

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3089/19
Applicant: Matthew Joseph McKell
Respondent: Woolworths Limited
Date of Determination: 28 November 2019
Citation: [2019] NSWCC 379

The Commission determines:

1. The applicant sustained psychological injury arising out of or in the course of his employment with the respondent on 1 September 2014.
2. The injury was caused by action taken or proposed to be taken by the respondent with respect to performance appraisal.
3. The action taken or proposed to be taken by the respondent with respect to performance appraisal was not reasonable.
4. As a result of the injury the applicant has had no capacity for suitable employment from 9 May 2017 to date.
5. The respondent is to pay the applicant \$1,951.75 per week from 9 May 2017 to date pursuant to s 37(1) of the *Workers Compensation Act 1987*.
6. The respondent is to pay the applicant's costs and expenses pursuant to s 60 of the *Workers Compensation Act 1987*.
7. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for assessment of permanent impairment as a result of injury on 1 September 2014.
8. The documents to be referred to the AMS are:
 - (a) Application to Resolve a Dispute and attached documents;
 - (b) Reply and attached documents;
 - (c) Application to Admit Late Documents dated 30 August 2019 lodged by the applicant with extracts of clinical records of Dr A McColl attached, and
 - (d) Application to Admit Late Documents dated 5 September 2019 lodged by the applicant with the following attachments:
 - (i) Clinical records of Ms Oxley, and
 - (ii) Extracts of clinical records of Dr B D Parsonage.

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

Brett Batchelor
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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Jackson

Ann Jackson
Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Matthew Joseph McKell (the applicant/Mr McKell) started working for Woolworths Limited (the respondent) in 1993. In about 2000, he transferred to the Mid North Coast and worked at Kempsey before transferring to the respondent's Port Macquarie Settlement City store, where he remained until he ceased work on 17 September 2014.
2. The applicant claims that he suffered psychological injury on 1 September 2014 caused by his employment with the respondent, which work exposed him to bullying and intimidation during performance review by the respondent.
3. In his Worker's Injury Claim Form signed 22 December 2014 Mr McKell¹ claims he was
"Blindsided with an unfair review leaving me feeling bullied, psychologically intimidated and void of any confidence."
4. The Application was registered in the Commission on 25 June 2019 in which the applicant claimed:
 - (a) weekly benefits compensation from 9 May 2017, ongoing;
 - (b) medical expenses pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act), and
 - (c) lump sum compensation for permanent impairment pursuant to s 66 of the 1987 Act in respect of 22% whole person impairment (WPI).
5. The respondent lodged a Reply to the Application, in Part 3 of which it confirmed matters in dispute as per dispute notice(s) attached to the Application.
6. There are three dispute notices attached to the Application, namely:
 - (a) a notice under s 54(2)(b) of the 1987 Act dated 3 June 2016²;
 - (b) an "Internal Review Decision" pursuant to s 287A of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) and s 54 of the 1987 Act dated 28 November 2016³, and
 - (c) a notice under s 74 of the 1998 Act dated 15 June 2018⁴, issued in response to the applicant's claim for lump sum compensation made by his lawyers on 9 February 2018 in respect of 22% WPI, based on an assessment of Dr B D Parsonage, psychiatrist, dated 28 September 2017.
7. The applicant's claim against the respondent for alleged psychological injury on 1 September 2014 was the subject of earlier proceedings in the Commission number 1625/17. These were discontinued by way of Certificate of Determination - Consent Orders dated 27 June 2017⁵, which contained a **Notation** that, without admission of liability, the respondent was to pay the applicant's s 60 expenses up to \$8,000 upon production of accounts, receipts and/or Medicare Charge.

¹ Application to Resolve a Dispute (the Application) p 43.

² Application p 45.

³ Application p 48.

⁴ Application p 52.

⁵ Application p 51.

8. The author of the s 74 notice dated 15 June 2018 addressed to the applicant noted the 2017 proceedings settled on 27 June 2017 and that:

“EML issued you with a section 54/74 notice dated 3 June 2016 disputing your claim outright pursuant to section 11A of the 1987 Act. Your entitlement to medical expenses ceased immediately and your entitlement to weekly payments were intended to cease from 15 Jul 2016 but, due to an administrative oversight, they continued to be paid until 8 May 2017.” [sic]

(The reference to “EML” being to Employers Mutual Limited, the Claims Agent for Woolworths Group Workers Compensation Self Insurance Scheme).

9. The author of the s 74 notice dated 15 June 2018 also referred to the re-examination of the applicant by Dr Lam-Po-Tang, psychiatrist (Dr Tang), on 23 May 2018, and the fact that the doctor assessed the applicant as suffering from 16% WPI as a result of his psychiatric condition, predominantly having been caused by action taken by his employer with respect to performance appraisal. The respondent therefore disputed the applicant’s claim pursuant to s 11A of the 1987 Act.

ISSUES FOR DETERMINATION

10. The parties agree that the following issues remain in dispute:

- (a) Was the applicant’s psychological injury 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?
- (b) What is the degree of incapacity suffered by the applicant as a result of psychological injury arising out of or in the course of his employment with the respondent?

PROCEDURE BEFORE THE COMMISSION

11. 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.
12. The matter proceeded to arbitration hearing in Port Macquarie on 17 September 2019 and 31 October 2019. Mr C Tanner of counsel appeared for the applicant instructed David Jones on 17 September and Ms Santos on 31 October. Ms N Compton of counsel appeared for the respondent on each occasion.

EVIDENCE

Documentary evidence

13. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) Application and attached documents;
 - (b) Reply and attached documents;
 - (c) Application to Admit Late Documents dated 30 August 2019 lodged by the applicant with extracts of clinical records of Dr A McColl attached;

- (d) Application to Admit late documents dated 5 September 2019 lodged by the applicant the following attachments:
 - (i) clinical records of Ms Oxley, and
 - (ii) extracts of clinical records of Dr B D Parsonage, and
- (e) Application to Admit Late Documents dated 10 September 2019 lodged by the respondent with financial statements and tax returns of the applicant attached.

14. Following the arbitration hearing on 31 October 2019 the parties agreed on the applicant's pre-injury average weekly earnings (PIAWE) as claimed in the Application of \$2,439.69, noting however it is subject to the relevant maximum weekly compensation amount pursuant to s 34 of the 1987 Act.

Oral evidence

15. There was no application to adduce oral evidence or to cross-examine the applicant.

SUBMISSIONS

16. The submissions of the parties are recorded in the transcript of 17 September 2019 (T-1) and 31 October 2019 (T-2) and will not be repeated in full. In summary they are as follows. As the respondent bore the onus of proof in respect of the defence under s 11A of the 1987 Act, its submissions are referred to first.

