

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2294/20
Applicant: Dennis John Ford
Respondent: Northern Star Ltd
Date of Determination: 6 October 2020
Citation: [2020] NSWCC 350

The Commission determines:

1. The Application to Resolve a Dispute is amended to add a claim pursuant to section 60 of the *Workers Compensation Act 1987* (the 1987 Act).
2. The applicant suffered psychological injury in the course of his employment with the respondent.
3. That employment was the main contributing factor to the psychological injury which is deemed to have occurred on 8 January 2018.
4. The psychological injury was not wholly or predominantly caused by reasonable actions taken or proposed to be taken by or on behalf of the respondent with respect to transfer, performance appraisal, discipline and/or dismissal and the defence pursuant to section 11A of the 1987 Act has not been established.
5. The applicant has had no current work capacity during the period 9 January 2018 to 6 July 2020.
6. The respondent is to pay weekly payments to the applicant:
 - (a) in the sum of \$1189.79 per week from 9 January 2018 to 9 April 2018 and
 - (b) in the sum of \$1001.93 from 10 April 2018 to 6 July 2020.
7. The respondent is to pay the applicant's reasonably necessary treatment expenses in respect of the psychological injury deemed have occurred on 8 January 2018 pursuant to section 60 of the 1987 Act.

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

W Dalley
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 WILLIAM DALLEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Dennis John Ford (Mr Ford / the applicant) has commenced proceedings in the Commission seeking an award of weekly payments as result of incapacity alleged to be due to psychological injury suffered as a result of incidents in the workplace which occurred between April or May 2013 and 9 January 2018.
2. Mr Ford commenced his employment as a sales representative with the respondent, Northern Star Pty Ltd, a publisher of regional newspapers, in 1997. Mr Ford became the Sales Manager at the Richmond River Express and held that position for a number of years.
3. Mr Ford then left his employment with the respondent and worked in the real estate industry for a time. In 2007 he returned to his former position as Sales Manager and continued in that role until 2013 when the respondent underwent a restructure. Mr Ford was appointed to a different role.
4. In his new role Mr Ford was assigned business areas from which he would source newspaper advertising. The respondent tried different business strategies and Mr Ford subsequently resumed part of his role as a Sales Manager although he did not have executive powers. Mr Ford encountered difficulties in performing his role and by 2017 he was not meeting his key performance indicators (KPIs) or his financial targets.
5. Mr Ford was required to attend a meeting with regard to his performance on 9 January 2018. The previous evening he suffered the onset of chest pains and the following day he consulted his general practitioner who put in place cardiac investigation and treatment under the care of a cardiologist, Dr Klaassen. Mr Ford went off work at that time and has not returned.
6. In March 2018 Mr Ford consulted his general practitioner regarding his mood and was referred to a psychiatrist, Dr McDornan, for treatment. Mr Ford submitted a WorkCover certificate of capacity in March 2018 and lodged a claim form in June 2018 alleging psychological injury.
7. The insurer issued a notice pursuant to section 78 of the *Workplace Injury Management and Workers Compensation Act 1998*; “as we do not consider you sustained a psychological injury arising out of employment, we believe your employment with Northern is not a substantial contributing factor to your claimed injury.” The insurer further decided; “that your psychological injury was wholly or predominantly caused by your employer’s reasonable action.” The insurer identified actions with respect to “transfer, performance appraisal, discipline and retrenchment” as the basis of the defence pursuant to section 11A of the *Workers Compensation Act 1987* (the 1987 Act).
8. The respondent maintains the defence notified in the dispute notice, disputing that the applicant suffered psychological injury to which employment was the main contributing factor or, in the alternative, whether the psychological injury was wholly or predominantly caused by the reasonable actions of the respondent with regard to transfer, performance appraisal discipline and retrenchment. The respondent also disputes the extent to which any psychological injury gives rise to incapacity.
9. At the hearing, following discussion, leave was granted to the respondent to rely on “dismissal” instead of “retrenchment” for the purposes of its defence pursuant to section 11A.

