

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4401/19
Applicant: Scott Everson
Respondent: Ausgrid
Date of Determination: 31 January 2020
Citation: [2020] NSWCC 32

The Commission determines:

1. The applicant sustained a psychological injury whilst in the employ of the respondent.
2. Such injury was wholly and predominantly caused by the actions of the respondent as to transfer and the provision of employment benefits to workers, specifically redundancy.
3. The oversight in providing Mr Everson with information pursuant to the respondent's Redundancy Policy was unreasonable.
4. The applicant has no current work capacity.
5. The respondent will pay the following weekly payments of compensation:
 - (a) 24 September 2016 to 30 September 2016 - \$1,991.20
 - (b) 1 October 2016 to 23 December 2016 - \$1,991.20
 - (c) 24 December 2016 to 22 September 2017 - \$1,676.80
 - (d) 23 September 2016 to 27 April 2018 - \$1,676.80
6. The respondent will pay the applicant's s 60 expenses upon production of accounts, receipts and/or HIC notice of charge
7. I remit this matter to the registrar for referral to an AMS for an assessment of whole person impairment caused by psychological injury sustained on 28 September 2016 (deemed). Evidence:
 - (a) Application to Resolve a Dispute and attached documents dated 27 August 2019;
 - (b) Application to Admit Late Documents from the applicant dated 9 October 2019;
 - (c) Amended Application to Resolve a Dispute and attached documents dated 30 October 2019;
 - (d) Application to Admit Late Documents from the applicant dated 6 December 2019;
 - (e) Reply and attached documents dated 18 September 2019;
 - (f) Application to Admit Late Documents from the respondent dated 14 October 2019;

- (g) Application to Admit Late Documents from the respondent dated 14 November 2019;
- (h) I direct that a copy of these reasons also be referred, due to the unsatisfactory nature of the medico-legal opinions herein, and my consequent findings as to causation.

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

John Wynyard
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 JOHN WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

G Bhasin

Gurmeet Bhasin
Acting/Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Scott Everson, the applicant, has brought an action against Ausgrid, the respondent, seeking weekly payments of compensation and lump sum compensation as a result of psychological injury caused on 28 September 2016.
2. Section 74 notices were issued on 5 December 2016 and 19 July 2017.
3. An Application to Resolve a Dispute and attached documents (ARD) was issued on 27 August 2019, but following the first day's hearing on 22 October 2019 an Amended ARD was lodged dated 30 August 2019. The Reply was dated 18 September 2019.
4. Part 4 was also amended to add the word "deemed" after the date of injury, 28 September 2016.

ISSUES FOR DETERMINATION

5. The parties agree that the following issues remain in dispute:
 - (a) Whether the applicant has satisfied his onus to prove the cause of his condition.
 - (b) Whether the provisions of s 11A of the *Workers Compensation Act 1987* (1987 Act) apply.

PROCEDURE BEFORE THE COMMISSION

6. This matter was heard over two dates, on 22 October 2019 and 16 December 2019. The applicant was represented by Ms Kavita Balendra of counsel and the respondent by Mr Simon McMahon of counsel. 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

7. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and attached documents dated 27 August 2019.
 - (b) Application to Admit Late Documents (ALD) from the applicant dated 9 October 2019.
 - (c) Amended ARD and attached documents dated 30 October 2019.
 - (d) ALD from the applicant dated 6 December 2019.
 - (e) Reply and attached documents dated 18 September 2019.
 - (f) ALD from the respondent dated 14 October 2019.
 - (g) ALD from the respondent dated 14 November 2019.

Oral Evidence

8. No application was made with regard to oral evidence.

FINDINGS AND REASONS

9. Mr Everson compiled an extensive and thoroughly prepared statement, replete with corroborative annexures in the form of diary entries and contemporaneous email copies. The exhaustive nature of the document resulted in its original form of 140 pages. Following the first hearing date, the statement was pared down to a length of 62 pages. Mr Everson detailed numerous conversations with many different managerial personnel in outlining the events which he claims to have led to his current condition. It is not possible, bearing in mind that these reasons are required to be “a brief statement”, to do justice to the care with which he has prepared his account, and accordingly it has been necessary to paraphrase much of this document.
10. Mr Everson has been involved in the electricity sector all of his working life. He completed an apprenticeship, having left school in year 11 and worked as an electrician or in a capacity related to the supply of electricity since. He has attained a number of certificates related to his employment during his employment.
11. In June 2000 he joined the respondent as a linesman, working out of the Noraville depot. He described his time at Noraville as “very happy,” and progressed from being a linesman through the ranks of Leading Hand, Field Co-ordinator to Field Supervisor. He was sometimes running teams of 30 men in a further capacity as acting Superintendent.
12. In 2014 a restructure occurred within Ausgrid and Mr Everson was redeployed to a newly created depot at Ourimbah. This was the result of an amalgamation with the larger Gosford depot.
13. Prior to being transferred to the Ourimbah Depot Mr Everson had been fit and well with no issues of a psychological nature.
14. Mr Everson developed his psychiatric condition over the next two and a half years, so that on 28 September 2016 he went off work, on the advice of his general practitioner, Dr Paul Muthiah.
15. It was common ground between the medical specialists retained for both sides that Mr Everson then suffered from a psychological condition which was caused by his employment. This evidence will be dealt with in due course.
16. The cause of Mr Everson’s psychological condition was said in Part 4 of the ARD to be:

“ ... as a result of ongoing bullying and harassment in the workplace, poor communication, concerns regarding safety issues that were not addressed, prolonged uncertainty about employment status and lack of support by the Respondent employer.”
17. It is not necessary to recount the many instances Mr Everson related as to his conflict with his Ourimbah managers over safety issues. His requests for job numbers and procedure were challenged “throughout this entire period”¹, which I take to be a reference to his time at Ourimbah. Mr Everson contended:

¹ ARD page 15 [43]

“Throughout this entire period, on numerous occasions I was constantly required to validate to Don Bower and Steve Head why job numbers and procedures on jobs were mandatory in order to complete jobs to meet the safety requirements. Management were consistently cutting staff numbers and allocated hours for completion of jobs which forced employees to work unsafely and not follow the legislated electrical safety rules. It was a well-known [sic] within the company that field workers were exposed to high unacceptable risks daily.”

18. The alleged bullying and harassment occurred against the background of both the safety issue and the uncertainty issue. As to the issue of uncertainty regarding Mr Everson’s employment status, it is convenient to refer firstly to correspondence sent to Mr Everson by Mr David Pengilly, the General Manager –Network Services.

19. On 31 August 2015, Mr Pengilly emailed Mr Everson, saying relevantly:²

“As a result of the completion of the Field Supervisor recruitment within the Regional Operations branches your role of Field Coordinator - Overhead has been deemed to be surplus to requirements. This letter is to confirm that you are now a redeployee.

You will be referred to the Mobility Team and be assigned a case manager who will facilitate your progress through the Mobility Program and ensure that you are informed of suitable roles for which you can apply. Every effort will be made to work with you in order to find a suitable role however this cannot be guaranteed. In the meantime, you will continue to report to Michael Duffy, Field Manager - Ourimbah and duties and projects in line with your skills and experience will continue to be allocated to you.

Your position of Field Coordinator effectively became redundant on 12 January 2015. However, you were not provided with a redeployment letter confirming your redeployment status. On that basis, your redeployment status is effective 3 August 2015.

While having redeployee status your employment conditions will remain consistent with the Ausgrid Agreement and the HRr1 Redeployment and Redundancy Policy. In accordance with the Redeployment and Redundancy Policy, your 12 month period of salary maintenance will commence effective 31 August 2015 at your current grade of Field Coordinator- Overhead, Pay point 36.” (Emphasis added).

20. With regard to the notice concerning Mr Everson’s position with the employer after the restructure, Mr Mark Stace, Mr Everson’s manager, said in his statement of 1 November 2016:³

“..., there had been major restructuring taking place within the organisation after Christmas 2014. In Scott’s case, my understanding is that he had not received a letter that HR would normally have sent him confirming that he was on salary maintenance. I believe there was a delay of approximately six months involved in this regard but that he did then subsequently receive the letter. I am not aware of any malice or other ill intent on the part of HR regarding this matter. My understanding is that it was simply an oversight on their part.”

