

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6568/20
Applicant: Christopher Forster
Respondent: State of New South Wales
Date of Determination: 21 January 2021
Citation No: [2021] NSWCC 23

The Commission determines:

1. The applicant sustained a psychological injury in the course of his employment with the respondent with a deemed date of injury of 20 December 2019.
2. The respondent has failed to establish a defence pursuant to section 11A of the *Workers Compensation Act 1987*.
3. The applicant has had no current work capacity from 9 April 2020.

The Commission orders:

1. The respondent is to pay the applicant weekly payments of compensation at the rate of \$985.85 from 9 April 2020 to date and continuing pursuant to section 37 (1) of the *Workers Compensation Act 1987*.
2. The respondent is to pay the applicant's reasonably necessary medical expenses for treatment for his psychological injury pursuant to section 60 of the *Workers Compensation Act 1987*.

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

John Isaksen
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 ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant, Christopher Forster, claims that he sustained a psychological injury in the course of his employment with the respondent, State of New South Wales, while working as a maintenance officer at Calvary Hospital.
2. The applicant claims that he was subjected to bullying and harassment by his direct manager, John Muscat, over a period of about 18 months, which caused him to sustain a psychological injury. The applicant ceased work due to his psychological injury on 20 December 2019.
3. The respondent issued dispute notices dated 31 March 2020, 17 April 2020 and 2 September 2020. The respondent concedes that the applicant did sustain psychological injury in the course of his employment but disputes liability on the grounds that the injury sustained by the applicant was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to discipline.
4. The applicant was paid weekly payments of compensation until 8 April 2020. The applicant claims that he has continued to have no current work capacity from 9 April 2020.
5. The applicant also claims the cost of medical treatment for his psychological injury.

ISSUES FOR DETERMINATION

6. The parties agree that the following issues remain in dispute:
 - (a) whether any psychological injury sustained by the applicant was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to discipline (section 11A of the *Workers Compensation Act 1987* (the 1987 Act));
 - (b) the extent of incapacity of the applicant as a result of his psychological injury (sections 32A, 33 and 37 of the 1987 Act).

PROCEDURE BEFORE THE COMMISSION

7. The parties attended a conference and hearing on 8 January 2020. 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.
8. Mr McEnaney appeared for the applicant, instructed by Ms Nair. Ms Goodman appeared for the respondent, instructed by Mr Orr.
9. The hearing was conducted by telephone in accordance with the protocols set out by the Commission due to the coronavirus pandemic.
10. There was no agreement by the parties of the applicant's pre-injury weekly earnings (PIAWE) because each party made a calculation of PIAWE based upon a different date of injury. The applicant calculated PIAWE on an injury date of 21 December 2019. The respondent calculated PIAWE on an injury date of 16 October 2019, being the date when the respondent claimed that the applicant commenced to be the subject of discipline. At the conclusion of the hearing I made a direction that the respondent file and serve by 15 January 2021, details of a calculation of PIAWE if the applicant was successful and the date of injury is deemed to be 21 December 2019.

EVIDENCE

Documentary evidence

11. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (ARD) and attached documents;
 - (b) Reply and attached documents;
 - (c) Application to Admit Late Documents filed by the applicant on 3 December 2020;
 - (d) Application to Admit Late Documents filed by the applicant on 24 December 2020.

Oral evidence

12. There was no application to cross examine the applicant or adduce oral evidence.

FINDINGS AND REASONS

The section 11A defence

The applicant's evidence

13. The applicant has provided a statement dated 22 September 2020. He also provided a statement at the request of the insurer for the respondent dated 23 January 2020.
14. The applicant states that he commenced employment with the respondent as a maintenance officer at Calvary Hospital in February 2012. He states that he was happy in the workplace until around August 2018 when his reporting changed from Sam Jeyakumar to John Muscat. He states that he had a good working relationship with Mr Muscat until the beginning of 2019.
15. The applicant states that from the beginning of 2019 Mr Muscat would be disrespectful in that he had a condescending manner in the tone of his voice. He states that he cannot be specific and did not record incidents, but the disrespectful comments were made daily.
16. The applicant states that after returning from holidays in October 2018 he found that his office had been moved from the workshop to the administration office, and that it was right next to Mr Muscat's desk. He states that he was not consulted about this and that he felt humiliated when he returned from holidays and Mr Muscat took him to his new place of work in front of other staff.
17. The applicant states that he took a 15-minute tea break every morning, which he was entitled to under the award, and it was during that break that he would chat with contractors on site to plan the day's work for himself and those contractors. He states that Mr Muscat did not like this and would regularly come to his work area and make him feel uncomfortable.
18. The applicant states that when he returned from holidays in March 2019, he found that his coffee machine, microwave and sandwich toaster had been taken from the workshop and placed under his desk in the administration office. He states that Mr Muscat did not like the applicant meeting with contractors for coffee in the workshop. The applicant states that the removal of his coffee machine and other items from the workshop caused him to feel intimidated and humiliated.