ISSUES FOR DETERMINATION

10. The parties agree that the following issues remain in dispute:
 - (a) Did the applicant suffer a psychological injury by means of a gradual process to which employment with respondent was the main contributing factor?
 - (b) If so, was the psychological injury wholly or predominantly caused by the reasonable actions of the respondent with respect to transfer, performance appraisal, discipline and dismissal?
 - (c) If injury is established, what is the extent of incapacity arising from that psychological injury?

PROCEDURE BEFORE THE COMMISSION

11. 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.
12. At hearing, conducted by way of telephone conference, it became apparent that certain material likely to assist in resolution of the dispute had not been able to be lodged in the proceedings. Accordingly, directions were made for the lodgement of that material and for the parties to then lodge written submissions after consideration of the additional material.
13. The submissions of the applicant and the respondent and the applicant's submissions in reply to those of the respondent have been received and taken into consideration.
14. The applicant in the submissions filed on his behalf sought a "general order" pursuant to section 60 of the 1987 Act. That claim was not included in the Application to Resolve a Dispute but the respondent appropriately agreed that this claim could be added, subject to liability.

EVIDENCE

Documentary Evidence

15. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute and attached documents;
 - (b) Reply and attached documents;
 - (c) Documents attached to Application to Admit Late Documents by the applicant dated 19 May 2020;
 - (d) Documents attached to Application to Admit Late Documents by the applicant dated 14 July 2020;
 - (e) Documents attached to Application to Admit Late Documents by the applicant dated 27 July 2020, and
 - (f) Documents attached to Application to Admit Late Documents by the respondent dated 24 July 2020.

Oral Evidence

16. No application was made to adduce oral evidence or to cross examine any witness.

FINDINGS AND REASONS

Issue 1 – Injury

17. Counsel for the applicant submitted that Mr Ford had suffered psychological injury in the course of his employment with the respondent and that employment in the period from April or May 2013 to 8 January 2018 was the main contributing factor to that injury.

18. Counsel for the applicant summarised the workplace stressors which are alleged to give rise to injury:

“In summary, there were changes within the structure of his employment with the respondent, which occurred over a number of years, commencing in 2013 to the date on which he ceased his employment with the respondent. As a result of the restructure the applicant was not supported by his employer [and] was provided with unrealistic work expectations (ARD 25 statement pp173) . The applicant was not provided with assistance in his role. He was also berated by clients (ARD 26 – statements pp 174 – 175, and ARD 67).”

19. Counsel for the respondent submitted that while there may have been an injury in 2013 there was insufficient evidence to establish that Mr Ford’s employment had led to the onset of a psychological condition deemed to have occurred in January 2018.

20. Counsel for respondent noted that although there are allegations of a stressful situation in 2013 no claim for compensation had been made and no WorkCover medical certificate issued by Mr Ford’s general practitioner. There was no complaint of work-related psychological problems until February 2018. Counsel for respondent noted that Mr Ford had gone off work in December 2017 as result of heart condition and that causal connection between employment and injury was not established on the evidence.

21. Counsel for the respondent also submitted that, although it was conceded that Mr Ford suffered a psychological condition, “injury” has not been made out as there was no evidence of a physiological change “either sudden or identifiable”. It was submitted “at most he may have suffered a temporary physiological change.”

22. In the light of the evidence summarised below, I am satisfied that Mr Ford suffered psychological injury as a result of the performance of his work tasks. I am satisfied on the balance of probabilities that his employment with the respondent was the main contributing factor to that injury.

23. As noted by the respondent, the worker needs to demonstrate a physiological effect in order to constitute injury¹. In order to prove psychiatric injury a worker needs to establish either:

- “a) that the nervous system was so affected that a physiological effect was induced, not a mere emotional impulse, or
- b) the aggravation, acceleration, exacerbation or deterioration of a pre-existing condition.”

(per Neilson CCJ in *Stewart v NSW Police Service*²).

