WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **4243/19**
Applicant: **Maribel Bradbury**
Respondent: **Livebetter Services Limited**
Date of Determination: **29 November 2019**
Citation: **[2019] NSWWCC 381**

The Commission determines:

1. The applicant suffered an injury in the course of her employment with the respondent on 12 May 2017, which was predominantly caused by the actions of the respondent with regards to discipline and/ or performance appraisal.

2. The defence raised by the respondent pursuant to section 11A of the *Workers Compensation Act 1987* is not made out.

3. At the date of her injury, the applicant's preinjury average weekly earnings were $1,380.48 per week.

4. The respondent is to pay the applicant weekly compensation as follows:

    (a) From 15 May 2017 to 28 May 2017 at the rate of $632.40 per week pursuant to sections 36, 49 and 50 of the *Workers Compensation Act 1987*;
    (b) From 29 May 2017 to 11 June 2017 at the rate of $644.63 per week pursuant to sections 36,49 and 50 of the *Workers Compensation Act 1987*;
    (c) From 12 June 2017 to 13 August 2017 at the rate of $1,311.46 per week pursuant to section 36 of the *Workers Compensation Act 1987*; and
    (d) From 14 August 2017 to date and continuing at the rate of $1,104.38 per week pursuant to section 37 of the *Workers Compensation Act 1987*.

5. The claim for permanent impairment compensation is remitted to the Registrar for referral to an Approved Medical Specialist for determination of the permanent impairment arising from the following:

Date of injury:	12 May 2017
Body systems referred:	Psychological injury
Method of assessment:	Whole person impairment (PIRS)

6. The documents to be referred to the Approved Medical Specialist to assist with their determination are to include the following:

    (a) This Certificate of Determination;
    (b) The Application to Resolve a Dispute and attached documents, save for pages 55 to 69 inclusive which are not relied on;
    (c) The Reply and attached documents;
    (d) The applicant's Application to Admit Late Documents dated 1 November 2019 and attached documents.

7. The respondent is to pay the applicant's medical and treatment expenses pursuant to section 60 of the *Workers Compensation Act 1987* upon production of accounts, receipts and/ or Medicare Australia Notice of Charge.

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. Maribel Bradbury (the applicant) brings a claim against Livebetter Services Limited (the respondent) in respect of a psychological injury which occurred on 12 May 2017.

2. There is no issue the applicant suffered an injury. There is also no issue the injury was wholly or predominantly caused by the actions of the employer with regards to performance appraisal and discipline. What is in issue is whether those causative actions on the part of the respondent were reasonable.

3. The applicant commenced with employment with the respondent as a case manager on 30 June 2014. She worked at the Bathurst office although she sometimes carried out her duties at Orange.

4. The applicant readily admitted in her statement she suffered prior Post-Traumatic Stress Disorder (PTSD) following a serious car accident in 2011, for which she sought treatment from psychologist Margaret Shearer.

5. There is no suggestion that there was any issue with the applicant's performance at work until 9 February 2017. On that date, the applicant was hospitalised for five days after passing out in her shower and being diagnosed with severe vertigo and vestibular migraine. She was discharged on 14 February 2017 and returned to work on 1 March 2017 on restricted and reduced duties for one week before returning to normal duties.

6. The applicant's duties were to supply and book services to people who are about to return home from hospital. She conducted assessments on the clients in hospitals, presumably to determine their suitability and explained to them how the respondent's services or "compacks" can be of assistance to the patient.

7. The applicant worked 38 hours per week. Her direct supervisor was Ms Gai Whiley and her team leader Ms Amanda Davis. Mr Scott Kable was the senior manager.

8. The applicant was subject to regular performance reviews in the course of her employment, generally every three months. They were carried out by Ms Davis. She states that her last appraisal was in or about late 2018, and at that time she was meeting all expectations and was not advised of any areas for improvement.

9. When the applicant returned to work in March 2017 following her hospital admission, she worked for one week at the Orange office under the supervision of Ms Whiley. As previously noted, on 8 March 2017 she returned to full duties at the Bathurst office.

10. Between 10 and 28 April 2017, the applicant went on prearranged annual leave. When she returned to work on 1 May 2017, the applicant states she completed eight client assessments in one week, which she said is an unusually high number. On 5 May 2017, she and the rest of the compacks team received an email from Ms Davis congratulating her and the team for a job well done in dealing with such a high number of referrals.