19. The applicant states that about 10 years ago, Calvary Hospital had five maintenance men, but it was then decided to contract out certain maintenance work and that the hospital only maintained one maintenance officer and one gardener. The applicant states that as a consequence of this he had a heavy workload and was also directed to undertake tasks that were outside of his normal duties, such as plumbing work.
20. The applicant states that in 2014 a 'BEIMS system' was introduced to enter and track jobs with times, dates and outstanding work. The applicant states that this was designed for a large maintenance team. He states that being the only maintenance officer, he was put under enormous pressure in terms of workload and accountability. The applicant states that he asked management for another person in the maintenance team because his workload was unreasonable, but this was refused. He states that he would have to complete on average 80 jobs per month, which he found exceedingly difficult and exhausting.
21. The applicant states that on 16 October 2019 his son and a close friend came to work with the applicant. He states that his son suffers from PTSD and struggles to travel on public transport and has difficulty interacting with people, especially strangers. He states that on 16 October 2019 his son had a meeting with a caseworker and he intended for his son and the friend to sit in the cafeteria at Calvary Hospital together until they had to leave for the meeting.
22. The applicant states that his son and friend sat with him for a few moments until the cafeteria was to open between 6.30 and 7.00, and that once the cafeteria was open, he told his son and friend to go there. He states that he walked with them to the top of the stairs and to a corridor which led to the cafeteria. He states that he did not escort them down the corridor but watched them walk down the corridor together.
23. The applicant states that a lady, who the applicant did not know, walked past his son and friend. The lady, whom the applicant learned was Nicole Kirk, the Area Health Nursing Manager, came to his office and asked him if he knew who the two persons walking down the corridor were. He states that he informed Ms Kirk that it was his son and friend, and she replied "okay, I now know who they are."
24. The applicant states that later that day he was required to attend a meeting with Mr Seyakumar and Mr Muscat and was told that it was a breach of policy to have children in the office. The applicant states that he explained to them that he was not aware that this was a breach of policy as he had seen several colleagues do the same thing. He states that he apologised and acknowledged that what had happened was a breach of policy, but otherwise considered the matter had been dealt with and it was not a big deal.
25. The applicant states that on 20 November 2019 he was directed to attend a fact-finding meeting with Karen Schaffer, the Human Resources Manager, and Mr Muscat. He states that he asked that Mr Muscat be removed from the meeting, but this was refused. He states that Ms Schaffer and Mr Muscat kept saying that his version of events was inconsistent because they could not see him on the CCTV footage watching the two children go down the corridor. The applicant states that it was likely that he was standing outside of the view of the camera. He states that they also accused him of not speaking to Ms Kirk, but that the applicant replied that he did not speak to her because he did not recognise her.
26. The applicant states that the meeting was entirely unreasonable and unfair and that he left the meeting feeling defeated and overwhelmed.
27. The applicant states that in November 2019 Mr Muscat decided that the maintenance of the pool, which had been the responsibility of Gary Handcock, and who had been paid an allowance of \$50 extra per week to do this task, would now be the applicant's responsibility. The applicant states that when Mr Muscat spoke to him about this task, he refused to do it as he was not trained to do this and was not being paid the allowance. The applicant states that

he previously undertook the pool maintenance when Mr Handcock was on leave, but he would contact the contractor for the pool if he had a problem. The applicant states he was not instructed on the type and amount of chemical that was to be put into the pool and there was a risk that he could burn patients using the pool because of this.

28. The applicant states that on 9 December 2019, Mr Muscat approached him and demanded that he do the pool. The applicant states that Mr Muscat said to him that if the applicant did not do the pool then he was of no use to him and to get in his car and go home. The applicant replied that he needed to contact the union. He states that Mr Muscat replied: "get your union, get your union, I don't care."
29. The applicant states that he walked to the pool area and while he was there, Mr Muscat arrived with a security guard. He states that Mr Muscat said to him: "I told you to get off site" and the applicant replied: "I am doing the pool what is your problem." The applicant states that he did the pool job but felt upset and was a nervous wreck and telephoned a union representative a day or so later.
30. The applicant states that on 10 December 2019 he was at his desk in the admin area when he overheard Mr Muscat and the CEO talking about the pool work and then heard the CEO say: "Keep on it. If he refuses it is refusing duties. Let him go."
31. The applicant states that on 17 December 2019, Mr Muscat decided to send an email to the entire hospital staff with a survey asking them to comment on the level of service and what they thought of the service technician. The applicant states that the hospital does not have a service technician, but he is the maintenance officer and the survey had to be directed at him. He states that he approached Mr Muscat and asked him to remove the email as he and Mr Handcock were being discriminated, but Mr Muscat refused to remove the survey.
32. The applicant states that he went home that day feeling defeated and anxious. He states that this email was the "straw that broke the camel's back" and that he had come to realise that Mr Muscat would not stop until he had got rid of him.
33. On 20 December 2019, the applicant had a meeting with Ms Schaffer in her office. In his first statement, the applicant states that Ms Schaffer "pulled me into the office" to speak about the results of the enquiry conducted in regard to the event on 16 October 2019. In his second statement, the applicant states that he was upset, teary and shaking when he passed Ms Schaffer in the corridor and she invited him into office to talk.
34. In his first statement, the applicant states that he told Ms Schaffer that he intended to appeal a warning letter that he had received regarding the incident on 16 October 2019, and as he did so he broke down and Ms Schaffer wanted him to go home immediately. The applicant states that he worked on for a few hours but could not cope any longer and stopped work.
35. In his second statement, the applicant states that he told Ms Schaffer about the bullying and intimidating behaviour of Mr Muscat, in particular the pool incident on 9 December 2019.
36. The applicant states that he attended his general practitioner, Dr Errey, on 21 December 2019, who issued a Workcover medical certificate for the next five weeks.

The evidence of Simon Leach

37. Simon Leach has provided a statement dated 2 November 2020. Mr Leach states that he is employed with MDL Asset Services, which supplies air-conditioning maintenance to Calvary Health Care, and that he attends the hospital two or three times per month. He states that he deals with Mr Muscat and the applicant and gets on well with them both.

38. Mr Leach states that on multiple occasions he has witnessed what he perceived to be bullying by Mr Muscat of the applicant. He states that when the applicant and himself and a few other contractors had coffee during a scheduled morning tea or lunch break, Mr Muscat would poke his head in and make it known that he had seen them and stared directly at the applicant. He states that he would do the same about 10 or 15 minutes later, and would also walk around the car park, again staring at the applicant. He states that he would not usually see Mr Muscat come by on the few occasions when the applicant did not have coffee with him.
39. Mr Leach states that Mr Muscat would walk into the workshop for no apparent reason while the applicant was working there, but often would not say anything to the applicant. He states that it appeared that Mr Muscat was coming into the workshop to specifically check on or intimidate the applicant.