Respondent

- 17. The respondent noted that date of injury pleaded in Part 4 of the Application and submits that the relevant issues for consideration are those from before that date. It submits that the applicant's condition is solely a result of the performance appraisal that took place in August 2014 and not factors that took place after 1 September 2014⁶.
- 18. The respondent submits that, in histories the applicant provided to his treating practitioners, revealed that there were other factors contributing to his condition, not relevant to the issue to be determined.
- 19. The respondent refers to the history provided to Dr Tang, qualified on behalf of the respondent, recorded in his report dated 19 March 2016⁷. This refers to the appointment of his new manager in February 2014 and that he "essentially fell apart, broke down... over a few months." Other incidents referred to in the history provided to Dr Tang are referred to, including the proposed transfer of a female employee from another store, requested by another store manager. A letter sent to the applicant's HR (Human Relations) manager in respect of this matter is submitted to be dated September 2014, as are meetings, the number of which is unclear, with the new manager Rick (Lowe). It was after these meetings that the respondent submits that the applicant ceased work on 1 September 2014 and saw his general practitioner shortly thereafter.
- 20. The respondent submits that the applicant's first meeting with Mr Lowe in respect of performance review was in August 2014 at the Coffs Harbour store and that there was then a subsequent meeting at the Taree store. The first meeting was the performance review meeting and the second a response to the performance review⁸.

⁶ T-1 11.20.

⁷ Reply p 71.

⁸ T-1 17.20.

21. The respondent also relies on the opinion expressed by Dr Tang in his second report dated 23 May 2018⁹ that in the doctor's opinion, the applicant's psychiatric symptoms consistent with Major Depressive Disorder developed whilst working on a full time basis as a store manager for the respondent, and that it was predominantly caused by action taken by the employer with respect to performance appraisal¹⁰.
22. The respondent submits that it was the performance appraisal that commenced with the meeting in August 2014, not matters that took place earlier that year involving the applicant and his new manager Rick Lowe, that caused the applicant's psychological injury. Alternatively, if it is the applicant's case that matters that took place earlier in 2014 contributed to his psychological condition, that is not supported by the medical evidence, which is to the effect that the performance appraisals and reviews that took place from August 2014 caused the applicant's condition.
23. The respondent submits that what took place earlier in 2014 was not part of performance appraisal. It submits that whether someone visited the applicant's store in February or March of 2014 is irrelevant.
24. The respondent submits that Dr N R Rose, who was qualified on behalf of the applicant and provided a report dated 23 August 2016¹¹, whilst conceding in that report that the applicant's employment was a substantial contributing factor to his injury, does not deal with the question as to whether the respondent's actions with respect to performance appraisal were causative of injury¹².
25. The respondent relies upon the history of complaint provided by the applicant to Dr Rose¹³ to support its submission that it was the performance appraisal which took place from the Coffs Harbour meeting in August 2014 that was causative of the applicant's psychological condition. According to that history, the applicant became upset after the subsequent Taree meeting and went off work shortly after that meeting.
26. The respondent also relies on the history recorded by the applicant's treating psychiatrist, Dr Parsonage who initially saw the applicant on 27 and 29 January 2015, to support its submission that it was the events that occurred from August 2014 that caused the applicant to become psychologically injured. The respondent also submits that the contents of the report of Dr Parsonage dated 15 December 2015¹⁴ also suggest (as I understand the submission) that events after 1 September 2014 were at least in part causative of the applicant's condition, and that these are not to be considered in the current proceedings.
27. The respondent also dealt with the applicant's evidence in statement dated 11 February 2015¹⁵, relevant parts of which will be referred to hereunder, to support its submission that the actions of the respondent with respect to performance appraisal were reasonable. Whilst the respondent submits that, whilst it only relies on what happened from August 2014 onward as being performance appraisal, what happened at that time must be looked at in the context of what occurred earlier in the year when Mr Lowe made visits to the applicant's store. What occurred during those visits was discussed in the performance appraisal process¹⁶. The respondent was not able to answer when the performance appraisal began and ended. However, it was confirmed that the "green dots" issue was a factor in the performance appraisal process¹⁷. The respondent emphasises that when doing a performance review, historical aspects must be looked at.

⁹ Reply p 84.

¹⁰ See T-1 18.20 and Reply p 92.

¹¹ Application p 213.

¹² See T-1 25.20 and Application p 219 at [6] and [11].

¹³ Application p 214.

¹⁴ Application p 248.

¹⁵ Application p 12.

¹⁶ T-1 36.05.

¹⁷ T-1 37.05 and 37.20.

28. The respondent draws attention to a number of other matters and programmes in respect of the applicant's management of his store including the proposed transfer of an employee from another store referred to in [19] above, apart from the "green dots" issue, that were discussed in the performance review from August 2014 onwards.
29. The respondent relies on the evidence of Rick Lowe in his statement dated 12 March 2015¹⁸ in support of its submission that the actions of the respondent, through Mr Lowe, were reasonable in respect of performance appraisal.
30. The respondent relies on the "PIP Review"¹⁹ to show that it was "provided to the applicant...that was the precursor to the review application" which "lists there the examples of the gaps in his behaviour that he was given the PIP review for and the adherence to company policy"²⁰. This document, according to the respondent, speaks for itself, and "...was the precipice [sic] for when he went off work subsequently"²¹.
31. The respondent also relies upon the internal documentation provided to the applicant commencing with "How will this guide help you"²² setting out the policy and procedures of the respondent in a diagrammatic form. The respondent submits that at all times its manager, Mr Lowe, adhered to the policy and procedures, and that his actions were reasonable in respect of performance appraisal.
32. The respondent further submits that the injury suffered by the applicant was wholly or predominantly caused by that reasonable action, citing the second page of the Worker's Injury Claim Form²³ completed 22 December 2014 where the applicant gives as his reason for what happened and how he was injured:
- "BLINDSIDED WITH UNFAIR & UNREASONABLE REVIEW LEAVING ME FEELING BULLIED, PSYCHOLOGICALLY INTIMIDATED AND VOID OF ANY CONFIDENCE"
33. The respondent also relies on the history the applicant gave to Dr Tang recorded in his reports dated 19 March 2016 and 23 May 2018²⁴ and email from the applicant to the respondent dated 8 September 2014²⁵
34. On the question of capacity for work, the respondent submits that having regard to what the applicant is currently doing to assist his wife in looking after rental properties jointly owned by them, doing home handyman work and gardening, he is capable of working of as a cleaner or in customer service work, earning \$800 - \$900 per week.

Applicant

35. The applicant submits that there are two crucial areas in support of his case, namely:
- (a) whether his condition was wholly or predominantly caused by performance appraisal, and if it was,
 - (b) whether what purports to be performance appraisal was reasonable in the circumstances.

¹⁸ Application p 178.

¹⁹ Reply p 27.

²⁰ T-2-3.20.

²¹ T-2 3.30.

²² Reply p 30.

²³ Application p 43.

