WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1627/20**
Applicant: **Rachel Mills**
Respondent: **Foxtel Management Pty Ltd**
Date of Determination: **26 May 2020**
Citation: **[2020] NSWWCC 173**

The Commission determines:

1. Amend the application to insert 14 February 2019 as the notional date of injury in lieu of what there appears.

2. The applicant suffered psychological injury namely a major depressive disorder arising out of and in the course of her employment by reason of the nature of her work prior to 14 February 2019.

3. Decline to find that the applicant's injury was wholly or predominantly caused by reasonable action taken by the employer in respect of transfer, demotion, dismissal or redundancy in accordance with s 11A (1).

4. That the applicant was incapacitated for work as a result of injury between 14 February 2019 and 30 November 2019.

5. At all material times the applicant's pre-injury average weekly earnings was $2,904.

6. Respondent to pay the applicant weekly payments at the maximum rate prescribed by section 34 (1) from 14 February 2019 to 30 November 2019.

7. Liberty to apply on the arithmetical calculations above.

8. The respondent to pay the applicant's hospital and medical expenses pursuant to section 60.

A brief statement is attached 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 PAUL SWEENEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Rachel Mills (the applicant) was a long-term employee of Foxtel Management Pty Ltd (the respondent). Her last position with the company was Head of Wholesale Partnerships Telco. On 13 February 2019, the applicant was informed during a meeting with Caroline McDaid that the title of her role would change to Telco Wholesale Partnerships Manager. The new role required her to perform only some of the duties of her previous role.

2. The applicant ceased work on 14 February 2019. She did not return to full-time employment until 2 January 2020.

3. The applicant alleges that she suffered a psychological injury by reason of her employment prior to 14 February 2019 which caused her to be incapacitated for work up until 2 January 2020.

4. The respondent accepts that the applicant suffered a psychological injury arising out of and in the course of her employment. It contends, however, that it is not liable to the applicant by reason of the operation of s 11A of the *Workers Compensation Act 1987* (the 1987 Act). By a s 78 notice, the respondent's insurer asserted that the applicant's psychological injury was wholly or predominantly caused by reasonable action taken by the respondent with respect to transfer, demotion or dismissal.

PROCEDURE BEFORE THE COMMISSION

5. When the matter came on for conciliation and arbitration by telephone on 8 May 2020, Mr Stockley, of counsel, represented the applicant and Mr Robison, of counsel, represented the respondent. I was informed that the parties were unable to reach any mutually acceptable compromise in respect of the claim. In particular, the parties were at odds about the application of s 11A. I am satisfied that the parties had ample opportunity to reach a settlement but were unable to reach a satisfactory resolution.

6. At the commencement of the arbitration hearing, Mr Robison sought leave to expand the activities set out in s 11A on which the respondent relied to defeat the applicant's claim. He sought to argue that the applicant's psychological injury was wholly and predominantly caused by reasonable action taken by the employer with respect to retrenchment and the provision of employment benefits to workers. Mr Stockley objected to the respondent relying upon these aspects of s 11A. He indicated that he was not in a position to meet these arguments.

7. I ruled that the respondent should not be permitted to raise a defence based upon the provision of benefits to workers. It was not raised in the s 74 notice in the matter. At the telephone conference, I was informed by the respondent's solicitors that the respondent's defence was based upon actions taken by the employer with regard to transfer, demotion or dismissal. There was no explanation as to why the respondent had not raised the issue at an earlier time.

8. Mr Stockley contended that, if the provision of employment benefits to workers was raised, he would need to reconsider the evidence before advising his client what action she should take. I formed the view that there was, almost certainly, a degree of prejudice in the matter. At the very least, the arbitration hearing would not complete in the allocated time. There was, of course, the real possibility that the applicant would require to put on further evidence.

9. Conversely, I allowed the respondent to rely upon the activity of retrenchment, although I had difficulty envisaging the application of that term to the circumstances of this case. The term retrenchment is of a similar flavour to dismissal and permitting reliance on it did not raise any novel issue, which could not be met by the applicant at the arbitration hearing.

EVIDENCE

10. The documents before the Commission are as follows:

    (a) the Application to Resolve a Dispute (the Application) and the documents attached, and

    (b) the Reply and the documents attached.

11. There was no objection to the material contained in the documents referred to above. Neither party sought to adduce oral evidence.

