

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

MATTER NO: 977/20
APPLICANT: Michele Holmes
RESPONDENT: State of New South Wales
DATE OF DETERMINATION: 7 May 2020
CITATION: [2020] NSWCC 142

The Commission determines:

1. The applicant sustained a psychological injury arising out of or in the course of her employment on 5 June 2019 (deemed).
2. The applicant's employment was the main contributing factor to her injury.
3. The applicant was paid weekly compensation from 7 June 2019 to 29 September 2019.
4. The applicant had no current work capacity from 5 June 2019 to 13 January 2020.
5. The applicant's psychological injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to performance appraisal and/or discipline.

The Commission orders:

6. The respondent to pay the applicant \$970.66 per week as adjusted from 30 September 2019 to 13 January 2020 pursuant to section 37(1)(a) of the *Workers Compensation Act 1987*.
7. The respondent to pay the applicant's reasonably necessary medical expenses pursuant to section 60 of the *Workers Compensation Act 1987*.

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

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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Michele Holmes (the applicant) is 60 years old and commenced employment with the State of New South Wales (the respondent) on 7 May 2007 and in the last eight years, she worked in a revenue officer within the Hunter New England Local Health District at Waratah in New South Wales. She resigned on or about 8 December 2019.
2. The applicant indicated that she ceased work on 5 June 2019. This seems to have been the last day that she was physically at work. The leave record shows that the applicant took three days of sick leave from 5 June 2019 to 7 June 2019, a rostered day off on 12 June 2019, two days' leave without pay on 13 June 2019 and 14 June 2019, and two days of annual leave on 17 June 2019 and 18 June 2019. The notice of injury completed by the respondent on 22 June 2019 suggests that the applicant ceased work on 19 June 2019.
3. On 5 June 2019, the applicant consulted her general practitioner, Dr Darji, who provided her with a certificate of unfitness due to reactive depression and anxiety. The applicant was paid provisional payments of compensation from 7 June 2019 to 29 September 2019.
4. On 28 August 2019, QBE Insurance Australia Ltd (the insurer) issued a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), disputing that the applicant had sustained an injury and that her employment was the main or a substantial contributing factor to her condition. The insurer denied that the applicant was incapacitated as a result of a work injury, and that medical and related treatment expenses were reasonably necessary.
5. In the alternative, the insurer denied that any compensation was payable for the applicant's psychological injury because it was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to performance appraisal, discipline and the provision of employment benefits. It cited ss 4, 4(b), 9A, 11A, 33, 59 and 60 of the *Workers Compensation Act 1987* (the 1987 Act).
6. On 30 January 2020, the applicant's solicitor requested that the insurer review its decision and advised that the applicant intended to claim weekly compensation and medical expenses.
7. On 13 February 2020, the insurer reviewed its decision pursuant to s 287A of the 1998 Act. It confirmed that it maintained its position, but the defence pursuant to s 11A of the 1987 Act was based on reasonable action taken or proposed to be taken by the respondent with respect to performance appraisal and discipline.
8. By an Application to Resolve a Dispute (the Application) registered in the Workers Compensation Commission (the Commission) on 24 February 2020 and amended at the conciliation conference, the applicant claims weekly compensation from 30 September 2019 to 13 January 2020 pursuant to s 37 of the 1987 Act and medical expenses pursuant to s 60 of the 1987 Act due to a psychological injury sustained during the course of her employment on 5 June 2019 (deemed).

PROCEDURE BEFORE THE COMMISSION

9. 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.

ISSUES FOR DETERMINATION

10. During the conciliation conference, it was agreed that there was no dispute that the applicant suffered a psychological injury as a result of the events at work.
11. The parties agree that the following issues remain in dispute:
 - (a) whether the applicant's psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect of performance appraisal or discipline – s 11A (1) of the 1987 Act;
 - (b) extent and quantification of the applicant's capacity – ss 36 and 37 of the 1987 Act, and
 - (c) the respondent's liability with respect to the payment of medical expenses – s 60 of the 1987 Act.

Documentary evidence

12. 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 received on 7 April 2020, and
 - (d) Application to Admit Late Documents received on 15 April 2020.

Oral evidence

13. Neither party sought leave to adduce oral evidence or cross examine any witnesses.

REVIEW OF EVIDENCE

Applicant's statements

14. The applicant provided a statement on 5 July 2019. He described the difficulties that she experienced at work since January 2019. These can be summarised in point form as follows:
 - (a) Argumentative responses from staff who were refusing to take telephone calls. Jenelle Hawkes-Daniels was rude, abrupt and refused to take the calls. Her supervisor, Kelley Martin, told her that she would address this problem with the staff concerned she raised this at staff meetings. After a group email, there was an improvement regarding the call issue.
 - (b) Disagreement with Dianne Burns in December 2018. Ms Martin spoke to Ms Burns. She denied that she had entered Ms Burns' work area. The applicant felt that this incident had not been properly investigated.
 - (c) Ms Burns ignored her for a number of months. The applicant raised this with Ms Martin, but there were no directives of substance issued.
 - (d) The water maintenance issue when the applicant was wrongly accused of suggesting that this was the responsibility of HR. She was summoned to a meeting with a support person to explain. She denied the allegation and felt that Ms Martin was implying that she was lying. She was upset and was crying.

Ms Martin declined to inform her who had made the allegation. Ms Martin informed her that the staff member had retracted the allegation and confirmed that the applicant was referring to an OH&S issue.

- (e) Scanning duties were given to her in January 2019. This was at the other end of the office. A scanner was purchased and located near her desk in February 2019.
- (f) Regular 15 minute meetings at 8.45 am every Monday from mid-February 2019 to check the scanning was done correctly and whether there were any issues with telephone call transfers. The applicant initially considered that this was reasonable, but when they continued, she questioned why they were necessary when her workstation was located near Ms Martin's office. Ms Martin advised that she wanted to check on her and make sure that she was all right. When the applicant asked whether there was any problem with her work, Ms Martin did not respond. The meetings resumed after she returned from leave in May 2019.
- (g) Meeting on 21 May 2019. The applicant was apprehensive about this meeting and told Ms Martin via email that she preferred not to attend due to stress. She had previously gone home from work following a panic attack after her dealings with Cheryl Howard. When she attended the meeting on 21 May 2019, Ms Martin said that she wanted to discuss "excessive leave". The applicant referred to her shoulder injury and the provision of medical certificates, and she questioned the periods identified by Ms Martin. The applicant agreed that two hours taken off work could be taken from her annual leave. She asked Ms Martin why the weekly meetings needed to continue, but Ms Martin said that they only needed to meet to discuss her sick leave. She became upset in this meeting and felt that she had been "railroaded".
- (h) Meetings running overtime. The applicant raised a concern about the length of the meetings, her sick leave, and bullying in an email on 28 May 2019. She felt that the meetings only dealt with routine matters, and in some instances, Ms Martin indicated that she just wanted to check if she was okay. The applicant did not feel that her response adequately addressed her concerns.
- (i) Conduct of Cheryl Howard. Ms Howard became angry, and would swear and bang things down at work. The applicant was often on the receiving end of these reactions, and she raised her concerns with Ms Martin via email on 24 May 2019. On 3 June 2019, after the applicant explained the protocol for billing after motor vehicle accidents, Ms Howard slammed things down, yelled and swore at her before she stormed out of the office. The applicant raised this issue with Ms Martin after this incident, but Ms Martin did not give her any response of substance, despite the fact that she was upset. Justine McGrath had also witnessed this incident and did nothing.
- (j) Sick leave issue. On 3 June 2019, the applicant provided Ms Martin with various printouts from the pay office that confirmed the leave that she had taken. Ms Martin was not prepared to discuss the matter that day, but indicated that she would do so at the meeting on Thursday, 6 June 2019. The applicant felt that she was being evasive.

- (k) The applicant sent an email to HR regarding her concerns and the impact on her health. Ms Martin invited her into her office and asked her whether she felt that she should be at work. Jodie McDonald [sic] acted as her support person. The applicant was surprised because her absence on sick leave had been an issue. The applicant became upset and left the meeting. Ms McDonald [sic] questioned Ms Martin about the effect that this was having on the applicant, but Ms Martin said that she could not speak to her about this.
 - (l) Meeting on 4 June 2019. The applicant found that the staff were not speaking to her. This made her feel ostracised. She was called into Ms Martin's office, with Susan Field as her support person. Ms Martin presented her with an envelope and said, "This is for you". Ms Martin indicated that the letter was to do with her sick leave, which was going to be the topic for discussion at the meeting on 6 June 2019. The applicant refused to accept the letter without speaking to the union. She broke down and cried. She said, "You have humiliated, bullied and intimidated me." She stated that her job was straightforward and there was no justification for the continuing meetings. The applicant also questioned whether Ms Martin had ever made a genuine enquiry about her, particularly after the emails she had sent. Ms Martin said that she had taken steps to address her concerns.
 - (m) The applicant left the meeting in a state of distress with the letter, but she could not find it when she arrived home. The next morning, she rang a number of staff members to check if it was on her desk, but nobody answered. She eventually spoke to Adrienne Prisk and asked to speak to Ms Field, but she was told that Ms Field was too busy. Ms Martin was contacted, and she could not find the letter, so a copy was emailed to her. She also received a copy in the mail three days later.
 - (n) The applicant was off work from 5 June 2019 to 7 June 2019 without pay despite providing a medical certificate for her absence. She was contacted by Jemma of HR on 5 June 2019, but she was not interested in listening to her concerns.
15. The applicant stated that she consulted her doctor and obtained medical certificates. On 11 June 2019, she submitted a formal complaint to HR regarding Ms Martin, but she did not use the correct form. The applicant had not completed another form.
16. On 13 June 2019, the applicant received an email from Ms Martin, who advised that she intended to discuss her email on her return to work. Ms Martin later directed her to contact her each Monday to advise her status. She had done this, but she had been advised by her treating clinicians to stop doing so due to her stress. Her position had been filled by two new staff members despite earlier advice that there were no positions available for her.
17. The applicant stated that she was anxious, depressed and lacked motivation and confidence. She experienced panic and denied having past psychological injuries or conditions, although she had seen a doctor about when she was upset about her daughter. She could not recall receiving treatment. She had seen a counsellor through the respondent's counselling service and a psychologist.
18. In her statement dated 7 February 2020, the applicant advised that she still suffered from anxiety and major depression, and she had not been able to obtain appropriate treatment. She struggled to function, concentrate and perform activities of daily living. She had lost her livelihood and her confidence. She had trouble sleeping due to her financial situation and this had aggravated her depression and anxiety. She was finding it difficult to survive on her Centrelink payments which commenced about four months earlier. She was unable to socialise and her old friends from work did not associate or speak to her anymore.

19. The applicant provided a statement on 6 April 2020 in response to the statements of the respondent's employees. I will comment on her responses when discussing the statements below.

Reports and certificates of Dr Darji

20. Dr Darji completed a mental health plan on 19 June 2019. He recorded a history of symptoms of anxiety and stress secondary to work issues that had been building up for many months. These included bullying, difficulties with a work colleague and her manager not addressing the problem, the lack of sick leave entitlements, co-workers refusing to acknowledge or speak to her and feeling that she was ostracised. She experienced panic attacks, and worried about how she could ever return to work. The doctor noted predisposing factors were her daughter's personal health issues and relationship abuse.
21. Dr Darji diagnosed reactive anxiety and depression "post cumulative stressor incidences at work". He recommended medication and psychological counselling.
22. In a report dated 8 July 2019, Dr Darji advised that the applicant's depression and anxiety was caused by cumulative events that included her inappropriate interactions with a work colleague, a lack of support, and being victimised and belittled by her manager.
23. The clinical notes of Dr Darji commence on 4 March 2019 and conclude on 10 October 2019. On 4 March 2019, Dr Darji recorded that the applicant had split with her partner and her mentally unwell daughter had threatened to kill her. The doctor recorded a past history that included anxiety, but the reason for the consultation was for treatment of a middle ear infection.
24. On 5 June 2019, Dr Darji reported as follows:

"currently experiencing bullying at work
another colleague is making her life difficult
feels manager not addressing the problem they sit/work in close vicinity of each other
lots of inappropriate behaviours which Michele feels crosses the line, but manager not acted on it
Michele's performance isn't an issue
this has been on-going for at least 6 months"
25. Dr Darji noted complaints of anxiety and panic attacks, chest pains, feelings of being overwhelmed, inability to cope, poor appetite and sleep, and constant worry. He noted that the applicant had been told to attend a meeting, but she was not allowed to discuss the bullying because it had to be put in writing. He also reported that the applicant had been attending 15 minute meetings every Monday for the past few weeks, and she felt degraded and humiliated. She had seen an EAP counsellor at work and the union considered that she was being micromanaged.
26. Dr Darji noted a background of depression and anxiety and reported that the applicant had been taking Efexor. He diagnosed work related stress and prescribed further medication.
27. On 12 June 2019, the doctor noted that the applicant had been called into the office and was told that she should be at work as she had no sick leave left. She complained that 10 people in the office did not acknowledge or speak to her. She put in an official complaint of bullying and had concerns about how she could return to the office. The applicant also disclosed her daughter's health and personal issues.