The evidence of John Muscat

40. John Muscat has provided a statement dated 3 February 2020. Mr Muscat states that he has been employed as the Corporate Service Manager with Calvary Hospital since October 2017.
41. Mr Muscat states that from the time he commenced to be the applicant's supervisor, he found the applicant to be lazy and avoiding doing work and not cooperative. He states that he found the applicant spending a lot of time talking to staff and having excessive coffee breaks. Mr Muscat states that he had to manage the applicant more than other staff because of the applicant's poor performance of his duties.
42. Mr Muscat states that he moved the applicant's desk to be next to his own so that he could monitor the applicant's work. He states that the applicant was very unhappy about this. Mr Muscat states that after the applicant's desk was moved, the applicant would not come to his desk until about 9:30am, and Mr Muscat directed the applicant to be at his desk before this to check his emails and organise his daily tasks.
43. Mr Muscat states that he removed the coffeemaker and toaster from the maintenance shed and told the applicant the reasons why he did this.
44. Mr Muscat states that he always spoke to the applicant in a polite manner and never raised his voice. He states that the applicant complained that his tasks were more than he could manage.
45. Mr Muscat states that he spoke to Ms Schaffer about putting in place a performance improvement plan for the applicant. He states that he spoke to the applicant about his workload and allocated certain tasks to be completed. He states that the applicant refused to complete these tasks and claimed that his workload was too much.
46. Mr Muscat states that the applicant objected to clean the pool, although it did form part of his normal tasks. He states that he informed the applicant of this on 9 December 2019. He states that the applicant only did the pool when Mr Handcock was not in the workplace.
47. Mr Muscat states that no incident occurred on 20 December 2019. He was only made aware that the applicant had left work when he was informed by Ms Schaffer.

The evidence of Karen Schaffer

48. Karen Schaffer has provided a statement dated 3 February 2020. Ms Schaffer states that she is employed as Human Resources Manager at Calvary Hospital.

49. Ms Schaffer states that she has been working closely with Mr Muscat in relation to issues around the poor performance of the applicant's duties. She states that in the early part of 2019, Mr Muscat approached her and she advised him on a course of action to improve the applicant's work performance and attitude. That advice was to informally manage the applicant and keep records of poor performance.
50. Ms Schaffer states that Mr Muscat approached her for advice in regard to the report made by the after-hours nurse manager regarding the applicant's son and girlfriend being on the premises. She states that Mr Muscat also wanted to implement a formal performance improvement plan for the applicant. She states that she went over documents provided by Mr Muscat regarding the applicant and considered there was not enough evidence to support a performance plan. She states that once Mr Muscat had enough evidence of poor performance then they would commence a formal plan.
51. Ms Schaffer states that as at 20 December 2019, there was no performance plan in place but she and Mr Muscat were satisfied that a plan would be put in place because of the prior poor work performance and attitude of the applicant, which was well known to many people in the hospital.
52. Ms Schaffer states that findings were made that the applicant was dishonest and failed in his duty of care in regard to the incident on 16 October 2019. The applicant was given a letter on 9 December 2019 and given 10 days to respond to those findings.
53. Ms Schaffer states that on 20 December 2019, the applicant came into her office to discuss the findings and stated that he was not very good verbally and did not explain himself properly and wanted extra time to respond, and she agreed to this. She states that the applicant told her that he felt that Mr Muscat had bullied him over the last 18 months. She states that the applicant was very upset, and she suggested that he go home for the day. She states that he did go home early.

The evidence of Sam Jeyakumar

54. Sam Jeyakumar has provided a statement dated 3 February 2020. Mr Jeyakumar states that he is employed as the Director of Corporate Operations at Calvary Hospital. He states that he manages the non-clinical operations of the hospital, including maintenance and domestic services.
55. Mr Jeyakumar states that for about six months in 2012 or 2013 he supervised the applicant and was able to improve his performance. He states that since then the applicant's performance of his duties slipped back to a poor standard that he had seen in 2012. He states that he advised other managers that they needed to closely monitor and control the applicant's workload.
56. Mr Jeyakumar states that in 2019 Mr Muscat began to closely scrutinise the applicant's workload. He states that the applicant complained that he was being micromanaged by Mr Muscat but Mr Jeyakumar states that he fully supported Mr Muscat because he believed that the applicant was lazy.
57. Mr Jeyakumar states that on occasions when he has seen Mr Muscat speak to the applicant, Mr Muscat has always spoken in a normal tone of voice.
58. Mr Jeyakumar states that he decided to put a stop to staff having coffee in the shed and he directed Mr Muscat to ensure this did not happen. He states that it was done to ensure that staff were not taking excessive breaks and to have the contractors do what they were supposed to do.

59. Mr Jeyakumar states that the cleaning of the pool is the responsibility of Mr Handcock, but the applicant is responsible for this job when Mr Handcock is away and it is in accordance with the applicant's job description. He states that the applicant has been previously trained in relation to the maintenance of the pool and has undertaken the task over many years.
60. Mr Jeyakumar states that he oversaw the process regarding the investigation of the incident on 16 October 2019.

Investigations relating to the applicant

61. The minutes of the fact-finding meeting on 20 November 2019 are in evidence. The minutes record that the applicant confirmed what he had stated in an email dated 18 November 2019 that Ms Kirk (whom the applicant did not know at the time) stared at the applicant, his son and the son's girlfriend. The minutes record that the applicant said Ms Kirk gave him a dirty look.
62. An investigation report in regard to the incident on 16 October 2019 which was prepared by Ms Schaffer and Mr Muscat and dated 9 December 2019 is in evidence. That report refers to a response from Ms Kirk who states that she did not at any point see the applicant when she looked down the foyer corridor and saw the two people coming towards her. It is recorded that Ms Kirk had stated: "absolutely did not see Chris at the top of the stairs during the incident...did not stare at him."
63. The report states that an allegation that the applicant breached policy when allowing his son and girlfriend after hours and unsupervised access to the hospital was not substantiated because the applicant was not aware of the policy at the time. However, two new allegations were substantiated:
 - (a) That the applicant had dishonestly stated that he had seen Ms Kirk and she had stared at him and gave him a dirty look;
 - (b) That the applicant failed in his duty of care and did not meet responsibilities for patient, resident client and staff safety and wellbeing by allowing his son, who is stated to have a mental health condition, to walk unaccompanied through the hospital.
64. There is an investigation report in evidence dated 8 January 2020 regarding a complaint made by the Health Services Union on behalf of the applicant involving the incident between the applicant and Mr Muscat at the pool on 9 December 2019. The report refers to five allegations made by the applicant and that two allegations are substantiated:
 - (a) That Mr Muscat acted in an intimidating behaviour towards the applicant when the applicant was directed to do the pool testing;
 - (b) That Mr Muscat brought a security guard as a threat or attempt to remove the applicant from the premises if he did not do the pool testing.
65. The report states that allegations made by the applicant that Mr Muscat threatened to dismiss the applicant for refusing to carry out the pool testing and that doing the pool testing without an allowance was in retaliation against Mr Handcock were found to be unsubstantiated due to lack of evidence.
66. The report states that a fifth allegation that the applicant's position was under review from a survey circulated to all staff regarding the provision of maintenance services was unsubstantiated. The report states that a survey was circulated to staff but it was to address methods for continuous improvement of services and it did not relate to a review of the applicant's position.

