

# WORKERS COMPENSATION COMMISSION

## FURTHER AMENDED CERTIFICATE OF DETERMINATION

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

**Matter Number:** 1426/19  
**Applicant:** Itay Sahar  
**First Respondent:** Moneysharing Pty Ltd  
**Second Respondent:** Enterprise IT Resources  
**Date of Determination:** 2 September 2019  
**Date of Amendment:** 3 September 2019  
**Date of Further Amendment:** 9 September 2019  
**Citation:** [2019] NSWWC 289

The Commission determines:

1. The applicant was employed as a worker by the first respondent.
2. The applicant suffered a psychological/psychiatric injury in the course of his employment with the first respondent, to which his employment was the main contributing factor with a deemed date of injury of 2 December 2016.
3. At the date of injury, the applicant's preinjury average weekly earnings (PIAWE) were in excess of the statutory maximum rate.
4. As a result of the injury referred to in (2) above, the applicant was totally incapacitated for employment between 2 December 2016 and 31 May 2019.
5. The respondent is to pay the applicant weekly compensation as follows:
  - (a) Pursuant to section 36 of the *Workers Compensation Act 1987* (the 1987 Act), \$1,955.10 per week for the period 2 December 2016 to 3 March 2017;
  - (b) Pursuant to section 37 of the 1987 Act, the following amounts:
    - \$1,646.50 per week from 4 March 2017 to 31 March 2017
    - \$1,667.92 per week from 1 April 2017 to 30 September 2017
    - \$1,681.35 per week from 1 October 2017 to 31 March 2018
    - \$1,702.80 per week from 1 April 2018 to 30 September 2018
    - \$1,716.24 per week from 1 October 2018 to 31 March 2019
    - \$1,741.92 per week from 1 April 2019 to 31 May 2019.
6. The applicant's claim for lump sum compensation will be referred to an Approved Medical Specialist (AMS) for determination of the whole person impairment arising from the following:
  - Date of injury (deemed): 19 April 2017 (being the date of claim)
  - Body system referred: psychiatric/ psychological injury
  - Method of assessment: whole person impairment.
7. The documents referred to the AMS will include:
  - (a) This Certificate of Determination and Statement of Reasons;
  - (b) The Application and attachments;
  - (c) The first respondent's Reply and attachments;
  - (d) The second respondent's Reply and attachments;
  - (e) The applicant's Application to Admit Late Documents dated 24 April 2019 and attachments; and

(f) The respondents' Application to Admit Late Documents dated 9 July 2019 and attachments.

8. The respondent is to pay the applicant's reasonably necessary medical and treatment expenses.

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

Cameron Burge  
**Arbitrator**

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A Sufian*

Abu Sufian  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. Itay Sahar (the applicant) brings proceedings against Moneysharing Pty Ltd (the first respondent) and Enterprise IT Resources (the second respondent) seeking weekly benefits compensation, payment of medical and treatment expenses and lump sum compensation.
2. Notwithstanding the joinder of both respondents, it was agreed at the hearing of this matter that the applicant was employed as a worker by the first respondent.
3. By Application to Resolve a Dispute (the Application) dated 22 March 2019, the applicant alleges he suffered a psychological injury as a result of the nature and conditions of employment. He alleges he suffered that injury because of bullying and harassment in the workplace, which has left him with an agitated major depressive disorder with psychotic features. The applicant has been certified as unfit for work since the onset of the alleged injury.
4. I note the Application pleads a date of injury of 2 October 2016, however, at the hearing of the matter the deemed date of injury with respect to the claim for weekly compensation was amended to 2 December 2016, being the first date of alleged incapacity.
5. Based on the evidence and submissions which shall be reviewed in detail during the course of these Reasons, there is no issue that the applicant suffers from a serious psychological/psychiatric condition. Rather, the differences between the parties may broadly be categorised as the applicant alleging his psychotic condition was brought about as a result of a reaction to matters which took place in the workplace, whereas the respondent alleges the applicant suffered a psychotic disorder unrelated to his employment.
6. The applicant began working for the first respondent in or around 2016 in a role as a Java developer. He stated he worked on coding and would cooperate with team mates on consultations, review code produced by colleagues, carry out coding as required by whatever project the company was working on and provide solutions for the team.
7. The applicant states that on 2 October 2016, he attended an informal meeting with co-workers. He said the meetings happened daily and each team member reports updates on their work. At the meeting, the applicant raised a concern regarding something about which he had not been informed. According to the applicant, Mr Eric Gao made the change, and this impacted the applicant's work without him being told.
8. According to the applicant, his question remained unanswered so after the meeting he approached Joseph Seo, an employee of the second respondent and asked him what should be done about the problem. The applicant states Mr Seo said "If you can't make a decision about what can be done you can send me an email and we will work it out." The applicant replied "Ok" and according to him the conversation was held in friendly terms.
9. The applicant states he then went to his desk to investigate what could be done, and discovered he was able to solve the issue. He then "assigned a review" to someone named Rosie, also an employee of the second respondent.
10. The applicant states Mr Seo then rushed to the applicant's desk and tapped him on the shoulder. He asked a question in relation to some work which had been carried out then apparently said to the applicant "Ok, come." And gestured to the applicant with his hand.