² ALD 7

³ Reply 61

21. Whether the above email from Mr Pengilly constituted “a letter from HR” is not clear, but it evident from that email that a decision had been made by management on 12 January 2015 - within a few weeks of the move to Ourimbah – to make Mr Everson’s existing position redundant as “surplus to requirements”. A decision had also been made to redeploy Mr Everson and that he would remain on his Noraville salary for a year from 31 August 2015. I accordingly infer that Mr Pengilly’s letter was indeed the “letter from HR.” It may be that the date “3 August 2015” in the third paragraph was intended to read “31 August 2015.”
22. This email of 31 August 2015 was the first formal notice received by Mr Everson regarding his continued employment with the respondent.
23. The evidence from all the witnesses was vague as to when Mr Everson actually physically moved to Ourimbah. He said it was “in late 2014”. He said that initially the hierarchy that existed in Noraville remained the same, but that there was an “us and them” mentality. He described various encounters with different employees in furtherance of his assertion that “issues’ began to emerge in December 2014 following the merger.
24. He described being intimidated by the behaviour of a project officer named Michael, who on one occasion, after asking Mr Everson to remain behind following a meeting, remonstrated with him over an issue regarding the payment of tolls when returning from a jobsite he was unfamiliar with. Mr Everson also said he felt bullied and harassed by the conduct of Mr Steve Head the following day in relation to the same issue. Mr Head was also nominated as bullying Mr Everson on 11 December 2014 over another job. Mr Everson complained that he was constantly required to validate job numbers and procedures regarding safety issues with management. He said:⁴

“Throughout this entire period, on numerous occasions I was constantly required to validate to Don Bower and Steve Head why job numbers and procedures on jobs were mandatory in order to complete jobs to meet the safety requirements. Management were consistently cutting staff numbers and allocated hours for completion of jobs which forced employees to work unsafely and not follow the legislated electrical safety rules. It was a well-known (sic) within the company that field workers were exposed to high unacceptable risks daily.”
25. Mr Everson also referred to an instance on 17 December 2014 when he was belittled, his protagonist engaging in insults as to Mr Everson’s alleged ignorance as to the duties of a field supervisor.
26. As indicated, Mr Everson had in fact been working in that position at Noraville for the previous three years, however he had become aware that with the merger he would have to reapply for his position. He said that “in early December 2014” he had to attend an interview for that purpose. In answering a question as to whether he had ever dealt with a difficult customer, Mr Everson gave an example he had dealt with “a couple of years” before. He was asked by a member of the panel “in an increasingly aggressive tone” about the outcome of the example he had given. Mr Stace, who was a member of the panel, appeared to be asleep and Mr Everson became increasingly confused and concerned about the success of his application.

⁴ ARD 15

27. Mr Everson was then telephoned by Mr Stace on 23 December 2014 to be told that his application had in fact been unsuccessful, as the position itself was abolished in the new structure. Mr Everson said:⁵

“[Mr Stace] was unable to tell me what role I would be filling at that point and could not guarantee me of any job security going forward.”

28. When he returned after leave on 19 January 2015, Mr Everson was still uncertain of his position. No-one advised him as to his duties, his new manager did not speak to him, and he felt that his colleagues were avoiding him, although he did not know why. He worked at his computer, but was confused as to his position. His diary entry for that day was lodged as “Annexure H.” It said, amongst other things:⁶

“Returned to work Monday morning. Arrived 0630 shook hands with Don Campbell. Other people in office very strange, feels more like a morgue now than when I left last year before holidays. The other field supervisors who got jobs not making eye contact and Mick Duffy lucky to say two words to me. No sign of Mark Stace so not sure on what my role is or what is happening. Mick Duffy sent multiple e-mails and I replied with e-mails as this seems to be the way the new order works, no communication or social skills required.”

29. Mr Everson described how his anxiety increased over the next months. He described being unable to obtain any clarity about his position with the respondent, and what role he was supposed to be acting in. He gave many examples of how his enquiries were ignored, and related various conversations he had with respondent personnel which made him anxious. He referred to a telephone conversation on 22 January 2015 with Mr Mark Buttergieg, a union representative, regarding Mr Everson’s position, as he had then learnt that the position of field supervisor no longer existed. Mr Buttergieg advised that Mr Everson should be spoken to by Mr Stace, and that Mr Everson should “receive a letter regarding my unsuccessful application for Field Supervisor, and that it should outline my options going forward.”⁷ Mr Everson’s manager, Mr Michael Duffy then telephoned him and said to speak with Mr Stace.
30. Mr Everson said Mr Stace offered the job of a leading hand, which he said he declined, as it was a demotion from his previous position at Noraville. However, he was not advised what the consequences of that refusal would be, and was not informed whether he would continue to have employment at the depot.
31. At the same time Mr Everson’s diary was accessed by some unknown person, who began to draw pictures relating to a tent at the top of the page. Annexed to Mr Everson’s statement were entries for 28-30 January 2015, 3, 6 and 12 February 2015, and 25 March 2015, all showing the drawings, which depicted a stick figure in or around a tent.⁸
32. Mr Everson explained that the depiction of a tent was a symbol for redeployment, which suggested that a person was “outside”, with no job prospects, and that his/her position was insecure or temporary.
33. Mr Everson thought it was meant as a joke initially, but as the entries continued “it started to play on my mind especially as my position still remained insecure.”⁹ At one point he showed it to his supervisor, but he was laughed off.

⁵ ARD 17

⁶ ARD 44

⁷ ARD 18

⁸ From ARD 48

⁹ ARD 19

34. Mr Everson alluded to other matters which distressed him around this time. There was an issue about fringe benefit tax, as his vehicle did not have a cargo barrier fitted. He was invited to “dodgy up” his log book, which he found unethical, and discussed the situation with Mr Duffy. He said he was still concerned about his ongoing employment, and found that such suggested processes caused him stress and worry.
35. It would appear that Mr Everson continued to work for the respondent with his situation unresolved. On 7 May 2015, he contacted Ms Kathy Spanos, who had been on the interview panel in December 2014, seeking feedback from his answers, as he had an interview pending. His request was denied.
36. On 19 June 2015, Mr Stace asked him if he would like a job as leading hand, in view of Mr Everson’s position. On enquiry, Mr Everson was advised that he was in the “redundancy pool.” Mr Everson denied that was the case “as I had never received a letter or any correspondence indicating I was in the pool.”¹⁰
37. On 2 July 2015, Mr Everson spoke with Mr Don Bower about the redundancy situation, and that after seven months his position within Ausgrid had still not been clarified. Mr Bower reacted aggressively, and said:
- "One thing's for sure people in the redeployment pool and people whose jobs have been dissolved will be the first gone".
38. This response made Mr Everson feel more anxious, and he was again given no confirmation of what his future role would be.
39. On 7 July 2015, Mr Everson was advised by Mr Stace that HR would be sending him a letter shortly, saying that HR had “stuffed up”.
40. Mr Everson then contacted the Union, saying he did not wish to put anything in dispute, but that he wished to know where he stood “legally.” On 17 July 2015, Mr Stace, who had received an email from the Union, said:¹¹
- “You have done yourself no favours by contacting the Union.”
41. On 20 July 2015, Mr Stace then advised Mr Everson that he was not able to offer a direct appointment as leading hand, but that he had to advertise it. However, Mr Stace suggested that Mr Everson’s experience should qualify him for acceptance, as he was the only one “in the tent” with that experience. Mr Everson explained to Mr Stace that the uncertainty was making him feel anxious and confused.
42. Further enquiry on 24 July 2015 from Mr Duffy did not assist Mr Everson, and in the meantime Mr Everson became upset by criticism made of him before other workers by Mr Head.
43. On 27 July 2015, Mr Everson contacted the manager of the Mental Health Division, Ms Wendy Brudnell-Woods, to whom he expressed his “concerns at the ongoing bullying and harassment from management, and the lack of clarity and direction around my position and role in the company.”¹²
44. Mr Everson then referred to criticism made of him at a Personal Development Skills Review meeting on 30 July 2015 that he was too friendly with his workers and that he was “ambushed” by Mr Duffy in the way the meeting was conducted.

¹⁰ ARD 20

¹¹ ARD 22

¹² ARD 23

45. Mr Stace then tried to talk to Mr Everson, but was offended by Mr Everson's response. On 11 August 2015, Mr Everson sent an email which stated:

"Hello Mark, Sorry about this morning, I suppose everything has been compounding and building up. I do feel a bit in the dark lately and I do think I was a bit out offline this morning. I did feel intimidated last time though and haven't been sleeping well. I have walked past several times but didn't want to intrude with the door being closed and understand you have a lot on your plate. I will endeavour to catch up with you Regards, Scott Everson."

46. On 18 August 2015, Mr Stace called Mr Everson into his office and said that he was allowed to advertise the leading hand position. Mr Everson said that he was told:¹³

"...they were going to *"pop you into the redeployment pool so you are able to apply for the position"*. I felt this was essentially a continuation of the uncertainty and lack of clarity I had been experiencing in recent months regarding my position."