67. The report also records from the investigation that was undertaken in regard to the pool incident on 9 December 2019 that Mr Muscat states that he directed the applicant to carry out pool testing from 27 November 2019, but that the daily log sheet only showed that the applicant completed tests on 27 November, 2 December and 9 December. The report notes that not testing the pool can lead to serious risks to patient safety.
68. The report records that the applicant had informed Mr Muscat that he was not qualified to maintain the pool because he had no formal training. The report states that a daily log for the whole of 2019 has entries with the applicant's signature and the applicant had not previously raised the issue of not being qualified for this job. The report states:
- "Further evidence would need to be obtained in order to confirm that Mr Forster was directed to carry out pool testing on 27 November prior to substantiating the allegation that Mr Foster did not carry out pool testing and cleaning duties as directed by his manager between the period of 27 November and 2 December 2019."
69. The report concludes with two allegations that could be investigated against the applicant:
- "Allegation 1: That between 27 November and 2 December 2019 Mr Forster failed to follow a reasonable management direction to carry out pool testing and cleaning leading to a serious patient safety and organisational risk.
- Allegation 2: That Mr Forster has been dishonest with the Health Services Union in relation to his statement to them that he has not been responsible for cleaning the pool prior to 27 November 2019 and does not know how to carry out the testing."

The medical evidence

70. The first entry made by the applicant's general practitioner, Dr Errey, in relation to the applicant's psychological injury, is on 21 December 2019 and includes:
- "Bully and harassment at work
New maintenance guy belittling
Took coffee machine and computer
Everybody knew that I was stuck in the naughty boy corner"
71. Dr Errey has provided a report dated 21 December 2020. Dr Errey confirms the details she recorded on the applicant's first consultation. She then writes:
- "If the incident on 16/10/2019 was the time Mr Forster had brought his son into the workplace and was later reprimanded for this as a risk for breach of confidentiality for clients at Calvary hospital, then I have made no record of it in my notes on that first consultation. Also, I do not remember it being mentioned then."
72. Dr Errey records that the applicant referred to this incident in subsequent consultations, but that the applicant had accepted the reprimand and the matter was resolved. She concludes that this incident did not have any part in the applicant's workplace injury.
73. The clinical notes from the applicant's treating psychologist, Ms Helen Stewart, are in evidence. There are no dates on the notes from Ms Stewart but it is apparent from Dr Errey's notes that the applicant would have commenced seeing Ms Stewart in late January 2020 and the applicant states that he had an appointment with "a Psychiatrist named Helen Austin" on 30 January 2020.

74. Ms Stewart records in her first entry that the applicant had been the subject of bullying in the workplace for the past 18 months. She records that the applicant felt micromanaged and pressured at work for a long time, and that he was being targeted to be pushed out of the company by two managers. She records that the applicant's feeling of being pressured went on for a long time, without realising the impact upon him. Ms Stewart records that the applicant's sleep was deteriorating and he was tearful and crying all the time.
75. Dr Canaris, consultant psychiatrist, has provided a report at the request of the applicant's solicitors dated 11 July 2020. Dr Canaris takes a history of the applicant being put under enormous pressure due to the amount of requests that he had to meet. He records Mr Muscat placing pressure on the applicant to get the work done when the amount of work was too much for one maintenance worker and a gardener.
76. Dr Canaris records Mr Muscat making "smartarse comments" and moving the applicant's coffee machine while on holidays, and also the applicant's computer on another occasion.
77. Dr Canaris records the incident involving the applicant's son and notes a fuller account in the applicant's statement. He records that the applicant said that Mr Muscat took the incident further to HR and used HR "to bash his workers." There is no mention in the report of the fact-finding meeting on 20 November 2019 or the incident at the pool on 9 December 2019.
78. Dr Canaris concludes that the applicant gives a history of a greatly increased workload, as well as ongoing harassment and humiliation in the workplace, culminating in the applicant being subjected to disciplinary action regarding the incident with his son. He concludes that the applicant's employment is the main contributing factor to his psychological injury.
79. Dr Canaris diagnoses a major depressive disorder with anxious distress, or in the alternative, an adjustment disorder with mixed anxiety and depression.
80. Dr Potter, psychiatrist, has provided two reports at the request of the respondent, dated 23 March 2020 and 27 April 2020.
81. The history of injury recorded by Dr Potter in his first report is rather brief, although he states that he does have the statements of the applicant, Ms Schaffer, Mr Muscat and Mr Jeyakumar and investigation reports from Ms Schaffer dated 8 January 2020 and 16 January 2020 (the latter seemingly a duplicate of the investigation report dated 9 December 2019). The history taken by Dr Potter is that Mr Muscat took over 18 months ago and:
- "Always at me for everything. Not happy with anything. Stands behind you while working, drops in eight to ten times a day to see what you're up to. Uses HR to bully, back stabs to the senior manager. Employed him for a reason."
82. Dr Potter diagnoses the applicant having adjustment disorder with mixed anxiety and depression. He opines that based upon the history available, it is the bullying and harassment by Mr Muscat over 18 months which led to the development of the applicant's anxiety.
83. Dr Potter notes that the applicant did not seek medical help until after he left work. He writes:
- "This late approach for help from his doctor is not necessarily inconsistent with a stoic nature of, 'getting on with life'. This may be addressed by his stated difficulties also with HR if, through that, there is a record of his seeking help at work for his stated experience of having been bullied."