28. On 19 June 2019, the applicant advised the doctor that her official complaint had been rejected by HR because it had not been made on the correct form. The doctor diagnosed reactive depression and anxiety. Her manager was also sending her “emotive” text messages.
29. On 25 June 2019, Dr Darji recorded that the applicant felt belittled because she was required to report to her manager every Monday.
30. On 1 August 2019 and 5 August 2019, the doctor reported that the applicant had severe symptoms of anxiety, frustration and feelings of victimisation. She was annoyed and humiliated because she had to be photographed with her possessions from work. The remaining entries detail her symptoms, the consultations with her psychologist and her dealings with the insurer and the investigator. She felt humiliated when she read the statements of her co-workers.
31. Dr Darji issued certificates that certified that the applicant had no current work capacity from 6 June 2019 to 20 October 2019 due to reactive depression and anxiety caused by a build-up of work issues over many months.

Report and clinical notes of Cameron McAndrew

32. In a report dated 10 July 2019, Mr McAndrew, the applicant’s psychologist, diagnosed anxiety and panic attacks related to workplace bullying, with a focus on the requirement that she keep Ms Martin informed about her recovery state via text each Monday. This was undermining her mood and state of mind and he recommended that it stop.
33. In a report dated 22 August 2019, Mr McAndrew confirmed that the applicant had been experiencing panic attacks, anxiety and depression. She was socially withdrawn and the requirement to email a certificate and inform her employer about her wellbeing was impacting on her. The applicant had also been bullied by the insurer and the need to be photographed. He stated that these events were undermining her wellbeing and recovery.
34. The clinical notes commence on 10 July 2019 and conclude on 24 September 2019. On 10 July 2019, Mr McAndrew recorded a history of the applicant being bullied by a colleague, inaction by her boss and HR, the sick leave issue, the water maintenance issue, and being ostracised at work. He noted that before the applicant ceased work, she was handed an envelope without being told about the contents, and her telephone calls were ignored after she left work. She felt at breaking point when she left work and suffered an anxiety attack.
35. At the consultation on 14 August 2019, the applicant complained of feeling humiliated when she was photographed with her personal possessions from work. She had also suffered an anxiety attack when talking with her case manager.

Report of Dr Canaris

36. Dr Canaris examined the applicant on 7 January 2020 and reported on 13 January 2020. He noted that the applicant had to report to Ms Martin when problems arose, and she had to continue to attend weekly meetings, even when the issues were resolved. The applicant asked if there were any issues with her work and was told there were no difficulties.
37. The applicant told the doctor that she found the actions of Ms Howard, who often slammed drawers and swore, unpleasant and distressing. She asked Ms Martin to address this and move her away from Ms Howard, but nothing happened.

38. The applicant claimed that Ms Martin picked on her, and it reached a stage where she would not see her without a support person. The applicant cited the water maintenance issue and the inference that she was a liar, which upset her. She was questioned about excessive leave following her shoulder injury, even though she had medical certificates and a printout showed that there were no issues.
39. The applicant stated that she was intimidated by the regular meetings with Ms Martin, who repeatedly asked her if there were any issues with her work. When she took a few days off work due to stress, staff members would not talk to her and she felt ostracised. When she was handed the letter on 4 [sic] June 2019, she refused to accept it, and she felt that she was being set up. When she rang the office in search of the missing letter, no one would answer the telephone. The letter referred to performance issues and her manner. She was put off work and she had to be photographed with her possessions, which she found humiliating.
40. The applicant complained of feelings of worthlessness, poor appetite, sadness, sleeping problems, financial issues and worry about her future, loss of credibility and trust in people, anger, loss of social contact with family and friends, loss of confidence and motivation, and forgetfulness. She was taking medication and consulting with her psychologist. There were past family issues with two of her partners. In respect of the issues with her daughter, she had “managed to walk away from it now”.
41. Dr Canaris stated that the applicant may have had a mood disorder before the onset of her work difficulties, but this had been in substantial remission. He considered that she had suffered a significant aggravation as a result of the workplace problems, and that she had a Major Depressive Disorder. The doctor thought that the applicant had understandable reasons for perceiving that her employer’s treatment was unreasonable.
42. Dr Canaris stated that the applicant was not “presently well enough to work and her time off work to date has been reasonable and necessary”. He felt that her condition had not stabilised for assessment of whole person impairment.

Reports of Dr Martin

43. Dr Martin reported on 19 September 2019. He recorded that the applicant felt that she was bullied and micromanaged by her manager, who insisted on calling frequent meetings. The applicant thought that many of the issues raised were trivial and ridiculous. Excessive sick leave was discussed, and she found the situation stressful. A colleague, who worked nearby, was always swearing and slamming drawers, and other employees would not take phone calls. This caused her anxiety.
44. The doctor reported that the applicant was upset and anxious when she was accused of lying in respect of the water maintenance issue. Another colleague screamed at her and she asked that this be addressed. She was ignored and ostracised by colleagues. She was given a letter in a meeting, but her manager would not tell her what the letter was about. She later learned that it concerned excessive sick leave and performance issues, which had never been formally raised with her. At this stage, she “lost it” and experienced severe anxiety and panic-like symptoms with difficulty breathing. Her situation was exacerbated by her subsequent dealings with the respondent.
45. The doctor recorded details of the applicant’s symptoms. She denied any formal history of mental health problems. There was mention of her daughter’s issues, and she confirmed that the eight year relationship with her partner ended two years ago.

46. Dr Martin diagnosed an Adjustment Disorder with depression and anxious mood due to her perception of unfair treatment in the workplace. He considered that there were no external factors or pre-existing conditions and the workplace issues and events were a substantial contributing factor to her psychological injury.
47. Dr Martin stated that the sooner the applicant returned to work the better. He advised that a return to her pre-injury employment would likely result in a worsening of her anxiety. Given her psychological and physical issues, he recommended an assertive vocational assessment. He expected that the applicant could probably return to work relatively quickly in a suitable environment on a gradual basis of perhaps four hours per day/ three days per week, and increase her hours over a few weeks until she achieved fulltime duties.
48. In his report dated 28 November 2019, Dr Martin confirmed that stress from work performance issues was a substantial contributing factor to her psychological injury, and he had significant doubt that she was a reliable historian, because she had not disclosed her treatment for previous psychiatric issues regarding her daughter and her partner.
49. Dr Martin stated that pre-existing issues were likely to be relevant and he was “slightly sceptical” of her claim of being bullied at work. He agreed that given that she had been taking antidepressants for many years, it was probably reasonable to accept that the applicant had been suffering from a pre-existing form of mood disorder, and that her current symptoms represented an aggravation acceleration, exacerbation or deterioration of the underlying disease.
50. Dr Martin concluded that her incapacity and need for treatment had been predominantly caused by the respondent in relation to performance management, in the form of regular performance meetings and reports of inappropriate behaviour.

Leave Matters for NSW Health Service document and printouts

51. The “Leave Matters for NSW Health Service” policy document sets out the requirements that includes four weeks annual leave each year, sick leave based on individual Awards, and other forms of leave.
52. The respondent has included a printout of the applicant’s leave record. This shows time that the applicant was absent from work. I will comment on these printouts later.

Emails

53. On 16 January 2019, the applicant complained to Ms Martin via email about the call issues when she was in the switch and her inability to cope with the abuse, her request to be moved elsewhere in the office, the stress that she was suffering, her concern that the issue with Ms Burns had not been dealt with correctly, the water maintenance issue allegation and its effect on her wellbeing.
54. In her response on 17 January 2019, Ms Martin stated that she was glad that the applicant had been able to contact EAP. She confirmed that she had raised the telephone issue on numerous occasions at staff meetings and directed them to follow the proper procedure.
55. Ms Martin explained the results of her investigation of the incident with Ms Burns. Both had used inappropriate comments, and she reminded them about the standards of behaviour. Ms Martin indicated that the comments may not have been made if the applicant had not approached Ms Burns. She was satisfied that no further action was required about this incident or in regard to the water maintenance issue, which had been resolved.

56. Ms Martin was concerned that the applicant had approached HR, so she reminded her of the proper protocol. Ms Martin felt that she had been fair in the meeting and that she had addressed the issue.
57. Ms Martin stated that the applicant could make comments, but they had to be made to her direct line manager, who could help her and avoid increasing her anxiety. Ms Martin declined her request to be relocated.
58. On 29 January 2019, the applicant complained about a telephone abuse from Ms Daniels, and the fact that Ms Martin would not allow her two days break from switch duties.
59. On 21 May 2019, the applicant complained about the need to have the weekly meetings and indicated that she felt like a child. She thought that she did her job well and she hoped the meetings would be informal, otherwise she would take a support person.
60. In response, Ms Martin said "I want to make sure you are ok". She advised that she wanted the weekly meetings to resume as she wanted to support her in her duties. Ms Martin sent the applicant an email about her excessive leave and this issue was to be discussed at the meeting on 24 May 2019. This email is not in evidence.
61. On 24 May 2019, the applicant complained about sitting near Ms Howard and her behaviour, such as slamming things and swearing. She felt that this was unfair. She complained that Ms Martin was concerned and was checking on her, but nothing was being done. The applicant stated that she could not take it anymore.
62. On 28 May 2019, the applicant complained about the length of a meeting and the fact that she had to go home. She felt that her concerns were not being treated seriously. She complained about the sick leave issue, even though she had certificates for her absences, and she questioned Ms Martin as to what she expected her to do about it.
63. The applicant complained that she was being intimidated and bullied. She questioned the need to have meetings when she was coping with her work. She had been doing the job for 16 months without any positive feedback, and she commented that Ms Martin only wanted to see if she was okay. The applicant complained that the meetings were more stressful than positive.
64. In her response on 29 May 2019, Ms Martin agreed that the meeting went longer than 15 minutes, but this was because the applicant wanted to discuss her email. Ms Martin stated that the leave taken on 16 May 2019 had been addressed on 21 May 2019. She stated that she hoped the call transfer issue during lunch breaks would be finalised.
65. Ms Martin explained that they had discussed the leave policies before. All staff were required to comply. She indicated that it was her job to ensure that the guidelines were followed, including the requirement to provide medical certificates. Ms Martin was required to report excessive/unplanned leave to her superiors.
66. Ms Martin stated that she was pleased that the scanning and telephone issues were in order. She confirmed that they had agreed to meet on a weekly basis to ensure that there would be improvement and consistency. Ms Martin advised that she could not find an email in which she declined to support RU OK day.
67. Ms Martin advised that they had met weekly during February 2019 and March 2019, and during those meetings, she provided feedback and guidance on the reception role. She had also provided procedures and explained the expectations to staff regarding call transfers and scanning. She offered the applicant the opportunity to discuss the email at a convenient time, or alternatively at the next morning meeting.

68. On 3 June 2019, the applicant complained about Ms Howard's behaviour. She explained that she had to speak to Ms Howard about the information that she was giving over the telephone. The applicant stated that she felt shaky and had a headache. She did not want to put up with this behaviour and asked how many more times did she have to ask Ms Martin to address the situation.
69. On 11 June 2019, the applicant sent an email to Renee Martin and indicated that she was making a formal complaint against Ms Martin for bullying. She said that she found the meetings humiliating and degrading and she could not work like that anymore. She also referred to the abuse from Ms Howard. She had asked to be moved, but Ms Martin told her that there was no place to go.
70. On 13 June 2019, Ms Martin responded to the applicant's email dated 3 June 2019. She stated that she hoped to discuss her email sooner, but this was not possible because the applicant was on leave. She assured the applicant that she took her allegations seriously and had begun to look into the matter.

Meeting letter 4 June 2019

71. On 4 June 2019, Ms Martin gave the applicant a letter regarding a meeting that was to be convened on 6 June 2019. The letter advised as follows:

"Dear Michele,

Re: Attendance and Workplace Behaviour

I refer to previous conversations and correspondence with you regarding your health, wellbeing and attendance and recent concerns regarding your workplace behaviour. As discussed today, you are required to attend a meeting to discuss these issues.

The issues of concern are:

- Excessive sick leave
- Frequency of unplanned time off
- Style of communication with colleagues and your manager

I would like to discuss these with you in order to ensure you are aware of the issues; provide you an opportunity to respond to these Issues; clarify the expectation of you in relation to your role as a Revenue Officer (A04); identify whether any measure(s) can be taken by the service to assist you in these areas and; seek your agreement to rectify these areas. An Attendance Agreement and a Record of Discussion in relation to the Workplace Behaviour will be developed to support you further.

A meeting for this purpose that you are required to attend will occur on:

Date: Thursday 6 June 2019
Time: 1.30pm
Location: CST Meeting Room 1004

As discussed, Ms Renee Martin, HR Consultant will be attending the meeting for the purpose of supporting the process. While a support person is not required, you may bring one if you wish.

I encourage you to contact the Employee Assistance Program on 4985 3289, if you feel confidential discussions with a qualified counsellor would be of assistance. This service is available at no cost to you, and as stated above is absolutely confidential."