11. The applicant got up and followed Mr Seo to a meeting room where they were joined by Rosie after Mr Seo had called her. According to the applicant, Mr Seo said "I asked you to send me an email and you finished the work and assigned it to Rosie." Apparently, Mr Seo said this in a raised voice and the applicant was surprised at the tone of voice.
12. The applicant stated that Mr Seo's tone was accusatory and that he did nothing but blame the applicant, who then proceeded to explain that Mr Seo had said the applicant could make a decision by himself if he knew what to do, and that he had assigned the review to Rosie because she was initially responsible for the specific rules of the task at issue.
13. According to the applicant, Mr Seo continued blaming him in an aggressive manner and was leaning over towards him. He said he spoke with a raised voice and was surprised because the applicant felt he had taken initiative and solved the problem. He suspected Mr Seo may have been jealous of him, and he conveyed that to Mr Seo. The applicant states Mr Seo reacted aggressively to that comment and continued to raise his voice at the applicant.
14. Mr Seo allegedly said the applicant was the developer, Mr Seo was the tech leader and when a mistake is made it is not the applicant's position to tell Mr Seo whether it has been solved, fixed or to pass the problem on. The applicant stated: "he made it clear I was lower than him and I was to do as I was told."
15. The applicant states at paragraph 30 of his statement:

"I tried to explain very nicely and calmly because I was right and he was getting angrier. I could see he was moving his upper body forward aggressively over the desk towards me and his head was moving and his face was red and I could see he was angry. I think he might have banged the table a couple of times. It felt like he was doing this purposely to humiliate me in front of Rosie."
16. The applicant states that he was very fearful, and it felt like Mr Seo was trying to make him feel afraid as he saw the applicant as a threat to his position. The applicant left the meeting room, went back to his desk and was asked by a co-worker what had happened. The applicant apparently replied, "I would find another job." The applicant states he was not calm and felt shocked with Mr Seo's behaviour. He said that he had never had a confrontation in the workplace like that before, and realised that he had not been called to a meeting but rather an opportunity for Mr Seo to humiliate him in front of Rosie.
17. On the same day, the applicant states he went to see Daniel Gadd and told him he wished to move to another project. He did not tell Mr Gadd why. When he met with Mr Gadd, he said there was no particular reason why he wanted to move from the project, and admits he was angry when he said so. According to the applicant, Mr Gadd agreed to move him but did not say when this would happen. Shortly after the incident with Mr Seo, the applicant states Rosie came to his desk, tapped him on the shoulder and asked if he was ok. According to the applicant "I said I was ok, however, I felt that her and Joseph had killed me inside and she was being very fake in asking."
18. At some point, Mr Seo sent the applicant an email with another task, which the applicant rejected and asked for it to be forwarded to another developer. Mr Seo came to see the applicant to ask what the problem was with the task, and the applicant told him he was working on something else. According to the applicant, Mr Seo's manner when speaking to him about this other task was very aggressive and he felt threatened.
19. Since the events recounted by the applicant, he stated that his productivity reduced and he developed depression. The applicant states Mr Gadd knew what had happened because Rosie would have told him. Mr Gadd apparently asked whether the applicant was ok on a number of occasions, and the applicant replied in the affirmative "because I was under the impression that Joseph would be dealt with. It seemed that all of the office knew about what had happened and that there had been a breach of policy. But nothing was done about it."

20. The applicant's condition deteriorated, and he consulted a number of practitioners and has, since leaving the employ of the respondent, been admitted twice to St Vincent's Hospital in 2018 suffering from suicidal ideation. The applicant also stated he was admitted to Royal Prince Alfred Hospital at one point in or about early 2019. The applicant said his mental health has deteriorated significantly, and he finds his condition difficult to live with. In his statement from paragraph 52 and following, he sets out the difficulties which he has in day to day life as a result of his condition.
21. As noted at the outset of these Reasons, there is no issue the applicant suffers from a serious psychiatric/psychological condition which includes psychosis and paranoia. He says that he has had suicidal thoughts in the past and a number of his admissions have arisen due to having thoughts of cutting his wrists. He says he has developed a gambling and drinking problem as a result of his condition.
22. The applicant submitted a claim form to the respondent on 19 December 2016, approximately two weeks after his first absence from the workplace arising from his alleged injury. On 12 January 2017, the respondent's insurer issued a section 74 notice denying liability because it did not accept the applicant's diagnosis of anxiety/depression, nor that the diagnosis arose out of or in the course of the applicant's employment (section 4 of the *Workers Compensation Act 1987* (the 1987 Act)). The insurer also denied liability as it did not accept that his employment was a substantial contributing factor to any psychological injury suffered by the applicant (section 9A of the 1987 Act).
23. On 19 April 2017, the applicant's attorneys wrote to the respondent making a claim for lump sum compensation with respect to a 23% whole person impairment arising from the alleged psychological injury. On 8 May 2017, the respondent's insurer issued a review response maintaining the denial of liability on the grounds set out in the original section 74 notice and also alleging the applicant's employment was not the main contributing factor to the onset, aggravation, acceleration, exacerbation or deterioration of any disease (section 4(b)(ii) of the 1987 Act).
24. On 7 July 2017, the respondent's insurer issued a further section 74 notice in response to the claim for lump sum compensation, maintaining its denial and relying on sections 4, 4(b), 9A and also section 11A of the 1987 Act. On 26 March 2019, the applicant filed these proceedings.
25. I note that between the issuing of the final section 74 notice in July 2017 and the commencement of these proceedings, the applicant was admitted to hospital in relation to his psychiatric condition. In January 2018, he was admitted to Caritas, and on 25 August 2018 was admitted to St Vincent's Hospital with a situational crisis before being again transferred to the Caritas unit with thoughts of self-harm.