47. Mr Everson then consulted Dr Matabwe at Warnervale Super Clinic on 20 August 2015. Mr Everson said he attended as "I felt that Ausgrid were trying to force me out of work. I wasn't feeling well psychologically that day and wanted the next day off as well. I requested a medical certificate which Dr Matebwe issued."¹⁴

48. On 28 August 2015, Mr Everson was advised at a meeting with Mr Stace and Ms Spanos that they had done him a "huge favour" by not previously putting him in the redeployment pool. Mr Everson took umbrage at that suggestion. He said:¹⁵

"I replied *"That's nice, thank you. But maybe if I had been placed there nine months ago, I might have cemented a job in the company and wouldn't be under the stress and anxiety that I am at the moment by not having a job in the company and facing a possible exist [sic] with the MEE policy looming"*. They said again *"No, we have done you a huge favour as your time hasn't started ticking yet"*. I stated again *"By not having a job it has put me under extreme pressure and ridicule from staff members and has caused me extreme anxiety and worry"*. Once again, they told me they had done me a huge favour because the clock hadn't started ticking yet."

49. Mr Everson then discussed what he regarded as preferential treatment of another employee who was promoted to the field supervisor afternoon position without the requisite criteria, after Mr Everson had been assured at a training course for field supervisors that the position was 80% his.

50. Mr Everson said that he was dumbfounded, taken aback, distraught and unwell, especially as there had been no clarity on his position.

51. Then, on 31 August 2015, Mr Everson received the letter from Mr Pengilly that I referred to in paragraph 23 hereof. In his statement of 2 August 2019, Mr Everson did not mention it. However, in a later statement of 29 November 2019 he said:¹⁶

"This letter made me anxious not knowing my role in the company and whether I was wanted. I had been in the dark for so long and Ausgrid seemed to contradict themselves and my role in the company. My sleep was poor and I wasn't eating at this time."

¹³ ARD 24

¹⁴ ARD 24

¹⁵ ARD 24

¹⁶ ALD 6.12.2019 page 27

52. Between August 2015 and 28 September 2016, Mr Everson continued to encounter difficulties at the workplace, which he described in detail - presumably from his diary. There were run-ins with various employees concerning Mr Everson's concern about safety and Mr Everson's attitude. Attempts were made to smooth things over, but Mr Everson continued to be offended by comments made to him by various workers. He gave examples throughout the following year from September 2015 through to 28 September 2016, when his GP, Dr Paul Muthiah, certified him unfit on the basis that:¹⁷
- "He has felt bullied at work, vindicated, not been given job opportunities fairly this has resulted in anxiety/depression."
53. There was a common theme throughout that year that Mr Everson felt isolated and unsupported. This included his continuing disappointment at his unsuccessful applications for a field supervisor's position, and the feeling that he had been "hung out to dry."¹⁸ On 18 May 2016 Mr Everson expressed to Ms Marianne Whitworth, a Mental Health First Aid Nurse who was with the respondent's Mental Health Division, his concerns at the "ongoing bullying and harassment from management, and the lack of clarity and direction around my position and role in the company."¹⁹
54. Dr Muthiah issued certificates of incapacity from 28 September 2016 to June 2017. The claim of bullying caused an immediate response from the employer. On 30 September 2016 Mr Everson was contacted by Ms Allison McNeill, the Return to Work Officer, saying that Ausgrid would likely not accept the claim.
55. On 4 October 2016 Mr Everson was contacted by Dr Muthiah "in a distressed state."²⁰ Mr Everson reported that Dr Muthiah had been "aggressively harassed" with questions regarding the injury by Ausgrid.
56. Mr Everson was contacted by Ms Whitworth on the same day seeking an explanation for the claim.
57. On 28 September 2016, in addition to being certified unfit, Dr Muthiah referred Mr Everson to Axiom Psychological and Coaching Services. He was referred to Mr Ian Kilpatrick, Psychologist of that practice on 18 October 2016. He supplied a report on 10 May 2017.²¹
58. Mr Kilpatrick treated Mr Everson on six occasions, the last being on 8 December 2016. He interviewed Mr Everson for the purposes of his report on 3 May 2017.
59. Mr Kilpatrick took a history that was generally consistent with that of Mr Everson's statement. Mr Kilpatrick's view was that the "original and subsequent" restructuring of the workplace was the cause of Mr Everson's condition. Mr Kilpatrick observed that there was no indication that Mr Everson had a pre-existing psychological vulnerability.
60. Mr Kilpatrick reported the frustration expressed by Mr Everson, which related to the behaviour and management style of his superiors. Their actions and instructions concerned Mr Everson as to workplace health and safety.
61. Also noted by Mr Kilpatrick was the system employed by management regarding redundancy. Mr Everson said that it was provoking depression and anxiety, both to the workers concerned, and to the rest of the workplace. Mr Kilpatrick recorded that these workers were placed on a "deployed list". They were not paid a redundancy payment

¹⁷ ARD 193

¹⁸ ARD 33

¹⁹ ARD page 29

²⁰ ARD page 35

²¹ ARD page 126

but were kept on the books and required to sit in an office each day looking for alternate work. Mr Kilpatrick said:²²

“From the information available to me it appears to me that Mr Everson’s depression and anxiety commenced soon after the amalgamation of two depots, the management style of some supervisors and the overall culture of the workplace.”

62. Dr Mutiah supplied reports dated 28 September 2016 and 21 February 2017, which took the form of reproducing his notes from his consultation with Mr Everson on 28 September 2016.²³ Relevantly, they said:

“6-12 months feeling depressed and anxious, has felt bullied by employer, vindicated, feels unsafe at work and when has raised it has just been told "get job done" by Matt Starret been tearful, depressed, Insomnia, anxious, thoughts what if he wasn't here but family protective thought has asked manager about why he was not given job, has done 4th Interview, was told that his score will not be given to him but others have been given score e.g told they came 2nd and score has started grievance process ...has written down pages of the issues he has field supervisor told him yesterday !hat people who come from Noraville have a 'target on his back" and he is not getting a Job because he Is from Noraville depot.”

63. Neither Dr Muthiah nor Mr Kilpatrick thought Mr Everson was then fit for work.
64. Mr Everson described in great detail his subsequent difficulties with management after first going off work on 28 September 2016. His status was not clear, and he recounted his dealings with Ms Alice McNeill, the Return to Work Officer, Ms Maryann Whitworth from MH, Mr Jeff Corcoran, field manager, Mr Michael Williams, supervisor, and Mr Mark Stace, Distribution Manager. The employer appeared to be confused as to whether his absence following his cessation at work was due to long service leave, sick leave, annual leave or workers compensation.
65. Tragically, Mr Everson’s wife died in June 2017, but he nonetheless was able to return to work sometime in October 2017. He was barred from attending a compulsory TAFE course out of hours at the depot towards the end of 2017, when he knew another worker on workers compensation had been permitted to attend. He came under pressure to accept a redundancy, which he declined, but was nonetheless sent an email setting out his redundancy payout figures on 5 December 2017. Mr Everson took long service leave between December 2017 and 4 April 2018. On his return Mr Everson’s allocated work vehicle was taken from him, and he found himself somewhat confused and isolated. He said:²⁴

“On 13 April 2018, I had now been back at work for 2 weeks. Management had still not contacted me to check on my state of mind, my PPE (personal protective equipment) or what statutory training I needed in accordance with their own company polices. No one was advising me on what jobs I was to attend. Therefore, every morning I would stand around until all workers had left to see what vehicle was available and drive to a job site co-workers had advised me of. I felt very alone and isolated and felt as though the company did not want me here after the numerous attempts trying to get me to accept a voluntary redundancy.”

²² ARD page 131

²³ ARD pages 95 and 117

²⁴ AARD 41

66. Mr Everson recounted a warning given to him by Mr Mick Lloyd-Jones on 19 April 2018 in which he was told “be careful, as [management] are specifically after you.” He was made redundant on 1 July 2018.

67. Statements were lodged from the respondent’s witnesses.

68. Mr Mark Stace was Distribution Manager during the relevant time. He made a statement on 1 November 2016. He confirmed that he was one of the panel that interviewed Mr Everson in December 2014, along with Mr Anosh Prasad and Ms Kathy Spanos. His memory was that nothing stood out about the interview. He denied that Mr Prasad had been aggressive in his manner of questioning Mr Everson, but conceded that Mr Prasad had “tested him to an extent” without raising his voice inappropriately. Mr Stace denied that he had been falling asleep during the interview.

69. Mr Stace agreed that he had advised Mr Everson that his application had been unsuccessful, and he agreed that the position of Field Co-ordinator did not form part of the structure of the new company. He said:²⁵

“This was the reality of his situation at that stage and I was not in a position to tell him what role he would be filling at that point.”

70. Without agreeing to the exact statement ascribed to him about Mr Everson being “in the redundancy pool”, Mr Stace thought that he would have said that Mr Everson was on salary maintenance as a redeployee. As earlier indicated, Mr Stace conceded that there had been an oversight by HR, and the letter should have been sent approximately six months earlier. The date mentioned in Mr Pengilly’s statement was 12 January 2015, so that in fact the delay was of the order of eight months.