Statement of Justine McGrath

72. Ms McGrath provided a statement on 16 July 2019. She confirmed the events regarding the water maintenance issue, and she was present when the staff member made the allegation. She stated that the applicant became upset and was heated, but she could not recall the conversation. She thought that Ms Martin remained professional and she was only making an enquiry and was not accusing the applicant. When Ms Martin ascertained that the allegation was incorrect, she met with the applicant and apologised for the misunderstanding.
73. Ms McGrath confirmed that she was present in Ms Martin's office when the applicant complained about verbal exchange with Ms Howard in late May 2019. The applicant claimed that Ms Howard should not have taken the call and she alleged that Ms Howard had yelled at her. The applicant did not ask Ms Martin to do anything.
74. Ms McGrath confirmed that she was present in Ms Martin's office when she spoke to Ms Howard. Ms Howard stated that the applicant had interfered, and she had directed her in a particular way, which Ms Howard objected to. Enquires of other staff members could not confirm the applicant's complaint. Ms McGrath had observed Ms Howard being frustrated at work without directing it at anyone. The applicant wanted some action to be taken.
75. Ms McGrath stated that she was aware that the applicant had complained that staff had been unreceptive when she tried to put calls through to them. Ms Martin addressed this by preparing a written reception procedure that was sent to all staff and she raised it at team meetings.
76. Ms McGrath was aware that the applicant had been attending regular weekly meetings with Ms Martin in order to assist her in her work duties. The applicant had informally referred to issues with her partner and daughter, and Ms McGrath had not noticed any change in her demeanour.
77. Ms McGrath stated that on about 3 June 2019, she and other staff members heard the applicant yelling at Ms Martin in a meeting. The applicant had taking significant amounts of leave, which had been a long-term issue, and Ms Martin was seeking to address the nature and content of emails that she had been sending to her. Some of the emails were quite erratic and demanding at times.
78. Ms McGrath stated that Ms Martin had conducted herself and corresponded with complete professionalism at all times. She was supportive of the applicant and they had done as much as they could to accommodate and support her.

Applicant's response

79. In her statement dated 6 April 2020, the applicant took issue with the accuracy of Ms McGrath's statement. She stated that Ms Martin refused to identify the staff member who had made the allegation regarding the water maintenance issue because this was confidential. She was upset when she was accused of lying, and she could not recall receiving an apology from Ms Martin.
80. The applicant asked Ms Martin to do something about Ms Howard because she was giving out wrong information about an account and then yelled at her when she tried to intervene. She was not aware that Ms Martin spoke with Ms Howard. She and other staff had complained about Ms Howard's behaviour. The applicant had not spoken directly to Ms Howard because she found it too confrontational. Ms McGrath had told her to email Ms Martin.

81. The applicant stated that she had doctor's certificates for her absences in April 2019. She questioned Ms McGrath's personal views about the emails that she sent Ms Martin, and she disagreed with her views about Ms Martin's conduct.

Statement of Susane Field

82. Susane Field provided a statement on 16 July 2019. She was the applicant's support person at the meeting on 4 June 2019. She stated that Ms Martin attempted to give the applicant a letter, but she refused to accept it. The applicant raised her voice and referred to past issues, but nothing had been resolved. Ms Martin explained that she needed to carry out proper investigations.
83. Ms Field stated that the applicant became defensive and said that all she wanted to do was to do her job. She claimed that she was being singled out by having to attend regular weekly meetings. She referred to having issues with her ex-partner and her daughter. The applicant then started to cry and said, "I'm not accepting the letter," before she left.
84. Ms Field stated that she did not answer her phone when the applicant called later that night and the next day. She did not answer the calls, because she was upset, and she felt uncomfortable and embarrassed by the way the applicant had reacted at the meeting. She did not want to have any further involvement.
85. Ms Field agreed that Ms Howard could be loud at times, but health issues had affected her. Ms Howard had worked with management in order to curb her reactions and she had appeared to be more settled.
86. Ms Field stated that she overheard the incident between the applicant and Ms Howard. Ms Howard was confused about where to direct a call, and the applicant was speaking over her and giving her directions. She heard nothing more other than a door being slammed.
87. Ms Field stated that the applicant had not said anything to her about her weekly meetings. She had heard the applicant unsuccessfully trying to put calls through to staff, and Ms Martin had addressed this issue at staff meetings. She was aware of the applicant's personal issues, and she appeared to be upset when discussing these matters.

Applicant's response

88. The applicant stated that she approached Ms Field to be her support person at a meeting which had not been scheduled. She denied that Ms Martin had informed her what was in the unsealed envelope. She agreed that she refused to accept the envelope because she was not aware of the contents of the envelope. She denied that she was aggressive and that she had mentioned her private life.
89. The applicant agreed that she had called Ms Field and asked about the whereabouts of the letter. She stated that Ms Field was aware that her weekly meetings were causing her concern, anxiety and stress, because they often discussed this over coffee.
90. The applicant stated that she was not aware that the calls that she put through were to the wrong staff. She approached Ms Martin and told her that staff were refusing to take calls. This was addressed in staff meetings and they decided to develop a receptionist procedure.

Statement of Adrienne Prisk

91. Adrienne Prisk provided a statement on 16 July 2019. She stated that the applicant called the office in early June 2019 to speak to Ms Field. Ms Field was distraught and crying, and claimed that the applicant had been harassing her regarding the meeting. Ms Field said that she did not want to speak to her.

92. Ms Prisk confirmed that the applicant openly complained about the call transfer issue, which was addressed at team meetings. The applicant also complained about the weekly meetings. She understood that Ms Martin was holding these meetings to assist the applicant in her work. The applicant seemed to take this personally, and complained of being micromanaged. She also referred to Ms Martin as a “bitch”, and that she hated her.
93. Ms Prisk stated that the applicant experienced difficulties in managing her work at times, but she could not be specific. She agreed that Ms Howard tended to raise her voice and bang things down at times if she became frustrated, but this was not directed at anyone. She had not witnessed any exchanges of significance between the applicant and Ms Howard.
94. Ms Prisk confirmed that she had heard the applicant yelling at the meeting in early June 2019. She saw the applicant walking out of the office and she looked upset. She asked the applicant if she was okay, and she responded, "No, not really". She was aware of the applicant's personal issues and she appeared unhappy when discussing this.

Applicant's response

95. The applicant stated that Ms Prisk did not approach her after the meeting on 4 June 2019, because she had already left work for the day. This was not a scheduled meeting and she agreed that she was vocal, totally blindsided, confused and distressed because Ms Martin would not disclose what was in the letter. She denied that she was aggressive.
96. Ms Prisk told her that no one in the office wanted to speak to her when she called on 5 June 2019. She was distressed and hung up. She tried to call another colleague, but she did not answer her phone. This added to her anxiety. She was trying to locate the letter.
97. The applicant stated that she had never made any comments to Ms Prisk about Ms Martin, or about her private life, because Ms Prisk was the office gossip. She also worked in another part of the office, so she would not have knowledge of any difficulties that she was having with her work.
98. The applicant stated that she returned to work in January 2019 after he shoulder surgery. She then took 3.5 weeks annual leave in April 2019. Ms Prisk sent numerous emails to Ms Martin regarding Ms Howard's behaviour, and she said that she was moving desks because of her disdain of Ms Howard.

Statement of Cheryl Howard

99. Cheryl Howard provided a statement on 22 July 2019. She agreed that she had closed drawers in the work area quite heavily on occasions. She agreed that she was irritated by general work matters and stressors at times, but her conduct was not significantly different to others.
100. Ms Howard stated that she had lost patience with the technological systems at times and she had issues with answering the phones, which annoyed her on occasions. Her reactions were not directed at the applicant. She could not recall these matters being addressed with her by Ms Martin, but it was possible.
101. Ms Howard stated that on 3 June 2019, she was speaking to someone on the phone when the applicant started to talk over her and tell her how the call should be directed. The applicant went to see Ms Martin, who came to her desk to check that she was alright. Ms Martin did not say anything in particular. She handed a piece of paper with the caller's details to the applicant and she took it away. That was the extent of the exchange.

Applicant's response

102. The applicant stated that Ms Howard swore, slammed drawers and doors, and was very loud. She spoke inappropriately to customers and gave out wrong information. Ms Martin was aware of this conduct and did nothing to rectify it.

Statement of Kelley Martin

103. Kelley Martin provided a statement on 22 July 2019. She confirmed that the applicant was off work with a non-work-related shoulder injury from approximately July 2017 to late February 2018. She then worked on restricted duties until about March 2018, when she resumed work on switch duties in reception.
104. Ms Martin stated that the applicant complained that staff were unreceptive or abrupt when refusing to take calls. Her enquiries indicated that on some occasions, the applicant had been trying to put calls through to the incorrect people. She had discussions with the applicant in an effort to educate and inform her, and told staff about the need to be receptive and professional when taking or referring on the calls. The applicant appeared to take the reactions by staff personally. Ms Martin drafted a phone procedure and emailed this to the work team in January 2019.
105. Ms Martin stated that in December 2018, the applicant tried to put a call through to Dianne Burns, but she did not realise that Ms Burns was already on a call. She was informed that the applicant approached Ms Burns and there was an argument. The applicant complained to her about the incident, and Ms Martin responded via email. She spoke with Ms Burns and told her that she needed to maintain professionalism when speaking to other staff. She counselled the applicant, noting that she had instigated and participated in the argument. No other formal action was taken or required.
106. Ms Martin stated that the call transfer issues were addressed at team meetings, and this issue resolved in time. She could not recall the applicant raising issues about Ms Burns not speaking to her, although it was possible. If that was the case, she would have reminded Ms Burns of their respectful workplace training.
107. Ms Martin referred to the water maintenance problem that arose in January 2019. She spoke to the applicant, who became angry and upset, and she confirmed that she said it was an OH&S issue and not a matter for HR.
108. Ms Martin stated that the applicant had previously approached HR, so she confirmed the appropriate protocol. Ms Martin spoke to the staff member, who acknowledged the error and apologised. Ms Martin met with applicant and informed her of outcome of her enquiry. She declined the applicant's request for the identity of the staff member's identity for privacy reasons and to avoid any ramifications.
109. Ms Martin stated that in February 2019, she commenced 15 minute meetings each Monday morning in response to emails that she had received from the applicant about being stressed. Ms Martin also wanted to address scanning issues.
110. Ms Martin stated that the applicant's stress related to day to day work matters, such as the call transfer issues and confrontations with staff. The meetings continued in February and March 2019 without issue. The applicant took long service for three weeks and returned to work in late April 2019.
111. Ms Martin stated that in mid-May 2019, she began to receive "erratic" emails from the applicant, so she reinstated the weekly meetings in order to monitor her welfare and to address other issues, such as the tone of her emails and the protocol for communications. These issues were not discussed before the applicant ceased work.

112. The applicant had questioned her about the need for these meetings, and she responded that she wanted to ensure her wellness at work and to discuss any issues that arose. The meetings were not exclusive to the applicant. She also met with other staff members regarding procedural and process-based matters.
113. Ms Martin stated that the only time that she could recall a meeting running significantly overtime was in May 2019, when a number of issues were discussed at the applicant's request. The meetings generally ran for five or ten minutes.
114. Ms Martin stated that the applicant had raised concerns about Ms Howard, who acknowledged that she had been angry or frustrated with staff including the applicant. Ms Martin counselled her and emphasised the need to maintain professionalism in the workplace. Ms Martin considered that she had addressed the issues appropriately informally, and she saw no need for any formal process.
115. Ms Martin stated that she wanted to meet with the applicant to discuss her ongoing absences. The applicant had told her that she was not stressed about her work, but she continued to take time off. This was of concern, so she wanted to understand whether there were any ongoing work issues that she could address.
116. Ms Martin confirmed that at the meeting on 3 June 2019, the applicant raised the issue of her sick leave, but she told her that this discussion would need take place later in the week due to end of month reporting. The applicant was unhappy when she heard this.
117. Acting on advice from HR, Ms Martin scheduled a formal meeting with the applicant to address the emails that she had been sending to her. On 4 June 2019, she asked the applicant to meet with her on 6 June 2019 to discuss the leave issue and the emails that she had been sending. She told the applicant that she had a letter formally inviting her to the meeting which would also be attended by someone from HR and Ms Field as her support person.
118. Ms Martin stated that the applicant responded angrily, raised her voice and indicated that she would seek union involvement. The applicant complained that she had found the ongoing meetings humiliating and she questioned the need for them. Ms Martin told her that she had raised issues of stress and she had been trying to help her. The applicant said, "Well, you never do anything." Ms Martin then referred to call procedure document and other steps that she had taken to assist her.
119. Ms Martin stated that the applicant was yelling, and she became tearful. She was surprised by her aggression. Ms Martin tried to remain calm and she did not raise her voice. She told the applicant that she only wanted to reach a solution. The applicant then left the meeting with the letter. The following day, the applicant called her and said that she could not find the letter. She told the applicant that she could not see it on her desk.

Applicant's response

120. The applicant stated that she was not aware that calls had been put through to the wrong staff. She denied that she had instigated the incident with Ms Burns. Ms Burns ignored her for some time, and she felt uncomfortable about this. Ms Martin was not prepared to participate in a meeting using the "straight talk" approach, and she told her to do it herself.
121. The applicant stated that Ms Martin had told her not to speak to HR about such matters as the water maintenance issue. She was upset because Ms Martin accused her of lying.