11. On 9 May 2017, the applicant says Ms Davis advised her there would be a meeting between Ms Davis, the applicant and Mr Kable in his office at Orange on 12 May 2017. She states:

> "Whilst on the phone to Amanda Davies [sic] she advised me they wanted to discuss my recent health issues in February and a couple of procedures with paperwork that I had not done properly.

Amanda Davies [sic] advised me that I could have a support person present if I needed."

12. The applicant states she arranged with Ms Kirsten Holgate of Orange to be her support person. She states she then noticed in the on-line calendar that Ms Davis had changed the venue for the meeting to the Bathurst office, and there was no subject title for it. The applicant said:

> "I then contacted Kirsten Holgate and I informed her that the meeting had now been changed to Bathurst and after the conversation with Amanda I formed the opinion that the meeting would be a casual chat about my February health issues and an opportunity for Amanda and Scott to show me how Amanda had indicated verbally that she was not satisfied with my paperwork, given that I had received no notification from the HR department nor given any official indication that the meeting was to be a disciplinary/reprimand/review I did not seek [sic] a need to get another support person after the venue had been changed.
>
> I did not feel comfortable asking Kirsten to travel all the way to Bathurst and I even joked with her that Scott was not going to hang me upside down."

13. According to the applicant, on 12 May 2017 Mr Kable and Ms Davis arrived at the Bathurst office and the meeting with the applicant commenced. She said:

> "The meeting lasted 45 minutes and during that time Scott Kable said words to the affect [sic], 'since my illness in February, my work performance had not been the same as previous.'
>
> Amanda Davis said words to the affect, 'some of my files were not up to date and some notes were not being added within 24 hours as required.'
>
> I asked them to show me where I was going wrong, but both Scott and Amanda declined to show specifics examples, despite all of my files being readily available.
>
> Scott went on to say words to the affect [sic], 'that he felt I should consider accepting a medical retirement, and my only other option was to go through a weekly review process which he felt I would not pass.'"

14. The applicant says she felt stressed but continued to work. She also said she felt in a great deal of shock. On 17 May 2017, the applicant was advised by letter from Mr Kable that a decision had been made to commence formal performance management, and a meeting had been scheduled for 18 May 2017 at the Bathurst office. She said:

> "Failure to improve my work performance would result in disciplinary action including the termination of my employment.
>
> The letter was signed by Amanda Davis on behalf of Scott Kable.
>
> When I received that letter I started crying and I replied 3.18 pm to Louise [Ms Fossilo, who works in the HR department] stating at the meeting with Scott Kable and Amanda Davis, they had given me till the end of 17/05/17 to decide if I wanted to accept a medical retirement before going through a performance review process. There is no mention of this in your correspondence. Now I am very confused and this situation has causing a great deal of stress, in future please provide my solicitor Jim Matthew in all correspondence.
>
> I received no reply.

I then left work at 4.10 pm and again advised Claire Plunket that I was leaving for the day."

15. The applicant has not attended work since.

16. On 7 June 2017, the applicant submitted an Injury Notification Form. On 28 September 2017, the respondent issued a section 74 notice alleging that any injury suffered by the applicant was caused by the respondent's reasonable actions regarding performance appraisal.

17. On 10 July 2018, the applicant completed a permanent impairment claim form. On 16 October 2018, the respondent issued a further section 74 notice relying section 11A of the *Workers Compensation Act 1987* (the 1987 Act) regarding performance appraisal, discipline and dismissal. A section 78 notice issued on 19 March 2019 maintained the basis for that denial, as did section 287 review notice issued on 7 August 2019.

18. On 20 August 2019, the applicant's solicitors issued these proceedings seeking payment of medical expenses pursuant to section 60 of the 1987 Act, weekly benefits and permanent impairment compensation. At the hearing of the matter, it is noted the applicant sought a general order for payment of medical expenses together with weekly benefits and lump sum compensation.

ISSUES FOR DETERMINATION

19. The parties agree that the following matter remains in dispute:

    (a) whether the actions of the respondent which are agreed to have caused the applicant's injury on 12 May 2017 regarding performance and appraisal and discipline were reasonable?