## **ISSUES FOR DETERMINATION**

26. The parties agree that the issue for determination by the Commission is whether the applicant's psychiatric condition, the existence of which is not disputed, was relevantly caused by his employment, or whether it is a constitutional condition to which his employment was neither the main nor a substantial contributing factor, depending upon the categorisation of the condition as either a disease process or a personal injury.
27. The respondent also places capacity for employment in issue, however, in my view a reading of the medical material in the matter indicates the applicant has no capacity for employment. Further consideration of this aspect of the matter is contained later in these Reasons.

## **PROCEDURE BEFORE THE COMMISSION**

28. The parties attended a hearing on 25 July 2017.
29. At the hearing, Mr B McManamey of counsel appeared for the applicant and Mr B Odling of counsel appeared for the respondent.
30. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

## **EVIDENCE**

### **Documentary evidence**

31. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) The Application and attached documents;
  - (b) The Reply of the first respondent and attached documents;
  - (c) The Reply of the second respondent and attached documents;
  - (d) The applicant's Application to Admit Late Documents and attached medical certificates (AALD), and
  - (e) The respondent's AALD enclosing independent medical examination (IME) report

### **Oral evidence**

32. There was no oral evidence called at the hearing.

### **The medical evidence**

33. The applicant relied upon the report of Dr Hampshire, psychiatrist IME dated 30 March 2017. Additionally, the applicant placed into evidence the reports of his general practitioner, Dr Chin dated 8 December 2016 and 6 August 2017 together with a report from Dr Nash, treating psychiatrist to Dr Chin dated 10 January 2017 and a report of Dr Norris, treating clinical psychologist to Dr Chin dated 3 September 2017.
34. Dr Hampshire took a history which illustrates the severe nature of the applicant's condition. He noted at the outset that the applicant suffers from a psychotic depression and was exhibiting formal thought disorder. He said the applicant certainly felt personally bullied and harassed, and was strongly of the view there was a conspiracy and planning for him to be effectively managed out of his job by Asian co-workers who would speak together in Chinese. The applicant became convinced that many of their conversations were about him. Dr Hampshire recorded the history of the events surrounding the applicant being "heavily criticised by Joseph for not having informed him by email that he had completed a task, and this lead him to tell me that he thought that those three in particular were out to try and punish him."

35. Dr Hampshire then set out the paranoid nature of the applicant's recounting of the events leading up to his leaving the respondent's employ. Dr Hampshire noted the applicant was suffering delusions, including a suggestion that when the Prime Minister of Israel visited Australia, he discussed with his Australian counterpart a letter of complaint which the applicant had written to the Human Resources department of his former employer, but that "Mr Turnbull only understands the bullying and harassment issue from the side of the other three workers and not from his side."
36. Dr Hampshire recorded the following mental state examination at page 49 of the Application:
- "His affect was inappropriate, in keeping with psychosis, and his mood agitated and somewhat perplexed but also clearly very depressed in an agitated manner. There was subtle Formal Thought Disorder present which made it difficult to keep track of his thoughts which were not appropriately goal directed. He did not describe any hallucinations but he did exhibit a number of paranoid delusions as I have outlined above. His cognitive testing was within normal limits. He is fully orientated in time, place and person and shows no clouding of his sensorium."
37. Dr Hampshire diagnosed the applicant as suffering from agitated Major Depressive Disorder with psychotic features, and noted:
- "it may be that he was bullied and harassed to such an extent that he has become depressed, but it may also be that he developed a Psychotic Depression in the course of his work and was then marginalised and isolated, as I have no doubt that he was leading up to his not being reappointed for a third six month term."
38. Dr Hampshire assessed the applicant as suffering from a 26% whole person impairment.
39. Dr Nash, treating psychiatrist supplied a report to the applicant's general practitioner Dr Chin, dated 10 January 2017. Dr Nash noted that Dr Hampshire's diagnosis and indicated he reviewed his report dated 30 March 2017. He noted Dr Hampshire's diagnosis of Major Depression with psychotic features and set out the subsequent history and treatment received by the applicant. Dr Nash said the applicant's engagement with the interview was variable with a paranoid and angry affect. At page 2, Dr Nash said:
- "He appears to be thought disordered with over inclusiveness and disorganisation in his accounts of past events. He is preoccupied with past perceived injustices. There are delusions of reference. He believes that a number of Asian people have conspired against him. There is no clear evidence of hallucinations. He denies thoughts of self-harm or suicidal ideation. He reports thoughts of harming others but denies that he would act on these due to his values."
40. Dr Nash provided the opinion that the applicant was suffering from paranoid psychosis. He said that given Dr Hampshire also felt the applicant was psychotic in March 2017 and the subsequent history of psychosocial decline and isolation, the applicant's presentation was concerning for schizophrenia with accompanying personality vulnerabilities.
41. Dr Nash provided an addendum to his report where he noted that shortly after his assessment, the applicant emailed the practise in what the doctor described as "rather concerning" terms. The applicant was apparently practicing stabbing people and anticipated going to jail. Dr Nash therefore completed a section 19 referral to the police and the applicant was conveyed to St Vincent's Hospital. Dr Nash spoke with a treating psychiatrist from St Vincent's, and they agreed the applicant's illness required the additional and assertive services which could only be offered by community mental health team once he was discharged from hospital.