84. In his second report Dr Potter is directed to the following:
- (a) That an investigation was conducted into the incident on 16 October 2019;
 - (b) That findings were made into the incident on 16 October 2019 that the applicant was dishonest and failed in his duty of care;
 - (c) That the applicant issued a letter on 9 December 2019 regarding those findings and giving the applicant 10 days to respond;
 - (d) That the applicant mentioned to Ms Schaffer for the first time on 20 December that Mr Muscat “had it in” for the applicant;
 - (e) That the applicant left work on 20 December 2019 and has not worked since.

85. Dr Potter then opines:

“...it is most likely that the anxiety, which precipitated his leaving work and not returning, and which precipitated his seeking of medical help was reflecting the dot points in your referral letter, which you have asked that I accept as true, caused his need to leave work and to seek medical help from his local doctor.

That is, it would be clinically reasonable to accept that it is likely that if not for the work events of investigation following the reporting of the findings into the 16 October 2019 incident, Mr Forster would have been able to continue with work and cope as he had prior to that with his described workplace experience of bullying and harassment, even if needing to be addressed at the workplace in an appropriate manner.”

86. Dr Potter then writes:

“...it would be clinically reasonable to accept that the escalation or precipitation of Mr Forster's anxiety with features of depression, which resulted in his leaving work and attending his local doctor, was predominantly caused by the action of his employer with the reasonableness of that action requiring the comment by an appropriate expert in workplace functioning.”

Determination

87. The respondent concedes that the applicant sustained a psychological injury in the course of his employment. Both Dr Canaris and Dr Potter identify the applicant having symptoms of anxiety and depression. The respondent contends, however, that the applicant's psychological injury has been wholly or predominantly caused by reasonable action taken with respect to discipline, and that pursuant to section 11A (1) of the 1987 Act, no compensation is payable to the applicant.

88. 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.”

89. The onus of proof rests with the respondent to establish the defence under section 11A (see *Department of Education and Training v Sinclair* [2005] NSWCA 465; (2005) 4 DDCR 206).
90. The respondent, through its insurer EML, issued three dispute notices dated 31 March 2020, 17 April 2020 and 2 September 2020. The second notice refers to the incident on 16 October 2019 being investigated, a letter being issued on 9 December 2019 in response to an investigation regarding that incident, the applicant asking for more time to respond to that letter on 20 December 2019, and the applicant ceasing work on that day. The notice states:
- “Our view was and remains that your claimed psychological injury is wholly or predominantly due to your employer’s reasonable action take with respect to the incident on 16 October 2019 when you allowed persons onto the hospital premises contrary to well-established policies and procedures.”
91. The dispute notices dated 31 March 2020 and 2 September 2020 do not refer to any other actions or events which the respondent claims are a cause of the applicant’s psychological injury. The three notices do not refer specifically refer to the fact-finding meeting on 20 November 2019 or the pool incident on 9 December 2019.
92. However, Ms Goodman in her submissions spent some time addressing what took place during those two events from the available evidence to ground an argument that from 16 October 2019 there were incidents, investigations and the letter to the applicant dated 9 December which were part and parcel of the factual matrix of the section 11A defence based upon discipline.
93. Mr McEnaney for the applicant did not formally object to the respondent relying on those two events but did submit that the respondent had endeavoured to bolster its defence from the dispute notices without the lay and medical evidence to support that defence.
94. Both parties made reference to by decision of Neilson CCJ in *Kushwaha v Queanbeyan City Council* [2002] NSWCC 25; 23 NSWCCR 339 (*Kushwaha*) which addressed ‘discipline’ in section 11A, where His Honour said at [152]:
- “It can be seen, therefore, that the primary meaning of ‘discipline’ is learning or instruction imparted to the learner and the maintenance of that learning by training, by exercise or repetition. The narrow meaning of punishment, chastisement is secondary to the primary meaning although this word is often used in this sense in popular speech.”
95. There were events or incidents from 16 October 2019 which were actions taken in respect of discipline, but the issue to determine is whether those events or incidents were enough to establish the whole or predominant cause of the applicant’s psychological injury and whether those actions that can be characterised as discipline were reasonable.
96. The actual incident on 16 October 2019 does not seem to have caused any immediate stress to the applicant. The applicant states that Ms Kirk came to his office and asked him if he knew who the two persons walking down the corridor were and he informed her that it was his son and friend, and she replied “okay, I now know who they are.” The limited information from Ms Kirk which is found in the investigation report is that when she found the applicant, he was quite dismissive about the situation. She does not describe any heightened agitation or tension on the part of the applicant when he was asked about the incident.