²⁴ Reply pp 70 and 84.

²⁵ Application p 85.

36. The applicant submits that the respondent, through Mr Lowe, failed to alert the applicant to the areas in which he was not meeting the respondent's required standard, in that there was no setting of objectives or goals at the outset, particularly in the context of Mr McKell being a long serving employee who had not on any previous occasion been assessed at a level other than effective. From the time of Mr Lowe's arrival as the applicant's new manager in early 2014, he did not provide the applicant with any notification of matters of the applicant's performance that required attention and did not provide a timetable of the period within which such matters were to be addressed.
37. The applicant draws attention to:
- (a) the failure of the respondent to put into evidence the audit that was apparently carried out of the respondent's store, or the date when such audit was carried out;
 - (b) the failure of the respondent to give the applicant a chance to respond to matters in the audit;
 - (c) the failure of the respondent to have a uniform approach to auditing its stores, given that it appears that only one of the other 15 to 20 stores under the supervision of Mr Lowe was the subject of an audit;
 - (d) the unannounced visit(s) of Mr Lowe to the applicant's store, given the applicant's unchallenged evidence that his enquiries revealed that only one other store had been the subject of an unannounced visit by Mr Lowe;
 - (e) the fact that the applicant did not have an assistant store manager for a period of 26 weeks before the appraisal carried out by Mr Lowe, and that Mr Lowe was unaware of this understaffing. This period effectively covered the period of Mr Lowe's employment as the applicant's supervisor of the applicant;
 - (f) the fact that Mr Lowe had already made up his mind that the applicant should be the subject of performance improvement before hearing from the applicant, or sharing any of the information on which he determined that the applicant should be the subject of performance improvement;
 - (g) the failure to give the applicant an opportunity to bring a representative to the first meeting, in Coffs Harbour when performance improvement was raised, and when such meeting would have a fundamental bearing on the applicant's employment security,
 - (h) the use of a "bell curve" in assessing the applicant's performance, and the way that the classification on that curve was arbitrarily imposed upon the applicant which had the effect of placing the applicant in a category simply based on percentages which the bell curve dictated;
 - (i) the criticism of the applicant in respect of the transfer to his store of an employee from another store, which the applicant deemed inappropriate because of the fact the proposed transferee had been in an affair with the husband of another employee at the applicant's store;
 - (j) the failure of the respondent to identify areas of non-performance by the applicant and give him an opportunity to correct these areas in the future (one example of which was the "green dots" on out-of-date stock issue), and
 - (k) the failure of the respondent to adhere to the principles in its performance review guide, which was in evidence in the proceedings, and its failure to adhere to the standards set by the Federal Fair Work Ombudsman.

38. Counsel for the applicant proceeded to carry out a detailed examination of the evidence of Mr McKell, Mr Lowe, the respondent's performance review guide and the Federal Fair Work Ombudsman's guidelines for managing under performance of employees. The applicant submits that this demonstrates that, if the applicant's psychological condition (the existence of which was not disputed by the respondent) was wholly or predominantly caused by the respondent's performance review, such review was not reasonable action taken of proposed to be taken by or on behalf of the respondent. Relevant parts of the applicant's submissions in this regard are referred to hereunder.
39. On the question of incapacity, the applicant submits that, effectively, he has no capacity for employment on the open labour market. Even if one was to accept what Dr Tang says in his reports dated 19 March 2016 and 23 May 2018, he could only work at most about 15 hours a week earning \$20 per hour which is well short of 80% of the agreed PIawe. However the primary submission is that he does not have capacity for employment. His involvement in the family business of renting out holiday accommodation cannot be considered employment.

EVIDENCE

The applicant's evidence

40. The applicant relies on three statements dated 11 February 2015, 24 February 2017 and 21 September 2018²⁶. The applicant says in the first statement that he was currently the manager of the Settlement City store of the respondent and that on any day he was responsible for 150 to 160 workers. He had been the manager of the store for about 10 or 11 years. He refers the appointment of Rick Lowe as the new Area Manager in early 2014, that the Area Manager operates from the Coffs Harbour store and that he did not visit the Settlement City store all that regularly.
41. The applicant refers to the unannounced visit of Rick Lowe to the Settlement City store most likely in early March 2014 with a senior executive, Carl Wilmore. The applicant was really disappointed with this visit as the first that he knew about it was when the two men were outside the store. He said to Mr Lowe that he could not believe that he was not even given five minutes notice of the visit. At the time the applicant was busy putting stock onto the shelves.
42. Mr McKell says that the conversation between him and the two men was okay at first, but he remembers feeling stressed and defensive at the surprise visit. He says that Mr Wilmore did not display any interest in what was said and was rude. The applicant says that he had been subject to unannounced visits in the past, but not for some time. As the company had gone through many leadership styles during his time, he thought that it had moved away from a confrontational style. He said that there was almost like a real arrogance in the way Rick conducted the visit.
43. The applicant says that he managed to get through the visit, that there were a few things discussed and that he took some notes. He did say to Mr Lowe that he felt he had been "blindsided" by the visit and that it showed him a lack of respect. Mr Lowe replied, "You're entitled to that opinion, thanks."
44. The applicant refers to the meeting with Rick Lowe in Coffs Harbour in August 2014 for his appraisal. At that time he says that he was not aware of any issues which may have related to poor work performance. The meeting took place between Mr Lowe and himself, with no one else present. He said that Mr Lowe appeared agitated and did not appear comfortable. He told the applicant that he had received a "Performance Improvement Required" (PIR), at which point the applicant said that he was "floored" as he had never ever been given one. This information left him feeling very upset. Mr Lowe explained that as a result of an audit

²⁶ Application pp 12,36 and 39.

conducted earlier in the year, he was scored at three out of five. Mr McKell thinks that the audit was conducted on the occasion that Mr Lowe first had a meeting “with us”. Nevertheless the applicant thought that three out of five was a pass and should not have resulted in a PIR.