¹ see *Austin v Director General of Education* (1994) 10 NSWCCR 373; *Thazin v WorkCover Authority (NSW)* (1995) 12 NSWCCR 340

² [1998] NSWCC 57; (17 NSWCCR 202

Dr William Rowe, Psychiatrist

24. Mr Ford was examined by Dr William Rowe, consultant psychiatrist, in July 2018. Dr Rowe reported that Mr Ford had provided a history:

“It appears he had no specific problems and enjoyed the job until 2013, when restructuring took place. He was virtually demoted from sales manager to sales representative (although his main job was selling advertising).

It seems that a woman was transferred from another section of Newscorp (which owned Northern Star) to become manager of the section and the Casino branch. He feels she had little experience in that field and had little empathy with the worker. The workload increased as he had to take over another sales representative’s area when that person went off work. He did not get on at all well with the female manager who said the worker would be ‘managed out the company (sic)’ if he could not do better. She could not accept the fact that he couldn’t do things which were virtually beyond his control.

Mr Ford became anxious and worried that his memory let him down to the extent that he began writing notes to himself.

He would feel tearful if anything occurred that had an emotional impact on him.

He carried on, but in March 2013, after restructuring, he felt so upset and tearful that he saw his GP who put him off work for one month, however, he felt little better when he returned to work despite the fact that he was told by management that ‘things would get better’. Things did improve when the female manager left and a new manager came in. This new manager left after about nine months after which another manager, Mr Spotsworth (with whom he had worked before), came in from another area. Although Mr Ford’s main job was that of the sales representative, the new manager let him do some of the work that Mr Ford had previously done when he was a manager himself.

On a number of occasions, he was the only person in the office when clients would ring up and complain – sometimes yelling at him, about editorial problems (which had nothing to do with his area in sales). He became more upset by these episodes and although he complained to management, it seems that nothing was rectified in this regard.

Mr Ford stated that he wasn’t able to reach targets, partly because of not enough time to do his own job partly because there was ‘no structure and general inefficiency’.

Towards the end of 2017, he received warnings about not reaching targets. He had to attend meetings in early December and early January regarding not reaching these targets. He felt he was being ‘managed out’. He became more anxious and his chest pain increased. He subsequently was admitted to hospital to have an angiogram, however, this was aborted because of bleeding where the catheter was put in. Mr Ford subsequently had a stent put in, but this only made a little change in his symptoms until he finally left work some months later.”

25. Dr Rowe recorded complaints of poor sleep and tightness in the chest. He recorded that Mr Ford was teary. Dr Rowe diagnosed Adjustment Disorder of mixed type. He reported:

“The most significant contributing factor is that of stress at work and that he felt he was being ‘managed out’. He is also concerned about his health, particularly his heart as regards his chest pain. He also has some concerns regarding his future work prospects and concerns about the current unresolved medicolegal matters.”

26. In a subsequent report, Dr Rowe confirmed:

“As stated, I am of the opinion that the diagnosis of Adjustment Disorder of mixed type was ‘a significant contributing factor’. To clarify, I am of the opinion that the Adjustment Disorder was predominantly caused by the employment issues and performance management.”

27. A referral letter dated 16 March 2018 from Mr Ford’s general practitioner, Dr Amey, to the treating psychiatrist, Dr McDornan was in evidence. The general practitioner noted:

“He presents today with a 5 yr history of feeling bullied at work. I think he’s depressed and there are a number of contributing factors certainly including work. He’s recently had coronary stents inserted and feels he is getting angina just even thinking about returning to the workplace.”

Dr Matt McDornan, Psychiatrist

28. Dr McDornan reported (6 December 2018):

“Mr Ford is a 60-year-old married man with two adult children previously employed by the Northern Star Newspaper a branch of NewsCorp for a 20-year period.

Mr Ford has been seen on the 10.0 5.2018 to the 29.0 5.2018 and the 26.0 6.2018 by myself.

Mr Ford presents with issues of a major depressive disorder dating back to at least 2013. He does not report major affective difficulties prior to this.