20. There is no issue the applicant suffers incapacity as alleged. Her pre-injury average weekly earnings (PIAWE) is also agreed. I note the respondent made no submissions contrary to the amended wages schedule which was filed in the Application to Admit Late Documents dated 1 November 2019.

PROCEDURE BEFORE THE COMMISSION

21. 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.

22. The parties attended a hearing on 12 November 2019.

23. At the hearing, the applicant was represented by Mr G Young of counsel and the respondent by Mr P Perry of counsel.

EVIDENCE

Documentary evidence

24. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) Application to Resolve a Dispute (the Application) and attached documents save for pages 55-69 inclusive which were not relied on;

(b) Reply and attached documents, and

(c) The applicant's Application to Admit Late Documents (AALD) and attached documents dated 1 November 2019.

Oral evidence

25. There was oral evidence called at the hearing.

SUBMISSIONS

The applicant's submissions

26. Mr Young noted the respondent's perception through the statement of Mr Kable that the applicant's performance before February 2017 had been excellent. He took the Commission to the applicant's annual performance appraisal form which was carried out on 17 August 2016 and which is attached to the Reply at page 235. Mr Young noted the applicant received the highest appraisal rating and it was apparent the applicant was an outstanding employee.

27. Mr Young noted the applicant's background of having worked for the respondent for three years and, having been assessed as an outstanding employee only six months before the events giving rise to the accepted injury, it is that background which helps inform what is or is not reasonable in the circumstances. He said the applicant being an outstanding employee, the question the Commission would have regard to is whether the respondent's actions were reasonable in the context of her record.

28. It was apparent, Mr Young submitted, the applicant had previously endured a number of issues in her life from which she has "bounced back", not least of which was the March 2011 motor vehicle accident in which she suffered severe physical and psychological injury. He noted there was no suggestion the applicant had any ongoing psychological issues at the date of the relevant injury, noting that her treating practitioners all indicated she had not been treated for any psychological symptoms since approximately November 2013. In other words, Mr Young submitted, the applicant is resilient and outstanding.

29. Mr Young submitted the Commission would accept the applicant believed Ms Davis and Mr Kable were holding the meeting to discuss her health and any paperwork matters. He conceded that such a meeting could be construed as discipline, in that it would be part of the process of teaching. He submitted the start of unreasonableness on the part of the respondent was when the meeting venue was changed to Bathurst unilaterally, and it was at this point the applicant told Ms Holgate not to worry about attending. He took the Commission to the statement of Ms Holgate at page 106 of the Reply where she says:

> "I can recall Maribel asking me to be a support person in a meeting she was to have with Scott Kable and Amanda Davis during May 2017.
>
> I can recall she called through on the main case management line and she wanted Gai Whiley however she was unavailable, and I spoke with her and she asked me to be her support person.
>
> At the time I was not aware what the meeting was about, I asked Maribel to clarify with Amanda Davis if it was appropriate for me to the support person.
>
> Maribel later emailed me and confirmed it was ok for me to act as a support person.

I can't recall if the meeting was always booked for Orange or was moved to Bathurst.

The morning of the meeting Maribel called me again and advised that the meeting was in Bathurst and she did not want me to have to come all the way across for her, I advised her that Scott Kable was happy to take me across and I was happy to travel to Bathurst.

Maribel then advised she didn't want me to travel to Bathurst.

She then made a joking comment being words to the affect [sic] 'Scott won't hang me upside down.'

I then asked if she had someone near by to attend the meeting and I suggested her daughter, she advised no."

30. Mr Young submitted that statement on the part of Ms Holgate confirms the applicant's version of events regarding her perception that the meeting did not involve any serious ramifications relating to her employment.

31. Concerning the events at the meeting on 12 May 2017, Mr Young relied upon the applicant's version of events at page 13 of the Application and submitted the failure by Mr Kable and/or Ms Davis to provide concrete examples of where the applicant was going wrong was unreasonable. Likewise, Mr Young contended Mr Kable's suggestion that the applicant "consider medical retirement" or she will be placed on a weekly review which she would not pass was also unreasonable.

32. Mr Young noted the context of the use of the words "medical retirement" may be in question, but the fact those words were said during the course of the meeting by a representative of the respondent and performance appraisal was also raised is not in issue.

33. Mr Young submitted the applicant, previously regarded as an exceptional employee, was confronted with words suggesting she undertake a medical retirement, and that being placed in such a scenario was unreasonable, leading her to justifiably construe it as a constructive dismissal.