97. There was a meeting between the applicant, Mr Muscat and Mr Jeyakumar about the incident. Neither Mr Muscat nor Mr Jeyakumar provide any details of that meeting. The applicant does not provide any details of that meeting in his first statement. In his second statement, the applicant states that he admitted fault and acknowledged there was a breach of policy and that “from my perspective that was the end of the matter.” There is no evidence of any stress being experienced by the applicant at or arising from this meeting.
98. The next event is the fact-finding meeting conducted on 20 November 2019. There are no details in the minutes of that meeting or the investigation report, or the statements of Ms Schaffer or Mr Muscat, regarding the demeanour of the applicant during this meeting.
99. The applicant states in his second statement that when the meeting concluded he felt defeated and overwhelmed, which is the first event of those events relied upon by the respondent where there is evidence of actual psychological stress and strain being experienced. Dr Errey concludes from what the applicant has told her that the incident, including the later reprimand, did not have any part in the applicant’s workplace injury, but that is not consistent with the applicant’s evidence that he felt defeated and overwhelmed after the meeting on 20 November 2019.
100. The applicant also states that the “meeting was entirely unreasonable and unfair.” That is based upon his statement that he already admitted that he should not have brought the children into the hospital and that he had acknowledged his wrongdoing on the day of the incident. Later in his second statement the applicant states that the investigation was not conducted in a reasonable or fair manner.
101. In my view it was reasonable for the respondent to enquire further into the incident on 16 October 2019 given the different accounts provided by the applicant and Ms Kirk. Persons of unknown identity walking through a hospital in the early part of the morning is a matter of serious concern and the respondent was entitled to investigate that further, especially as there were parts of the applicant’s explanation of events that required further enquiry.
102. However, the evidence regarding the meeting does indicate that it was approached in an adversarial manner by those officers of the respondent. The minutes of the meeting state that Mr Muscat advised the applicant that the meeting was to gather facts about the incident. The minutes do not state that the applicant had been informed of discrepancies in his explanation of events which he would be challenged on.
103. The minutes state that it was Mr Muscat who asked 16 questions of the applicant, despite the applicant’s request that Mr Muscat not be present at the meeting and the difficulties that both men had with each other. Mr Muscat had already formed the view well before the meeting on 20 November 2019 that he considered the applicant lazy and avoided work. In those circumstances, there should have been more consideration given to whether it was appropriate for Mr Muscat to be questioning the applicant.
104. In *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255; 12 DDCR (*Heggie*), AJA Sackville said at [59]:

“The following propositions are consistent both with the statutory language and the authorities that have construed s 11A(1) of the [1987] Act:

(i) A broad view is to be taken of the expression ‘action with respect to discipline’. It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation.

(ii) Nonetheless, for s 11A(1) to apply, the psychological injury must be wholly or predominantly caused by reasonable action taken or proposed to be taken **by or on behalf of the employer**.

(iii) An employer bears the burden of proving that the action with respect to discipline was reasonable.

(iv) The test of reasonableness is objective. It is not enough that the employer believed in good faith that the action with respect to discipline that caused psychological injury was reasonable. Nor is it necessarily enough that the employer believed that it was compelled to act as it did in the interests of discipline.

(v) Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of **that action** that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury.

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

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

105. In my view the purpose of the meeting on 20 November 2019 was reasonable, and I am surprised that even with the value of hindsight the applicant does not acknowledge this. However, the adversarial manner in which the meeting was conducted, particularly by a person whom the applicant objected to being there and who had already formed a pre-determined opinion of the applicant's character, cannot not be regarded as reasonable.
106. The next event in the events relied upon by the respondent is the incident at the pool on 9 December 2019. Mr Muscat does not provide much detail of this incident in his own statement – he merely states that he spoke to the applicant about the job on that day and showed him his job description. The investigation report refers to two audio recorded fact-finding meetings with Mr Muscat in which Mr Muscat denies acting in an aggressive manner. The security guard, Milko Peroski, states that he saw the applicant and Mr Muscat arguing, although when he was present the other two men talked normally and without raised voices.
107. The investigation report records that Mr Muscat stated that the applicant was aggressive and threatening and that he said to the applicant: "If you are not doing the pool and not going home, then I'm calling security", to make certain that the applicant went home.
108. I accept that this was an event that generated tension and stress. An investigation found that Mr Muscat had acted in an intimidating manner towards the applicant and that Mr Muscat had brought a security guard as a threat to remove the applicant from the premises. The applicant states that he was a nervous wreck following this altercation with Mr Muscat.
109. I also accept that it was an event that involved discipline because Mr Muscat, who was the applicant's supervisor, was directing the applicant to undertake work that was part of the applicant's duties. The applicant had been required to do the pool testing job from 27 November while another employee was not able to do that job.
110. However, some of the action taken by Mr Muscat in regard to this discipline cannot be regarded as reasonable. The investigation found that Mr Muscat had acted in an intimidating manner towards the applicant, which was not reasonable. The calling of a security guard to send the applicant home was also not a reasonable response.

111. The applicant's objection to pool testing was that he did not have the requisite training. Whether that be true or not, it was not a reasonable response to threaten to send the applicant home. Mr Muscat does not provide any explanation in any of the evidence as to why that was the appropriate action to be taken. Reasonable action could have involved directing the applicant to his other duties or standing him down from his duties until emotions had settled and Mr Muscat had obtained the assistance of higher management.
112. It is likely that Mr Muscat's conduct was motivated by his understanding that the pool had not been tested by the applicant on a daily basis. I accept that this was serious issue because there were risks to patient health if it was not done on a regular basis. The applicant does not dispute that he did not test the pool as he was directed to do and does not provide any explanation as to why he did not alert management as to why he was not doing that job. That was to be the subject of further investigation, although the applicant has since ceased employment with the respondent, and there is no further evidence on this issue that has been made available in this dispute. However, the action taken by Mr Muscat by way of discipline in response to the pool testing that was not reasonable.
113. The letter to the applicant dated 9 December 2019 was action with respect to discipline. It was reasonable for this letter to be sent following the meeting on 20 November 2019 and for the applicant to provide a response. The applicant does not state how he felt upon receipt of this letter and during the 10 days he was supposed to respond to its contents. Neither Dr Canaris nor Dr Potter make enquiry in regard to this.
114. However, it is apparent that the receipt of the letter and the aftermath of the meeting on 20 November 2019 were troubling the applicant because he states that on 20 December 2019 when he saw Ms Schaffer in her office he spoke to her about the letter and became emotional and teary.
115. The applicant provides two different versions of how he came to be in Ms Schaffer's office on 20 December. In his first statement the applicant states that he was "pulled" into her office. In his second statement he states that Ms Schaffer found him upset and teary in the corridor and that she invited him into office for a talk.
116. Given the discrepancy in the applicant's evidence on this issue, I prefer the evidence of Ms Schaffer who states that it was the applicant who came to her office. I find it reasonable to conclude that the applicant went to see her so that he could have more time to respond to the letter, which is consistent with Ms Schaffer's evidence that the applicant said he was not good verbally and did not explain the incident on 16 October 2019 properly.
117. Although the applicant was not summoned to Ms Schaffer's office, the conversation between the two can be regarded as part of the process involved in disciplinary action. Sackville AJA said in *Heggie* at [141]:
- "A broad view is to be taken of the expression 'action with respect to discipline'. It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation."
118. However, it was during that conversation that the applicant also informed of Ms Schaffer that he had been subjected to bullying by Mr Muscat over the previous 18 months.
119. From my review of the evidence, the action taken by the respondent with respect to discipline of the applicant from 16 October 2019 which was reasonable and which had some effect upon the applicant's psychological condition was limited to the letter provided to the applicant dated 9 December 2019 and the conversation between the applicant and Ms Schaffer on 20 December 2019.