SUBMISSIONS

12. The submissions of the parties are recorded, and I do not propose to reiterate each of the arguments raised by counsel in these short reasons. I will attempt to engage with the general thrust of the respective cases in resolving the issues in dispute.

13. Mr Robison argued that the phrase "with respect to" in s11A(1) required the Commission to take a wide view of the employment circumstances connected to the matters set out in the subsection. On this point, both counsel referred to the decision of the Court of Appeal in *Manly Pacific International Hotel Pty Limited v Doyle* (1999) 10 NSWCCR 181 (*Doyle*).

14. So interpreted, the difficulties which the applicant encountered, after her return from secondment to her usual role in July 2018, should be construed as actions with *respect to transfer*. The return from secondment constituted the relevant transfer.

15. Similarly, the restructure of the marketing aspect of the respondent's operation, which was first conveyed to the applicant by Ms McDaid in July 2018 were actions *with respect to demotion, dismissal or retrenchment* as they were connected with the ultimate termination of the applicant's employment in February 2019. It was self-evident that these actions were reasonable. There was no reason to suspect otherwise. Employers were able to transfer employees, restructure their operations and change the duties and responsibilities of position in good faith. There was nothing to suggest otherwise in this case.

16. Mr Stockley, on the other hand, submitted the applicant's return to her usual role after secondment was not an action with respect to *transfer*. The restructure of the respondent's marketing operation was not an action contemplated by s 11A. Equally, the proposed change of the title and responsibilities of her position in February 2019 did not amount to a transfer. The proposed position was essentially the same as her previous one and the respondent's evidence emphasised the substantial continuity in duties.

17. Moreover, the respondent had not proven that all of its relevant actions were reasonable. On the contrary, none of the employees of the respondent, who were involved in the restructure or who conveyed the decisions of the respondent to the applicant, gave evidence in these proceedings.

18. In order to understand the way in which the Commission has resolved the dispute in this matter, it is necessary to set out the evidence of the applicant and the evidence of Mr Hill, the respondent's legal counsel, the only lay evidence adduced by the respondent. What follows is not intended to be a complete survey of the evidence. Rather, I set out those aspects of the evidence which are relevant to the issues in dispute.

THE APPLICANT

19. The applicant's evidence is comprised of two signed statements dated 11 April 2019 and 10 February 2020. There was no application to cross-examine the applicant at the arbitration hearing. The two statements largely overlap, and I will only refer fleetingly to the statement of 11 April 2019.

20. The applicant records that in November 2017, she was seconded to the finance section of the respondent, where she worked "on a cost cutting project as Senior Transformation Manager". She returned to her usual role in marketing in July 2018. She states that her team lacked sufficient support to cope with its tasks. She states that she was required to work long hours including three hours at night and additional hours on the weekends. She continues:

> "The hours had increased with the new marketing requirements. It was extremely difficult to keep up with the amount of work required."

21. The applicant says that her Manager, Caroline McDaid, agreed that the team needed more support. She alleges that Ms McDaid said:

> "Our team is massively overworked. We need a restructure and more resources."

22. The applicant recounts that she was only able to keep going with the "new requirement because I thought that things would improve with the restructure." But, as time went by, she found that "more and more work was required." She continues:

> "As the weeks dragged by with no restructure and no support I was becoming more and more stressed. I could not sleep because I was worried about getting through all the work without adequate support. I initially spoke to my GP at the end of July about work stress causing low mood and insomnia."

23. She states in October 2018, she was "really struggling with work place anxiety". She saw Dr Kordjian, her general practitioner, but rejected the advice given in respect of treatment because she "assumed our team would be getting more support or our roles changed to ease the pressure."

24. In that month, she also advised the Human Resources Director by email of her "work-related anxiety" and, on 6 November 2018, emailed Ms McDaid explaining that her work and the delay in providing support was causing "insomnia". There was no change to the structure or to her workload at that time.

25. In 2018, a new Group Director of Distribution, Ms Tropman, was employed with Ms McDaid as her only direct report. The applicant states:

> "Our team was not told of this new hire until the day that she started. This was very unsettling and added to my stress because we were not told what this meant for my Manager or my position."