42. Dr Norris, treating psychologist provided both a report and an Allied Health Recovery Request dated 20 March 2017. Under section 2 of the Allied Health Recovery Request, Dr Norris made the following diagnosis:
- “Likely MDE [major depression episode] – possibly with psychotic features. Alternatively, an adjustment disorder with mixed anxiety and depressed mood. Probable personality vulnerabilities.”
43. Dr Norris noted it was difficult to obtain a clear history from the applicant. In their first meeting, the applicant indicated he was assaulted 12 years ago and took anti-depressants at that time, with associated sleep problems since then. By their third meeting, the applicant said he had not been assaulted or injured at all and was anxious in relation to his legal case.
44. By their second and third meetings, Dr Norris was recording symptoms consistent with psychosis including delusions. After their second meeting on 9 March 2017, he referred the applicant to Royal Prince Alfred Hospital’s mental health services, only for the applicant to decline that referral.
45. In his report dated 3 September 2017, Dr Norris noted the applicant had contacted him by email on 31 August 2017 to advise he was angry in relation to his claim being declined. Dr Norris offered the applicant a consultation free of charge to discuss his concerns and indicated he was planning to refer the applicant to a local mental health service.

#### **THE RESPONDENT'S MEDICAL EVIDENCE**

46. The respondent relied upon the opinion of Dr JA Roberts, psychiatrist IME dated 31 May 2017. Dr Roberts took a history from the applicant concerning the events which he alleges caused his injury. He noted it was at times difficult to follow the applicant’s train of thought as he sometimes delivered his account in a loud, screaming voice and in an incoherent manner. Dr Roberts noted at the bottom page 103 of the Reply:
- “Mr Sahar alleged the persons Joseph and Rosie were angry because in regard to a certain matter he was right and they were wrong. Mr Sahar stated that he was the only person who was not Asian but that he was Israeli and Jewish and that he was told to get out of there.”
47. Dr Roberts also recorded various statements by the applicant in which he referred to a take-over of the government by a group of people working within the Office of State Revenue. The applicant complained of being subjected to humiliation and referred to himself as having been placed under “investigation” and made reference to “the agency” as having followed him.
48. Dr Roberts took a history in relation to prior psychiatric conditions in which the applicant disclosed there had been a family trauma as a result of his sister’s suiciding at the age of 16. He noted the applicant confirmed difficulties with memory and concentration, which Dr Roberts said are commonly disturbed in a variety of psychiatric conditions.
49. Dr Roberts provided an opinion that the applicant’s condition has not been caused nor aggravated by employment and was the product of psychosis. He diagnosed the applicant as suffering from a severe paranoid psychotic condition which results in him misinterpreting his environment. He said: “Mr Sahar is an example of a mentally ill man attempting to function in the workplace, he is not a person made mentally ill by work.” Dr Roberts considered the applicant as unfit for work by virtue of his disturbed and mental state. He disagreed with Dr Hampshire’s diagnosis and considered the applicant was suffering from paranoid schizophrenia with depression.



50. Regarding the cause of the applicant's condition, Dr Roberts said:

“In regard to the causation of a psychosis it is untenable on reasonable psychiatric grounds to assert that a psychotic disorder could arise as a result of such circumstances. ...

Paranoid delusions are indicative more of a schizophrenic spectrum disorder than major depression where the delusional beliefs tend to be self-deprecatory.”

## **THE APPLICANT'S LAY EVIDENCE**

51. As previously noted, the applicant provided a statement dated 8 March 2019. His version of the events leading up to the alleged injury on 2 October 2016 are set out from paragraph 21 on page 3 of that document. I note they have been summarised at the outset of these Reasons.

52. In relation to his capacity for employment, I note the applicant gives uncontested evidence that he is paranoid and anxious, has developed a drinking and gambling habit and has had suicidal thoughts in the past. As at the date of his statement, he said he is looking for public housing as he cannot afford his previous premises. He said his gambling addiction is so serious that he squanders his Centrelink benefit and relies on charity for food.

## **THE RESPONDENT'S LAY EVIDENCE**

53. The respondent attached the applicant's complaint to the Office of State Revenue which is dated 12 July 2017 at page 69 of the Reply. The Office of State Revenue responded by a letter dated 27 July 2017 advising the applicant's allegations would be investigated. On 31 August 2017, the Acting Director of the Office of State Revenue, Mr Bushe wrote to the applicant and indicated there was no evidence that the actions taken by the applicant's co-workers were planned nor was there any evidence that the actions were discriminatory in nature.

54. The Office of State Revenue produced records which were attached to the Reply. They include an investigation plan and a list of people who the investigator would contact in relation to the complaints. The documents produced do not include statements from the relevant witnesses, however, there is an indication some were spoken to concerning the matters complained of.

## **SUBMISSIONS**

### **The respondent's submissions**

55. Mr Odling submitted Dr Roberts had set out the nature of the applicant's condition in stark terms. He also noted Dr Hampshire's comments at page 47 of the Application, and in particular the doctor's difficulty in understanding the nature of the alleged bullying suffered by the applicant.

56. With regards to the cause of the applicant's condition, Mr Odling submitted it was difficult to determine the weight to be given to Dr Hampshire's opinion given his own comments surrounding the aetiology at page 50, where the doctor said:

“It may be that he was bullied and harassed to such an extent that he has become depressed, but it may also be that he developed a Psychotic Depression in the course of his work and was then marginalised and isolated, as I have no doubt that he was leading up to his not being reappointed for a third 6-month term.”

Mr Odling submitted it is apparent the applicant's own IME was uncertain as to the cause of his psychiatric condition.