120. In *Hamad v Q Catering Limited* [2017] NSWCCPD 6 (*Hamad*), DP Snell said at [88]:

“The extent to which aspects of the appellant’s history contributed to causing the psychological injury was not, in the circumstances, something which could be decided in the absence of medical evidence. There may be cases in which causation of a psychological injury can be established without specific medical evidence, for example where there is a single instance of major psychological trauma, with no other competing factors. The need for medical evidence, dealing with the causation issue in s 11A(1) of the 1987 Act, will depend on the facts and circumstances of the individual case. In the current case, as in most, there are a number of potentially causative factors raised in the appellant’s statement and the medical histories. Proof of whether those factors, which potentially provide a defence under s 11A(1), were the whole or predominant cause of the psychological injury, required medical evidence on that topic. The extent of any causal contribution, from matters not constituting actions or proposed actions by the respondent with respect to discipline, could not be resolved on the basis of the Arbitrator’s common knowledge and experience.”

121. In this dispute there has not been a single instance of psychological trauma, but a number of potentially causative factors. However, I have only identified two events that meet the requirement of reasonableness with respect to discipline. Dr Potter is asked to accept other events as amounting to discipline, such as the investigation of the incident on 16 October 2019, and has not been directed to another stressful event, being the pool incident on 9 December 2019.
122. Dr Potter’s opinion then that it would be clinically reasonable that the escalation of the applicant’s symptoms was predominantly caused by reasonable action by the respondent is compromised by proceeding on a set of assumptions which included events which did not cause the applicant any stress (the actual incident on 16 October 2019 and the initial meeting between the applicant, Mr Muscat and Mr Jeyakumar), which were not conducted reasonably (being the fact finding meeting on 27 November 2019) and which excluded another event which was the cause of specific stress to the applicant (the pool incident).
123. Having reviewed the lay evidence in relation to the events relied upon by the respondent from 16 October 2019 to 20 December 2019, and then matching that against the medical evidence relied upon by the respondent, as required by *Hamad*, I cannot be satisfied that the respondent has met the onus of proof set by section 11A that the applicant is not entitled to compensation due to reasonable action taken by the respondent with respect to discipline being the whole or predominant cause of the applicant’s psychological injury.
124. Ms Goodman submits that the opinion of Dr Canaris is also flawed because he does not make any mention in his report of significant events with respect to discipline. Dr Canaris does not mention the fact-finding meeting on 27 November 2019 or the incident at the pool on 9 December 2019.
125. However, it is the respondent who bears the onus of proof in a section 11A defence, and that has not been established for the reasons I have given.
126. Further, I accept that there was unreasonable behaviour on the part of Mr Muscat towards the applicant which contributed to his psychological injury.
127. There is no reason for me to doubt the evidence provided by Simon Leach. He states that he witnessed on multiple occasions what he perceived to be bullying by of the applicant by Mr Muscat poking around when the applicant was at morning tea or at lunch and staring directly at the applicant.

128. Mr Muscat states that the applicant was taking too long with his authorised breaks, but persistently dropping by and staring at the applicant, in the absence of any performance management plan or disciplinary procedure is an intimidating way to act and was capable of causing the applicant stress, especially as it was done on multiple occasions.
129. Neither Mr Muscat or Mr Jeyakumar dispute that the applicant's coffee machine and computer were moved while the applicant was on holidays. Mr Muscat states that he told the applicant why he moved the coffee machine but does not state when that occurred.
130. The email sent to the entire hospital staff to comment on the level of service from the service technician is not in evidence. It is referred to in the investigation report dated 8 January 2020, where it is stated that the survey was circulated to staff to address methods for continuous improvement of services and it did not relate to a review of the applicant's position. However, there is no evidence that the applicant was informed before the survey was circulated that it would include the opportunity to comment on matters pertinent to his position.
131. DP Roche said in *Attorney General's Department v K* [2010] NSWCCPD 76 (*Attorney General's Department v K*) at [54]:
- “The critical question is whether the event or events complained of occurred in the workplace. If they did occur in the workplace and the worker perceived them as creating an ‘offensive or hostile working environment’, and a psychological injury has resulted, it is open to find that causation is established. A worker’s reaction to the events will always be subjective and will depend upon his or her personality and circumstances. It is not necessary to establish that the worker’s response was ‘rational, reasonable and proportional’.”
132. I accept that the multiple occasions of Mr Muscat dropping in and staring at the applicant for no apparent reason which is supported by the evidence of Mr Leach; the removal of the applicant's coffee machine and the computer that the applicant worked on while he was on holidays; and the email sent to staff regarding the work which the applicant did without informing the applicant of this, were events that the applicant perceived as being hostile towards him.
133. That is also supported by the details recorded by Dr Errey when she first sees the applicant on 21 December 2019. I accept Dr Errey's record of the “new maintenance guy belittling” and the applicant's coffee machine and computer being taken from the applicant, as being the immediate and predominant events which the applicant identified as causing his stress and seeking medical treatment. Ms Stewart also records the applicant feeling micromanaged when he attends for treatment about a month later.
134. Ms Goodman submits that the applicant carefully and deliberately chose not to tell Dr Errey about the disciplinary action that he had been the subject of, and which was very proximate to the time he ceases work. She submits that applicants do not “fess up” and say they are disciplined when they attend for medical treatment for a psychological injury sustained in the course of their employment. Ms Goodman also refers to the applicant's lack of truth, such as the change in his version of events as to what occurred on 16 October 2019 or how he came to be in Ms Schaffer's office on 20 December 2019.
135. I do not accept those submissions. The applicant broke down in Ms Schaffer's office on 20 December 2019 due to his concern about the letter he had to respond to and his perceived intimidation by Mr Muscat. Dr Potter accepts that a stoic individual can withhold the need for medical help. When the applicant initially sees Dr Errey, that doctor records the predominant reasons for his stress. I accept that the applicant was identifying to Dr Errey those events at work which he considered were the main cause of his symptoms.