45. During the appraisal in August 2014 the applicant says that Mr Lowe told him that a further reason for his PIR was as a result of the unannounced visit earlier in the year with Carl Wilmore. The applicant says that he said to Mr Lowe that this was not fair as no other store manager had received an audit or had an unannounced visit. The applicant says that he was later to confirm that, of the 15 to 16 stores under Mr Lowe’s supervision, only one had been the subject of an audit and another to an unannounced visit.
46. Further issues were discussed at the visit, some of which had occurred months before. These included management of overstock, and the placement of “green dots” on inventory stock, which displayed information about the stock. The applicant was not following this procedure as he thought it a waste of time, and notes that the practice was subsequently discontinued by the respondent. When told by Mr Lowe that he needed to get the green dots issue fixed, the applicant indicated that he would start putting the green dots back on in accordance with the practice. However, at the next visit to the store, Mr Lowe observed that not all of the green dots were in place on the inventory, to which the applicant responded that they were working their way through it. It was within two to three weeks of this meeting that the applicant was notified that the green dots procedure was no longer required. When this issue was brought up at the appraisal, the applicant says that he was “beside myself” and informed Mr Lowe that, if he found that if it was such an issue, it should have been addressed properly rather than simply being told that “You just need to get it done.”
47. Other issues raised during the appraisal were in relation to the meat area, under the management of Jason Higgins, which the applicant says was never even raised again after the visits of Mr Lowe. The applicant found it hard to accept criticism in respect of the meat management issue when, on later enquiry of Jason Higgins, he was told that Mr Higgins had received a review indicating that he was an effective performer.
48. Another issue that was raised during the August appraisal was in relation to the chicken production planner in the delicatessen. The applicant wondered how that issue made it to the appraisal as he says that there was no investigation, no follow up and no investigation requested.
49. The applicant says that he was upset, disgruntled and experiencing a number of emotions during the performance appraisal. He was informed that there would have to be a PIR over the succeeding couple of weeks. A few days later the applicant says he received an email informing him when the PIR would take place, in Taree. During this period that the applicant says his mood changed and he felt “manic”, betrayed, intimidated and that all the values and beliefs that he had were ignored and he lost his confidence.
50. Later, after some confusion in respect of deleted emails that had been forwarded by Mr Lowe, the applicant located a form that had been sent to him by Mr Lowe. The applicant was asked to fill in the form prior to the PIR meeting, which he thought was odd in that he had to fill in a form with his own improvement notes. The applicant thought that the process was that Mr Lowe was to fill in the form and that he (the applicant) should sign off on it. The applicant informed Mr Lowe over the phone that he felt uncomfortable completing the form and was not comfortable that this was the correct procedure to follow. When quizzed about this by Mr Lowe, the applicant said “Rick, I really feel it’s a form that you are required to fill in” [sic]. Mr McKell still believes that his interpretation was correct, and that Mr Lowe misunderstood the process.

51. The PIR meeting took place on 26 August 2014, and Mr Lowe was running late. By the time the meeting started the applicant says that he was “beside himself”; he described his mood as “manic”. He says that during this interview the two of them almost never discussed the audit, and Mr Lowe’s unannounced visit that was the focus of the appraisal. There was discussion about another issue, a behavioural issue related to a worker called Nicole. This related to a request that Nicole, who was working at the Kempsey store, be transferred to the applicant’s store. The applicant did not want this as he was aware that Nicole had had an affair with the husband of one of his other staff workers. The applicant was surprised that this issue was brought up at the PIR meeting as he had dealt with it some months earlier and was now faced with it being brought up by Mr Lowe at the PIR meeting. Mr Lowe’s last words to the applicant on this issue were that “I will have to go back to Courtney and get some more details” (Courtney Palmer, the Human Relations manager). The applicant was surprised that this was brought up at the PIR meeting as a “behaviour issue” when, during his first appraisal, he was informed that there were no behavioural issues. The applicant says that he was not even aware that it was going to be raised at the PIR meeting and said to Mr Lowe “If this is such an issue why am I hearing about it now for the first time?”
52. There was also discussion at the meeting of 26 August 2014 of the “bell curve”, and the placement of the applicant thereon.
53. The applicant says that at the end of the meeting he felt totally “scrambled”, and on reviewing the documentation he had left with, realised that there was also another entry which Mr Lowe did not even raised or discuss with him during the meeting; that was his lack of leadership in other stores. That was not mentioned during his appraisal.
54. The applicant phoned Mr Lowe the following week to determine if he had made any follow up investigations, as Mr Lowe had indicated that he was going to speak to Courtney, Kate Green or John Eales (State Manager). The applicant said that he was very nervous when he made the call, but that he wanted to be updated with how things were proceeding. During the call, Mr Lowe asked how the applicant was going to which he replied, “Not very well”. Mr Lowe also said that he had not spoken to Courtney as she had been on leave, and that in any case “...that’s only a small issue.” The applicant said that he thought that it was a major part of the issue because it was an attack on his character and how he had handled the matter.
55. The applicant also asked Mr Lowe if he still wanted him to complete the PIR plan which had not been completed at the meeting, to which the answer was “yes”. When asked if he could suggest how, Mr Lowe said that he could not advise him at the time but that he would send an email the following day.
56. The applicant saw his doctor on 1 September 2014 and was given a couple of days off work, and then got the rest of the week off. He returned to work on 8 September 2014 and worked six days that week. On 9 September 2014 he sent an email letter dated 8 September 2014 addressed “To whom it may concern”²⁷ setting out his concerns regarding both his recent appraisal, resulting rating and subsequent management of that rating and the efficacy and fairness of the process itself.
57. In his statement dated 24 February 2017 the applicant makes the following relevant points:
 - (a) during the period of his employment up to his injury his performance had never been called into question, but to the contrary he was repeatedly sent inexperienced managers in order to train them for other stores;
 - (b) he understood that Mr Lowe would speak to Alan Wright, the applicant’s previous supervisor about his work performance, but he believes this did not occur;

²⁷ Application p 85.

- (c) Mr Lowe did not have extensive experience in the North Coast as to the operations of Woolworths, nor did he visit his store or have many meetings during this time;
- (d) he believes that it was Mr Lowe's agenda to place pressure on him to leave his store in an endeavour to reduce salaries;
- (e) he believes that his negative appraisal was also so designed to place him on a bell curve "because someone had to be" which would in turn negatively impact on his ability to receive a reasonable bonus, and that he cannot recall ever having a bonus affected in this way;
- (f) during the relevant period, 26 weeks, he did not have his assistant manager, Kylie Hopper, or any other assistant manager for six weeks of this time. He was therefore struggling to manage on his own for a significant period and received no support from Mr Lowe or his superiors in that time, and
- (g) notwithstanding the fact that, according to Mr Lowe's statement he noted changes in his behaviour, at no stage did he feel any concern from Mr Lowe regarding the deteriorating state of mental health.

58. In his third statement dated 21 September 2009, the applicant gives details of his treatment by his general practitioner, Dr McColl, psychologist Wendy Oxley and psychiatrist Dr Parsonage. He says that his employment with the respondent ceased in or about September 2017. He also gives details of the work he does from time to time assisting in the maintenance and upkeep of the family's investment properties.