57. Mr Odling contrasted Dr Hampshire's view with that of Dr Roberts, who diagnosed the applicant as suffering from a florid psychosis unrelated to his employment and which required urgent treatment from a mental health team.
58. He also referred to the report of Dr Nash, treating psychologist, which bears the date 10 January 2017, but which refers to Dr Hampshire's diagnosis which was provided in March 2017, and submitted the likely date of Dr Nash's report is 10 January 2018. I accept that submission.
59. Mr Odling relied on both reports of Dr Roberts, and impressed on the Commission the history taken and views expressed in the second report, attached to the respondent's AALD. At page four of that report, Dr Roberts noted:

"At this point Mr Sahar stated that he had had six hospital admissions since last seen and that three of them were longer admissions namely of one to two weeks duration.

In regard to diagnoses made at the time of the various hospital admissions Mr Sahar stated that at St Vincent's they had called his condition psychotic depression and that at Royal Prince Alfred hospital they said he was schizophrenic.

COMMENT: The boundary between psychotic depression and schizophrenia may at times overlap.

In my opinion Mr Sahar's presentation is consistent with that of a schizophrenic illness rather than a major depression with psychosis since the content of the delusional belief system of a psychotic depression tends to be delusions of a self-deprecating nature and that persecutory paranoid beliefs are less likely to occur.

The aggressive thoughts as expressed by Mr Sahar namely that because of him being the victim of persecution by Asians that he is going to kill them is more consistent with the behaviour of a paranoid schizophrenic person, than that of psychotic depression."

60. Mr Odling noted, in my view correctly, that the nature of the dispute between Dr Hampshire and Dr Roberts is in relation to the cause of the applicant's psychiatric condition, rather than whether that condition exists. In summary, he relied on the opinion of Dr Roberts and submitted the Commission would not be satisfied on the balance of probabilities that the applicant's psychiatric condition was relevantly caused by his employment.

### **The applicant's submissions**

61. At the outset, Mr McManamey reiterated the nature of the dispute, which surrounds causation. He noted there is no dispute the applicant has psychotic symptoms and is significantly debilitated.
62. Mr McManamey noted the respondent does not concede incapacity, but submitted all of the medical opinion states the applicant has no capacity for employment. Having regard to the medical evidence, I accept that submission, noting also that it was quite appropriately uncontested by Mr Odling in reply.
63. Mr McManamey noted the respondent had not provided any statements by the other parties to the alleged conversations with and bullying of the applicant, despite those people being clearly identified and a factual investigation having been undertaken by the insurer. Moreover, Mr McManamey noted there was no explanation put forward by the respondent as to why that evidence was not forthcoming.

64. The clinical records of Dr Chin were raised by Mr McManamey as corroboration of the applicant's version of events in the workplace. He took the Commission to the entry of 7 December 2016, which reads as follows:

"work harassment [sic]

alleged work place harassment on 2/10/2016

previously called into a meeting at 9.15am - told meeting was not updated about certain aspect.

Was sitting in own desk on computer – got tapped on the shoulder by tech lead – was asked a question then was asked to go to the meeting room

Went to the meeting room with tech lead and female team leader and sat on the side of the table

then tech lead told Itay had 2 options - to fix problem by self OR send email to ask tech lead for assistance

then went back to desk to determine If he was able to fix the problem

then fixed the problem

after finishing task - sent task for review to female leader but NOT tech lead; She was in initially [sic] involved in the business

Tech lead then approach Itay to call a meeting - said I ask you to send you an email and he done fix and sent to Rosie. Itay explained to tech lead that he had fixed the problem.

then he said that you should have sent to him rather than to Rosie. This was in presence of female team leader

then said to him – you have a problematic developer

then tech lead said -- If you can't work like -this; then you will be trouble with OSR - he moved forward with upper body and head in a threatening gesture.

then was shocked and moved out of room

then was approached by female team leader to see if Itay was okay

Said to her was okay

then asked group manager to move to another project on the same day

then ask agency to ask for pay rise

then was asked by the same tech lead to do another task- but replied to tech lead that he could not do this task and to reassign to another person - was not prepared to work with tech lead after what just happened

Group manager then said generally if choose not to work with someone; then risk of losing reputation...

works as software developer on contract but contract not extended

made complaint to HR and seeing solicitor for possible legal action

feels upset - says subjected to whispering around the work place

feels depressed, lack of motivation"

65. Mr McManamey submitted that each of the other protagonists in the alleged workplace incidents are employees of the second respondent, and there is no substantive reason given as to why there is no evidence disputing the applicant's version of events. He referred the Commission to the factual report from page 30 of the Reply, and noted the details of the allegations were well known. The second respondent provided details of an incident involving Mr Seo and the applicant by way of a discussion held with Ms Black, however, no statements were provided to contradict the applicant's version of the relevant events, and the factual report notes:

"The representative of Enterprise to whom the claimant generally reported, Sue Jones, and her associate Lynda Devon Black who were acting on behalf of OSR declined to cooperate, communicate or supply information in the matter. As such we were unable to interview or obtain signed statements from Joseph Sea, Rosie Wong, Daniel Gadd or Lynda Devon Black."