71. Mr Stace thought it was likely that he empathised with Mr Everson regarding the oversight, and he said he “went into bat” for Mr Everson. This eventually resulted in Mr Everson being appointed as Overhead Working Leading Hand.

72. Mr Stace did not agree that he told Mr Everson that he had done himself no favours by contacting the union. He said:²⁶

“What I do remember indicating to him at that time is that he should have spoken to us as his line managers first before going to the union about his employment situation and future in the background of the restructuring that had been taking place. This was at a time when Ausgrid was in a separate and unrelated dispute with the union in regards to re-structuring generally. In this regard, I found during this time that he was raising issues with us that had not been previously canvassed and which could have been discussed more effectively and openly with him one-on-one than through union representatives.”

73. Mr Stace agreed that on 11 August 2015 he was surprised at Mr Everson’s attitude when he tried to talk to him. He confirmed that Mr Everson had wanted a support person when Mr Stace was probably simply wanting to chat about available positions, which he had been doing with other employees at that time. The other employees, Mr Stace said, had not wanted support persons. He said he did not receive Mr Everson’s email of apology.

²⁵ Reply page 62

²⁶ Reply page 63

74. Mr Stace agreed that he had said he was putting Mr Everson into the redeployment pool on 18 August 2015. It was no more than the fact, he said. Mr Stace thought that Mr Everson had “never been able to let go” of his December 2014 failure to get the field supervisor role. He said that he and the other management contacts went out of their way to look after Mr Everson when opportunities arose. They made genuine and concerted attempts “to make things as easy as possible for him.”
75. Mr Stace did not recall “us” saying that they were doing Mr Everson a “huge favour” by delaying his entry into the redeployment pool in a meeting on either 26 or 28 August 2015. He said:²⁷

“I do remember Scott indicating that he wanted to know about what was going on with his situation more generally and that Kathy and I gave him what information we could within the confines of our managerial responsibility towards both him and other workers. To put these discussions in context, I can confirm that as at April 2015, we were operating with 247 staff whereas this number has now been reduced to 126 staff.”

76. Mr Stace said that Mr Everson again referred to the failure of his first interview in December 2014. Mr Everson “appeared pre-occupied” with this issue, he said, although Mr Everson did not show any outward signs of being distressed at the meeting.
77. Mr Stace then referred to the various comments made by Mr Everson that were hostile to him over the course of time. Mr Stace said that he tried to be supportive, but one could never know whether Mr Everson was being flippant or genuine “particularly when he was asking questions about his future or job security.”
78. Mr Stace concluded by saying that Mr Everson in fact was a good worker, and had a far easier time than others in the restructure. The claim for compensation came as a complete surprise to him.
79. Mr Matthew Starrett was employed as a Field Supervisor, and made a statement on 13 November 2016. His evidence evinced a similar approach to that of Mr Stace. He denied making negative statements or being hostile to Mr Everson. His involvement was during the early part of 2016, and I have not detailed that evidence beyond saying that there were run-ins with various employees, of whom Mr Starrett was one.
80. Mr Starrett agreed with one of Mr Everson’s allegations about this time, saying that Mr Everson would ask whether Mr Starrett thought Mr Everson’s position was insecure. Mr Everson would “probe for detail and put people including myself in positions where they were effectively trapped into providing him with Information which was pertinent to his role but not necessarily appropriate for us to give him.” When Mr Everson would ask a direct question about his employment future, Mr Starrett would point out that he was “not able to tell him what he wanted to know.”²⁸
81. Mr Starrett also agreed that his relationship with Mr Everson did become “fractured.” He said:²⁹

“I had formed the Impression that Scott was travelling down a path of negativity in association with his work and position with Ausgrid and that he considered himself at all points to be a victim in some way. He did not appear to be able to see the rationale behind various management decisions that had been made in relation to his role and that of others around him.”

²⁷ Reply page 65

²⁸ Reply page 71

²⁹ Reply page 74

82. Mr Starrett also agreed that Mr Everson complained that the managers under whom he and other workers from the Noraville depot approached things differently. It was Mr Starrett who was alleged to have made the comment about Mr Everson having a target on his back, and whilst he denied saying those words, he did say that most people who came from Noraville were under a bit more scrutiny as a result of various safety and work ethic issues emerging from Noraville.
83. Mr Starrett remembered during a conversation on 27 September 2016 that Mr Everson seemed very tired. Mr Starrett said:³⁰

“He said to me at one point, *‘I’m just over it..’*”

MEDICO-LEGAL

Dr Khan

84. Mr Everson relied on the opinion of Dr Abdal W Khan, Psychiatrist for his medico-legal support. He supplied two reports dated 23 June 2017³¹. The latter which assessed a Whole Person Impairment (WPI) of 26%.
85. The history taken by Dr Khan related that Mr Everson first reported experiencing difficulties in 2014. Dr Khan recorded that Mr Everson felt “ignored, dismissed, bullied, intimidated, threatened and harassed.” The causes were work related, and were “summarised below.”
86. Dr Khan then referred to some of the events described by Mr Everson, whose 144 page statement was before him. These related to specific instances of alleged bullying, where there had been a misunderstanding when Mr Everson allegedly got lost in December 2014. Dr Khan also referred to the altercation regarding safety on 11 December 2014. Dr Khan chose to cover the intervening history of Mr Everson’s experiences up to 29 May 2016 by saying:
- “Similar incidents occurred with numerous other colleagues and management staff, including Mr Tony Vella, Mr Mark Stace, Mr Matthew Starrett and Mr Steven Murphy.”
87. Dr Khan then referred to Mr Everson’s concern about safety and the possibility of the respondent’s processes causing death or injury, and Mr Everson’s complaint that his concerns were dismissed and he was not supported.
88. Dr Khan then recorded:³²
- “Mr Everson mentioned that he had applied for multiple promotions to the position of field supervisor but was unsuccessful. When he discussed this with his field supervisor, he was told, “you have a target on your back”.
89. Dr Khan found that as a result of “these aforementioned work-related stressors” Mr Everson’s mental state deteriorated, and he suffered symptoms of depression and anxiety. Dr Khan’s opinion was that Mr Everson suffered a major depressive disorder with melancholic features.

³⁰ Reply page 76

³¹ From ARD page 67

³² ARD page 68

90. In answer to questions from Mr Everson's legal advisors, Dr Khan found:
- Employment had substantially caused Mr Everson's condition.
 - Mr Everson's condition was not wholly or predominantly caused by reasonable action taken or proposed to be taken by Ausgrid with respect to transfer, demotion, promotion, performance appraisal or discipline of Mr Everson. His condition had rather been "wholly caused" by other stressors outlined in the history section of his report.
 - The whole or predominant cause of Mr Everson's condition was said to be:
"unreasonable action taken by Ausgrid to ignore his concerns about safety, unreasonable action taken by Ausgrid to provide inadequate resources for Mr Everson to complete his work safely, and repeated exposure to unreasonable and unprofessional bullying, intimidation, threats and harassment in the workplace."
 - Dr Khan disagreed with the opinion of Dr Vickery, the medico-legal referee retained by the respondent, whose reports will be considered presently.
 - Mr Everson had no work capacity as a result of his condition.
 - Prognosis was poor.

Dr Vickery

91. As indicated, the respondent relied on the medico-legal opinion of Dr Graham Vickery, Psychiatrist. He supplied reports dated 14 November 2016 and 14 October 2019.
92. In his report of 14 November 2016 Dr Vickery took a history that Mr Everson had been held back from promotions that were given to other workers, following the formation of the new Ourimbah depot in late 2014.
93. Dr Vickery recorded a detailed history of Mr Everson's concern about safety. He summarised the history by saying:³³
- "Mr Everson has become increasingly concerned in relation to safety issues over the past year or so and in particular to the legal consequences for him personally if there is an injury or accident due to a safety issue."
94. Dr Vickery then noted that there had been a restructure "six weeks ago" and that whilst Mr Everson had been told he was "safe" as a leading hand, he was unsuccessful in his application for the position as a Field Supervisor. Dr Vickery noted that Mr Everson had been unsuccessful in three prior applications. Mr Everson said that his Field Supervisor (presumably Mr Starrett) told him in late September 2016 that he had a target on his back and would not be promoted if he did not make friends with management.
95. Dr Vickery took an accurate history that Mr Everson had gone off work on workers' compensation on 28 September 2016.
96. Dr Vickery diagnosed Acute Adjustment Disorder with Anxiety and Depressed Mood. He also noted that Mr Everson was not exaggerating or feigning his symptoms, and that his examination was consistent. The prognosis was "guarded as the work related issues are unresolved."