The respondent's evidence

59. The respondent's case relies on the evidence of Rick Lowe in his three statements dated 27 February 2015, 12 March 2015 and 19 June 2017²⁸.
60. In his first statement Mr Lowe says that he was aware that the applicant had lodged a workers compensation claim and refers to his previous contact with the applicant over a period of approximately 15 years. He knew him as a store manager in Newcastle. Attached to that statement is a document entitled "Case File Notes" which contains an outline of the contact that he had with Mr McKell about the incident, and what he did about the matter. These Case File Notes detail Mr Lowe's actions in response to the complaint that the applicant emailed to Kate Green on 10 September 2014. They document Mr Lowe's actions over the period from 11 September 2014 to 1 October 2014.
61. In his second statement Mr Lowe says that he first became acquainted with the applicant in or about January 2014 when the applicant was a store manager at Port Macquarie, and he was Area Manager for that region at that time. It was performance appraisals time, and the applicant was rated as effective. He was not involved in that determination.
62. Mr Lowe says that he communicated with the applicant via phone and email and that on the phone he was not very forthcoming. On his first visit he found that the applicant's store was not in great shape and from a customer's perspective quite dirty. He had particular concern about the bakery. He found that the applicant wanted to challenge basic instruction, for example about the green stickers issue, and felt that Mr McKell needed to show more leadership.

²⁸ Reply pp 6, 10 and 22.

63. Mr Lowe confirms the visit he made to the applicant's store with Karl [sic] Wilmore and that it was unannounced. He says that it was normal practice and that there was nothing underhand or unusual about that. He does not recall talking to the applicant about the "ninety day plan" during the meeting, and that to his recollection, Karl did most of the talking. He denies that he was not interested in what the applicant was saying during the visit, or that he was arrogant. He found the behaviour of the applicant to be negative, non-engaging and defensive when given feedback.
64. Mr Lowe says that he did raise whether the applicant would be interested in transferring to another store later in the performance appraisal, and says that if there were no performance issues, he probably would not have brought it up. He says that sometimes a different environment can be very beneficial to a store manager.
65. At the end of the visit Mr Lowe acknowledges that the applicant did comment about being blindsided and shown lack of respect. He says that his response was not as portrayed by the applicant, but asked Mr McKell why he felt blindsided. To the applicant's comment about the visit being unannounced, Mr Lowe said that it was common practice and that it would continue during his leadership.
66. Mr Lowe organised a meeting between himself, the applicant and Courtney Palmer as a result of concerns he had about his interactions with the applicant. Several store issues were discussed, including the unannounced visits to the store and third party feedback about the bakery. Mr Lowe felt that the relationship was the for better as a result of the meeting.
67. Later, after the applicant had been asked by Mr Lowe to become involved in the "We Love Food" program, Mr Lowe noticed an improvement in the applicant for about a month when he became more communicative and jovial. However after this time he reverted to his old ways and the enthusiasm waned.
68. Mr Lowe confirms the performance appraisal meeting with the applicant in Coffs Harbour at [22] of his second statement. He says that it is his normal practice not to have a third party present for these meetings and would only do this if he felt that there was going to be some issue. Whilst he says that he was a bit apprehensive about the meeting as he believed that it was going to be a challenging conversation, as he had to advise the applicant that he had received a PIR, he did not see any such issues for his meeting with Mr McKell that would require HR assistance.
69. A number of issues were discussed at the meeting, including the fact that the applicant's belief that the audit was conducted on the occasion of the first visit of Mr Lowe to the store was mistaken. Mr Lowe makes the point that he has no input as to when or where audits take place, and that while the three out of five mark that the applicant received was a pass, the applicant failed to understand that there was much more to the PIR than the audit.
70. The green dot issue was discussed, as was the meat production issue which Mr Lowe also says he discussed with the meat manager, Jason Higgins. Mr Lowe says that this issue should have been solved within three or four weeks. Mr Lowe did not see why the fact that Mr Higgins was classed as an effective performer had anything to do with the criticism of the applicant in respect of the meat production.
71. Mr Lowe did inform the applicant that he would have to do a Performance Improvement Plan (PIP) over the following couple of weeks and set a date for the meeting to take place in Taree. He says that at the end of the meeting, he and the applicant shook hands and that that there was nothing to suggest that the applicant was aggrieved or disgruntled by the conversation that had just occurred.

72. Mr Lowe did send Mr McKell a blank PIP and asked him to start “populating some notes on areas he felt that he could improve on.” He says that he just wanted to be sure that the applicant comprehended “where we were at and what had happened at the previous meeting.” He says later in the statement that it is correct that it is his job to fill out the PIP at finalisation, but he did not see any issues with someone being offered the opportunity to provide input.
73. In respect of the meeting in Taree (for which he was running approximately 15 minutes late) Mr Lowe says that, after some small talk, applicant said that he was not interested in engaging in chit chat which comment set the tone for the meeting. However the applicant advised Mr Lowe that he was comfortable to continue. When Mr Lowe stated going through his points, the applicant’s response was that they were either irrelevant or that it was effective performance. He found it strange that the applicant at no point during the performance review did not agree with any rating nor did his body language suggest that he was disgruntled.
74. Mr Lowe then says at [41] of his statement that after about 10 minutes he said that it was best if they ceased the meeting as he needed to seek advice from the State HR Manager. His observations of the applicant were that he was disgruntled and was trying to be awkward. In hindsight, he says that the fact that the applicant had failed to start inserting some of the PIP information should have rung alarm bells, and that he probably should have had HR at that meeting.
75. Mr Lowe says that the bell curve was discussed, and that he asked the applicant if he understood it. The applicant said that he did understand it.
76. Mr Lowe says that after the meeting he contacted the HR Manager Kate Green to advise her what happened. He says that he then relocated to Sydney and that Gary O’Donnell took over from him.
77. Mr Lowe denies that he had an agenda against the applicant. He simply wanted him to do his job correctly.
78. In his third statement dated 19 June 2017 Mr Lowe says that in order to review the applicant’s performance he reviewed his previous rating and commentary for the previous year as per the respondent’s “Success Factor” performance system. Those comments were made by the previous Area Manager, Alan Wright and Mr Lowe was not therefore required to speak directly to Alan about the applicant. In addition, Mr Lowe was provided feedback by Human Resources specialist Courtney Palmer and Retail Specialist John Erskine, and Allan Watson who was relieving in Mr Lowe’s role for a period of about two months during the transition between Alan Wright and himself.
79. Mr Lowe says that he visited the applicant’s store approximately six times, one of which was with the Assistant State Manager. As it was a day trip to the store, he spent about three to four hours in the store, not with the applicant throughout the entire time. He did see the applicant on every occasion other than one occasion when Mr McKell was not at work. He says that he always spent time debriefing the applicant at the end of his visits and providing feedback. Mr Lowe notes that he had another 17 stores to oversee at the time.
80. Mr Lowe denies that there was pressure on himself and management to in turn pressure the applicant to resign to reduce salaries, and certainly no pressure from a financial point of view, as the applicant’s store was within the band of stores where his salary was commensurate with the percentage of sales. He did note however that the applicant’s store was overspending about \$3,000 to \$4,000 per week.