26. After a conversation with the new manager. in November 2018 the applicant says that it was apparent to her that the enormous workload and stress of restructuring would continue for some time. Despite this she agreed for her only direct report to move to the position of Head of Marketing. She says this:

> "As the year came to an end the situation became more difficult. I was being given competing instructions from Tropman and McDaid. It wasn't clear who my manager was. I had no support and the restructure and all its uncertainty hanging over me which considerably added to the anxiety."

27. On 6 December 2018, the applicant advised Ms Tropman that the "wholesale team is drowning" and she continued to inform Ms McDaid that she was overwhelmed by "the workload and my anxiety is increasing due to the lack of clarity about restructure."

28. The applicant states over the Christmas break she developed extreme anxiety about work and her sleep was compromised and her relationship with her husband and children suffered. She was concerned that her actual role was now quite different to the job description and thought that her employer should have this information available when considering restructure. She forwarded this to the Human Resources officer on 11 January 2019.

29. The applicant was called to a meeting with Ms Tropman on 9 January 2019. Her account of that meeting is as follows:

> "She told me that she was considering splitting my role and invited me to select which role. I said I could not make such an important decision unless I knew exactly what the roles looked like and how they fitted into the overall structure. She aggressively turned on me and said, '*are you resigning?*'. I again asked her to show me the final structure once she decided. This aggressive statement felt like she was bullying me, especially given she was aware of my work placed [sic] anxiety that had been building. I had absolutely no decision making powers in relation to the restructure and I told her that being told the continually changing ideas on the restructure caused me extreme anxiety, especially when presented with these without notice and during catch ups with her which were organised to review specific pieces of work."

30. The applicant says that she continued to perform her work with "deteriorating mental health". She saw Dr Kordjian on 15 January 2019. She advised Ms McDaid of this visit.

31. The applicant was then called to a meeting with Ms McDaid on 13 February 2019 where she was "told about my new role." She said it felt like a demotion, although she "was told it was not a demotion.". The applicant says that she broke down and went home, after which she consulted her GP. She says:

> "I consulted my GP multiple times during the following weeks. I was prescribed multiple sleeping pills due to my severe insomnia and depression. I could not stop ruminating on what had happened to me over the last six months."

32. The applicant says that she struggles each day and feels overwhelmed she continues to see Dr Friend, psychiatrist and Ms Gunther a psychologist. She says that she commenced looking for work again in November 2019. She worked three days per week prior to Christmas 2019 and then commenced work as a National Accounts Manager on 2 January 2020.

Mr Hill

33. Mr Hill largely addresses the situation after the applicant met with Ms McDaid on 13 February 2019. He was responsible for negotiating the deed release which was signed by the applicant on 20 March 2019. His evidence concerns the negotiations by which it was agreed that the applicant's contract of employment would cease on 15 March 2019, the details of the financial aspects of the termination and the way that it was conveyed to the staff. Ultimately, it was agreed that staff would be advised that:

> "Rachel has decided to leave Foxtel and pursue opportunities outside of Foxtel."

34. Mr Hill refutes the suggestion that the applicant was made redundant. He says that: "Reasonable changes had been proposed to her role in accordance with her employment contract whereby" the respondent was entitled to reasonably modify her duties or assign her to a new position but with different duties. Nonetheless, he asserted in a letter to the applicant's solicitor that the proposed split of her responsibilities and the new change in the nomenclature applied to that role did not alter her renumeration or the nature of her work.

35. Mr Hill attaches to his statement as annexure 1 an outline of events between 13 February 2019, the date of the meeting between the applicant and Ms McDaid and 20 March 2019 when finality was reached in relation to the termination of the applicant's contract of employment.

LEGISLATION

36. In so far as it is relevant, s 11A of the 1987 Act is as follows:

> "1) No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers."

DISCUSSION AND FINDINGS

37. Apart from the submissions made in relation to *Doyle*, which I will address further below, I was not referred to authorities, although Mr Robison's submissions, in part, turned on the proper construction of the section.

38. It is probably uncontroversial, but it is appropriate to repeat the instruction of the Court of Appeal in *Northern NSW Local Health Network v Heggi*e [2013] NSWCA 255 (9 August 2013) (*Heggie*). In that case Sackville AJA with whom Ward JA agreed stated that the following propositions were consistent with the statutory language and the authorities that have construed s11A(1) of the 1987 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.