66. Relying on the decision in *State Transit Authority of NSW v Fritzi Chemler* [2007] NSWCA 249 (*Chemler*), Mr McManamey submitted the evidence discloses there was a conflict between the applicant and Mr Seo, and it was the applicant's perception of that conflict which has led to his injury.
67. Turning to the question of causation, Mr McManamey said the dispute was one between the characterisation of the applicant's injury by Dr Hampshire, and that of Dr JA Roberts. The contest, Mr McManamey surmised, was between Dr Hampshire's view that there was a depressive condition with psychotic features which was reactive to issues at work, and Dr Roberts' view that the applicant's psychosis was naturally occurring and unrelated to work.
68. In weighing up which opinion to prefer, Mr McManamey submitted:
- the uncontested evidence is that the conflict between Mr Seo and the applicant happened;
  - the applicant related his problems to those events, and
  - in reacting to those real events, the applicant suffered his injury.
69. Mr McManamey took issue with the approach taken by Dr Roberts from page 107 of the Reply. He submitted that when Dr Roberts undertook his consideration of whether the applicant suffered from the physiological concomitants of anxiety, the results were positive. Having found those indicia, Dr Roberts then commented at page 108:
- “COMMENT ON SYMPTOMATOLOGY ELICITED:  
Cognitive impairment, chest symptomatology, Increased heart rate as a contributory factor to weight loss and increased perspiration are associated with heightened anxiety of inappropriate degree which having regard to the adjectives mild, moderate and severe would be of moderate to severe degree namely a level of anxiety that would enter awareness cause discomfort and having regard to psychosis would impact upon function.”
70. Mr McManamey said that, having undertaken an exercise to determine whether the requirements for a reactive state were present, Dr Roberts' positive findings were compelling on his own terms. However, Mr McManamey said that once Dr Roberts found such positive signs, he declined to mention them again, and merely went on to conclude later in his report that the applicant's condition is unrelated to work.
71. The applicant submitted the evidence discloses there were conflict events, he reacted to them, Dr Roberts conducts tests to determine whether a reactive state exists, and finds such signs exist only to simply ignore them in reaching his conclusion that the applicant's condition is entirely constitutional and not reactive to events at work.
72. Mr McManamey said it is not enough for Dr Roberts to simply say the applicant's condition is not related to work, and that he must explain why that is the case and why the condition developed at a point in time immediately following workplace conflict.
73. When comparing the opinions of the two IMEs, Mr McManamey said the Commission should prefer the views of Dr Hampshire, whose opinion correlates with that of Dr Chin and ties in with the development of the condition shortly after a workplace conflict.
74. In dealing with the applicant's alcohol consumption, Mr McManamey said it was clearly a consequence of the condition, rather than a cause of it. There was, he said, no evidence to suggest the applicant had a drinking problem before he developed his psychiatric condition.

75. Mr McManamey also noted that Dr Wren, treating psychiatrist from St Vincent's Hospital, reviewed the applicant on 21 November 2018, and provided a report to Dr Chin that day. He described the applicant's active problems as including both "schizophrenia (improved)" and "major depression (modest symptoms persist)." He submitted that opinion is consistent with the applicant having suffered depression, which arose from his perception of and reaction to a real workplace conflict.
76. In terms of capacity for employment, Mr McManamey noted the 130 weeks second entitlement period under section 37 of the 1987 Act has expired. He sought a general order for medical and treatment expenses, and submitted the Commission would refer this matter to an AMS to make a determination of the whole person impairment. Alternatively, given the respondent has placed no evidence as to whole person impairment before the Commission, Mr McManamey submitted the Commission could make an award without referral and simply rely on the assessment of Dr Hampshire, which is uncontested.

## DISCUSSION

77. The applicant bears the onus of proving that his psychiatric/psychological condition is work-related. In determining the cause of an injury, the Commission must apply a common-sense test of causation. In the workers compensation context, the appropriate test for causation was set out by Kirby P (as he then was) in *Kooragang Cement Pty Ltd v Bates* (1994) 10 NSWCCR 796 (*Kooragang*) where his Honour said:

"The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent death or injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. **What is required is a common-sense evaluation of the causal chain.** As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation." (at 810; emphasis added)

78. "Injury" is defined in s 4 of the 1987 Act as follows:

"In this Act: injury means

- (a) personal injury arising out of or in the course of employment,
- (b) includes a 'disease injury', which means:
  - (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
  - (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and
- (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the Workers' Compensation (Dust Diseases) Act 1942, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."

79. There is a useful review of the authorities concerning the issue of injury in *Castro v State Transit Authority* (NSW) [2000] NSWCC 12; (2000) 19 NSWCCR 496 (*Castro*). That case makes clear that what is required to constitute “injury” is a “sudden or identifiable pathological change”. In *Castro* a temporary physiological change in the body’s functioning (atrial fibrillation: irregular rhythm of the heart), without pathological change, did not constitute injury.
80. Liability for an employer to pay compensation pursuant to section 9 is limited by the requirement under section 9A that employment is a substantial contributing factor to the injury. Section 9A was introduced shortly after the High Court’s decision in *Zickar v MGH Plastic Industries Pty Ltd* (*Zickar*) [1996] HCA 31; 187 CLR 310, and relevantly provides:
- “No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.
- Note: In the case of a disease injury, the worker’s employment must be the main contributing factor. See section 4.”
81. Whether employment is a substantial contributing factor to an injury is a question of fact and is a matter of impression and degree (*Dayton v Coles Supermarkets Pty Ltd* [2001] NSWCA 153 at [29] (*Dayton*); *McMahon v Lagana* [2004] NSWCA 164 (*McMahon*) at [32]) to be decided after a consideration of all the evidence. See also *Workcover Authority of NSW v Walsh* [2004] NSWCA 186.
82. The question of “main contributing factor” in claims such as this which involve an alleged disease process was considered by Arbitrator Harris in *Ariton Mitic v Rail Corporation of NSW* (Matter number 8497 of 2013, 8 April 2014). In considering the terms of section 4(b)(ii), the Arbitrator said:
- “The opening words of the amended s. 4(b)(ii) relate to the aggravation, acceleration, exacerbation or deterioration ‘in the course of employment of any disease’. In my view, those opening words therefore direct attention to the work related component of the ‘aggravation, acceleration, exacerbation or deterioration’. The following words of clause (ii) then state ‘but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease’. The concluding words of clause (ii) requires an examination of whether the employment was the main contributing factor ‘to the aggravation, acceleration, exacerbation or deterioration of that disease’ and not to the overall pathology or the overall disease process...
- In my view, the amendment to s 4(b)(ii) does not require the applicant to establish that the employment must be the main contributing factor to the overall disease process or pathology within his left knee but simply that the employment must be the main contributing factor to the injury, that is, the aggravation, acceleration, exacerbation or deterioration of such disease.”
83. Arbitrator Rimmer adopted this approach in *Mylonas v The Star Pty Ltd* [2014] NSWCC 174 at [151]-[166], as did Arbitrator Edwards in *Egan v Woolworths Limited* [2014] NSWCC 281 at [60]-[82]. Arbitrator Harris further considered this approach in *Harrison v Central Coast Local Health District* [2015] NSWCC 86. In *Meaney v Office of Environment and Heritage – National Parks and Wildlife Service* [2014] NSWCC 339 (at [138]-[147]) and *Wayne Robinson v Pybar Mining Services Pty Ltd* [2014] NSWCC 248, Arbitrator Capel (as he then was) considered the meaning of “main contributing factor” and interpreted the word “main” to mean “chief” or “principal” (at [78]-[88]).