³³ Reply page 79

97. Dr Vickery was asked by the respondent's legal advisors whether Mr Everson's psychological injury had been wholly or predominantly caused by reasonable action taken proposed to be taken by the Ausgrid with respect to transfer, demotion, promotion, performance appraisal or discipline of the workers [sic].

98. This question was not directly responded to, as Dr Vickery said:³⁴

"There was a lack of promotion which Mr Everson believed was due to victimisation by the Field Supervisor and Field Managers."

99. When asked what the "wholly or predominantly causative [sic]" of the injury had been, Dr Vickery referred to the report dated 28 September 2016 from Dr Mutiah, which I have reproduced above. Dr Vickery also referred to the Factual Report from Procure of 27 October 2016 which summarised the statement of Mr Starrett, to which I have also referred. Having done that, Dr Vickery said:³⁵

"It is my opinion that Mr Everson's perception of harassment, victimisation, discrimination and being boycotted from promotion has been wholly or predominantly the causative factor of his psychological injury."

100. Dr Vickery updated Mr Everson's case in his report of 14 October 2019.³⁶ He noted that Mr Everson had accepted a redundancy on 1 July 2018 and continued to suffer symptoms. Dr Vickery noted that Mr Everson had formed another relationship, but that it ceased in mid-2019. Dr Vickery noted that Mr Everson had lowered tolerance of his two teenage daughters, including one that had been involved with "pot." Dr Vickery noted that Mr Everson was attending a psychologist every four to six weeks.

101. Dr Vickery recorded Mr Everson's presenting symptoms at this consultation (8 October 2019). He noted:³⁷

- Depressed mood ("struggles to get out of bed some days..")
- Disturbed sleep and insomnia
- Reduced hygiene and grooming
- Reduced memory and concentration
- Reliance on sleeping tablets
- A "scraggy appearance"
- Despondent mood and behaviour
- No formal thought disorder
- Suicidal thoughts
- Difficulty in undertaking and completing tasks

102. Dr Vickery diagnosed a Major Depressive Disorder, and that Mr Everson's prognosis was guarded. He thought the counselling was ineffective, and that Mr Everson required monthly psychiatric review.

³⁴ Reply page 85

³⁵ Reply page 86

³⁶ Respondent ALD dated 14 October 2019 page 1.

³⁷ Respondent ALD dated 14 October 2019 page 3 and following

103. In answer to a well-nigh incomprehensible question from the respondent's legal advisors, Dr Vickery noted that Dr Muthiah had reported on 20 June 2018 that Mr Everson was anxious to have the redundancy finalised in July 2018, but was mentally stable.

104. Dr Vickery concluded that therefore it appeared that Mr Everson was then asymptomatic, and that his current condition had entirely been caused by the subsequent events, namely:

- Having to ground his daughter for having "pot"
- Relationship problems with his partner
- Having to call the suicide prevention counsellors
- The new partner was moving out

105. Dr Vickery did acknowledge that Mr Everson had been aggrieved by work related matters, but his work-related psychiatric condition had resolved by 2018.

106. Dr Muthiah's clinical note referred to by Dr Vickery stated:³⁸

"Reason for visit:

Review

Mental state examination

Stress

found out 1/52 that has a redundancy packaged approved, went above bosses direct to HR and last day is 6th July, been there 18 years ...

Will have one year or so to find an new post, daughter should be driving by nov and then she can drive to school so

this opens up job options for pt e.g newcastle.

currently assigned nil tasks by work Just drives ...

itchy scalp better, nil lesions seen on scalp ..

sometimes crampyabdo, ml fevers, ate some beef jery recently, no fevers,

bowels normal 1-2 daily, nil diarrhoea, nil

weight loss, nil rectal bleeding, no Fh bowel cancer

thinks may have been nerves about the redundancy currently feels better now apyrexlal

abdo sfnt bs +

Subjective:

Psychiatric:

Normal mood. Anxious. No relationship problems. Recent bereavement. No delusions. No auditory hallucinations. No visual hallucinations. No suicidal thoughts. No suicide attempts. No substance abuse.

feels mentally stable, engages fine, relationship is good, anxious re work and getting redundancy finalised but once this happens reports will be fine , does not want psychologist/counsellor etc ...

good rapport and reactive, stressed re work only and that is being taken care of

Objective:

...

supervisor has advised pt he is booked in *tor* training for final 2 weeks as they expect him to not be there, feels stressed to talk to colleagues about his redundancy and would hke remaining few wweeks (sic) off work

Actions:

Medical Certificate given from 20/06/2018 until 06/07/2018"

³⁸ ARD page 170

Dr Gertler

107. The respondent also lodged a report by Dr Robert Gertler, Psychiatrist, dated 6 April 2017.³⁹ Dr Gertler had been retained by Mr Everson, but the report was not relied on by him. Mr McMahon submitted that the history taken by Dr Gertler demonstrated the inadequacies of the report of Dr Khan, who did not refer to the transfer from Noraville to Ourimbah. The report was supplied to the respondent pursuant to an order by the Arbitrator at teleconference.⁴⁰
108. Dr Gertler noted the transfer, and that problems arose thereafter. He said:⁴¹

“Specifically there was in [Mr Everson’s] opinion, a lack of suitable staffing, there were ongoing safety issues which were ignored by others, there was a lack of support from senior staff who tended to “laugh at me”, and there was also an investigation of a job in which he was involved which he felt was unjustified.

He was subjected to increasing and ongoing criticism. He remained concerned about ongoing risks at work which were not being considered by senior staff.

Some eight months ago, Mr Everson was told by a work colleague that there was “a target on my back” and that in other words, his job was under threat.”

SUBMISSIONS

Mr McMahon

109. McMahon firstly addressed the opinion of Dr Khan. He submitted that it failed to address the events between December 2014 and May 2015. This was a significant omission in the history, and reflected the failure by Dr Khan to appreciate that there had been a restructure which was being implemented in that time. It failed also to address the workers’ own statement as to the anxiety that implementation engendered.
110. Mr McMahon said that the restructure was identified by Mr Kilpatrick, Dr Vickery and indeed Dr Gertler, whose report was not relied upon by the worker, but was lodged by the respondent to demonstrate that this aspect of the history was regarded as significant by him.
111. Thus, argued Mr McMahon, I would not reach the stage of ruling on the s 11A defence, as the worker had failed to meet his onus, and had not therefore established a prima facie case. He submitted that Dr Khan’s report was so deficient that I could not find that his opinion had been reached in a fair climate.
112. I would not accept, it was argued, that the statement made to Dr Vickery that “it just all built up” related to only the events of 28 September 2016. As I understood Mr McMahon, the appropriate interpretation of that comment would be that the build-up was occurring over the previous eighteen months – the period that Dr Khan glossed over. I would observe in passing that the evidence sustains that interpretation, as will be seen.
113. Mr McMahon submitted that the genesis of the worker’s psychological condition could be seen to be a misperception by him as to the process of the merger and redeployment.

³⁹ Respondent ALD dated 14 October 2019 page 17

⁴⁰ Applicant ALD dated 9 October 2019 page 18

⁴¹ Respondent ALD dated 14 October 2019 page 18

114. If I was satisfied that a prima facie case had been established, Mr McMahon submitted that I would be satisfied that the respondent had made out its defence pursuant to s 11A. He argued that the histories taken by Dr Vickery and Mr Kilpatrick demonstrated that the worker's condition was wholly or predominantly caused by the particular circumstances of his employment. He submitted that the process of transfer and redundancy could be seen to be reasonable, even if there had been some glitches in its implementation.

Ms Balendra

115. Ms Balendra submitted that the evidence demonstrated there were three causes for Mr Everson's condition. They were:

- Bullying and harassment
- Concerns over the approach by the merged depot to safety issues, and
- status

116. Ms Balendra submitted that each of those causes had been traversed by Dr Khan, and that the history taken by him contained all those elements. I was referred to Dr Khan's opinion that the cause had not been wholly or predominantly Mr Everson's employment.

117. Ms Balendra conceded, as she had to, that Dr Khan's opinion was based upon assumptions that the causative factors were safety and bullying, rather than transfer. However, she argued that when read in conjunction with Mr Everson's statement, which was before Dr Khan, Dr Khan's opinion could be seen to have been made in a fair climate. I was referred to Dr Khan's history that Mr Everson had been unsuccessful in his applications for promotion, and that, when combined with Mr Kilpatrick's evidence, the deficiencies in Dr Khan's report were remedied to the point, as I understood her, that I could be satisfied that his opinion was acceptable.

118. Ms Balendra submitted further that the evidence of the respondent's witnesses also corroborated Mr Everson's statement, in that there was very little that they had denied. Their perspective may have been slightly different, she argued, but the effect of the transfer was plainly one of the matters that they reported Mr Everson was having difficulties adjusting to.