136. The applicant states that he was overloaded with work, and that this caused him stress. Mr Muscat and Mr Jeyakumar state that the applicant was lazy. It is difficult to draw a conclusion on these competing contentions without more precise details from Mr Muscat or Mr Jeyakumar of the work that the applicant was directed to do. However, Mr Jeyakumar, who has worked with the respondent for 20 years, does not dispute the applicant's claim of there being a reduction in maintenance workers employed with the respondent.
137. Having scrutinised those events which involved action with respect to discipline, and also having accepted that there were other events in the course of the applicant's employment which the applicant perceived to be hostile, some of which have been corroborated by Mr Leach, I am not satisfied that the applicant's psychological injury sustained in the course of his employment was wholly or predominantly caused by reasonable action taken by the respondent with respect to discipline.
138. The date of the applicant's injury should be 20 December 2019, being the day when he left work because of his injury and became incapacitated for his work.

The claim for weekly payments

The applicant's evidence

139. The applicant states in his statement dated 22 September 2020 that he continues to experience severe depression and anxiety, and his general practitioner continues to certify him as being totally unfit for employment.
140. The applicant's wife, Leanne Forster, has provided a statement dated 14 September 2020 wherein she states that the applicant has had minimal involvement in renovations at their home, and that the applicant is just there to allow trades people to come and go.

The medical evidence

141. Dr Errey has provided Certificates of Capacity which certify the applicant having no current work capacity throughout 2020.
142. The notes of Dr Errey refer to the applicant going for a job interview in February 2020, and the applicant mowing the lawn and working around the house. In a referral letter to Dr Selwyn Smith dated 1 December 2020, Dr Errey states that the applicant has been renovating his home but is not ready to look for new work.
143. Dr Errey has provided a detailed opinion on the applicant's capacity for employment in a report dated 21 December 2020. She states that early in the process of his claim she was hopeful of the applicant taking up different work, but that the applicant's current symptoms of depression and anxiety are preventing the applicant using the skills and knowledge which he has in consistent and reliable way.
144. Dr Errey identifies a lack of self-confidence as restricting the applicant's ability to work in a team and respond to authority. She opines that the applicant's cognition is definitely affected by his depression. She also opines that the applicant's ability to problem solve is reduced due to his injury, and his ability to make decisions is compromised by depression.
145. Dr Errey states that upon closer questioning of the applicant, she understands that the applicant has done very little hands on work at home other than cleaning up after trades people.

146. When Dr Potter saw the applicant in March 2020, he considered that the applicant could return to work with appropriate psychological support. He opined that any return to work should be graduated and “should depend on the approval of his mental health professionals.”
147. Dr Canaris opined in July 2020 that the applicant was not fit for any employment, although he provided no explanation for this and his record of the mental status examination which he undertook is brief.

Determination

148. Ms Goodman submits that the applicant has a background in maintenance work which means that he has some capacity to work, and that is demonstrated by the records made by Ms Errey of the applicant looking for work in the early part of 2020. She submits that there is no explanation for a decompensation in the applicant’s condition during 2020, whereby he claims to have had no work capacity since ceasing work in December 2019.
149. There are elements of the advocate in the report of Dr Errey dated 21 December 2020. Nonetheless she is in the best position to provide an opinion on the applicant’s capacity for employment because she has regularly seen the applicant throughout 2020 and has guided him in his treatment. Dr Potter was of the view that any return to work should depend on the approval of the applicant’s mental health professionals, and although Dr Errey is a general practitioner, she has certainly been providing mental health treatment for the applicant for over a year now.
150. Although it might be possible that the applicant could do a few hours of work per week, the level of disability found by Dr Errey, and whose opinion I accept due to her integral role in the treatment of the applicant, leads me to conclude that the applicant has had no current work capacity from 21 December 2019.
151. Dr Errey states that she was hopeful of the applicant taking up different work in early 2020, but she now believes more effective treatment for the applicant’s depression and anxiety is required. The applicant has recently been provided with a referral to Dr Selwyn Smith for psychiatric treatment. I consider that Dr Errey has provided a reasonable explanation for the applicant’s total incapacity for work, despite her own optimism in the early months following the applicant’s cessation of work.
152. The applicant was paid weekly payments until 8 April 2020. There is no list of payments in evidence. Mr McEnaney conceded that it was likely that the applicant was paid at least 13 weeks of weekly compensation. The ARD claims weekly payments pursuant to section 37 of the 1987 Act.
153. The applicant claims that his PIAWE is \$1,232.31. The respondent claims that the applicant’s PIAWE is \$1,179.40, however that calculation is based on an injury date of 16 October 2019. I made a direction that the respondent file and serve details of a calculation of PIAWE if the applicant was successful and the date of injury is deemed to be 21 December 2019. That was to be done by 15 January 2021, but nothing had been filed by the respondent by 20 January 2021.
154. In the absence of any material being provided by the respondent regarding a calculation of PIAWE for a date of injury which I have determined of 20 December 2019, the award of weekly compensation made in favour of the applicant will be based on PIAWE of \$1,232.31. Eighty per cent of the applicant’s PIAWE is \$985.85.
155. There will be an award of weekly payments made to the applicant at the rate of \$985.85 from 9 April 2020 to date and continuing pursuant to section 37 (1) of the 1987 Act.

The claim for medical expenses

156. There will also an order that the respondent is to pay the applicant's reasonably necessary medical expenses for treatment as a result of the psychological injury that he has sustained in the course of his employment with the respondent.