84. Injury includes mental disorder: *Anderson Meat Packing Co Pty Ltd v Giacomantonio* (1973) 47 WCR 3. To establish that a worker has suffered a personal injury, it is not enough that a worker suffers frustration and upset, even of a high degree; it is necessary there be a physiological effect and not a mere emotional impulse: *Austin; Thazin-Aye v Workcover Authority (NSW)* (1995) 12 NSWCCR 340.
85. Whether a psychological condition is classified as a personal injury or a disease depends on the evidence in each case. For it to be found that a worker with a psychological condition has received a personal injury, it is necessary that the events complained of had a physiological effect on the worker (*Yates v South Kirkby Collieries Ltd* [1910] 2 KB 538; *Anderson Meat Packing Co Pty Ltd v Giacomantonio* [1973] 47 WCR 3).
86. As noted by Mr McManamey in his submissions, the question of an applicant's perception of events is relevant to determining whether an injury is work-related. In *Chemler*, Spigelman CJ said a perception of real events, which are not external events, can satisfy the test of injury. *Chemler* also made it clear the eggshell skull rule applies in a general sense and in psychiatric cases in particular, with Spigelman CJ using the phrase "‘eggshell psyche’ principle".
87. Basten JA noted in *Chemler*:

“67 The Appellant’s [employer] contention that a misperception, or indeed a perception, cannot give rise to an injury ‘arising out of or in the course of employment’, must be a contention that the accepted psychological state of the Respondent did not arise out of or in the course of that employment. For there to be the relevant connection with the employment, it was argued that the events perceived must be ‘real’ and not ‘imagined’.

68 No doubt a psychological state can be based upon a delusion, but the question remains one of causation. The point was succinctly identified and addressed by Windeyer J in *Federal Broom Company Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at 642:

‘Can the event to which a disordered mind irrationally attributes physical suffering, that is real to the patient but delusional, be properly called a contributing factor? Ordinary concepts of cause and consequence are perhaps not applicable. Yet it seems to me that the incident which precipitated or stimulated, however irrationally, the worsening of her condition could be regarded as a factor contributing to it.’

69 There must be an aspect of the employment which constitutes ‘a substantial contributing factor to the injury’ for compensation to be payable: see s 9A(1) of the 1987 Act. To focus on the concept of ‘perception’ may obscure the real issue. Although the arbitrator said that he accepted the statements from witnesses who denied that they had heard anybody refer to the Respondent in a derogatory fashion because of his race or religion, he nevertheless accepted that ‘in this workplace, racial slurs and comments were made, particularly in relation to the Jewish religion, and the respondent’s witnesses accept that’: Reasons, Tcpt, 09/08/04, p 57. In so far as his findings constituted a rejection of the need for an intention to harass, there was no error of law. Nor is it necessary to determine whether the Respondent’s response was a misperception as to the intention or attitudes of his fellow workers. In contrast to discrimination law, the proper focus in this context is the consequence of conduct on the claimant and not, even in a limited sense, the motivation, intention or other mental state of the co-worker or supervisor: cf *Purvis v New State Wales (Department of Education and Training)* [2003] HCA 62; (2003) 217 CLR 92 at [166] (McHugh and Kirby JJ);

and [234]-[236] (Gummow, Hayne and Heydon JJ). If conduct which actually occurred in the workplace was perceived as creating an offensive or hostile working environment, and a cognizable injury followed, it was open to the Commission to conclude that causation was established.”

