13 July 2017.[7] The chronology outlined, amongst other things, the series of events leading up to her sustaining the alleged primary psychological injury on 13 April 2016.

31. On 10 July 2017, Ms Sullivan consulted Dr Anthony Dinnen, Consultant Psychiatrist at the request of her lawyers. In evidence, there is a report by Dr Dinnen dated 20 July 2017.[8]

32. Dr Dinnen took a history from Ms Sullivan, which is summarised as follows:

> "The background of the situation was a buildup from 2012 when there had been a restructure at TAFE. Redundancies were coming. As head teacher she was managing 13 staff teaching adult students called the Education Pathways Course. She had been at Leeton since 2000 when she was appointed there as Head Teacher."[9]

33. Dr Dinnen also referred to Ms Sullivan's account of having been advised that another teacher had put in a formal complaint about her on 26 October 2015. Ms Sullivan explained to Dr Dinnen that she was the Head Teacher at TAFE and had experienced management issues with the teacher who had put in the complaint. An external investigation was to take place. She also referred to an interview with her manager and the investigator on 11 or 12 April 2016, after which she became most distressed at the likelihood that everyone could have heard the discussion. She was working on a small campus in a small town. On 13 April 2016, she was so upset that she consulted her doctor. Following the latter incident, Ms Sullivan complained that she suffered from disturbed sleep; tearfulness; tiredness; anxiety; an inability to focus; sadness and an inability to do her job.

34. Dr Dinnen opined that Ms Sullivan suffered from an adjustment disorder with anxiety and depressed mood as a result of the workplace issues at TAFE Leeton.

35. The respondent did not have any expert evidence from a psychiatrist or psychologist.

36. I disagree with the respondent's submission that Ms Sullivan's claim for psychological injury deemed to have occurred on 13 April 2016, should be determined along with the respondent's section 11A defence.

37. I agree with Ms Sullivan's submission that the respondent's submissions proceed on the erroneous basis that injury is in dispute and a matter for determination. I find that the Dispute Notice dated 25 November 2016 did not raise any dispute as to injury.

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[6] Applicant's Application to Admit Late Documents dated 17 May 2019 at pages 15-22
[7] Applicant's Application to Admit Late Documents dated 17 May 2019 at pages 23-30
[8] ARD at pages 22-28
[9] ARD at page 23

38. The respondent did not raise any dispute pursuant to section 4 of the 1987 Act regarding injury or whether employment was the main contributing factor to such injury in the Dispute Notice or during the conciliation phase on 27 May 2019. It did not seek leave pursuant to section 289A(4) of the 1998 Act at the conciliation conference, at the teleconference before Arbitrator McDonald on 28 March 2019 or at any other stage (including written submissions) to dispute injury. Section 289A(4) of the 1998 Act provides that where the insurer has failed to meet the notice requirements or has failed to put all relevant issues in dispute, an arbitrator may exercise his or her discretion to allow issues to be raised where they are of the opinion that it is in the interests of justice to do so. Leave was not sought. The respondent only raised injury as an issue in its written submissions dated 17 June 2019. On that basis, I find that injury is not in dispute and accordingly, I am not required to make a determination in this regard.

Issue 2 - The section 11A defence

39. Section 11A(1) of 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 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".

40. The respondent submitted that any psychological injury suffered by Ms Sullivan was wholly or predominantly caused by reasonable action taken by or on behalf of it with respect to performance appraisal and/or discipline.

41. The respondent bears the onus of establishing on the balance of probabilities both that the "action" was at least the predominant cause of Ms Sullivan's injury and that such an action was reasonable.[10] If both these elements are established, then Ms Sullivan's entitlement to compensation is extinguished by section 11A(1) of the 1987 Act.

42. Section 11A(1) uses the words "wholly or predominantly". It is important to appreciate that "wholly" and "predominantly" are separate concepts and a finding of one or the other needs to be considered.[11] The test of causation to be applied is that described in *Kooragang Cement Pty Limited v Bates* (1994)[12]; *Ponnan v George Weston Foods Ltd*[13]; Temelkov *v Kemblawarra Portuguese Sports and Social Club Ltd*[14]; and *Smith v Roads and Traffic Authority of NSW*[15].