119. Ms Balendra submitted that I would not be satisfied on the balance of the evidence that Mr Everson's psychological condition had been wholly or predominantly caused by the actions of the employer. If I was against that submission, she contended that I would not find that those actions had been reasonable.

120. Ms Balendra referred to the delay that the respondent had conceded had occurred in notifying Mr Everson of his situation. She referred to Mr Pengilly's letter of 31 August 2015, and the admission therein that a letter informing Mr Everson of the redeployment procedure had not been sent. She referred to the Redundancy Policy, Chapter 1.3 of which is headed:⁴²

"Employees are fully informed about redeployment programs."

⁴² Applicant's Application to Admit Late Documents dated 6 December 2019, page 4

121. Ms Balendra said that the facts demonstrated that Mr Everson was not informed at all. A common theme to his statement was that he was never advised exactly what his status was. When he was finally advised that he had continuing employment by letter of 10 October 2016 it was too late, as he had by then developed his psychological injury, which it was common ground had incapacitated him from continuing his employment. That letter was written by Mr Pengilly and said relevantly:⁴³

“I am pleased to advise that following completion of the Network Services Phase 2 Limited Contestability process north of the Hawkesbury River, you are confirmed in your position at your current depot. This means that your position has not changed and you are no longer reform affected.”

122. It was unreasonable, given that background, that it had taken Ausgrid two years to confirm Mr Everson’s position with the company, Ms Balendra contended. His psychological condition had come about because of multiple causes, but they were all connected with the merger, and that condition had been if not wholly, then certainly predominantly caused by the unreasonable failure by the respondent to advise Mr Everson regarding the redeployment process.

123. Ms Balendra also referred to Chapter 1.4.1 of the Redundancy Policy, which states:

“Division/Branch managers are responsible for the implementation of the redeployment procedure for employees in their Division/Branch. This includes ensuring provision of and access to information and advice (options, entitlements, and taxation and superannuation matters), determination of affected employees, voluntary redundancy offers and responses in writing, liaison with appointments section and also communication with supervisors concerning their responsibilities, e.g. time off for attendance at seminars and job interviews.”

124. The evidence demonstrated a failure to comply with this directive also, she said.

125. McMahan said in reply that because Dr Khan had access to the documents referred to by Ms Balendra, it did not follow that he had read them. Dr Khan had clearly not considered their entirety because the history contained in them was not mentioned.

126. Mr McMahan argued that the respondent had complied with the redundancy policy. The evidence of Mr Stace and Mr Starrett was that there were constant meetings in which Mr Everson was advised of his position. He said that the two year delay was reasonable, given the scope of the merger. The evidence was that the workforce was reduced from 246 to 176 employees, and that could not be done quickly.

127. Mr McMahan submitted in any event I would accept Dr Vickery’s opinion of 14 October 2019 that Mr Everson’s current incapacity was not caused by his employment at all, but by the stressors such as his daughter being caught with “pot” and other non-work-related matters.

128. Finally, Mr McMahan submitted, the evidence established that Mr Everson’s lack of promotion was not due to victimisation, but rather to the restructure. In terms of s 11A, the transfer and redundancy actions were the cause, and they were reasonable. Mr McMahan went one step further, and said that, although not particularised, performance appraisal was also a reasonable action which had contributed to the psychological condition.

⁴³ Respondent’s Application to Admit Late Documents dated 14 November 2019, page 15

DISCUSSION

129. It can be seen that I have spent some time considering the events between the transfer of the Noraville employees in late 2014 to Ourimbah as part of the merger to when Mr Everson went off work on 28 September 2016.
130. There is corroboration for Mr Everson's assertion that he noticed an "us and them" attitude from the Gosford depot personnel as soon as he arrived. Mr Starrett, whose evidence I found to be balanced and considered, said that the Noraville employees were under more scrutiny as a result of safety and work ethic issues that emerged from Noraville.
131. One of the recurring complaints by Mr Everson throughout his evidence related to safety issues. He was of the view that the management at Ourimbah were derelict in safety matters. I have not enumerated all the instances of such alleged dereliction raised by him, but Mr Starrett's comments I take to mean that management were suspicious of the emphasis laid on safety and the resources required to satisfy the Noraville employees' concerns, to the point where Mr Starrett included the question as to the ethics of such emphasis.
132. Although Mr Starrett denied using the term "target on your back," he conceded that Noraville workers were viewed with that suspicion.
133. It has not been suggested that Mr Everson was exaggerating or feigning his symptoms, and the evidence as a whole does not suggest that his evidence may not be relied upon. The conversations he recounted were, in the main, confirmed by either Mr Stace or Mr Starrett. Although both witnesses had doubts about what they were reported as actually saying, the colloquial nature of Mr Everson's reporting I found to be more likely in the everyday reality of a busy workplace. The phrase "target on your back" was a frequent allegation made to all medical practitioners – even Dr Khan, whose opinion was problematic, as has been seen from the tenor of the submissions made by Counsel.
134. All medical practitioners too raised Mr Everson's pre-occupation with safety issues and perceived lack of support therefore as one of the causes of the onset of his injury. I am satisfied that this issue was partially responsible for his condition.
135. However, during submissions I enquired of Ms Balendra as to whether part of Mr Everson's job description was to ensure a safe working environment. She referred me to the following description given in Mr Everson's statement:⁴⁴
- "30. My duties as a Linesman/Leading Hand included the following:
 - a. performing maintenance and repair of the distribution and subtransmission network;
 - b. Major upgrade work (Installation of new high powered subtransmission lines, including from Tuggerah to Lake Munmorah, Ourimbah to Gosford);
 - c. work as part of a team of to 30 men, including sub-contractors;
 - d. resolving issues between the group of workers on site on any given day;
 - e. drive to and from various locations around the Central Coast.
 - 31. My duties as a Field Coordinator/Field Supervisor involved the following:
 - a. Scoping jobs;
 - b. Organise crews and number of personnel for any given job;
 - c. Timesheet entries and hours booked for jobs;

⁴⁴ ARD page 13

- d. Liaising with project officers;
- e. If needed/required, assist with on-site linesman duties described above.

32. Being a Line Worker/Leading Hand was a highly dangerous and technical job. Because of the nature of the job involved working with live electricity, managing traffic, working from heights, managing pedestrians, there was a large risk for any error that might occur at any time. Because of these various hazards, if any error or accident occurred, it could result in injuries or fatalities.
33. As well as trying to ensure jobs are performed correctly and safely, and making sure those around you (including civilians or colleagues) were kept safe, you would also be under pressure to ensure the task that you were performing wouldn't kill or injured you. The time constraints imposed by Ausgrid or the other stake holders on any site added to stress levels."

136. I do not read that account as any assertion that Mr Everson was required to do any more than act responsibly in a highly dangerous work environment. He was not tasked with any policy directive within management, although it must be acknowledged that Mr Everson's approach to his duties from a safety point of view was commendable.

137. Accordingly, his frequent disagreements with his managers at Ourimbah about safety issues cannot be seen as being based on any authority, and I do not find the actions by those various managerial personnel with whom Mr Everson was in conflict to have been unreasonable. I accept Mr Starrett's evidence that management regarded the safety practices of the Noraville depot as being of concern, and that the concerns expressed by Mr Everson were not supported as a result of considered policy.

138. Mr Everson also claimed that his psychological condition had been caused by "poor communication." Both Mr Stace and Mr Starrett conceded that communication was limited, as managerial responsibility limited the answers that could be given to Mr Everson's enquiries, which were persistent and probing. Those enquiries were in part as a result of the failure of HR to fully inform Mr Everson about his redeployment program or to provide him with the material outlined in the respondent's Redundancy Program. The evidence shows that Mr Stace, as early as 23 December 2014, following Mr Everson's unsuccessful application for the position of field supervisor, was unable to advise Mr Everson either as to Mr Everson's future role in the merged depot, and could not guarantee any job security.

139. It stands to reason that the Redundancy Policy enacted by the respondent was an acknowledgment that future job opportunities and options would be of prime importance to those employees affected. It was reasonable for Mr Stace to answer as he did in December 2014, as it would appear that management were still completing the Field Supervisor recruitment at that time. However, Mr Pengilly's email of 31 August 2015 makes it clear that a final decision was made in Mr Everson's case by 12 January 2015. Mr Everson returned from leave on 19 January 2015 and was mystified as to the lack of communication, and I accept that his anxiety increased over the following months as he continued unsuccessfully to seek clarity as to his position.