122. The applicant stated that the meetings were scheduled in February 2019 in order to make sure that everything was okay with the new scanning system. The meetings lasted more than 15 minutes and occasionally up to one hour.
123. The applicant denied that she was stressed by her day to day duties. Rather, her stress was caused by Ms Howard's behaviour which had not been addressed. She sought an explanation from Ms Martin on numerous occasions why the meetings had to continue, but Ms Martin never replied. At no stage did Ms Martin refer to her emails, welfare or wellbeing during the meetings. She was aware that no one else in the office was having meetings.
124. The applicant claimed that Ms Martin told her on 3 June 2019 that she wanted another meeting on the Thursday because of the excessive sick leave she was taking. The applicant contacted the pay office and obtained a printout, which did not accord with what Ms Martin was saying. Ms Martin was not happy about this.
125. The applicant stated that she asked Ms Martin to be taken off the switchboard on numerous occasions, but she was informed that there were no roles available. She refused to allow the applicant to work in an area of the office that was short a team member. Two people had been employed since she left work.

Statement of Jenna Bell

126. Jenna Bell provided a statement on 25 July 2019. She advised that Ms Martin contacted HR in January 2019 for advice as to how to address concerns regarding the applicant's health, leave and the way she communicated with her and other staff. Another HR officer, Renee Martin, took over the handling of the matter.
127. Ms Bell understood from her discussions with Renee Martin that Ms Martin was having catch-up meetings and the applicant was responding positively. In April or May 2019, Ms Martin raised similar concerns regarding the applicant's health, attendance and workplace conduct. Ms Martin advised that the tone of the applicant's conversations and some of her email correspondence was of concern. She was aware that Renee Martin advised Ms Martin to address these concerns at a meeting, which was not a disciplinary meeting, but it was a preliminary step to address Ms Martin's concerns and to develop strategies for improvement.
128. Ms Bell spoke to the applicant on 5 June 2019. The applicant initially indicated that she was off work due to stress and that she felt she was being bullied. The applicant referred to the letter that she had been given by Ms Martin. The applicant did not know why she was required to attend the meeting and she did not agree with the issues that had been raised in the letter. Ms Bell explained that the purpose of the meeting was to clarify her work issues and to discuss ways to improve and resolve them. The applicant raised her tone and referred to a number of issues, such as the incident on 4 June 2019 when a colleague screamed at her and no action had been taken. She told the applicant that she could submit a formal written complaint if she wished to. The applicant was upset during their conversation.
129. Ms Bell stated that the applicant said that she intended to see her doctor and confirmed that she was seeing somebody from the EAP. She invited her to discuss any concerns or complaints with Renee Martin, but it seemed that she did not feel comfortable speaking with Renee Martin or with HR, and she preferred to consult the union.
130. Ms Bell stated that the applicant indicated that she did not wish to attend her scheduled meeting because she did not agree with the issues in the letter. She wanted to talk about bullying and harassment, but she felt that she could not do so because this was not on the agenda. The applicant advised that she was shaking, and she sounded like she was on the verge of tears.

131. Ms Bell advised Renee Martin about the phone call and she indicated that she would ask Ms Martin to reschedule the meeting and to include the additional issues raised by the applicant. She confirmed that the applicant had sent an email about a bullying and harassment complaint against Ms Martin, but no formal complaint had been received.

Applicant's response

132. The applicant's response to Ms Bell's statement largely reiterates what she said in her primary statement and in comments about the statements of the other employees. Her response only minimally touches upon Ms Bell's statement.
133. The applicant stated that she had medical certificates to cover her absences from work following her shoulder surgery, and there were no issues with Ms Martin or other staff. She tried to stay positive during her regular Monday meetings, although she was humiliated by them and Ms Martin's questions. She stated that a 10 year old child could perform the scanning task. There were three other staff members that were performing these duties relating to the new system and they were not included in these meetings.
134. The applicant stated that she was taken away from her work duties drubbing the meetings, and she was concerned that her co-workers would have to do some of her work, and they would be getting annoyed with her. She became very stressed over this and it was creating animosity towards her. She claimed that some of her co-workers did not understand why the meetings were necessary. The discussion at the meetings only concerned feedback on the progress of the new program and there was no discussion about her performance, health issues or her sick leave.
135. The applicant disputed that Ms Martin had enquired about her health and wellbeing or how her time off work had been. The applicant confirmed that she was merely handed the letter by Ms Martin on 4 June 2019 without any explanation. She was very distressed when Ms Martin would not tell her what the letter was about.
136. The applicant denied that she told Ms Bell on 5 June 2019 that she was off work, because she had not seen her doctor. She asked Ms Bell about the letter, and the applicant told her that she was not aware of any of the conduct allegations. She had asked Ms Martin numerous times if there were any problems with her work performance or anything else, and she said there were no problems.
137. The applicant denied that she had ever refused to attend the meeting on 6 June 2019 because her allegations of bullying and harassment were not on the agenda. She did not attend because she was severely traumatised and anxious as a result of the way that she had been treated. She had not lodged an official complaint because of her mental state. She had not mentioned any bullying and harassment to Ms Bell because she considered that she was not approachable, and she would not support her.

Statement of Katie Beeton

138. Katie Beeton provided a statement on 16 July 2019. She observed that applicant appeared to take a lot of leave and that she called in sick. She was unaware of staff ignoring or ostracising the applicant.
139. Ms Beeton confirmed that she witnessed the call transfer issues, and the applicant had mentioned this to her. She appeared frustrated by this. Ms Beeton advised that she had similar experiences when she was working on the switchboard.

140. Ms Beeton was not aware of the applicant raising any issues with her attendance at the weekly meetings. She was aware of the applicant's work tasks and the various deadlines could cause pressure. The applicant often walked around the office for a "stretch", and when she was away from her desk, other staff members had to cover for her switch duties.
141. Ms Beeton agreed that Ms Howard tended to talk loudly, swore, banged things down in frustration and at times had lost her temper in reaction to certain work issues, but this was not directed at anyone. She had observed the applicant trying to assist Ms Howard by taking enquiries, but on some occasions, Ms Howard had taken offence and reacted by slamming drawers and appearing angry. Ms Beeton had seen the applicant trying to explain that she was only trying to help, but at other times, she had remained quiet.
142. Ms Beeton stated that she had asked to be moved away from Ms Howard because of her behaviour, and in the last few months, the applicant had appeared stressed at times. She did not want to discuss the applicant's personal issues.

Applicant's response

143. The applicant stated that she walked around the office as part of the OH&S regulations, or went to the toilet, which she did every two hours. She informed her co-workers, and this was more noticeable because she needed someone to cover for her switchboard duties.

Statement of Jodi McDonald

144. Jodi McDonald provided a statement on 22 July 2019. She advised that she was the applicant's support person at the meeting to discuss the water maintenance issue allegation. She confirmed that the applicant became very upset and appeared angry when was told about the allegation, and she asked whether she was disliked by staff. She also asked to be taken off the switchboard duties. Ms Martin indicated that she would investigate the matter.
145. At a further meeting that day, Ms Martin informed the applicant that the staff member had withdrawn the allegation. The applicant again became upset.
146. Ms McDonald stated that she attended the meeting on 4 June 2019. When Ms Martin asked the applicant if she was alright, the applicant responded "no, I'm not, but I'm here". Ms Martin informed the applicant that she wanted to have a meeting to discuss her excess leave and what strategies could be adopted to address this. The applicant became upset and questioned why a meeting was necessary, and also why they were continuing to have weekly meetings. The applicant said that she did not want to work with Ms Howard, who she claimed was yelling and angry about taking calls, but Ms Martin indicated that they were not there to talk about that issue.
147. Ms McDonald stated that within days of this meeting, she saw the applicant leaving work in a distressed state, and the applicant said "I've got to go. I've got to get out of here". The applicant called her the next day and asked if a letter that Ms Martin had given her at their meeting was on her desk. She looked but could not locate it. The applicant sounded very upset. Ms McDonald became distressed and was in tears after taking this call. She was later told by another staff member that she was not to talk to the applicant when she came back into the office, warning her that she "just don't want to get involved."
148. Ms McDonald stated that when the applicant eventually returned to the office, she noticed that no one was talking to her. The applicant said words to that effect before she left work.

APPLICANT'S SUBMISSIONS

149. The applicant's counsel, Mr Ty Hickey, submits that the respondent relies upon s 11A of the 1987 Act on the basis that the applicant's psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to performance appraisal and discipline. However, the dispute notices only referred to performance issues and management of her performance, which are not terms in the 1987 Act.
150. Mr Hickey submits that the precise incidents of any performance management were not identified in the notices or by the qualified specialists. Therefore, it is difficult to understand how one could say that the respondent took reasonable action with respect to performance appraisal and/or discipline where it does not identify the circumstances.
151. Mr Hickey submits that performance appraisal is not an on-going process, unlike discipline. The respondent gains no benefit from the evidence of Dr Martin, who only made a general statement about performance management issues. He noted that there were no external factors and he accepted that the applicant was genuinely distressed. Performance appraisal may have been raised regarding the applicant's excessive leave, but the insurer did not do so.
152. Mr Hickey submits that Dr Martin recorded that the applicant was being micromanaged and she perceived that she was being treated unfairly. There was a breakdown in communication, and performance management was raised as being the major stressor, but it is not clear what Dr Martin was referring to.
153. Mr Hickey submits performance management is not identified in the s 11A of the 1987 Act, and Dr Martin did not say that the respondent's actions had a whole or predominant causative effect. The respondent did not have the benefit of a medical opinion that explains why the injury was wholly or predominately caused by reasonable action. The authorities confirm that this is a requirement¹. Even if the interaction on 4 June 2019 was the whole or predominant cause, there was no evidence that the action was reasonable.
154. Mr Hickey submits that the applicant identified a number of events and the difficulties that she had with various work colleagues. The emails identify incidents and she advised Ms Martin about the difficulties that she was experiencing. The applicant also complained about the weekly meetings. These were true and real events, and they have not been denied by the respondent. The applicant referred to being stressed by her dealings with Ms Howard and the manner that she was spoken to by Ms Burns.
155. Mr Hickey submits that the emails show that she had ongoing issues. Ms Martin accepted that the events occurred, and they were not denied in the respondent's statements. The factual matrix is confirmed by the statements and the emails, and because the incidents were not denied. The applicant's last day of work on 4 June 2019 coincided with the last date of the on-going conduct of the respondent's employees.
156. Mr Hickey submits that when the applicant saw Dr Darji on 5 June 2019, he recorded a history that was consistent with her statement. The applicant's focus was not on the meeting that had been scheduled for the following day, but on the events that had been occurring on an ongoing basis for six months. There were a number of relevant factors.
157. Mr Hickey submits the mental health plan completed by Dr Darji described the applicant's work issues and the difficulties that she had with her work colleagues. Mr McAndrew recorded details of a series of events that the applicant faced at work.

¹ *Hamad v Q Catering Limited* [2017] NSWCCPD 6 [85] – [88] (Snell DP)

158. Mr Hickey submits that Ms McGrath confirmed that the applicant was upset and became heated at the meeting regarding the water maintenance issue and when the allegation was withdrawn.
159. Mr Hickey submits that Ms McGrath confirmed that there was an incident involving the applicant and Ms Howard, and when it was investigated, Ms Howard did not deny that it occurred. Ms McGrath commented that she had seen Ms Howard being frustrated at work, and her behaviour is described elsewhere in the evidence. The applicant's assertions were not denied, and they were merely downplayed by Ms Howard.
160. Mr Hickey submits that Ms Field recalled that the applicant had raised issues before the meeting on 4 June 2019, and these had not been resolved. She confirmed that the applicant had said that she felt that she was being singled out by Ms Martin because of the weekly meetings. This is consistent with the history given to her doctor and in her statement.
161. Mr Hickey submits that Ms Field commented about the behaviour of Ms Howard and the issue with staff members not taking calls from the applicant. This is consistent with the applicant's statement and is not denied by the respondent.
162. Mr Hickey submits that the history recorded by Dr Canaris accords with Dr Darji's notes and the applicant's statement. The applicant complained about Ms Howard, and the fact that nothing was done. He recorded that Ms Martin picked on the applicant about excessive sick leave, the water maintenance issue, and the regular meetings, which the applicant found intimidating. This history was confirmed by the evidence of the applicant and the respondent. Dr Martin recorded a similar history, and he sought to engage with performance appraisal, but he did not articulate further.
163. Mr Hickey submits that Dr Canaris indicated that the applicant was unfit for work when he saw her on 7 January 2020. The certificates issued prior to his examination certified that the applicant had no current work capacity. Dr Martin stated that it was better for the applicant to get back to work, but he suggested that the applicant have an assertive vocational assessment. He stated that it was unlikely that she could return to her pre-injury duties at the respondent, but could probably work elsewhere for four hours per day/ three days per week. However, his opinion was contingent on the applicant having a vocational assessment and rehabilitation to assist her in finding work.
164. Mr Hickey submits that the respondent has the onus on establishing that s 11A of the 1987 Act applies. The respondent has not discharged the onus and the defence must fail.