43. In *ISS Property Services Pty Ltd v Milovanovic*[16] at [67], it was held that where none of the actions of the employer were found to be reasonable and the worker's psychological condition arose from those actions, it was not necessary to determine by which of the actions the injury was "wholly or predominantly" caused. Candy ADP went on to state at [89] that what is required by section 11A(1) "is comparison between all of the employment related contributions to injury and those contributions as a result of reasonable actions by the employer".

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[10] *Department of Education and Training v Sinclair* [2005] NSWCA 465 (*Sinclair*)
[11] *Smith v Roads and Traffic Authority of NSW* [2008] NSWWCCPD 130 (*Smith*)
[12] *Kooragang Cement Pty Limited v Bates* (1994) 35 NSWLR 452; (1994) 10 NSWCCR 796
[13] *Ponnan v George Weston Foods Ltd* [2007] NSWWCCPD 92 (*Ponnan*)
[14] Temelkov *v Kemblawarra Portuguese Sports and Social Club Ltd* [2008] NSWCCPD 96 (Temelkov)
[15] *Smith v Roads and Traffic Authority of NSW* [2008] NSWCCPD 130
[16] *ISS Property Services Pty Ltd v Milovanovic* [2009] NSWCCPD 27 (*Milovanovic*)

44. The meaning of "predominantly caused" was considered in *Ponnan* in which Handley ADP at [24] applied the dictionary meaning of "mainly or principally caused". Roche DP agreed with this view in *McCarthy v Department of Corrective Services.*[17]

45. Section 11A(1) uses the words "reasonable action". In considering the issue of reasonableness, Geraghty J in *Irwin v Director General of School Education*[18] said:

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

46. In *Ivanisevic v Laudet Pty Ltd*[19]), Truss CCJ said:

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

47. In *Department of Education and Training v Sinclair*[20], Spigelman CJ observed that one must look at the entire process to see if it was reasonable action within section 11A of the 1987 Act and that includes looking at the circumstances surrounding the action, both before and after the action.[21]

48. The relevant parts of Allianz Dispute Notice pursuant to section 74 of the 1998 Act read as follows:

> "Based on the information reviewed and considered we have concluded that:
>
> - Your downgrade in capacity is due to the allegations of misconduct, of which TAFE have sent you notification of as part of the internal investigation: Section 11a [sic]; Workers Compensation Act 1987
>
> Why?
>
> Your certificate of capacity states that you are currently unfit to seek work due to time commitments with the current TAFE investigation. Prior to this, you were fit for suitable duties, pre-injury hours and you were submitting weekly job seeking diaries. The decision has been made to decline your recent downgrade as the downgrade is due to the TAFE investigation into allegations of misconduct which is not compensable under Section 11a [sic] of the Worker [sic] Compensation Act.
>
> In addition, as you have not been at your place of employment and have been job seeking, your downgrade is not related to your original workplace injury."[22]

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[17] *McCarthy v Department of Corrective Services* [2010] NSWCCPD 27 at [157] (*McCarthy*)
[18] *Irwin v Director General of School Education* (NSWCC, Geraghty J No 14068/97, 18 June 1998, unreported) (*Irwin*)
[19] *Ivanisevic v Laudet Pty Ltd* (unreported, 24 November 1998) (*Ivanisevic*)
[20] *Department of Education and Training v Sinclair* [2005] NSWCA 465 (*Sinclair*)
[21] *Burton v Bi-Lo Pty Ltd* [1998] NSWCC 13; *Melder v Ausbowl Pty Ltd* [1997] 15 NSWCCR 454 at 458
[22] Reply at pages 1-2

49. The Dispute Notice was poorly drafted. I do not accept the respondent's submissions that the Dispute Notice adequately raised a dispute based on section 11A of the 1987 Act and that it was tolerably clear that the reference to "misconduct" in the Dispute Notice was a reference to the words of section 11A of the 1987 Act concerning the respondent's responsibility for "performance appraisal and/or discipline".