140. The respondent witnesses referred to Mr Everson's disappointment at not obtaining the Field Supervisor role after the December 2014 interview. I accept that the rejection of his application would have caused him rancour and some bitterness. As I have already observed, Mr Everson had been fulfilling that role at Noraville over the previous three years. The respondent lodged a document entitled "Merits Appointment Policy Recommendation for Appointment Form," which contained summaries of all applicant

interviews.⁴⁵ The reasons given for Mr Everson's failure might be criticised as being somewhat vague and unsatisfactory, but could not in my view be described as unreasonable. The respondent adopted an open and transparent system of appointment interviews, and recorded reasons for its decisions. That another panel might have come to a different conclusion does not vitiate the reasonableness of that procedure.

141. However, because of their managerial responsibilities, both Mr Stace and Mr Starrett were not able to give any satisfactory clarity to Mr Everson's future job security or his future role with the company. I note that by 7 July 2015 Mr Stace was aware that HR had failed to send Mr Everson the email advising him of his status within the merger. No explanation was given as to why it took a further eight weeks or so to rectify this oversight.
142. I accept Mr Everson's evidence that the anonymous entries to his diary of a tent also played on his mind, as he said. The drawings may or may not have been intended as a harmless piece of humour, but in the circumstances the effect was to exacerbate Mr Everson's deteriorating condition – especially as no action was taken when he complained to his supervisor.
143. I have no difficulty in accepting Mr Everson's statement as being accurate and reliable. In the first place, he was a copious diarist as has been illustrated by the annexures to his statement, and accordingly his account has contemporaneous support. I infer from the specificity of conversation and date that his diaries were utilised. Secondly, there is on the whole no challenge to the accuracy of Mr Everson's recollection by the respondent witnesses. Thirdly, Dr Vickery confirmed in his report of 14 November 2016 that Mr Everson's presentation was consistent, he was not exaggerating, or feigning his symptoms.
144. Thus, of the allegations raised in Part 4 of the ARD I find that there was poor communication, anxiety about safety issues and prolonged uncertainty as to Mr Everson's employment status. I reject the allegation that Mr Everson was bullied and harassed. I accept that there were robust exchanges from time to time between the managerial personnel and Mr Everson, and I accept also that there was a degree of frustration on both sides, but such exchanges cannot be categorised as bullying or harassment on either side.
145. As indicated above, some criticism was made of the medico-legal opinion of Dr Abdal Khan, upon which Mr Everson relied. Such criticism was justified, as it can be seen that I agree with Mr McMahon's submission that the genesis of Mr Everson's psychological condition was the process of merger and redeployment. I do not however agree that Mr Everson misperceived the process. He was not made aware of what the process was, and that omission was the principal cause.
146. It appears that Mr Everson was in fact doing some work during the crucial time between the transfer and when he went off on 28 September 2016, but he had not been given any surety as to his future role. He had been involved in the industry all his working life, and was born in 1973, so that he had a reasonable expectation that he would be gainfully employed in a specialised field for many more years. He perceived that there was a bias against Noraville employees and his experience in being overlooked for the job he had been doing over the past three years may well have given him some misgiving about his future role. Those misgivings became anxiety as he was, through oversight, not given any formal or official notification of his position. I accept Mr Stace's assurance that there was no ulterior motive such as malice or other ill intent on the part of HR, but I am also satisfied that this oversight was the main cause of the onset of Mr Everson's condition.

⁴⁵ ALD Respondent dated 14 November 2019 page 10

147. I also accept that his condition was developing at the time he finally received Mr Pengilly's email on 31 August 2015. I accept Mr Everson's evidence that when he finally received it, he regarded it as no more than a further contradictory piece of information and that he was already suffering symptoms of insomnia and loss of appetite. I note that he had seen Dr Matebwe on 20 August 2015 because of his symptoms.
148. However, Dr Khan failed to refer to this evidence, contenting himself to cover the period during which I am satisfied Mr Everson's condition developed by referring to "similar incidents", and naming various protagonists, including Mr Stace and Mr Starrett. The incidents to which Dr Khan was referring were firstly, when Mr Everson got lost, which also involved a controversy over the payment of tolls, as I have indicated. Secondly, the incident on 11 December 2014 over safety on another job.
149. Although Dr Khan referred to "similar incidents" which involved Messrs Stace and Starrett, I was not assisted by such a generalisation. The many incidents over that time I have set out above, and as I have indicated, they concerned Mr Everson's concerns about his employment future and job security. The evidence of Messrs Stace and Starrett were predominantly concerned with those matters.
150. Dr Khan did note two aspects of the evidence which touched on job security. He noted that Mr Everson had not succeeded in many applications for promotion, and Dr Khan repeated the allegation made by Mr Everson, that he had a target on his back.
151. Dr Khan's diagnosis of a major depressive disorder with melancholic features was similar to those of other medical practitioners. Dr Muthiah in his first certificate of 28 September 2016 nominated the lack of job opportunities as one of the factors that had resulted in "anxiety/depression."
152. Mr Kilpatrick also remarked that the system employed by management regarding redeployment was provoking depression and anxiety. Mr Kilpatrick indeed stated:
- "Constant change and restructuring of a workplace is well recognised to cause significant deleterious effects on employees mental health wellbeing."
153. Mr Kilpatrick cited a paper on restructuring, "Davide Dazzi and Volker Telijohann, 2009, Impact of restructuring on health and safety of workers." It is unnecessary to discuss its contents, as the respondent is clearly aware of the mental health implications of a restructure as evidenced by its Redundancy Policy. I note too that the respondent has a Mental Health Division within its First Aid facilities.
154. Dr Vickery diagnosed an Acute Adjustment Disorder with Anxiety and Depressed Mood. His view was that Mr Everson's perception of harassment, victimisation discrimination and being boycotted from promotion had been wholly or predominantly the causative factor for his condition.
155. Mr McMahon argued that Dr Khan's report was so deficient in the history it relied on, that it could not be relied on as an expert report which demonstrated a prima facie case. It did not refer to the merger and transfer, and it did not refer to Mr Everson's own statement as to the effect the failure by the respondent to advise as to his job security and future.
156. Ms Balendra argued that, granting that deficiency in the report, nonetheless I could accept Dr Khan's diagnosis as being made in a fair climate.

157. The question of the adequacy of the assumptions made by an expert in giving an opinion has been considered by President Judge Phillips in *Westpac Banking Corporation v Chauhan*.⁴⁶
158. The learned President considered the authorities regarding the admissibility of expert evidence. From [81] he said:⁴⁷
81. Based upon a consideration of the authorities described above, I do not accept the appellant's essential submission that strict non-compliance with *Makita* is fatal to the learned Arbitrator placing any reliance upon Dr Gupta's report. I do not read the authorities of *Makita*, *Paric* and *Hancock* as necessarily presenting an either/or choice for a decision maker. In my view, *Makita* sets out in comprehensive terms the proper approach for the tribunal of fact when considering expert evidence. In *Makita*, Heydon JA himself refers to *Paric* and acknowledges that an opinion will be admissible and material even though the facts established may not correspond with complete precision.- I do not therefore read *Makita* as standing for the rather stark proposition asserted by the appellant in this matter, that namely if the facts are not proven to substantiate the opinion, the opinion is inadmissible or ought be accorded little or no weight. At [64] of *Makita* Heydon JA acknowledges that "other admissible evidence may be available to substantiate the opinion".
82. *Makita* of course was decided before *Hancock*. *Hancock* specifically dealt with how *Makita* is to be applied in the context of a tribunal not bound by the rules of evidence. As described above, Beazley JA says that strict compliance with each and every feature referred to by Heydon JA in *Makita* is not required. What is required is for the Commission to be satisfied that the expert evidence provides a satisfactory basis upon which the Commission can make its findings." (Footnote omitted).
159. The question accordingly arises as to whether Dr Khan's report provides a satisfactory basis upon which I can find that Mr Everson's employment caused his psychological injury. I think it does. The failures to which I have referred regarding aspects of the history taken by Dr Khan do not alter his final opinion. I have outlined the claim made in Part 4 of the ARD and Dr Khan has found that the injury occurred as a result of the alleged actions.
160. He found that employment had substantially caused Mr Everson's condition, and that amongst the causes had been the issues as to safety, promotion and inadequate resources. That Dr Khan did not record the predominant issue as to the transfer and redeployment was unfortunate, but not fatal to the establishment of a prima facie case. The evidence of Mr Everson himself, which I have accepted, and that of Mr Kilpatrick relates the commencement of Mr Everson's depression and anxiety to the amalgamation of the two depots, and the management style of some supervisors. Those management personnel who gave statements, Messrs Stace and Starrett, agreed that the predominant concerns expressed by Mr Everson was as to his future and job security with Ausgrid, and his inability to understand why his applications for promotion did not succeed. The opinion of the respondent's own medico-legal referee, Dr Vickery, also spoke of a lack of promotion which Mr Everson believed was victimisation. As I have found, I do not accept that the actions of the respondent

⁴⁶ [2019] NSWCCPD 63

⁴⁷ References made are to:

Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305, *Paric v John Holland (Constructions) Pty Ltd* [1984] 2 NSWLR 505, *Hancock v East Coast Timber Products Pty Limited* [2011] NSWCA 11 considered

managers were intended to be victimisation, but the facts do demonstrate that Mr Everson's perception had some actual basis, as the respondent had failed to comply with its own Redundancy Policy, as I have found.