RESPONDENT'S SUBMISSIONS

165. The respondent's counsel, Mr Doak, submits that although the dispute notices are poorly drafted, there was no question of the nature of the grounds relied upon. Dr Martin identified the events in his reports, and they were discussed in the statements. There were differences of opinion between the applicant, Ms Howard and Ms Burns. The incidents were addressed by Ms Martin. The applicant acknowledged that she had engaged in a verbal altercation, and that she reciprocated. There was also the water maintenance issue, which was clarified and promptly rectified.
166. Mr Doak submits that any criticism that Dr Martin did not address the grounds in s 11A of the 1987 Act was unfounded, as this is a legal question. Dr Martin was slightly misled by the question that was posed to him, and he was not given a comprehensive description of the performance appraisal and discipline implemented by the respondent.

167. Mr Doak submits that the authorities confirm that performance appraisal is not the same as performance management. Discipline can relate to the attention to deficiencies in an employee's performance.
168. Mr Doak submits that there were some elements of discipline in the incidents involving Ms Burns and Ms Howard. The weekly meetings were instigated by Ms Martin to monitor the performance of the applicant's work. This amounted to discipline and the applicant resented the process.
169. Mr Doak submits that Ms Prisk indicated that the applicant complained about having to attend the meetings, but she understood that these were to assist the applicant in her work. This was consistent with Ms Martin's evidence. The applicant resented this and took it personally, said Ms Martin was a bitch and she hated her. Ms Prisk thought that these comments were inappropriate.
170. Mr Doak submits that the emails detailed concerns about her style and conduct, questioned her performance and identified problems with her mode of communication. Much of the evidence focussed on the weekly meetings, but Ms Martin confirmed that these were undertaken to assist the applicant with the issues that she had raised.
171. Mr Doak submits that Ms Martin explained that the weekly meetings were instigated because the applicant had indicated in emails that she was stressed with day to day work and to address issues regarding documents to be scanned. This puts the meetings into the context of performance management. There were issues regarding excessive sick leave taken prior to her long service leave, as shown on the sick leave record at page 246 of the respondent's late documents. The applicant said that she had health issues and it was incumbent on the respondent to address these issues.
172. Mr Doak submits that the "Leave Matters for NSW Health Service" policy document indicates that there were mandatory requirements for managing sick leave, and managers were required to monitor and review sick leave absence levels. Ms Martin was attempting to do this in May 2019 by bringing this to the applicant's attention. This was reasonable.
173. Mr Doak submits that according to Ms McGrath, the applicant was taking significant amounts of leave. This was a long term issue. She had been told by Ms Martin that she was seeking to address the applicant's emails. There were a range of issues being dealt with by the respondent and if one was satisfied that she was stressed and suffered a psychological injury, then the respondent's defence must fail.
174. Mr Doak submits that the applicant advised Dr Darji on 4 March 2019 about her personal issues, but there was no history of any stress at work. The applicant did not complain about the work issues to her doctor until after she had ceased employment. There was not a great deal of controversy about the existence of the events, and the applicant told Dr Darji about what she perceived was happening.
175. Mr Doak submits that the applicant denied having any past mental health problems when she was examined by Dr Martin. She did not disclose the issues with her ex-partner and her daughter, and the threats of violence. This was important when considering whether the applicant was a witness of truth. Some of the events were acknowledged, but there was some disagreement about others. The emails referred to stress, but the applicant could simply be mentioning things that annoyed her.
176. Mr Doak submits that the comments by Mr McAndrew about the respondent's treatment of the applicant were unusual, and this affects the weight that can be given to his opinion.

177. Mr Doak submits that the meetings that were resented by the applicant were undertaken to address her work and behaviour. This relates more to discipline than performance appraisal, consistent with the authorities. There were many factors, and the respondent relies on the evidence of Dr Martin.
178. Mr Doak submits that Dr Martin reported that there were no external factors, but those issues need to be considered. He noted that performance issues may have been raised, but “may” is not correct. There was a history of performance issues and taking excessive sick leave, but the applicant denied that this was the case. The fact that the applicant did not want to attend the meeting might be because she knew that she was taking excessive sick leave.
179. Mr Doak submits that Dr Martin was unable to determine if the applicant’s injury was wholly or predominantly caused by reasonable action taken or proposed to be taken with respect to performance appraisal and discipline in his first report, but on review in his second report, the doctor advised that stress from performance issues was a substantial contributing factor to her injury. “Substantially” equates to “predominantly”. The impression that one gained from this report is that this was a predominant factor.
180. Mr Doak submits that Dr Martin obtained a history that the applicant was being micromanaged and the issues raised were trivial and ridiculous, and that her manager continued to go on about sick leave. She also claimed that she was ostracised, but she did not go into any great detail.
181. Mr Doak submits that the applicant’s medical certificates run out in September 2019, and when Dr Canaris examined the applicant on 7 January 2020, he only provided a one line comment regarding her capacity, and he did not explain why she was not well enough to work.
182. Mr Doak submits that Dr Martin stated that the applicant was able to work in another employment and any return to work should be gradual. A vocational assessment was different from a functional assessment, because it considers employment options that best suit a worker. She has both physical and psychological injuries. Dr Martin thought that the applicant would be fit for non-stressful work within four weeks of his examination, and the type of work would be determined by a vocational assessment.

APPLICANT’S SUBMISSIONS IN REPLY

183. Mr Hickey was unable to make submissions in reply at the hearing due to time restrictions. Accordingly, I directed the applicant to file written submissions in reply, and granted the respondent leave to file further submissions in the event that Mr Hickey raised additional matters. Written submissions were filed by the applicant on 29 April 2020 and by the respondent on 4 May 2020.
184. Mr Hickey submits that the dispute notices did not properly explain the nature of the s 11A defence and the explanation was so generic as to be devoid of any meaningful content. This was inconsistent with the authorities. The nature of the pleaded defence was such that the applicant was unable to determine the basis upon which the Respondent was pleading its case and the specific events upon which it was relying. This only became apparent during Mr Doak’s submissions.
185. Mr Hickey submits the respondent’s submissions asserted a variety of different manifestations by reference to various meetings, workplace and related interactions, which were not previously identified in the dispute notices. He submits that he did not object to the respondent’s submissions due to time limitations, but the applicant now objected to the matters raised and the manner in which the defence has been presented at the hearing.

186. Mr Hickey submits that the authorities such as *The Healthy Snack People Pty Ltd*² and *Gray v Busways Gosford EMP Pty Limited*³, and *Hobden v South East Illawarra Area Health Service*⁴ confirm that an insurer must provide precise details of the reason that it disputes liability, identify the issues relevant to the dispute and the factual basis for the dispute, and indicate in clear and plain language which action or actions it alleges were the whole or predominant cause of the psychological injury.
187. Mr Hickey submits that the manner in which the respondent's defence has been pleaded is deficient and does not comply with s 78 of the 1998 Act. The insurer has at all times failed to clearly and concisely identify the issues in the proceedings by reference to the event or events relied upon pursuant to s 11A of the 1987 Act.
188. Mr Hickey submits that the applicant objects to the respondent's reliance upon s 11A of the 1987 Act as pleaded, and objects to the manner in which the submissions were made by Mr Doak during the course of the proceedings. He submits that at best, the respondent could rely upon the meeting of 4 June 2019, which was the only factual event or action specifically referred to in the dispute notices and in the evidence. As such, this was the case that the applicant sought to meet.
189. Mr Hickey submits that the respondent bears the onus in respect to that defence⁵. The applicant is merely required to meet the case that has been pleaded, and it is not incumbent upon the applicant to highlight or otherwise put the respondent on notice that its pleading is or was defective.
190. Mr Hickey submits that the defective nature of the dispute notices was rectified by the manner in which the submissions were made at the hearing. The respondent has sought to characterise numerous events, dates and interactions within discipline and/or performance appraisal, without those incidents or events having otherwise being previously identified in the notices. This was first raised in submissions and the applicant has been prejudiced. Accordingly, the applicant objects to the other matters raised in submissions, apart from the meeting on 4 June 2019.
191. Mr Hickey submits that it cannot be inferred in the absence of evidence that the applicant's email correspondence supported the proposition that interactions between Ms Martin and the applicant arose due to concerns regarding the applicant's ability to perform her role on the switch.
192. Mr Hickey submits that submissions made by the respondent are not supported by the factual evidence. Ms Martin indicated in her statement that the applicant made numerous complaints about staff being unreceptive or abrupt, and others were specifically spoken to. The incident in December 2018 with Ms Burns was one such incident.
193. Mr Hickey submits that there was the water maintenance issue, which was investigated and resulted in an apology from Ms Martin. The weekly meetings with Ms Martin were organised to address the applicant's "stress", which arose in connection with staff refusing to take phone calls and/or confrontations with staff.
194. Mr Hickey submits that the applicant had raised issues with Ms Martin in relation to Ms Howard, and Ms Martin confirmed that Ms Howard could at times be angry and frustrated with staff.

² [2009] NSWCCPD 32, [132] (Roche DP).

³ [2009] NSWCCPD 124 (*Gray*), [6] (Roche DP).

⁴ [2010] NSWCCPD 13, [139] – [140] (Keating P).

⁵ *Department of Education and Training v Sinclair* [2004] NSWCCPD 90 (*Sinclair*), [23].

195. Mr Hickey submits that apart from the interaction of 4 June 2019 and Ms Martin's attempt to address what she perceived to be leave issues at a meeting on 6 June 2019, Ms Martin does not otherwise support the propositions or characterisations put forward by the respondent. Rather, she supports the evidence provided by the applicant and accords with the reasons provided by the applicant as giving rise to her psychological injury.
196. Mr Hickey submits that Ms Martin told the applicant that she wished to ensure her wellness at work and discuss any issues that arose. This does not accord with the interpretation of discipline and/or performance appraisal in the authorities, where performance appraisal was described as "an examination, not a continuing process".⁶
197. Mr Hickey submits that there was no support for such a performance appraisal process in the statement of Ms Martin, and the explanation of her reasons for the ongoing meetings did not accord with the concept of a performance appraisal, but rather to deal with the applicant's "stress".
198. Mr Hickey submits that Dr Martin failed in his initial report to express a "whole or predominant" view. He recorded a history of numerous workplace stressors and interactions, but he disregarded these without any explanation. He did not identify the nature of the "performance issue", and he did not specifically refer to the events relied upon underlying his opinion. Further, Dr Martin did not engage in a process of reconciling the history and statement evidence, but applied a broad-brush term of "performance issues" to address multiple events without explanation.

RESPONDENT'S SUBMISSIONS IN REPLY

199. Mr Doak submits that the authorities relied upon by the applicant were matters that concerned the former s 74 of the 1998 Act. The requirements in s 78 of the 1998 Act and cl 38 of the *Workers Compensation Regulation 2016* (the 2016 Regulation) are different to the repealed section, so the authorities were no longer relevant.
200. Mr Doak submits that the underlying requirement for the giving of notice of a dispute is procedural fairness to ensure that a worker is aware of the nature of the dispute about liability. This is consistent with the comments of the Court of Appeal in *Fairfield City Council v Arduca*⁷.
201. Mr Doak submits that in the present case, the insurer indicated in its notices that it disputed the applicant's claim based on s 11A of the 1987 Act, and it identified the relevant issues as performance appraisal and discipline. This complied with the requirements identified in *Gray*.
202. Mr Doak submits that in the application for review, the applicant relied upon the report of Dr Canaris, who commented on the insurer's suggestion that the injury rose due to reasonable action based on various statements, so it could not be said that the applicant was not on notice that the insurer relied upon s 11A of the 1987 Act. It gave details of the particular actions of the respondent and identified the evidence upon which the decision was based.
203. Mr Doak submits that the respondent bears the onus of proof in establishing a successful defence under section 11A of the 1987 Act. The applicant did not raise any issue about the lack of proper notice of the nature of the dispute under section 11A of the 1987 Act in the review application.

⁶ *Smyth v Charles Sturt University* [2007] NSWCCPD 184

⁷ [2015] NSWCA 166, [33].

204. Mr Doak submits that even if there was a failure to properly identify the nature of the defence and the review decision, as a matter of procedural fairness, the applicant should have raised the point before the hearing.

REASONS

PRELIMINARY ISSUE

205. In his primary submissions, Mr Hickey briefly submitted that the dispute notices only referred to performance issues and management, which were not grounds identified in s 11A of the 1987 Act. Further, the precise incidents of any performance management were not identified, so it was difficult to understand whether the respondent took reasonable action with respect to performance appraisal and/or discipline.
206. Mr Hickey did not raise any objection at the commencement of the hearing, and he did not take issue with Mr Doak's submissions at that time that they were given. He did not raise any objection until after Mr Doak had finished. This is unfortunate, as it did not allow me to rule on the objections contemporaneously, and may well have shortened Mr Doak's submissions.
207. Mr Hickey referred to a number of Presidential decisions that confirmed how an insurer should give notice of the dispute to a worker in accordance with s 74 of the 1998 Act, which was repealed in 2012, and replaced with ss 78 and 79 of the 1998 Act.
208. Sections 78 and 79 of the 1998 Act require an insurer to give notice of a decision to a worker. They provide:

“78 Insurer to give notice of decisions

- (1) An insurer must give notice in accordance with this Division of any decision of the insurer—
 - (a) to dispute liability in respect of a claim or any aspect of a claim, or
 - (b) to discontinue payment to a worker of weekly payments of compensation, or reduce the amount of the compensation.
- (2) Notice of a decision of an insurer involving both a liability dispute and a discontinuation or reduction of weekly compensation may be combined into a single notice (subject to any provision of the Workers Compensation Guidelines requiring separate notices to be given).
- (3) The requirement to give notice of a decision to discontinue payment to a worker of weekly payments of compensation does not affect any limitation on weekly payments of compensation under Division 2 of Part 3 of the 1987 Act.