34. It was significant, Mr Young said, that the applicant's boss and supervisor were present in the room and suggested medical retirement or formal performance appraisal. He said it was unreasonable in the context of a meeting for the applicant's performance to have slid from being of the highest order in late 2016 to the point where she was being asked to consider medical retirement. He said there was no adequate notice provided to her that she had slipped so far in her performance. Mr Young also noted the applicant asked Mr Kable whether she might be placed elsewhere if it was thought she was not capable of carrying out her duties, and he replied there were no other jobs available elsewhere.

35. In summary, Mr Young noted the applicant was isolated at the meeting, subjected to a change of venue, suffered from a lack of notice regarding the extent to which the respondent alleged her performance had fallen, was the victim of a lack of communication as to how serious the meeting was, was not provided with examples of problems relating to her performance and that in order for there to be a fair performance appraisal, the applicant needed to be formally advised as to what requirement she had to meet.

36. Referring to Mr Kable's letter of 17 May 2017, Mr Young noted the applicant's response was the letter did not fit a time table which the respondent itself had set her in terms of making a decision about the future of her employment. He said this was plainly unreasonable on the part of the respondent.

37. Mr Young submitted that if the respondent was indeed attempting to performance manage or coach someone to improve their output, it is not reasonable to suggest they see a financial advisor or consider medically retiring. Likewise, he submitted it was inappropriate for the respondent to raise such serious matters with the applicant given no support person was present. He submitted it would have been reasonable of the respondent to inform the applicant of the seriousness of the meeting in order that a support person would be there. It particular, Mr Young submitted the failure by Ms Davis and Mr Kable to provide the applicant with concrete examples of where her performance was not up to scratch despite her requesting, they do so was unreasonable in the circumstances. He submitted the applicant, having continually ask what was wrong with her performance in the meeting, it was unreasonable of the respondent to simply refer her back to other conversations rather than provide her with concrete examples. The contents of the letter of 17 May 2017 confirmed, Mr Young submitted, that to that point the applicant had not been advised as to which areas of her performance required improvement.

The respondent's submissions

38. Mr Perry noted that the test of reasonableness on the part of the respondent is an objective one, and the applicant's perceptions as to what was or was not reasonable are not strictly relevant in deciding whether the test is met. He appropriately acknowledged the respondent bears the onus of establishing its conduct was reasonable on the balance of probabilities.

39. Mr Perry referred the Commission to the decision of Acting Deputy President Handley in *Director General, Department of Education and Training v Pembroke* [2006] NSWWCCPD 182 (*Pembroke*) where, at [26] the Deputy President stated:

> "26. Having determined that the answer to the first question is that the Department's action was 'with respect to … discipline', then the second question which must be considered is whether that action was 'reasonable'. This is a question of fact involving an objective test, that of the reasonableness of the conduct: *Minahan* at [27]. In determining whether the conduct was reasonable, all relevant factors must be taken into consideration including the rights of both employee and employer (*Aristocrat Technologies Australia Pty Ltd v Rashov* [2005] NSWWCCPD 66, at [82]). If the employer can establish that its conduct was reasonable, then the employee cannot recover compensation."

40. Mr Perry submitted the Commission needed to take into account the issues which were confronting the respondent as at May 2017 and weigh up what it did in response. He submitted the respondent was aware what had happened to the applicant on 9 February 2017 regarding her hospitalisation. He noted that once the applicant returned to work on 1 March 2017, her performance was monitored. In relation to whether the applicant was on notice regarding the respondent's concerns, Mr Perry submitted the Commission would accept Ms Davis in her statement that the concerns of the respondent regarding the applicant's performance were well communicated to her by Ms Davis.

41. Mr Perry referred the Commission to the statement of Ms Davis from page 145 of the Reply, where she recounted discussions, she had with the applicant from 28 December 2016 regarding errors found in her work and the requirement to contact the team leader for support if she felt she was falling behind. Mr Perry submitted it was apparent from Ms Davis's statement there had been issues arising in the applicant's performance from December 2016 onwards, which had been communicated to her. He submitted the applicant would have a point regarding lack of notice if no one had told her about issues relating to the quality of her work, however, there were detailed discussions which took place before the meeting on 12 May 2017.