81. Mr Lowe denies being influenced by Courtney Palmer in his perception of the applicant's performance. He vaguely recalls an issue where Courtney challenged the applicant in respect of the request to transfer an employee to the store but does not have detailed knowledge of this.
82. Mr Lowe notes that, prior to the applicant being placed on the bell curve, he had him at effective, although sitting on PIR. He says that by nature, someone does have to sit in PIR, however there is no percentage of staff members who are required to be placed in this category.
83. Mr Lowe says that regarding the applicant's performance, the business was still profitable "so financials were not a major issue." The applicant's behaviour was a major issue as Mr McKell would not accept feedback.
84. Mr Lowe says that he was not aware that the applicant was struggling with his workload as his Assistant Manager was not at work for 26 weeks. He says that although Mr McKell had plenty of opportunities to raise issues with him, he never discussed that with him, nor tell him that he was struggling at any time.
85. With regard to the behaviours of Mr McKell, Mr Lowe says that he did address this during the meeting with the applicant and Courtney Palmer sometime after the "unannounced" visit to the store, but the applicant did not use this opportunity to advise that he was struggling.

PIP review

86. This document is in evidence²⁹. It contains reference to the matters discussed between the applicant and Mr Lowe. It does not contain any employee feedback and is not signed by Mr McKell.

Respondent's performance documents

87. In evidence is a document headed "How will this guide help you"³⁰ which is the performance review guide referred to by the applicant (see [37(k)] above). There is also a further booklet headed "Contents" and "1. Creating a High Performance Culture in Woolworths"³¹. The applicant made certain submissions in respect of the contents of these documents, relevant parts of which will be referred to hereunder.

Medical evidence

88. The respondent does not put in issue that the applicant has suffered issue arising out of or in the course of his employment. The only issues are those referred to at [10] above, namely the respondent's defence to the claim under s 11A of the 1987 Act and the applicant's capacity for work as a result of injury.
89. Dr Brian Parsonage, first treated Mr McKell on 27 January 2015. He has continued to treat him to date and supplied a report to his solicitors on 28 September 2017³². His diagnosis in that report is:

"As a result of Mr McKell's perception that he was being treated unfairly, not supported and being targeted for removal from his position regardless of what he did or said, he became severely depressed and anxious. At the time I first assessed him in January 2015 his diagnosis using DSM-5 criteria would have been severe Major Depressive Disorder with anxious distress.

²⁹ Reply p 27.

³⁰ Reply p 30.

³¹ Reply p 43

³² Application p 222.

There has been some improvement in Mr McKell's condition so that his current diagnosis is moderate Major Depressive Disorder with anxious distress.”

90. Dr Parsonage's expressed an opinion of the applicant's employability, given in respect of his assessment of WPI. It is that, using his clinical judgement and having regard to the low stress tasks Mr McKell carries out in and around the six holiday units which he owns with his wife, he was severely impaired in the area of employability but not entirely incapable of working at all.
91. Dr N R Rose was qualified on behalf of the applicant and supplied a report to his solicitors on 23 August 2016³³. His “**SUMMARY AND ASSESSMENT**” is as follows:

“Mr McKell is a 50-year-old man who worked as a full time store manager at Woolworths for many years and who appears to have coped very well with his work until 2014 when a new area manager was appointed. Mr McKell alleges that he was unfairly discriminated against and treated by this new area manager whom he says chose to give him unfavourable work assessments. Mr McKell coped very poorly with the pressure to perform in a certain way despite the fact that contrary to the views of his new area manager he believed he was functioning well at work. He became under much more pressure to comply with the demands of his area manager and in this setting he became very severely depressed with a sense that he had been maliciously targeted and betrayed.

As a consequence of this Mr McKell developed increasing symptoms of severe depression such that a diagnosis of major depression could eventually be sustained. In addition to this he became grossly withdrawn with manifestations of severe anxiety at the slightest hint that he might be asked to do anything uncomfortable. He became extremely withdrawn and unable to cope with the slightest change or challenge. He found it difficult to cope with life but he did manage to do some cleaning and laundry at the units that he and his wife own but only for up to three or four hours a week during the summer season. Mr McKell has had expert psychiatric treatment but despite this there has been little improvement in his psychiatric symptoms. I believe that his psychiatric status has reached maximum medical improvement and that his condition for all purposes is static.”

92. In answer to a specific question put to him, Dr Rose said that the applicant's employment was a substantial contributing factor to his injury. He also said that Mr McKell had little if any current fitness for work.
93. Dr Tang supplied two reports to the respondent's insurer dated 19 March 2016 and 23 May 2018³⁴. The later report contains a diagnosis that the applicant developed Major Depressive Disorder whilst working on a full-time basis as a store manager for Woolworths, and that his condition was work related. That employment was the main contributing factor to the development of the Major Depressive Disorder. Dr Tang also says:

“It is my opinion that Mr McKell's psychiatric condition was predominantly caused by action taken by his employer with respect to performance appraisal.

In the interests of fairness, I have documented that Mr McKell believes that he was ‘set up’ by his employer with respect to performance appraisal processes.”

³³ Application p 213.

³⁴ Reply pp 70 and

94. On the question of employability, Dr Tang says that Mr McKell does have capacity for employment. He notes that he jointly manages a holiday rental business with his wife, undertaking some of the tasks associated with customer service and cleaning. This work is undertaken on a variable part-time basis, around two hours per day at times, sometimes reporting more work. Dr Tang opines that Mr McKell would not be able to perform the pre-injury duties as a store manager for another employer or at another site.

General practitioner notes

95. Extracts of clinical records by Dr A McColl are in evidence³⁵. From these it is evident that the applicant had a surgery consultation with Dr Daniel Oliveira on 19 February 2014 for treatment of hypertension, and thereafter with Dr Tenell Holborrow on 1 September 2014, for which the reason for the visit is recorded as "Insomnia". The doctor records a long history commencing with the applicant "Presenting very upset in a crisis currently". The full recorded history is:

"History:

Appraisal at work two weeks ago

Was floored by a poor appraisal which he feels was unfair

He feels he is being unherd at work

Very anxious about the situation

Jon could be in jeopardy but this is some way off at the moment

Main problem is feeling unherd

An anxious personality and high achiever

His work is a big part of his life

Wif eis very supportive

No suicidal thoughts

Never had mental health problems before

Very poor sleep

Waking at 2 am and very tired during the day

Feels that he can take on the problems at work if he can reduce the tiredness and the depressive feelings

Good insight

Drinking less alcohol then usual

No enjoyment in activities" [sic]

Dr Holborrow's "Impression" is "Adjustment disorder with depressive symptoms".

96. The next recorded attendance on Dr Holborrow is on 4 September 2014 for "Counselling", when the applicant "Feels almost ready to go back to work". Mr McKell "Would like to see psychologist for extra coping mechanisms to help him tackle the problems at work". A work certificate was given. Thereafter a surgery consultation with Dr McColl is recorded on 25 September 2014.