79 How notice of decision is given

- (1) A notice required by this Division must be given—
 - (a) to the claimant or worker concerned, and
 - (b) in the case of a notice of a decision to dispute liability—to the worker's employer, if required by the regulations.
- (2) The notice must contain a concise and readily understandable statement of the reason for the insurer's decision and of the issues relevant to the decision.

- (3) In addition, notice of a decision to dispute liability for a claim for compensation must identify any provision of the workers compensation legislation on which the insurer relies to dispute liability.
- (4) The regulations may make provision for—
 - (a) the manner in which a notice under this Division is to be given, and
 - (b) the form of and other information to be included in or to accompany the notice.”

209. Regulation 38 of the 2016 Regulation also sets out an insurer’s obligation to give notice. It provides:

“38 Notice of insurer decisions

- (1) A notice under section 78 of the 1998 Act of an insurer’s decision to dispute liability in respect of a claim or any aspect of a claim (except in connection with a work injury damages matter), or to discontinue or reduce the amount of weekly payments of compensation, is to contain the following information—
 - (a) a statement identifying all the reports and documents submitted by the worker in making the claim for compensation, and by the employer in connection with the claim,
 - (b) a statement identifying all the reports of the type to which clause 41 applies that are relevant to the decision, whether or not the reports support the reasons for the decision,
 - (c) a statement advising that a copy of a report required to be provided by the insurer under clause 41(3) (except as provided by clause 41(5) or (6)) accompanies the notice,
 - (d) details of the procedure for requesting a review of the decision,
 - (e) a statement to the effect that the worker can seek advice or assistance from the worker’s trade union organisation, from an Australian legal practitioner, from the Independent Review Officer or from any other relevant service established by the Authority,
 - (f) the contact details for the Independent Review Officer,
 - (g) the street address and the email address of the Registrar of the Commission,
 - (h) a summary, in the approved form, of the effect of the decision, the worker’s rights of review, the procedure for requesting a review and the legal and other services that may be available to the worker to provide advice or assistance in relation to the dispute....”

210. The obligation on an insurer to give notice was described in similar terms in chapter B10 of the SIRA *Guidelines for Claiming Workers Compensation* (the Guidelines) that applied to claims made prior to 21 October 2019, and in chapter GN 8.1 of SIRA’S Claim Management Guide.

211. Whilst it true that there is ambiguity in the s 78 Notice issued on 28 August 2019, the insurer identified that it relied upon pursuant to s 11A of the 1987 Act with regards to performance appraisal, discipline and the provision of employment benefits. It referred to the applicant's allegations regarding the switchboard and sick leave issues, the water maintenance issue, the weekly meetings, Ms Howard's behaviour and the applicant's feelings of being ostracised. These must have been relevant to the insurer's decision.
212. The insurer identified and attached to the notice the statements that I have summarised above, and it indicated that this evidence refuted the applicant's allegations. Given the number of statements, I do not believe that it was necessary for the insurer to summarise each of the statements in the notice.
213. The insurer referred to the meeting on 4 June 2019 and the proposed meeting on 6 June 2019. It indicated that the evidence showed that the respondent had acted reasonably to address the issues relating to the applicant's leave and performance, and it identified various obligations in the Code of Conduct. The insurer also referred to the medical evidence of Mr McAndrew, and Drs Darji and Martin. Dr Martin had regard to performance management, so it possible that one might infer that this may have been the only basis upon which the insurer relied on the grounds in s 11A of the 1987 Act.
214. In the dispute noticed issued on 13 February 2020, the insurer advised that it relied on its previous notice. It referred to the additional medical evidence, including the reports of Drs Martin [sic] and Canaris, and confirmed that it still relied on a defence pursuant to s 11A of the 1987 Act, but this was restricted to discipline and "performance issues", a ground that is not identified in the section. In my view, that is not a material concern, given that performance appraisal was identified in the initial dispute notice.
215. It is true that the notices were somewhat vague in describing the facts that the insurer alleged were the whole or predominant cause of the applicant's injury, but in my view, this could be drawn from the statements and the medical evidence. Indeed, the applicant obtained a report from Dr Canaris and she went into some detail in her supplementary statement regarding the statements of the respondent's employees, so it could not be said that the applicant was not aware of the nature of the dispute and the case that she had to meet. Accordingly, I am satisfied that the matters raised regarding the present dispute can be relied upon by the respondent.

Was the applicant's psychological injury wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to performance appraisal and/or discipline?

216. There is no dispute that the applicant suffers from a psychological injury as a result of the events at work, and that her employment was the main contributing factor to her injury. Consequently, there are two aspects that need to be considered.
217. Firstly, whether the applicant's psychological injury was caused by behaviour that she perceived amounted to bullying and harassment, and secondly, whether the applicant's psychological injury was wholly or predominantly caused by the reasonable action taken or proposed to be taken by the respondent with respect to performance appraisal and/or discipline in accordance with s 11A (1) of the 1987 Act.
218. 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 or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers."

219. This requires a consideration of the statutory provisions and the principles in *Kooragang Cement Pty Ltd v Bates*⁸ regarding the existence of a psychological injury, and then a consideration as to whether the psychological injury was wholly or predominantly caused by reasonable action of the employer with respect to one of the grounds in the section. In the present matter, injury is not in dispute.

220. In *Temelkov v Kemblawarra Portuguese Sports & Social Club Ltd*⁹, Roche DP stated:

“The leading authority on causation in workers compensation claims is *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*) where it was observed that causation is a question of fact to be determined on the evidence in each case. That case concerned the question of whether the death of a worker had ‘resulted from’ the relevant work injury. The present matter concerns whether ‘the injury was wholly or predominantly caused by reasonable action’. Acting Deputy President Handley considered the phrase ‘predominantly caused’ in *Ponnan v George Weston Foods Ltd* [2007] NSWCCPD 92 and applied the dictionary meaning (at [24]) of ‘mainly or principally caused’. I agree with that definition and intend to apply it in the present matter.”¹⁰

221. The respondent bears the onus of establishing the action taken was reasonable in accordance with the principles discussed in *Pirie v Franklins Ltd*¹¹ and in *Sinclair*.

222. The importance of medical evidence in establishing whether a psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by an employer was highlighted in *Hamad*, where Snell DP stated:

“... There may be cases in which causation of a psychological injury can be established without specific medical evidence, for example where there is a single instance of major psychological trauma, with no other competing factors. The need for medical evidence, dealing with the causation issue in s 11A(1) of the 1987 Act, will depend on the facts and circumstances of the individual case. In the current case, as in most, there are a number of potentially causative factors raised in the appellant’s statement and the medical histories. Proof of whether those factors, which potentially provide a defence under s 11A(1), were the whole or predominant cause of the psychological injury, required medical evidence on that topic...”¹²

223. The test is objective, based on the facts, and involves questions of fairness. In *Irwin v Director-General of School Education*¹³, Geraghty CCJ stated:

“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 a test of convenience. The test of ‘reasonableness’ is objective and must weigh the rights of employees against the objective of employment. Whether an action is reasonable should be attended, in all the circumstances, by questions of fairness.”

⁸ (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*)

⁹ [2008] NSWCCPD 96 (*Temelkov*)

¹⁰ *Temelkov*, [79].

¹¹ [2001] NSWCC 167; 22 NSWCCR 346 (*Pirie*).

¹² *Hamad*, [88].

¹³ NSWCC No 14068/97 (unreported, Geraghty J, 18 June 1998) (*Irwin*).

224. When considering what is reasonable, it is also important to have regard not only to the end result, but to the manner in which it is done. This was discussed in some detail by Truss CCJ in *Ivanisevic v Laudet Pty Ltd*¹⁴, by Roche DP in *St George Leagues Club Ltd v Wretowska*¹⁵, and by the Court of Appeal in *Northern NSW Local Health Network v Heggie*¹⁶ and in *Sinclair*.

Performance Appraisal - Authorities

225. The authorities establish that it is necessary to consider the whole of the performance appraisal process and objectively consider whether the respondent's actions were reasonable.

226. In *Irwin*, Geraghty CCJ stated:

"It is important to consider the meaning of the term 'performance appraisal'. The respondent submitted that it should receive its ordinary street meaning, that it is not a term of art. But it seems to me to be a rather precious and precise expression. It is framed within the context of other processes, of crises [sic] points in a worker's life. It is placed in the context of processes like 'transfer', 'demotion', 'promotion', 'retrenchment or dismissal' of workers. It must be seen in this context. Furthermore, performance appraisal in any work situation is a process, an established process involving various steps. Perhaps it will involve the completion of questionnaires and forms. It requires discussion between various parties about performance, written appraisal, sometime even self-appraisal, maybe even a score. It is a process in which parties are engaged and knowingly engaged.

Performance appraisal is not a vague, continuing, informal process which begins on the first day of employment although, in a sense, we can say that we are continually under scrutiny and being appraised in somewhat the same way as students in a classroom are being scrutinised on a day to day basis. But 'performance appraisal' is 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."

227. His Honour applied the same reasoning in *Dunn v Department of Education & Training*¹⁷, where he found on the facts of that case that Mr Dunn was not involved in a performance appraisal plan because he was participating in a type of in-service training. His Honour stated¹⁸:

".... If I am wrong in this regard, it seems to me that, if he was involved in performance appraisal, the action taken by his employer was unreasonable, firstly, because Dunn had not been informed about this; secondly, because the program itself lacked clarity; thirdly, because Dunn was not given any formal regular feedback; and fourthly, because the appraisal was far too long, from June 1996 to November 1997. For these reasons, if the employer was conducting a performance appraisal, it was not acting reasonably."

¹⁴ (unreported, 24 November 1998).

¹⁵ [2013] NSWCCPD 64.

¹⁶ [2013] NSWCA 255 (*Heggie*).

¹⁷ [2000] NSWCC 11; (2000) 19 NSWCCR 475 (*Dunn*).

¹⁸ *Dunn*, [69].

228. Performance appraisal has also been held to involve a general discussion regarding an employee's performance at work that is not punitive in nature¹⁹.

Discipline - Authorities

229. In *Kushwaha v Queanbeyan City Council*²⁰, which was cited with approval by Deputy President Candy in *ISS Property Services Pty Ltd v Milovanovic*²¹, Neilson CCJ considered the meaning of "discipline" in terms of s 11A (1) of the 1987 Act. He stated:

"It can be seen, therefore, that the primary meaning of 'discipline' is learning or instruction imparted to the learner and the maintenance of that learning by training, by exercise or repetition. The narrow meaning of punishment, chastisement is secondary to the primary meaning although this word is often used in this sense in popular speech. It is this narrow meaning which weighed on my mind in *Bottle's* case. However, the word used in an Act of Parliament must be given its full meaning, unless the context otherwise requires. Such a context does not appear to me to be called for in the interpretation of s 11A (1)."²²

230. It was confirmed in *Heggie* that the term "discipline" in s 11A (1) of the 1987 Act includes the whole of the disciplinary process. Sackville AJA stated:

"The following propositions are consistent both with the statutory language and the authorities that have construed s 11A (1) of the WC Act:

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

¹⁹ *Hunt v Department of Education and Training (NSW)* (2003) 24 NSWCCR 642 (Walker CCJ).

²⁰ (2002) 23 NSWCCR 339; [2002] NSWCC 25 (*Kushwaha*).

²¹ [2009] NSWCCPD 27.

²² *Kushwaha*, [152].

- (vi) The assessment of reasonableness should take into account the rights of the employee, but the extent to which these rights are to be given weight in a particular case depends on the circumstances (emphasis added)."²³

Application of the principles

231. According to the applicant's evidence, there were a number of issues that caused her to become stressed and anxious. These included staff refusing to take calls and being abusive in the process (Ms Hawkes-Daniels and Ms Burns), the failure by Ms Martin to adequately address and counsel the individuals regarding this issue, being ignored at work (staff members including Ms Burns), being falsely accused regard the water maintenance issue, and undertaking switch and scanning duties at the same time.
232. The applicant had issues with the regular weekly meetings with Ms Martin, the abuse from and the behaviour of Ms Howard, the failure by Ms Martin and Ms McGrath to adequately address Ms Howard's behaviour, the meeting on 21 May 2019 about excessive leave, meetings running overtime that impacted on her work, the failure by Ms Martin to address her concerns that were raised in emails, the refusal by Ms Martin to discuss the sick leave issue on 3 June 2019, and being asked by Ms Martin whether she should be at work when excessive leave was an issue.
233. The applicant was distressed by the meeting on 4 June 2019. She was handed a letter without an explanation from Ms Martin, who only mentioned that it related to her sick leave, and she was upset when staff members refused to take her calls on 4 June 2019 and 5 June 2019.
234. The applicant sent a number of emails to Ms Martin. These emails represent contemporaneous evidence of the reporting of her concerns, and Ms Martin's responses.
235. A review of the applicant's emails shows that she complained about the telephone issue and the abuse that she received from Ms Daniels and Ms Burns. Ms Burns ignored for some time after the event. She said she could not cope and that she had stress. Her requests for a two day break from the switchboard duties and to be moved away from Ms Howard were declined. She had issues with Ms Howard's behaviour, and this caused headaches and she was shaky. She questioned how many more times she had to ask for this to be addressed.
236. The applicant stated that the water maintenance issue impacted on her wellbeing. She considered that the issues with Ms Burns and Ms Howard had not been properly addressed. The applicant felt that Ms Martin was checking on her, but she was doing nothing to address her concerns.
237. The applicant questioned why the weekly meetings needed to be reinstated, because she thought that she was doing well. She thought that Ms Martin only seemed to want to make sure that she was okay. The meetings were stressful, and she complained about their length. She felt that she was being intimidated and bullied. The applicant had medical certificates to substantiate her absences from work. After she ceased work, she complained to Renee Martin about being bullied by Ms Martin. She found the meetings humiliating and degrading. She mentioned Ms Howard's abuse, her request to be relocated that had been denied, and she stated that she could not work like this anymore.