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

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

39. Obviously, it is necessary in the circumstances of the case to substitute transfer demotion or dismissal for the word discipline in the above quotation. *Heggie* also instructs that reasonableness is to be assessed by reference to what is known to the employer at the time it takes one of the actions mentioned in s 11A. Sackville AJA said:

> "The language does not readily lend itself to an interpretation which would allow disciplinary action, or action of any other kind identified in s 11A(1) to be characterised as not reasonable because of circumstances or events that could not have been known at the time the employer took the action with respect to discipline": *Heggie* at [62].

The causes of the applicant's Injury

40. In order to determine whether the matters identified in s 11A(1) were a cause, or the whole or predominant cause of the worker's injury, it is first necessary to identify the applicant's psychological injury and its causes. As I understand the way in which the case was presented, both counsel argued that the injury was caused by the cumulative effect of events in the workplace over a period of time after the applicant's return to her usual role of Head of Wholesale Partnerships Telco in July 2018. Thus, the case was either the contraction or the aggravation of a disease and also consisted in the contraction or aggravation of a disease for the purpose of ss15 or 16 of the 1987 Act.

41. As always in a s 11A(1) case, the parties placed different emphasis on aspects of the employment relationship during this period. There is also a difference in emphasis between the applicant's evidence and parts of the medical evidence.

42. The applicant's evidence emphasised overwork in the second half of 2018, while waiting for a restructure to take place as a significant causative factor of her injury. Mr Stockley described this as the "dysfunctional workplace" scenario, although this might not be entirely apt in the circumstances of this case.

43. Mr Robison, on the other hand, put that the causes of injury included events after the applicant ceased work, particularly the negotiations and terms of the termination of her employment.

44. Dr Snowdon, a psychiatrist, provided a report to the applicant's solicitors. He expressed the opinion that the applicant had developed a major depressive disorder against a background of an adjustment disorder. He accepted that the applicant had a predisposition to this condition by reason of her history of prior bouts of depression. Nonetheless, he stated:

> "I would however add that it also has to be acknowledged, I feel, that her workplace circumstances or anyone, would be considerably stressed."

45. Dr Snowden accepted that the applicant's employment was the "main contributing factor" to her psychological condition. He considered and rejected the opinion of Dr Roberts, a psychiatrist retained by the respondent, that it was not.

46. Patently, Dr Snowdon accepted the applicant's evidence. He commented on the consistency between her written statement and history he obtained. He stated that her "current clinical picture has been recently precipitated and by the workplace events she described".

47. During her absence from work, the applicant was treated by Dr Friend, a psychiatrist to whom she was referred by Dr Sahagian of the Willoughby Medical Practice. Dr Friend expressed the opinion that:

> "In the context of work related bullying and unfair treatment whilst employed at Foxtel, Rachel has experienced a relapse of major depressive disorder."

48. By 18 September 2019, Dr Friend noted that there had been "definite improvement in depressive anxiety symptoms with 'treatment'. She expressed the opinion that these "injuries occurred during the course of her employment at Foxtel." She noted that the applicant had worked at Foxtel for 10 years prior to this onset of depressive symptoms without incident.

49. Throughout the entirety of her illness, the applicant was treated by Dr Kordjian, a general practitioner who also diagnosed anxiety/depressive symptoms was far more specific in attributing a cause to the development of these symptoms. She stated that:

> "The worker's greatest issue is that she felt demoted. This then led her to suffer anxiety/insomnia and eventually developed depressive symptoms."

50. The doctor expressed the opinion that this presentation was consistent with the history given because:

> "They took away her team member, they caused delays in decision making in the workplace which left her with prolonged uncertainty, she was not included in decision making, and almost felt forced to resign after interactions with management after restructuring etc."

The doctor's comment that the applicant "felt demoted", is, apparently a consequence of a series of incidents over a period of time.

51. Ms Gynther, a psychologist who treated the applicant dealt with causation as follows:

> "The development of my client's depression and mental health symptoms appears to have been gradual, over a period of six to twelve months in reaction to an increasingly difficult and stressful situation at work. There appeared to have been 4 crucial triggers of the deterioration of her mental health".

52. Mr Gynther identifies the four triggers as a "lengthy restructuring process" in the latter half of 2018; the outcome of the restructure in mid-February 2019; the "painful negotiation process" at the conclusion of her employment; and the requirement to sign a confidentiality agreement.