42. Mr Perry submitted it cannot be said the applicant would be unaware of the contents of the meeting of 12 May 2017 were going to be serious. He submitted the fact Ms Davis offered the applicant a support person conveys the seriousness of the meeting to the applicant and is also a reasonable step by the respondent. He said the respondent was going "to the next level" to support the applicant in her employment.

43. In relation to the letter of 17 May 2017, Mr Perry submitted that the respondent, when faced with a fall in performance by the applicant as identified by Ms Whiley and Ms Davis, acted reasonably in moving to formal performance appraisal. He submitted the fact the applicant reacted as she did to the meeting and the letter did not render either or both of them unreasonable.

Applicant's submissions in reply

44. Mr Young submitted it was not clearly established by the respondent that the matters which Ms Davis identified as problems with the applicant's work in December 2016 were the subject of the meeting in May 2017. He submitted those matters most likely were not at issue in the meeting, given the applicant was on leave from 10 April 2017 to 28 April 2017, and the respondent allegedly found errors in her work which were not conveyed until the meeting took place. Moreover, Mr Young noted an audit of the applicant's work was apparently carried out by Mr Jordan Collins, however, nothing arising from that audit was apparently put to the applicant as evidence her performance had deteriorated.

45. Mr Young reiterated there was no explanation proffered by the respondent for sending a congratulatory email to the applicant on her and the team's performance within a week of conducting an interview at which performance appraisal and possible medical retirement are mentioned.

DISCUSSION

46. Section 11A(1) of the 1987 Act provides:

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

47. It is trite to say that an employer which seeks to make out a defence pursuant to s 11A carries the onus of establishing that defence: see *Pirie v Franklins Ltd* [2001] NSWCC 167. Likewise, as it is agreed the respondent's actions regarding discipline and/ or performance appraisal wholly or predominantly caused the applicant's injury, there is no need to enter into an exercise regarding causation.

48. In order to successfully raise a defence under section 11A, the respondent must not only show the requisite causal connection between its actions and the applicant's injury, it must also satisfy the Commission that its actions were reasonable.

49. Considering the meaning of reasonableness, Geraghty J in *Irwin v Director-General of Education* NSWCC 14068/97, 18 June 1998 (*Irwin*) said:

> "… the question of reasonableness is one of fact, weighing all the relevant factors. That test is less demanding than the test of necessity, but more demanding than the test of convenience. The test of 'reasonableness' is objective and must weigh the rights of employees against the object of the employment. Whether an action is reasonable should be attended, in all the circumstances, by questions of fairness."

50. In *Ivanisevic v Laudet Pty Ltd* (unreported, 24 November 1998), Truss CCJ said:

> "In my view when considering the concept of reasonable action, the Court is required to have regard not only to the end result but to the manner in which it was effected."

51. These passages were quoted with approval by Foster AJA (Sheller and Santow JJA agreeing) in *Commissioner of Police v Minahan* [2003] NSWCA 239; 1 DDCR 57 (*Minahan*), where his Honour said:

> "I prefer the construction which has been accorded to it in the decisions in the Compensation Court referred to in this judgment and in his Honour's judgment. The words 'reasonable action', in a statute dealing with Workers Compensation rights of employees should be given a broad construction, unfettered by considerations as to whether the employee can or cannot also bring an action at common law against the employer, founded upon breach of a duty of care." (at [42])

52. Reasonableness is judged having regard to fairness appropriate in the circumstances, including what went before or after a particular action (Burke J in *Melder v Ausbowl Pty Ltd* [1997] 15 NSWCCR 454). Armitage J in *Jackson v Work Directions Australia Pty Ltd* [1998] NSWCC 45 stated "only if the employer's action in all the circumstances was fair could it be said to be reasonable." (see also *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255 (*Heggie*), where it was held that the reasonableness of a person's actions is assessed by reference to the circumstances known to that person at the time the action is taken).

53. In this matter, I am not satisfied that the respondent's actions which caused the applicant's injury were reasonable. As noted, the respondent bears the onus of proving reasonableness, and the test is an objective one. Nevertheless, the circumstances of the employment relationship between the applicant and respondent informs which conduct is or is not reasonable.

54. The applicant was considered, at least until late 2016, an employee of the highest calibre. Her last performance appraisal before her extended sick leave was virtually flawless. By May 2017, her performance had, according to the respondent, deteriorated to the point where a meeting was called at which it was suggested she would be subject to formal performance appraisal, and the possibility of a medical retirement was raised.