²³ Heggie, [59].

238. According to Ms Martin, the telephone call transfer problem and the issues with Ms Burns and Ms Howard had been appropriately addressed. The weekly meetings were scheduled to support the applicant in her duties and to ensure that there would be improvement and consistency. She indicated that she had provided feedback during those meetings. She stated that staff had to comply with the leave policy, and she was obliged to ensure that the guidelines were followed.
239. The respondent's statements corroborate much of the applicant's evidence. The circumstances surrounding the call transfer issue, the water maintenance issue and the outcome of the investigation were confirmed by Ms McGrath. She said that the applicant was upset, and her tone was heated, but Ms Martin was professional.
240. Ms McGrath was present when the applicant complained about Ms Howard, but she claimed that the applicant did not ask Ms Martin to do anything. She acknowledged that Ms Howard did become frustrated at work, but this was not directed at anyone.
241. Ms McGrath stated that the weekly meetings with Ms Martin were convened to assist the applicant in her duties. She heard the applicant yelling in the meeting on 3 June 2019. She knew that the applicant had been taking excessive leave for some time, and Ms Martin was addressing this. Ms Martin was also seeking to address the nature and content of applicant's "erratic" emails. She supported Ms Martin's professionalism and the attempts to assist the applicant.
242. Ms Field confirmed that at the meeting on 4 June 2019, the applicant raised her voice and said that nothing had been resolved about her issues. The applicant complained about the meetings and felt that she was being singled out. The applicant refused to take the letter from Ms Martin and was crying when she left the meeting. There was no suggestion in Ms Field's statement that Ms Martin had explained the contents of the letter to the applicant. Ms Field agreed that she had subsequently not taken calls from the applicant. This was confirmed by Ms Prisk.
243. Ms Field confirmed some of the details regarding the incident between the applicant and Ms Howard. She acknowledged that Ms Howard could be loud, but she had worked with management to address this. She also confirmed that there was an issue regarding staff taking calls from the applicant, and this was addressed at staff meetings. According to the applicant, Ms Field was aware that her weekly meetings were causing her stress.
244. Ms Prisk had no knowledge of the call transfer issue, but it was discussed at the team meetings. She confirmed that the applicant complained about the weekly meetings and felt that she was being micromanaged. She agreed that Ms Howard was loud and banged things down when she was frustrated, but it was not directed at anyone. According to the applicant, Ms Prisk had sent emails of complaint to Ms Martin and she was allowed to relocate.
245. Ms Prisk stated that the applicant made derogatory remarks about Ms Martin, which the applicant denied, and she understood that the meetings were being held to assist the applicant. It would seem that this witness had little understanding about the precise nature of the meetings. She agreed that the applicant was upset following the meeting on 4 June 2019. The applicant suggested that Ms Prisk did not see her because she had already left work. Ms Prisk told her that no one wanted to speak to her when she called the office on 5 June 2019.
246. Ms Howard agreed that she closed drawers heavily at times, lost patience with systems, had issues with calls and was irritated by work matters and stressors, but she claimed that her conduct was not significantly different to others. She had no recollection about being counselled by Ms Martin, but the evidence of her co-workers would seem to suggest

otherwise. She played down the incident with the applicant on 3 June 2019 and she did not identify any verbal altercation. Her evidence is inconsistent with that of Ms Martin.

247. Ms Martin confirmed details of the water maintenance issue and indicated that the applicant was angry and upset. According to the applicant, Ms Martin accused her of lying.
248. Ms Martin confirmed that she had received verbal and email complaints from the applicant about the call transfer issue. She addressed the issue at team meetings and in a directive. She confirmed that Ms Howard had agreed that she had been angry and frustrated with the applicant. Ms Martin counselled Ms Howard, and she spoke to Ms Burns and the applicant regarding the incident in December 2018. She felt that the informal discussions were adequate, and she did not feel that any further action was required. She was unaware of Ms Burns ignoring the applicant. According to the applicant, her stress was caused by Ms Howard's behaviour which had not been addressed.
249. Ms Martin stated the weekly meetings since February 2019 were in response to emails that she had received from the applicant that indicated that she was stressed, and to address scanning issues. The applicant's stress arose from the call transfer issues and confrontations with staff. The applicant had no issues with the meetings before she went on leave.
250. Ms Martin stated that when she received "erratic" emails from the applicant on her return to work, she decided to reinstate the weekly meetings to monitor her welfare, the tone of her emails and her issues. She claimed that she explained this, but the applicant said that the emails and wellbeing were not discussed. Ms Martin stated that she had meetings with other staff as well, but the applicant disagreed with this. She could only recall one meeting running overtime, which contrasted with the applicant's evidence.
251. Ms Martin stated that she wanted to discuss the applicant's ongoing absences, given that the applicant had told her that she was not stressed. This comment seems inconsistent with the content of the applicant's emails. She wanted to know if the absences were due to work issues. She agreed that she declined to discuss the sick leave issue on 3 June 2019, and she said that this would be discussed later that week. This upset the applicant. Ms Martin did not mention that the applicant had the printouts, or whether they substantiated her concerns.
252. Ms Martin received advice from HR to schedule a formal meeting to discuss the emails and the leave issue. Her evidence that she told the applicant on 4 June 2019 about the nature of the meeting and that she had a letter formally inviting her to the meeting contrasts with that of the applicant, although in her supplementary statement, the applicant conceded that Ms Martin had told her that she wanted to discuss excessive sick leave. Ms Martin's evidence regarding the applicant's reaction at this meeting is consistent with that of the applicant and Ms Field.
253. Ms Martin stated that the applicant complained about the weekly meetings. They made her feel humiliated and they were of no assistance. Ms Martin responded that she was trying to help the applicant deal with her stress.
254. According to the applicant, Ms Martin suggested that the incident with Ms Burns might not have happened if she had not approached her. This was not challenged in Ms Martin's statement. One might infer from such a comment that Ms Martin held the applicant responsible, so it is not surprising that the applicant was aggrieved with how Ms Martin dealt with the incident. Such a comment from a person in authority seems inappropriate.

255. According to the applicant, she had asked to be taken off the switchboard and Ms Martin would not allow her to work in a team that was short a member. This evidence has not been challenged by Ms Martin.
256. Ms Bell's evidence is based on third hand information and carries little weight, given that Renee Martin was handling the matter. Her knowledge of Ms Martin's concerns seemed to have come from Renee Martin. She referred to the concerns that Ms Martin had about the applicant's health, her attendance record and the tone of the applicant's conversations and email correspondence. She confirmed that the applicant complained to her about stress and being bullied by Ms Martin in respect of the proposed meeting to discuss issues that she did not agree with.
257. Ms Bell stated that the applicant refused to attend the meeting, however this was denied by the applicant, who said that the reason for non-attendance was due to her emotional state. The applicant wanted to discuss bullying and harassment but that was not an agenda item. Ms Bell stated that the applicant raised her voice, which is understandable, given the nature of her distress. Ms Bell's direct evidence is consistent with that of the applicant.
258. Ms Bell indicated that Renee Martin had advised Ms Martin to reschedule the meeting and to include the additional issues on the agenda, but it appears that this never happened.
259. Ms Beeton's statement largely confirms the issues that the applicant was having with the call transfers. She had similar experiences on the switch. Ms Beeton is quite supportive of the applicant regarding the issues that he had with Ms Howard. She had also asked to be moved away from her.
260. Ms McDonald confirmed that the applicant was upset about the allegations in relation to the water maintenance issue and she had asked to be taken off the switch. She advised that Ms Martin told the applicant that the meeting on 6 June 2019 was convened to discuss her excessive leave. This is consistent with Ms Martin's evidence and the applicant's supplementary statement. So, there seems little doubt that the applicant knew two days before the scheduled meeting that the leave issues were to be discussed.
261. Ms McDonald confirmed that the applicant questioned why a meeting was needed and why weekly meetings were continuing. The applicant did not work near Ms Howard. The applicant was upset, and Ms Martin told her that these issues would not be discussed. Ms McDonald was told not to talk to the applicant, so there is truth in the applicant's evidence that she was being ignored by staff after she left work.
262. In summary, the applicant has identified multiple issues that caused her stress during the course of her employment prior to her cessation of work on 4 June 2019. There was a perception that she was being bullied and harassed.
263. In *Attorney General's Department v K*²⁴, Deputy President Roche summarised relevant authorities in relation to a worker's perception of real events at work:
- (a) employers take their employees as they find them. There is an 'egg-shell psyche' principle which is the equivalent of the 'egg-shell skull' principle (Spigelman CJ in *State Transit Authority of NSW v Chemler* [2007] NSWCA 249 (*Chemler*) at [40]);
 - (b) a perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in *Chemler* at [54]);

²⁴ [2010] NSWCCPD 76 (*Attorney General's Department v K*).

- (c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in *Chemler* at [69]);
- (d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in *Leigh Sheridan v Q-Comp* [2009] QIC 12);
- (e) there is no requirement at law that the worker's perception of the events must have been one that passed some qualitative test based on an 'objective measure of reasonableness' (Von Doussa J in *Wiegand v Comcare Australia* [2002] FCA 1464 at [31]), and
- (f) it is not necessary that the worker's reaction to the events must have been 'rational, reasonable and proportionate' before compensation can be recovered."²⁵

264. The applicant has identified a number of instances where she perceived that she was being bullied, abused and harassed. There is contemporaneous material in the form of emails that support her evidence, and some of her concerns have been corroborated by the respondent's employees. There has been an acknowledgement that some of the events did in fact occur, and in other instances, the witnesses have not challenged the applicant's evidence.
265. On review of the applicant's evidence and the evidence as a whole, I am satisfied that some of the events raised by the applicant did in fact occur and were not imaginary. She had issues with working on the switch, being abused by work colleagues, including Ms Burns and Ms Howard, and she felt humiliated, distressed, victimised and micromanaged by having to attend regular weekly meetings with Ms Martin. The applicant viewed these interactions as bullying and harassment, and I have no reason to doubt the veracity of her evidence or her perception of these real events.
266. The final straw seems to have been when she was invited to attend the meeting with Ms Martin on 6 June 2019 to discuss excessive sick leave, frequent unplanned leave and her style of communication. There was no suggestion that the meeting was disciplinary in nature or concerned performance appraisal. The meeting was purely to discuss the matters, clarify the applicant's expectations and identify how the respondent could assist her to address these issues. One would have thought that most of these matters could have easily been discussed at the regular Monday meetings on an informal basis.
267. In the meeting letter, there was reference to an attendance agreement and a record of discussion in relation to the workplace behaviour. This would seem to refer to formal minutes and some agreement as to how to move forward. This might relate to discipline.
268. When one examines the leave records that commence on page 22 of the respondent's late documents, in the period from January 2018 until June 2019, the applicant did not appear to take excessive amounts of sick leave. There were only a few whole days taken in addition to a number of partial days. According to the applicant, she provided medical certificates for her sick leave, and this has not been disputed by the respondent.

²⁵ *Attorney General's Department v K*, [52].