53. On the basis of this brief review of the evidence in the applicant's case, I am satisfied that the applicant commenced to suffer symptoms of stress shortly after her return to work in her permanent position in July 2018. These symptoms gradually worsened with the passage of time and worsened again at the time of the meeting with Ms McDaid, when she was informed that her role in the company would now be that of Telco Agency Partnership Manager reporting to the Head of Commercial Partnerships.

54. That is not to say that the applicant suffered a recognisable psychological condition in the second half of 2018, although that is possible. In order to establish psychological injury, it is necessary for a worker to prove either physiological change, the contraction of a disease to which the employment is a contributing factor, or the aggravation of a pre-existing disease; see *Austin v Director-General of Education* [1994] 10 NSWCCR 373. The evidence of injury in 2018 is not compelling. But I am left in no doubt, that these events were material causes of the psychological injury which was manifest and accepted by the respondent by Christmas 2018 or, at the latest, by early 2018.

55. In reaching this conclusion, I have only briefly touched on the evidence of Dr Roberts, as it is accepted by the respondent that the applicant suffered psychological injury to which employment was the main contributing factor. In these circumstances, Dr Roberts' opinion is of little assistance, as he largely attributes the applicant's psychological condition to an absence of normal psychological fortitude and excludes employment as being a major contributing factor.

56. I have not dwelt on events which occurred after the cessation of the applicant's employment and, therefore, after the notional date of injury. These events which relate to the termination of her employment have compounded the applicant's psychological injury. However, the applicant was incapacitated for work prior to the termination of her contract of employment.

Transfer

57. Against that background, I turn to the specific grounds of defence raised by Mr Robison in his submissions. The initial threshold question is whether the applicant's return from secondment to her usual role in mid-2018 is a transfer for the purposes of s 11A(1)? Whilst I was initially dubious about the validity of that proposition, a consideration of the reasoning in *Doyle* offers support for the respondent's contention. In that case, Davis JA said the following at [31]:

> "In my opinion, that interpretation of the word '*transfer'* was too narrow. The word is used in the employment context. As such, it encompasses a move from one position to another whether or not there is any change in location. In determining whether or not there is a transfer, a change in the nature and responsibilities of the work performed may be of more importance than a change in the place where the work is carried out. Mr Doyle was moved from the position of Larder Chef to that of Sauciere. That was a transfer."

58. In response to Mr Robison's argument, Mr Stockley stressed that the applicant was returning to her customary role in marketing and this could not be considered a transfer. Unfortunately, neither the applicant's evidence nor Mr Hill's evidence address the circumstances of the applicant's return to her position as Head of Wholesale Partnerships Telco July 2018 in any detail. It seems clear, however, that the duties to which she returned were very different to the job she performed in the respondent's finance operation as Senior Transformation Manager. She moved from one team to another to perform this different role. In those circumstances, on balance I am inclined to the view that the change of position was a transfer as the word is used in s 11A(1).

59. With even less confidence, I hold that the respondent's proposal to change the nomenclature of the applicant's position in February 2018 from Head of Wholesale Partnerships Telco to Telco Wholesale Partnerships Manager and to alter the duties that she performed constituted a transfer. Mr Hill referred to the employer's rights to impose such changes by reason of the contract of employment, which provided that:

> "The Company may reasonably modify your duties, assign you to a new position with different duties, change your reporting structure, change your position title ... ".

60. There may be a fine line between the modification of an existing position and the transfer of an employee to another position. It is obviously a matter of fact and degree to be determined in the circumstances of each case.

61. Certainly, the applicant believed that the proposed position of Telco Wholesale Partnerships Manager was a categorically different position to that which she had previously held. The applicant's subjective view however is an inappropriate test of a statutory or contractual term. It certainly involved a change in the nature and responsibilities of the work which she was required to perform by the respondent. On the other hand, it did not involve the dramatic changes in duties or reporting structures which accompanied her return to the marketing role in July 2018.

Demotion, dismissal or retrenchment

62. The evidence does not establish that the applicant was demoted or dismissed. Certainly, Mr Hill does not suggest that she was demoted or dismissed. He states her remuneration remained the same and the nature of her work did not "significantly change". She was able to apply for the more senior role of Head of Commercial Partnerships if she chose to so. The factual investigation refers to legal advice obtained by the respondent, possibly from Mr Hill, that the position, which Ms McDaid offered the applicant in February 2018, was "comparable" to her previous role. Against the background of this evidence, it is difficult to find that the applicant was demoted.