55. It is apparent from the statement of Ms Holgate that the applicant did not regard the meeting with Mr Kable and Ms Davis as one which had serious consequences for the future of her employment. That is not to say the respondent was necessarily acting unreasonably in calling the meeting, rather in my view it failed to act reasonably in making the applicant aware of the seriousness of it.

56. The applicant states that when Ms Davis rang her on 9 May 2017 to advise of the meeting to be held three days later, Ms Davis:

> "… advised me they wanted to discuss my recent health issues in February and a couple of procedures with paperwork that I hadn't done properly.
>
> Amanda Davies [sic] advised me that I could have a support person present if I needed."

Nothing in Ms Davis' statement contradicts that evidence. She simply says, "I phoned Maribel regarding a performance meeting, Maribel advised that she wished to have Kristen Holgate attend as a support person."

57. There appears to be no issue Ms Davis then arranged for the meeting venue to be changed to Bathurst, at which point the applicant advised Ms Holgate not to attend. In weighing up the reasonableness of the respondent's actions, regard should also be had to the fact Ms Davis sent an email to the applicant only a week before the 12 May 2019 meeting, in which the entire team including the applicant were praised for handling a large number of new files.

58. I accept Mr Young's submission that if the respondent wished to conduct a meeting in such serious terms with the applicant, then it should have conveyed to her in the clearest terms both that the presence of a support person is essential, and the serious nature of what was to be discussed. Certainly, I do not consider it appropriate for the respondent to raise with the applicant the notion of a medical retirement or consulting her financial adviser, in circumstances where she was not given notice as to the serious nature of the matters to be discussed at the meeting.

59. Mr Kable noted the applicant's performance had been discussed with her as part of normal supervision, however, in my view that is very different to calling a worker to a meeting where the very future of her employment was discussed. He conceded issues of obtaining financial advice and medical retirement were raised at the meeting with the applicant. There was no evidence from the respondent to contradict the applicant's claim that she had received no notice from Human Resources regarding the seriousness of the meeting, nor any official indication the meeting was to be so serious.

60. I also find it unreasonable that neither Ms Davis nor Mr Kable saw fit to answer the applicant's questions in the meeting concerning specific examples of where she was not meeting expectations. In my view, given the severity of the meeting and its potential consequences to the applicant, it was incumbent on the respondent to provide specific examples of her allegedly substandard performance rather than to recount previous conversations between eh applicant and other staff members. It was not, in my view, enough for the respondent to simply state that matters had been previously raised with the applicant in the course of her employment. The meeting in issue was clearly an escalation of the situation, and the applicant ought to have been provided with specific examples of allegedly unsatisfactory performance.

61. Lastly, I note the evidence establishes the applicant had until the end of the working day on 17 May 2017 to consider her position regarding medical retirement. Nevertheless, after receiving correspondence from the applicant's solicitor and GP, the respondent proceeded to send Mr Kable's letter on 17 May 2019 advising formal performance appraisal would commence, and a meeting held to discuss it on 18 May 2019. In my view, there is no reason why the respondent could not have waited until after the applicant had decided her future before forwarding that letter. In sending the letter when it did, in my view the respondent acted pre-emptively and contrary to what had been discussed at the meeting on 12 May 2017. Such conduct was not, in my view reasonable.

62. Given the above findings, and the acceptance by both parties that the conduct in issue was relevantly causative of the applicant's injury, I find the respondent has failed to make out a defence under section 11A of the 1987 Act.

INCAPACITY

63. The respondent made no submissions in relation to incapacity. In my view, that approach was appropriate, given the preponderance of the medical evidence clearly establishes to the requisite standard that the applicant remains totally incapacitated for work. That being so, I accept the applicant's Amended Wages Schedule filed in the AALD dated 1 November 2019 as the basis for the claim for weekly benefits and will make orders accordingly.

PERMANENT IMPAIRMENT CLAIM

64. I am not minded to make an order regarding whole person impairment in this matter. The matter will therefore be remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for determination of the level of the applicant's whole person impairment.

MEDICAL EXPENSES

65. Given the above findings, there will be a general order for payment by the respondent of the applicant's section 60 medical expenses.