## FINDINGS

88. Concerning the alleged workplace conflict between Mr Seo and the applicant, I am satisfied that such conflict took place. In so finding, I note the applicant has given uncontested evidence of the events surrounding the conflict, and that he reported them in broadly consistent terms to his general practitioner in early December 2018, as set out in paragraph 64. The respondents have not filed any evidence to contradict the applicant's statement, despite commissioning a factual investigation.
89. With respect, I do not believe the statement in the factual report concerning declinature to cooperate by Ms Jones and Ms Black is sufficient to rebut Mr McManamey's submission that there is no reason for the second respondent to fail to obtain statements from relevant employees who were either parties or witnesses to the alleged conflict. Moreover, the statement in the factual report to the effect Ms Black declined to provide any information is plainly untrue, as she disclosed to the investigator details of another alleged incident between Mr Seo and the applicant, but not the incident of which the applicant complains.
90. The Commission is left with only the applicant's statement, corroborated as it is by the clinical note of Dr Chin, as lay evidence of the circumstances of the alleged workplace conflict involving Mr Seo. Nothing before the Commission from any lay witnesses suggests the conflict did not take place, or to contradict the applicant's version of it. As such, I am satisfied on the balance of probabilities that such conflict took place.
91. Consistent with the decision of Basten JA in *Chemler* at [69], I do not consider that I need to make a finding as to whether the applicant's version of the conflict is accurate or a misperception. Rather, the appropriate issue for determination is the consequence of the conflict on the applicant. In my view, there was clearly a hostile working environment present, and the issue is then whether a cognizable injury followed.
92. In my view, such an injury did follow as a result of the workplace conflict, and that conflict was the main contributing factor to it. There is no suggestion the applicant was experiencing psychological/psychiatric symptoms before the conflict, and the applicant's perception of that conflict and the events surrounding it was in my opinion the main contributing factor to the development of his disease injury.
93. In finding the applicant's employment was the main contributing factor to his injury, I have had regard to all the medical evidence. I note the general practitioner clinical records which date from 2012 reveal no report of psychiatric or psychological treatment before the workplace conflict. The applicant's first presentation and complaint came in December 2016 and he provided a consistent history to Dr Chin of a conflict with co-workers. In my view the general practitioner's notes are consistent with the applicant's injury having developed out of and primarily because of that conflict and his perception of it.
94. In comparing the opinions of the two IMEs, I prefer that of Dr Hampshire. He describes a depressive condition arising from the applicant's employment, and in my opinion, he accounts for the applicant's symptoms in a manner consistent with their development. By contrast, I do not accept the opinion of Dr Roberts who, as Mr McManamey noted, sets out on an exercise to discover whether signs of a reactive psychiatric condition are present, finds those signs are present in the applicant, then proceeds to ignore that finding and simply state the applicant's condition is not and cannot be work related.



95. In my view, Dr Roberts' failure to account for physiological symptoms of anxiety which he found on examination renders his opinion less valuable than that of Dr Hampshire, whose view I find is consistent with that of Dr Chin, and also Dr Wren, treating psychiatrist who notes the persistence of major depressive symptoms. Accordingly, the preponderance of the medical evidence supports a finding that the applicant suffered a disease injury to which his employment was the main contributing factor.
96. I note the respondent raised in its section 74 notice a defence under section 11A of the 1987 Act, however, quite appropriately given the state of the evidence, no submissions were made in support of that defence. Given the paucity of lay evidence on the issue and the lack of medical evidence in support, I find the respondent has not satisfied its onus under section 11A.

### **Capacity**

97. Having found for the applicant on the question of injury, I must deal with the question of capacity for employment. As noted earlier in these reasons, not one medical practitioner - treating or IME, who has provided an opinion in this matter is of the view the applicant has any capacity for employment. Having regard to the totality of the evidence, I have no difficulty in finding on the balance of probabilities that the applicant has been totally incapacitated for employment from 2 December 2016, and remained so incapacitated until the expiration of the second entitlement period under section 37 of the 1987 Act.
98. At the hearing, Mr Odling sought leave to raise issues surrounding the applicant's preinjury average weekly earnings (PIAWE). That application was opposed, on the basis the respondent had not filed a competing wages schedule to challenge that contained in the Application. Leave to raise a challenge to the stated PIAWE in the Application was therefore refused.
99. Given there is no evidence to the contrary, I find the applicant's PIAWE was above the statutory maximum, and accordingly his claim is limited to that amount as indexed for the appropriate periods, and as set forth in the uncontested wage schedule set out in the Application.
100. Accordingly, the respondent will pay the applicant weekly compensation as follows:
- (a) Pursuant to section 36 of the 1987 Act, \$1,955.10 per week for the period 2 December 2016 to 3 March 2017;
  - (b) Pursuant to section 37 of the 1987 Act, the following amounts:
    - \$1,646.50 per week from 4 March 2017 to 31 March 2017
    - \$1,667.92 per week from 1 April 2017 to 30 September 2017
    - \$1,681.35 per week from 1 October 2017 to 31 March 2018
    - \$1,702.80 per week from 1 April 2018 to 30 September 2018
    - \$1,716.24 per week from 1 October 2018 to 31 March 2019
    - \$1,741.92 per week from 1 April 2019 to 31 May 2019.

### **Claim for lump sum compensation**

101. The applicant's claim for lump sum compensation will be referred to an AMS for determination of the whole person impairment arising from the following:

Date of injury (deemed):	19 April 2017 (being the date of claim)
Body system referred:	psychiatric/ psychological injury
Method of assessment:	whole person impairment.

102. The documents referred to the AMS will include:

- (a) this Certificate of Determination and Statement of Reasons;
- (b) The Application and attachments;
- (c) The first respondent's Reply and attachments;
- (d) The second respondent's Reply and attachments;
- (e) The applicant's AALD and attachments, and
- (f) The respondent's AALD and attachments.

**Medical and treatment expenses**

103. Given the above findings in relation to liability, the respondent is to pay the applicant's reasonably necessary medical and treatment expenses.

**SUMMARY**

104. For the above reasons, the Commission will make the findings and orders set out in the Certificate of Determination.