63. It is true that the applicant thought that she had been demoted. She seemed to place some weight on the removal of the word "Head" from her job description. Once again, however, the applicant's subjective view of the matter is a poor substitute for the evidence. In the circumstances, I am not persuaded that any relevant action by the respondent was action with respect to "demotion".

64. Similarly, there is complete absence of evidence that the applicant was dismissed. On the contrary, the respondent offered her a well-paid job, which was arguably comparable with her position. It is true that the applicant did enquire of the respondent, whether a redundancy was available. I suppose that the respondent's response that it was not, might be an action in respect of redundancy but this was not addressed at the arbitration hearing. But if the respondent's refusal of a redundancy falls within s 11A(1), it is of little, if any, causal potency in comparison with difficulties which confronted the applicant in the second half of 2018.

Whole and predominant cause

65. Mr Robison submitted that the difficulties, which the applicant deposed to at work in the second half of 2018 resulted from the action by the respondent in transferring her from the finance section to her ordinary duties in July 2018. He argued that the phrase "with respect to" in s11A(1) was wide enough to encompass the work performed by a worker after a transfer. He relied upon the dicta of Fitzgerald JA in *Doyle*. At paragraphs [7] and [8], his Honour said this:

> "Davies AJA has stated that the Compensation Court 'held that the circumstances under which Mr Doyle worked [after his transfer] were the predominant cause of his breakdown' Para 28. and expressed the opinion that, for the purpose of subs 11A(1), the consequences of actions 'taken or proposed to be taken by or on behalf of the employer with respect to transfer' do not include 'the worker's response to employment conditions encountered after a transfer ...'. Para 27. In my opinion, that proposition is too broadly stated.

> It was an action taken by the appellant with respect to the transfer of Mr Doyle, namely, the transfer of him from one position to another, which caused him to work in 'the circumstances ... which ... were the predominant cause of his breakdown'. That being so, the appellant's material action, the transfer of Mr Doyle , cannot be automatically excluded as the whole or predominant cause of Mr Doyle 's psychological injury. Whether or not the appellant's transfer of Mr Doyle was the whole or predominant cause of his psychological injury within the meaning of subs 11A(1) is a question of fact and degree, which involves consideration of all the factors which produced Mr Doyle's condition."

66. This statement of a Judge of Appeal probably falls into the category of seriously considered dicta and cannot readily be ignored. Clearly, his Honour contemplated that action "with respect to transfer" may include the nature of the work which a worker performs after transfer. Whether that is so is a question of fact and degree, which involves a consideration of all the factors which caused a worker's psychological injury.

67. I also accept Mr Robison's submission that the phrase in respect of has considerable width. In Pearce and Geddes *Statutory Interpretation in Australia* 7th edition, the authors state that connecting phrases such as the expression "with respect to" are of "broad import". In *O'Grady v Northern Queensland Co Ltd* [1990] 169 CLR 356, McHugh J at [228] stated that the phrase "in relation to" requires no more than a relationship, whether direct or indirect, between two subject matters. That is also true of the phrase "with respect to".

68. While the work performed after transfer may be relevant and important in considering whether an action is one with respect to transfer, I am not persuaded that the difficulties which the applicant encountered after her return to the position of Head of Wholesale Partnerships Telco had any connection whatsoever with her transfer. Unlike the worker in *Doyle*, the applicant in this case was not transferred to an unfamiliar position where she did not have the requisite technical skills and aptitude to perform the work. She returned to a position, which she had occupied for many years. She had a proven capacity to carry out the functions of the role.

69. The actions of the respondent which caused the applicant's psychological stress in the second half of 2018 are readily identified in the evidence. They include the increase in the applicant's workload over time; the increasingly long hours, which she was required to work; the repeated delay in restructuring, which the applicant hoped would relieve her workload; the appointment of Ms Tropman and the blurring of reporting lines, which the applicant perceived accompanied this; and the loss of her only "direct report". None of these matters are connected with the "transfer". In my opinion, it would be decidedly odd to hold that these actions, many of which occurred in late 2018, related to a transfer in July 2018.

70. Equally, it is quite clear from my review of the evidence above that these matters were causative of the applicant's psychological injury. Plainly, by Christmas of 2018, she was suffering symptoms which were either characteristic of a psychological illness or a precursor of it. Her evidence is that she suffered "extreme anxiety" and insomnia over the Christmas break in 2018.