269. What the records do show is that the applicant had a significant number of isolated days off work on annual leave, rostered days off, and a few days off without pay. She had about three weeks off in January 2018. Given that it appears that she was paid for the annual leave, as was her entitlement, it is difficult to understand how this constituted frequent unplanned leave without further precise details and an explanation from Ms Martin, the pay office or HR. The calendars on pages 246 and 247 of the late documents are faint and are of no assistance.
270. The statements discussed above also referred to the issues as sick leave, rather than annual leave. Throughout the evidence, there is reference to the discussions relating to either excess sick leave or excess general leave, or both. According to the letter dated 4 June 2019, it seems that both types of leave were to be discussed on 6 June 2019.
271. Finally, the meeting was to include discussion about the applicant's style of communication with colleagues and her manager. This seems quite odd, because according to Ms Martin, she had adequately dealt with the issues involving the applicant and Ms Burns and Ms Howard, and there is no evidence to suggest that the applicant had been inappropriately communicating with her other colleagues. Therefore, the meeting must have been to address the emails that she had been sending to Ms Martin.
272. There seems little doubt from the evidence that the applicant was frustrated and distressed by Ms Martin's refusal to move her away from Ms Howard. The call transfer seemed to have been resolved, but the applicant took the allegations regarding the water management issue personally. The applicant was not satisfied that appropriate action had been taken against Ms Burns and Ms Howard, and she was no doubt aggrieved by Ms Martin's suggestion that she had been the instigator of the incident with Ms Burns.
273. It is true that the emails that the applicant sent were a concern to Ms Martin, but one can understand why the applicant sent them in her distressed state. The emails were not insulting or abusive. Rather it is apparent that the applicant was pleading with Ms Martin to address her on-going concerns. They constituted a plea for help. No doubt Ms Martin was concerned about their content.
274. The vagueness of the dispute notices causes some uncertainty about the precise nature of the dispute. The insurer merely stated that the respondent's statements refuted the applicant's evidence. How it was refuted was not disclosed in any detail. The insurer focussed on the meeting on 4 June 2019 and the proposed meeting on 6 June 2019 and suggested that the respondent had acted reasonably to address the issues relating to her leave, performance and conduct. What the insurer ignored were the various issues that the applicant complained about beforehand, including the need to attend weekly meetings.
275. In my view, there is no evidence to suggest that the applicant was involved in performance appraisal. There were no steps in the process, completion of forms, discussions about her performance, written appraisal or self-appraisal. The weekly meetings seemed to be a "vague, continuing and informal process" and not a "limited discrete process, with a recognised procedure through which the parties move in order to establish an employee's efficiency and performance" as discussed in *Irwin*. The proposed meeting may well have been consistent with performance appraisal, but the applicant's emotional issues were well in train before the meeting on 4 June 2019 and the proposed meeting two days later.
276. It seems that the applicant had no knowledge of any performance issues and she had not been under any performance management. She had not been given any feedback, adverse or otherwise, so it could not be said that her performance was being appraised in accordance with *Dunn*.

277. The next question to consider is whether the applicant was involved in a disciplinary process. There is no suggestion that the applicant was being disciplined as a means of punishment. One might consider that the regular weekly meetings were being undertaken to monitor the applicant's work and ensure that she was conducting her duties in an appropriate manner.
278. However, all that we know about the meetings is that Ms Martin was checking to make sure the scanning was being performed properly and that the applicant's emotional state was under control. This begs the question why such enquires could not have been made in a less formal fashion during normal work hours on an ad hoc basis, without forcing the applicant to attend regular meetings that were known to cause her humiliation and distress. Surely the reasonable action would be to dispense with the meetings, which would have lessened the applicant's stress. Ms Martin's insistence of the applicant's attendance at weekly meetings did not constitute reasonable action.
279. Whilst it is true that Ms Martin might have been acting in good faith, it was not perceived in that light by the applicant. The proposed meeting was certainly not described as a disciplinary meeting with the potential outcome being dismissal. The leave records do not seem to disclose that the applicant was taking excessive sick leave, and the applicant challenged Ms Martin about this. Ms Martin's statement also does not give any guidance as to what constituted the "excessive sick leave" or "frequency of unplanned time off".
280. Therefore, the factual evidence seems to support the contention that the applicant's psychological condition was caused by what she perceived as bullying, micromanagement and harassment by Ms Martin, coupled with the abuse to which she was exposed to from colleagues over the call transfer issue and from Ms Burns and Ms Howard.
281. What then does the medical evidence tell us regarding the issue of causation? Dr Darji referred to work issues that had been building for a number of months, not just at the time of the meetings in June 2019. His history of bullying, lack of action by her manager and issues with her work colleagues was consistent with the applicant's statements. He was also aware of the applicant's personal issues. Dr Darji attributed the applicant's reactive anxiety and depression cumulative stressor incidents at work, not just the meetings in June 2019.
282. It is it true that the applicant had past psychological issues and she had been taking antidepressant medication, but she was still able to work. When the applicant saw Dr Darji in March 2019, she was seeking treatment for an ear infection.
283. The entry on 5 June 2019 highlighted the issues that the applicant was experiencing with Ms Howard and inaction by her manager to address the issue. This had been happening for at least six months. Dr Darji also noted that the applicant had been directed to attend a meeting, but the bullying could not be discussed. Staff did not talk to her when she went back to work. This is consistent with the applicant's statement. The applicant also complained about the weekly meetings and she felt that she was being micromanaged. Therefore, there were multiple factors.
284. Mr McAndrew reported that the applicant was concerned by being bullied at work by a colleague, the water maintenance issue, inaction by her manager, the sick leave issue and being ignored by staff. He attributed the applicant's anxiety and panic attacks to workplace bullying and the need to keep Ms Martin informed. Therefore, there were multiple factors.
285. Dr Canaris summarised the applicant's concerns that included the inference that she was lying about the water maintenance issue and questioning about excessive leave following her shoulder injury, which was supported by medical certificates and the printout. The applicant was also troubled by the behaviour of Ms Howard and the failure of her manager to address the issue and move her away, being intimidated by the weekly meetings, and being ignored by staff. This history is consistent with the applicant statements.

286. Dr Canaris stated that the applicant suffered a significant aggravation of her pre-existing psychological condition as a result of the workplace problems, and she had a Major Depressive Disorder, so he accepted that the cause was multifactorial.
287. The history recorded by Dr Martin was not dissimilar to that recorded elsewhere, and encompassed the water maintenance issue, Ms Howard's and Ms Burns' behaviour, the weekly meetings, micromanagement by Ms Martin, excessive sick leave, the call transfer issues, being ignored and ostracised by colleagues, the letter and finally the proposed meeting to discuss excessive sick leave and performance issues, which had never been formally raised with her before.
288. Dr Martin was initially unaware of the applicant's past personal issues, which seems odd, as he was provided with copies of Dr Darji's notes and the statements from the respondent that mentioned the applicant personal concerns. If the applicant had not disclosed this, one would have thought that the doctor would have raised this with her. Therefore, his questioning of the applicant's reliability as a historian seems somewhat misconceived and illogical.
289. Dr Martin attributed the applicant's Adjustment Disorder with depression and anxious mood to her perception of unfair treatment. He accepted that these issues and events were a substantial contributing factor to her psychological injury, but in his second report, he stated that her incapacity and need for treatment, and presumably her injury, had been predominantly caused by the respondent in relation to performance management because of the regular performance meetings and reports of inappropriate behaviour. The doctor did not provide any detailed reasons for his conclusion, nor did he explain why he thought the other events were no longer causative.

Conclusion

290. A review of the dispute notices shows that the insurer disputed liability because it considered that the applicant's psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent in relation to performance appraisal/issues and/or discipline.
291. I am not satisfied that the evidence supports the insurer's contention that the applicant had issues regarding the performance of her work. The respondent's concerns related to excessive leave and sick leave, and her mode of communication. These issues might be more in the nature of disciplinary matters. This in turn affects the weight that can be given to the opinion of Dr Martin, who seemed to have come to the correct conclusion in his initial report, but changed his opinion in his further report without providing a detailed explanation for doing so.
292. The applicant was not subject to any disciplinary process before she was directed to attend the meeting on 6 June 2019. The respondent may well have been correct to arrange this meeting to discuss the applicant's sick leave and unplanned leave, which may or may not have merit, and to discuss the content of the emails under the guise of inappropriate behaviour. However, there were many other issues at play.
293. The applicant was pleading with Ms Martin to take her off the switch duties so she could avoid abuse from her colleagues, move her away from Ms Howard so that she did not have to put up with her behaviour, and to cease having the weekly meetings, which she found humiliating and degrading. It is no wonder that the tone in the applicant's emails was of concern. There were issues about the applicant's interactions with Ms Burns and Ms Howard, but according to Ms Martin, she had satisfactorily addressed this, so presumably this was no longer an issue and should not have been a topic for discussion.

294. Given that it was clear that these matters were causing the applicant distress, the easiest way of addressing the problem was to take her off the switch, move her or move Ms Howard away, and cease having the meetings. A reasonable employer would have taken such steps, and the failure by Ms Martin to do this was unreasonable. There were alternative options available and the respondent failed to implement those options.
295. The requirement to attend a meeting on 6 June 2019, on the background of the other issues, and the rejection of the applicant's request to discuss the bullying and harassment, was in my view the final straw. Her stress was longstanding, and its cause was multifactorial. The applicant's medical evidence supports the contention that all of the events were responsible for her psychological injury and there is no evidence to suggest that the respondent's actions were reasonable.
296. Therefore, having regard to the totality of the evidence, I am not satisfied that the respondent has discharged the onus of showing that the applicant's psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by it with respect to performance appraisal and/or discipline.

Extent of the applicant's incapacity

297. An assessment of the applicant's capacity involves a consideration of whether the applicant has no current work capacity or a current work capacity as defined in s 32A of the 1987 Act.
298. Section 32A of the 1987 Act defines the relevant terms as follows:

“current work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment.

no current work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment.

suitable employment, in relation to a worker, means employment in work for which the worker is currently suited:

- (a) having regard to:
 - (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
 - (ii) the worker's age, education, skills and work experience, and
 - (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
 - (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
 - (v) such other matters as the WorkCover Guidelines may specify, and
- (b) regardless of:
 - (i) whether the work or the employment is available, and
 - (ii) whether the work or the 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.”

299. “No current work capacity” requires a consideration of a worker’s capacity to undertake not only his pre-injury duties, but also suitable employment, irrespective of its availability. This was confirmed by Deputy President Roche in *Mid North Coast Local Health District v De Boer*²⁶ and in *Wollongong Nursing Home Pty Ltd v Dewar*.²⁷
300. Therefore, if the applicant has “no current work capacity”, I need to assess whether the applicant is unable to return to both his pre-injury duties and some suitable employment.
301. There is no dispute that the applicant is unfit for her pre-injury duties. The medical certificates of Dr Darji certified that the applicant had no current work capacity prior to 20 October 2019. He prescribed medication and psychological counselling.
302. The evidence of Mr McAndrew does not address the applicant’s capacity, but his focus is on psychological treatment, so this is not surprising.
303. According to Dr Canaris, the applicant was not well enough to work when he saw her on 7 January 2020. I would accept that such a comment is consistent with a certification that the applicant had no current work capacity. His report is dated 13 January 2020, so I would accept that the applicant had no current work capacity as at the date of his report.
304. Finally, Dr Martin thought that the applicant should not return to her pre-injury duties at the respondent, and he felt that the sooner the applicant returned to work the better. This appears to me to be an aspirational view, contingent on the applicant being rehabilitated into a supportive environment on a gradual basis.
305. According to the applicant’s evidence, she is anxious, depressed and lacks motivation and confidence. She has problems with her sleep, concentration and day to day activities. Dr Canaris indicated that her condition is not stable, and it seems that she requires on-going treatment.
306. Dr Martin is the only clinician to suggest that the applicant has some capacity, but when one has regard to the applicant’s medical evidence, I have doubts that she could resume any form of work in the short term.
307. The applicant is now 60 years old. Details of her education, training, skills and employment history are unknown. She has not been involved in any return to work plans or rehabilitation.
308. Therefore, having regard the relevant factors identified in s 32A of the 1987 Act, I am satisfied on the balance of probabilities that the applicant has had no current work capacity since he ceased work on 5 June 2019 until 13 January 2020.

Quantification of the applicant’s entitlement to weekly compensation

309. The parties agreed that the applicant’s Pre Injury Average Weekly Earnings (PIAWE) was \$1,213.32. It seems that the applicant was not in receipt of any pecuniary benefits.
310. The applicant received provisional payments of compensation from 7 June 2019 to 29 September 2019. Therefore, her entitlements will be calculated pursuant to s 37 of the 1987 Act.

²⁶ [2013] NSWCCPD 41.

²⁷ [2014] NSWCCPD 55.

311. In accordance with s 37(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period from 30 September 2019 to 13 January 2020 is:

$$(AWE \times 80\%) - D = \\ \$1,213.32 \times 80\% - 0 = \$970.66 \text{ per week as adjusted.}$$

312. During the conciliation conference, Mr Hickey quite wisely amended the weekly claim to close the period of the claim at 13 January 2020, given my concerns about the absence of medical evidence to support the applicant's capacity beyond that date.

313. It seems from the evidence that it is likely that the applicant will continue to experience incapacitating symptoms due to her psychological injury. Hopefully the insurer will use common sense and make payments after 13 January 2020, if the applicant provides it with evidence to substantiate her incapacity. Such action would be consistent with the Model Litigant Policy.

Medical Expenses

314. As the applicant has succeeded in her claim, I accept the medical evidence that supports the need for payment of reasonably necessary medical, hospital and related expenses. Accordingly, there will be a general order under s 60 of the 1987 Act.

FINDINGS

315. The applicant sustained a psychological injury arising out of or in the course of her employment on 5 June 2019 (deemed).

316. The applicant's employment was the main contributing factor to her injury.

317. The applicant was paid weekly compensation from 7 June 2019 to 29 September 2019.

318. The applicant had no current work capacity from 5 June 2019 to 13 January 2020.

319. The applicant's psychological injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to performance appraisal and/or discipline.

ORDERS

320. The respondent to pay the applicant \$970.66 per week as adjusted from 30 September 2019 to 13 January 2020 pursuant to s 37(1)(a) of the 1987 Act.

321. The respondent to pay the applicant's reasonably necessary medical expenses pursuant to s 60 of the 1987 Act.