161. Before considering the 11A defence, mention should be made of Dr Vickery's opinion as expressed in his report of 14 October 2019. It was pressed (but faintly) by Mr McMahon, and I accordingly have to consider it.
162. Dr Vickery had noted in his opinion of 14 November 2016 that Mr Everson had contracted an Acute Adjustment Disorder with Anxiety and Depressed Mood. The prognosis was guarded as the work related issues were unresolved. He found Mr Everson to be consistent in his presentation, and not one to exaggerate or feign his symptoms. He found Mr Everson unfit for work "at the present time."
163. When he reviewed Mr Everson on 14 October 2019, Dr Vickery found that Mr Everson suffered a Major Depressive Disorder, and that his prognosis was guarded. He thought Mr Everson had a capacity to work in some employment in with less demanding duties for twenty hours per week. He found Mr Everson had a depressed mood, that he suffered from insomnia and suicidal thoughts, had reduced hygiene and grooming, had reduced memory and concentration, a despondent mood and behaviour, and difficulty in undertaking and completing tasks.
164. When asked to give a detailed history of the circumstances of "the injury" by the respondent's solicitors, Dr Vickery referred to the history he had taken on 14 November 2016, and repeated it, except at the end of the history he said that Mr Everson was managed on sleeping tablets, and was undergoing psychological counselling, and he omitted the last paragraph of his earlier history.
165. It follows that Dr Vickery consciously answered the question asked of him, and outlined the circumstances of "the injury", which he clearly understood to be the injury referred to him.
166. However, without discussing the matter with Mr Everson, whom he had interviewed, Dr Vickery later in his report referred to a note made by Dr Muthia in the clinical records of the Warnervale Medical Practice on 20 June 2018. This note referred to the time Mr Everson's redundancy package had been approved, and of Mr Everson's plans for the future. It noted that on this occasion Mr Everson was not exhibiting any psychiatric problems, and spoke of his hope that once the redundancy package had been finalised he "will be fine." Dr Muthiah noted that Mr Everson was "stressed re work only" but "that was being taken care of."
167. Based on this entry alone, Dr Vickery ascribed Mr Everson's Major Depressive Disorder and guarded prognosis to his domestic situation, as I have indicated, including that Mr Everson's teenage daughter had some "pot". Dr Vickery did not discuss whether the stress recorded in Dr Muthiah's notes about talking to colleagues indicated that Mr Everson continued to suffer his work related injury. Dr Vickery did not discuss either with Mr Everson or in his opinion why medical certificates continued to be issued, as indicated in that note. Dr Vickery did not discuss either with Mr Everson or in his opinion the reference in the following entry in the notes to his solicitors⁴⁸, nor in the entry after that of 21 November 2018 which referred to "Depression," "GP Mental Health Plan" and "Depression/Anxiety," nor the entry on that date "Depressed mood, anxious, no relationship problems." Moreover, Dr Vickery failed to engage with Mr Everson's statement, which described his domestic condition under "current conditions," and who detailed his deterioration since he ceased work.⁴⁹

⁴⁸ ARD page 171

⁴⁹ ARD pages 42/43

168. I reject Dr Vickery's opinion. To base an opinion on expressions of hope in one entry in a clinical note I find to be somewhat unusual. Further, to express such an opinion without discussing it with the injured worker I find to be somewhat surprising. Further, to fail to discuss the following entries which cast some doubt on the accuracy of that opinion I find to be somewhat mystifying. It is trite law that entries in the clinical notes are to be treated with some caution, given the circumstances in which they are taken.⁵⁰ Dr Vickery has exhibited none. I find more reliable Dr Vickery's opinion of 14 November 2016, and it is probable that the symptoms he described in his second report are those caused by "injury" that he described and not any reaction to his domestic circumstances.

169. I also accept Dr Vickery's opinion that Mr Everson's psychological condition was wholly or predominantly caused by the actions of the respondent with regard to transfer and redundancy. Dr Khan argued that the actions set out in s 11A were not so caused, saying that it was simply that Mr Everson's concerns were being ignored, that inadequate resources were supplied re safety and that he was being bullied. As I have indicated, the source of those complaints is to be found in the merger of the two depots and the subsequent policy regarding redeployment, which included the question of promotion and redundancy.

170. Section 11A of the 1987 Act provides relevantly:

"(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."

171. Mr McMahon submitted that the respondent was entitled to the protection of this section. He accepted that he bore the onus of establishing the defence, and as I have indicated I am satisfied that the respondent has established that Mr Everson's psychological condition was wholly or predominantly caused by the actions of the respondent with regard to transfer, promotion and redundancy, which the parties accepted was a form of employment benefit.

172. Mr McMahon contended that the actions of the respondent were reasonable. He referred to the oversight in notifying Mr Everson of his position was no more than a glitch in the process, and that it did not deprive the respondent of its protection. In doing so, he was relying on the authority of *Department of Education & Training v Sinclair*⁵¹ per Spigelman CJ at [97]:

"97 His Honour's analysis, as that of the Arbitrator, appears to assume that any specific blemish in the disciplinary process, however material in a causative sense or not, was such as to deprive the whole course of conduct of the characterisation "reasonable action with respect to discipline". In my opinion, a course of conduct may still be "reasonable action", even if particular steps are not. If the "whole or predominant cause" was the entirety of the disciplinary process, as much of the evidence suggested and his Honour appeared to assume, his Honour did not determine whether the whole process was, notwithstanding the blemishes, "reasonable action"...."

⁵⁰ See *Mason v Demasi* [2009] NSWCA 227; *Qannadian v Bartter Enterprises Pty Limited* [2016] NSWCCPD 50

⁵¹ [2005] NSWCA 465: see also *Rail Corporation NSW v Aravanopoulos* [2019] NSWCCPD 65

173. I do not regard the oversight in the notification of the redeployment scheme to be a “glitch” or a “blemish.” I have given my reasons as to that finding. The respondent itself regarded such notification as being necessary, as set out in the Redundancy Policy to which I have referred. I accept the evidence of Mr Kilpatrick that the process of redeployment has the potential to have a deleterious effect on workers’ mental health, and as I have found, such a concern is echoed in the Redundancy Policy itself.
174. The consequences of such oversight are demonstrated by the present case. All medical practitioners concurred that Mr Everson had no pre-existing vulnerability, and the manner in which he coped with his grief following the death of his wife in 2017 was given as an example of Mr Everson’s robust mental health. I am satisfied that he is now unemployable. I reject Dr Vickery’s opinion that he is capable of suitable duties, as I do not find his opinion to be impartial for the reasons I have given above. I prefer the evidence of Dr Khan, which I accept, that Mr Everson has no current work capacity.

SUMMARY

175. For the above reasons, I find:

- (a) The applicant sustained a psychological injury whilst in the employ of the respondent.
- (b) Such injury was wholly and predominantly caused by the actions of the respondent as to transfer and the provision of employment benefits to workers, specifically redundancy.
- (c) The oversight in providing Mr Everson with information pursuant to the respondent’s Redundancy Policy was unreasonable.
- (d) The applicant has no current work capacity.
- (e) The respondent will pay the following weekly payments of compensation:
 - (i) 24 September 2016 to 30 September 2016 - \$1,991.20
 - (ii) 1 October 2016 to 23 December 2016 - \$1,991.20
 - (iii) 24 December 2016 to 22 September 2017 - \$1,676.80
 - (iv) 23 September 2016 to 27 April 2018 - \$1,676.80
- (f) The respondent will pay the applicant’s s 60 expenses upon production of accounts, receipts and/or HIC notice of charge
- (g) I remit this matter to the registrar for referral to an AMS for an assessment of WPI caused by psychological injury sustained on 28 September 2016 (deemed). Evidence:
 - (i) Application to Resolve a Dispute (ARD) and attached documents dated 27 August 2019;
 - (ii) Application to Admit Late Documents (ALD) from the applicant dated 9 October 2019;
 - (iii) Amended ARD and attached documents dated 30 October 2019;
 - (iv) ALD from the applicant dated 6 December 2019;
 - (v) Reply and attached documents dated 18 September 2019;

- (vi) ALD from the respondent dated 14 October 2019;
- (vii) ALD from the respondent dated 14 November 2019;
- (viii) I direct that a copy of these reasons also be referred, due to the unsatisfactory nature of the medico-legal opinions herein, and my consequent findings as to causation.