50. I agree with Ms Sullivan's submissions that the Dispute Notice does not assert that her injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to performance appraisal or discipline on any reasonable interpretation of it. I agree that it appears as if Allianz misunderstood the nature of the section 11A defence. It considered that it was able to rely on the section as a basis to cease paying weekly payments and not challenge whether the injury was compensable in the first place. Further, it is clear that Allianz did not consider that it was denying liability for the injury as it continued the payment of weekly compensation and medical expenses. If it had intended to rely on section 11A of the 1987 Act to extinguish liability for injury, it would have ceased payment of all compensation immediately. Instead, it issued a WCD on the same day as the Dispute Notice confirming its acceptance of liability and Ms Sullivan's ongoing entitlement by referring to "your entitlement to weekly payments under the new benefits scheme will reduce from $1,571.26 to $371.26 from 4 March 2017".[23]

51. Further, there is just no evidence from the respondent that Ms Sullivan's injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to performance appraisal or discipline. The respondent has not tendered an expert report addressing the question or any investigation reports. The respondent's focus has clearly been on the issue of capacity.

52. I find that the respondent has failed to establish on the balance of probabilities that Ms Sullivan's primary psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of it with respect to performance appraisal and discipline. Accordingly, the defence under section 11A(1) of the 1987 Act is not made out for the reasons stated above.

Issue 3 - The indexation of weekly benefits from 1 October 2016

53. Ms Sullivan alleges that the voluntary payments made by the Allianz from 1 October 2016 to the date, have not been indexed based on the Wage Price Index in accordance with section 82A of the 1987 Act and the indexation figures set out in the Workers Compensation Benefits Guide at pages 18-19.

54. The respondent's written submissions were silent on the indexation issue.

55. In Ms Sullivan's written submissions in reply dated 21 June 2019, she stated that she reserved her rights to challenge the respondent's work capacity assessment and would assert the same following the expiry of the transitional review period defined in Schedule 6, Part 19L, clause 6(4) of the 1987 Act (30 June 2019). I am not prepared to make the proposed adjustments to Ms Sullivan's weekly benefit payments now, in circumstances where Ms Sullivan prematurely brought what amounted to a challenge to Allianz's WCD dated 25 November 2016. Further proceedings are imminent and could alter some of the proposed indexation calculations I have been requested to make in these proceedings in any event.

[23] Respondent's Application to Admit Late Documents dated 23 April 2019 at page 1

56. However, I make the following observations. Allianz has an obligation to act as a model litigant in accordance with the Model Litigant Policy for Civil Litigation. According to clause 3.2, it is obliged to act fairly and honestly in handing claims and litigation by, amongst other things, dealing with claims promptly and not causing unnecessary delays, paying legitimate claims, and endeavouring to avoid litigation and keep the cost of same to a minimum. Allianz is also obliged to conduct itself in accordance with the SIRA Guidelines for Claiming Workers Compensation, as well as in accordance the 1987 and 1998 Acts and the Workers Compensation Regulation 2016. Allianz should be given credit for the fact that it has continued to make ongoing voluntary payments to Ms Sullivan from 13 April 2016 to date. However, in the event, that by some oversight or otherwise, Ms Sullivan's voluntary weekly benefits from 1 October 2016 have not been appropriately indexed as mandated by section 82A of the 1987 Act, I would expect Allianz to rectify the matter promptly.

SUMMARY

57. The respondent has failed to establish on the balance of probabilities that Ms Sullivan's primary psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of it with respect to performance appraisal and discipline. Accordingly, the defence under section 11A(1) of the 1987 Act is not made out for the reasons stated above.

58. In view of Ms Sullivan's stated intention to challenge the respondent's work capacity assessment following the expiry of the transitional review period defined in Schedule 6, Part 19L, clause 6(4) of the 1987 Act (30 June 2019), I make no orders in relation to the claim for weekly benefits.