71. As these matters were causative of the applicant's psychological condition, it is necessary to weigh them against the causative factors which arise from transfer. I have concluded that the respondent has not proven that the applicant's psychological injury was wholly or predominantly caused by the transfer in July 2018 or the proposed transfer in early 2019.

72. First, as I have already indicated, I do not accept that the transfer in July 2018 has influenced the applicant's psychological injury. The medical evidence does not suggest that it did. Secondly, while the proposed transfer of the applicant in February 2019 stimulated the applicant's psychological injury, it is only one of the causes. It is not evident that it outweighs the events that I have set out in paragraph 69 above. The medical evidence is not crystal-clear on this issue, but it is evident that all the treating doctors accept that events in the second half of 2018 were causative of the applicant's psychological injury. Certainly, it does not establish that the renaming of the applicant's position and the allocation of different duties and responsibilities in February 2019 was the predominant cause of the applicant's psychological injury.

73. Thirdly, while the negotiation of her termination may have caused the applicant distress, it occurred after the applicant ceased work and was diagnosed with a psychological injury. It may have compounded an injury, which had already occurred as a result of the applicant's employment prior to 14 February 2019. However, I doubt whether it could be considered a predominant cause of the injury. Further, the termination of the applicant's employment was not an action by the respondent in respect of dismissal. The respondent did not dismiss the applicant. Rather, she resigned from her employment. The negotiations in respect of termination do not fall within s 11A(1).

74. Finally, I do not accept Mr Robison's submission that the restructure of the marketing section, which continued throughout the second half of 2018 and into early 2019, was an action in respect of demotion, dismissal or retrenchment. I have held that the evidence does not support a finding of demotion or dismissal and, if there was an action by the respondent in respect of retrenchment, it was of very limited causal potency.

Reasonable action

75. The respondent adduced no evidence from Ms McDaid or Ms Tropman. They were the agents of the respondent who supervised the applicant during the second half of the 2018 and up until her cessation of work on 14 February 2019. In *New South Wales State of v Stokes* [2014] NSWWCCPD 78 (26 November 2014), Deputy President Roche observed that "it will always be open to infer from the surrounding circumstances that conduct was reasonable, even if there is no direct evidence addressing that issue." However, a failure to adduce evidence on a point on which a party bears an onus is obviously fraught with forensic danger.

76. The only action by the respondent within s 11A which was causative of the applicant's psychological condition was the proposed change in her duties and responsibilities in February 2019, which I have characterised as an action in respect of transfer. There is no doubt that the respondent had the contractual right to make such a change as Mr Hill points out in his statement. It is evident that a restructuring of the marketing section of the respondent's operation in which the applicant was employed was anticipated for some time. Whether the change of the applicant's duties was an integral part of an overall restructure or independent of it is not entirely clear from the evidence.

77. Given the absence of evidence on the point, I am unable to conclude that the respondent has established that its actions through Ms McDaid or Ms Tropman were reasonable. It is not open to simply assume that they were. The respondent must prove that they were either by adducing evidence or by reference to the surrounding circumstances. In this case neither the direct nor circumstantial evidence leads to proof of reasonableness on the balance of probabilities.

Incapacity

78. The specialist medical evidence asserts that the applicant was unfit for work up until December 2019. Dr Roberts, who saw the applicant in May 2019, stated that she was not capable of working. Dr Snowdon saw the applicant several months later and also expressed the opinion that she was totally unfit for work.

79. The applicant returned to work three days per week prior to Christmas 2019. The evidence does not establish the date on which she returned to work or her earnings upon her return to work. Accordingly, the applicant has not established an entitlement to compensation after 30 November 2019.

80. It seems to be accepted that the applicant's pre-injury average weekly earnings were $2,904 at the date of injury. It follows that the applicant would be entitled to the maximum weekly payment pursuant to s 34 (1) of the 1987 Act throughout her period of incapacity.

81. I propose to order that the respondent pay the applicant the sum of $2,145.30 as adjusted pursuant to s 34 on the basis that the applicant had no residual earning capacity between 14 February 2019 and 30 November 2019. I give liberty to apply in respect of the arithmetical calculation of the award.

82. I also propose to order that the respondent pay the applicant's medical and hospital expenses pursuant to s 60.