FINDINGS AND REASONS

Section 11A - performance appraisal

97. The question of what is "performance appraisal" has been considered by Geraghty J in *Irwin v Director General of School Education (Irwin)*³⁶ where his Honour referred to "performance appraisal" as being:

"...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."

³⁵ Application to Admit Late Documents (AALD) 30 August 2019.

³⁶ NSWCC, Geraghty J, No 14068/97, unreported.

98. This interpretation is broader than the meaning of that term given by Neilson J in *Bottle v Wieland Consumables Pty Ltd*³⁷ where he held that it refers to “part of the process of fixing an employee’s salary or remuneration”. Deputy President Byron in the Commission in *Smyth v Charles Sturt University*³⁸ seemed to prefer the broader definition of Geraghty J in *Irwin*.
99. In my view that process of assessing the applicant’s performance by the respondent in this case, essentially through the actions of his Area Manager Rick Lowe, is consistent with the process described in *Irwin*. At the arbitration hearing it was not conceded that what the applicant underwent was performance appraisal. However in his evidence Mr McKell seemed to accept that it was at least a performance review. At [14] and [15] of his statement dated 11 February 2015 he notes that as part of the respondent’s senior management review, a work performance appraisal is conducted yearly. He also refers to a ‘pulse’ review, usually conducted every six months to determine if there are any issues that need to be discussed. The applicant then goes on to state that in August 2014 he attended the respondent’s Coffs Harbour store to meet with Rick for his appraisal. He said that at that time he was not aware of any issues which may have related to a poor performance review.
100. In answer to a question put to counsel for the respondent during the arbitration hearing on 17 September 2019, she was not able to specify when the performance appraisal process began and ended. It was however conceded that issues raised at the unannounced visit in March 2014 were factors that were in the performance appraisal process³⁹.
101. In my view the applicant was subject to performance appraisal by the respondent, which took place at the Coffs Harbour meeting in August 2014 and continued until the Taree meeting on 26 August 2014. Section 11A(1) of the 1987 Act refers to “...reasonable action taken or proposed to be taken by or on behalf of the employer with respect to ...performance appraisal...” Therefore, the actions of the employer, principally through Rick Lowe from the first unannounced visit in early 2014, must be considered when determining if they were reasonable.
102. I think that the unannounced visit by Mr Lowe and Carl Wilmore in March 2014 set the scene for an uneasy relationship between the applicant and Mr Lowe. Mr Lowe was the applicant’s new area supervisor, was aware that the applicant had been with the respondent for a long period and was rated as an effective manager until that time. I accept the applicant’s evidence that the practice of unannounced store visits by Area Managers was not one that was utilised by the respondent at the time, although it had been in the past. This is corroborated by Mr McKell’s evidence that his enquiry revealed that only one other store manager out of 15 or 16 in the area of supervision of Mr Lowe had been the subject of such a visit. The applicant says that he felt under pressure during the visit and said to Mr Lowe at the end of the visit that he felt he had been “blindsided” and shown a lack of respect. Although Mr Lowe denies any lack of respect to the applicant, that was his perception.
103. The applicant criticises the lack of any minutes of meetings which Mr Lowe says he had with him after the first visit to the store, or emails drawing attention addressing measurable issues that needed attention. Criticism is also levelled at the vagueness of Mr Lowe’s evidence in respect of the applicant’s attitude, particularly when Mr Lowe says that the applicant reverted to his “old ways” after a perceived period of improvement in his attitude. Further, the audit on which the respondent relied in the performance appraisal is not in evidence. I accept these submissions of the applicant. There is a lack of written evidence of ongoing communication between Mr Lowe drawing the applicant’s attention to shortcomings that needed to be addressed, and to matters in the audit that were substandard.

³⁷ (1999) 19 NSWCCR 135.

³⁸ [2007] NSWCCPD 184.

³⁹ T-1 36.30-38.10.

104. The applicant submits that there is no evidence of “a number of ongoing, open and constructive discussions throughout the year” which are referred to in the respondent’s “How this guide will help you” document as important in respect of a performance review. I accept this, and that there is no evidence of a “high level of trust” (also referred to in that document) which was developed between the applicant and Mr Lowe. Further there is no evidence of “Honest feedback” about how the applicant had performed compared to others, another matter referred to in the document.
105. It is also relevant in my view that for the 26 weeks leading up to the performance review meeting in Coffs Harbour Mr McKell was without his assistant manager Kylie Hopper, or any other assistant manager for six weeks of that time. Mr Lowe was unaware of this, although he says that the applicant had ample opportunity to inform him of it. Irrespective of whether Mr Lowe should have been aware of this in any event as the applicant’s Area Manager, that was no doubt a factor affecting the performance of the applicant over this period.
106. The applicant is particularly critical of how he was placed on the bell curve as “Performance Improvement Required” when until the visit of Mr Lowe to the store in March 2014 he was rated as effective, which should have placed him in the top 60% on that curve. As I understand the submission, it is the arbitrary nature of the classification of persons on that curve which is unfair in that there must be persons placed in each category, from “Unsatisfactory Performance” to “Effective Performance”. I accept this submission. There was no evidence placed before the Commission which would enable consideration if the classification was reasonable in the circumstances.
107. I accept the applicant’s submission that Mr Lowe came to the performance review meeting in Coffs Harbour (the first meeting) with the predetermined outcome that the applicant required performance improvement. This is against a background of a failure on the part of Mr Lowe to properly communicate with the applicant about concerns he had with the applicant’s store or his performance by way of emails, or other correspondence or documents to convey to the applicant the areas where improvement was required.
108. The applicant was surprised when, at the Coffs Harbour meeting, he was presented with the fact that he required PIR (Performance Improvement Required). Mr Lowe was apprehensive about the meeting because the applicant was to be presented with this, and although he says that it is not normal to have a third party at such meetings, if he felt that if there was going to be some issue to be discussed, he would bring along such a person. There was a serious issue to be discussed and I think that he should have brought along a third party. For the same reason the applicant should have been given the opportunity to bring along a support person. For the first time in Mr McKell’s long employment history with the respondent he was to be presented with an adverse assessment.
109. I think that it was not appropriate to forward to the applicant after that meeting the blank PIP Review document for filling out. Mr McKell was surprised when he received it; he thought that it was odd that he had to fill out a form with his own improvement notes, and the process was that Mr Lowe was to fill out the form for him to sign off on it. Mr Lowe acknowledges this but did not see any issues with someone being offered the opportunity to provide input. This was not foreshadowed of the Coffs Harbour meeting. In view of the applicant’s surprise at being confronted with an adverse review at that meeting, it should have been if Mr Lowe was intending to follow this unusual procedure.
110. The second meeting in Taree on 26 August 2014 was short. Mr Lowe started to go through his points with the applicant, and firstly says at [40] in his statement dated 12 March 2015 that at no point did the applicant’s body language suggest that he was disgruntled. He then goes on to say that after approximately 10 minutes he said he felt it best that they cease the meeting as he needed to seek advice from the State HR Manager. His observations of the applicant were that he was disgruntled and trying to be awkward. Mr Lowe says that in hindsight he “probably should have had HR at the meeting.” The applicant also should have been given an opportunity to have a support person at the meeting.

111. The foregoing findings have been made having regard to:

- (a) the respondent's performance documents referred to above at [87];
- (b) the PIP Review referred to above at [86], and
- (c) the standards set by the Federal Fair Work Ombudsman referred to above at [37(k)] above.

112. The respondent acknowledges that the standards set by the Federal Fair Work Ombudsman in respect of managing underperformance and setting up a performance system checklist apply to it. Documents (which are on the public record) setting out the steps to be taken in respect of these matters were without objection handed up during the hearing⁴⁰. It is clear from a perusal of those documents that the respondent has not complied with several the steps therein, in particular:

- (a) identifying the issue;
- (b) assessing the issue;
- (c) letting the employee know in advance what the discussion will be about and allowing the employee to bring a support person;
- (d) jointly devise a solution;
- (e) monitor performance, and
- (f) keep records.

113. My finding is that the applicant was subject to performance appraisal over the period from the date of the first meeting with Mr Lowe in Coffs Harbour in early August 2014 to and including the date of the second meeting in Taree on 26 August 2014. However the action taken with respect to that appraisal must be considered and commenced with the unannounced visit of Mr Lowe and Carl Wilmore in March 2014. For the reasons outlined herein I do not think that the action taken by the respondent with respect to performance appraisal was reasonable.

114. It was shortly after the second meeting on 26 August 2014 that the applicant visited his general practitioner on 1 September 2014 (see [95] above) and ceased work thereafter. Having regard to the medical evidence which I have summarised at [88]-[96] above, I think that the applicant's injury, whilst not wholly caused by action taken with respect to performance appraisal, was predominantly caused by the performance appraisal. It is evident that the applicant was under pressure in his employment from about March 2014 but, notwithstanding the fact that he did not first consult a doctor complaining of stress and anxiety until 1 September 2014, did not start to significantly decompensate until the first meeting with Mr Lowe in Coffs Harbour. This is evident in my view from the history recorded by Dr Holborrow on 1 September 2014.

Incapacity

115. The applicant has been paid weekly benefits for 88 weeks⁴¹ and claims weekly benefits from 9 May 2017 ongoing. An award in his favour will therefore be either pursuant to s 37(1) of the 1987 Act (where a worker has no current work capacity) or s 37(3) (where a worker has current work capacity and has returned to work for less than 15 hours a week or who has not returned to work). In either case that will be 80% of the applicant's agreed PIawe of \$2,439.69 less, in the case of s 37(3), the greater of what the applicant is able to earn in suitable employment or his current weekly earnings. "[S]uitable employment" is relevantly defined in s 32A as employment in work for which the worker is currently suited:

⁴⁰ T-2 55.05-T2.15.

⁴¹ T-2 65.25.

- (a) having regard to:
 - (i) the nature of the worker's incapacity and details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker, and
 - (ii) the worker's age, education, skills and work experience, and
 - ...
- (b) regardless of:
 - (i) whether the work or the employment is available, and
 - (ii) whether the work or employment is of a type or nature that is generally available in the employment market, and
 - (iii) the nature of the worker's pre-injury employment, and
 - (iv) the worker's place of residence.

116. The applicant worked for the respondent for approximately 20 years. It is not disputed that he cannot return to his pre-injury employment with the respondent or another employer.
117. The most that the respondent submitted that the applicant was capable of working, having regard to his casual "work" in the family holiday home rental business, was in a customer service role potentially working at Bunnings, doing cleaning work or home handyman or gardening work. The respondent submits that there is no evidence provided by the applicant of any steps he has taken to find work⁴².
118. The applicant submits that he has no capacity for suitable employment. Alternatively he notes that Dr Tang says in his report dated 23 May 2018 that Mr McKell would be capable of working 15 hours a week at that time⁴³. There is nothing to indicate that the applicant's condition has improved. He submits that any work that he could do would be at a minimal wage of \$20 per hour, meaning that his capacity to earn in suitable employment would be \$300 per week. When this figure is deducted from the agreed PIAWE of \$2,439.69, the resulting amount is still in excess of 80% of PIAWE. Eighty per cent of \$2,439.69 is \$1,951.75. This sum is less than the maximum weekly compensation amount provided for in s 34 of the 1987 Act for the period from 9 May 2017.
119. The applicant submits that helping in the family business that cannot be considered to be suitable employment.
120. Dr Rose considered in August 2016 that the applicant had very little if any current fitness for work and doubted that Mr McKell could do any work other than the three and a half hours a week that he was spending doing the physical chores at the units managed by him and his wife.
121. In September 2017 Dr Parsonage considered that the applicant was not entirely incapable of working at all.
122. In my view that applicant has no capacity for suitable employment. I accept that his current "work" in the family holiday rental business is not indicative of any capacity for suitable employment. Neither Dr Rose nor Dr Parsonage considers that the applicant has any greater capacity for work.
123. There will therefore be an award in favour of the applicant for weekly benefits pursuant to s 37(1) of the 1987 Act.

⁴² T-2 68.05 – 68.20.

⁴³ Reply p 76.

124. There will be a general order in favour of the applicant for medical expenses pursuant to s 60 of the 1987 Act.
125. The matter will be referred to an Approved Medical Specialist (AMS) for assessment of permanent impairment as a result of injury on 1 September 2014.

SUMMARY

126. The applicant sustained psychological injury arising out of or in the course of his employment with the respondent on 1 September 2015.
127. The injury was caused by action taken or proposed to be by the respondent with respect to performance appraisal.
128. The action taken or proposed to be taken by the respondent with respect to performance appraisal was not reasonable.
129. As a result of the injury the applicant had no capacity for suitable employment from 9 May 2017 to date.
130. The respondent is to pay the applicant \$1,951.75 per week from 9 May 2017 to date pursuant to s 37(1) of the 1987 Act.
131. The respondent is to pay the applicant's costs and expenses pursuant to s 60 of the 1987 Act.
132. The matter is remitted to the Registrar for referral to an AMS assessment of permanent impairment as a result if injury on 1 September 104.
133. The documents to be referred to the AMS are
- (a) the Application and attached documents;
 - (b) Reply and attached documents;
 - (c) Application to Admit Late Documents dated 30 August 2019 lodged by the applicant with extracts of clinical records of Dr A McColl attached, and
 - (d) Application to Admit late documents dated 5 September 2019 lodged by the applicant the following attachments:
 - (i) clinical records of Ms Oxley, and
 - (ii) extracts of clinical records of Dr B D Parsonage.