Mr Ford struggled initially with the restructure post GFC within NewsCorp

Initially this was in the form of a conflict with the professional manager, Natalie Angel, who according to Mr Ford entered the workplace and was quite forceful and conflictual in her management style. According to Mr Ford she was quickly moved aside although Mr Ford at the time had four weeks off work and reports historically the emergence of a depressive episode.

He has never returned to his normal baseline since this point.

Mr Ford in the many months of late 2017 developed ischaemic heart disease ultimately requiring stents and significant time off work.

In this context his mood steps down further.

He reported diurnal variation in his mood, loss of humour, moderate depressive thinking and neurovegetative disturbance. His depressive symptom complex also included a cognitive decline in the form of difficulties with attention and executive function.”

Riverside Family Practice, General Practitioners

29. The clinical notes of general practitioners in the Riverside Family Practice were in evidence. The entry dated 4 April 2013 is reproduced in the report of Dr Amey referred to below. An entry on 27 May 2013 notes that Mr Ford is returning to work the following day with a meeting to discuss “work/negotiate situation, rather than quitting”.

30. Records in the intervening years to 22 February 2018 do not disclose any report of work-related stress although there are records of stress relating to Mr Ford's son. On 22 February 2018 Dr Kennedy noted that Mr Ford had undergone an angiogram with "extensive discussion re-IHD [ischaemic heart disease]". Dr Kennedy noted:
- "also work-related stresses discussed – currently on sick leave plus long service leave since onset of chest pain in dec [sic] work for newspaper – senior role – has been advised by union rep to mount workers comp claim – advised to seek legal opinion first – bullying and stress reported but would be difficult to prove this as a cause of IHD in light of family history – may not benefit from stress of trying to mount workers comp claim – also stressed discussed surrounding son's recent scheduling – wife and Dennis teary – counselling"
31. On 14 March 2018, Dr Kennedy noted that Mr Ford was seeking a WorkCover certificate of capacity but declined to give this as she felt "in my opinion there is not enough history on file to directly relate a diagnosis of stress-related injury to the workplace".
32. On 16 March 2018, Mr Ford saw Dr Amey who noted:
- "off work since January 2018 – due to heart problems – has had stents inserted – see notes/letters for details – company restructured 5 years ago, feels has been bullied and XS [sic] workload – since this time – he now feels he is being moved out, feels is age-related – says he's been breaking down in tears intermittently for no reason – says over the past 5 years – nightmares – sleep – frequent waking – early morning hard to get going – mood score 4/10 – teary episodes – daily feel can't control it e.g. if he watches football, or something emotional e.g. rivervie [sic] win Brisbane – memory – short-term memory – especially over the first 12/12 after the restructure, has improved but is variable – appetite says is a 'nervous eater' so used to be a high carb load (recently changed due to heart health) – worried about going back to work – says he gets angina, which he says he gets when he even thinks about work – worried heart issues will be worse when he goes back to work i.e. angina – future – would like to continue working in another job – too young to retire – but feels issues at work unsolvable – doesn't feel valued, feels has been continually treated badly – other less qualified people have been promoted over him etc."
33. Dr Amey reported to the insurer in June 2018, that she had been first consulted by Mr Ford on 16 March 2018 in regard to his psychological symptoms. She reported:

"He had advised Dr Bentley – a colleague (no longer at the practice) her consult was as follows on 4/4/13:

Walks in and burst into tears. Walked out on job Tuesday. New 'restructuring'. Has moved from sales manager to representative. New manager female and tension has arisen. Has not been sleeping. Nauseated/anxious in the mornings. Had panic attack when manager 'in my face' on Tuesday and chose to leave. Aware of stress and Mx . Has been in stressful situations in past. Not suicidal slept well last night."

Dr Mark Scurrah, Psychiatrist

34. At the request of his legal advisors, Mr Ford was examined by a consultant psychiatrist, Dr Scurrah in February 2019. Dr Scurrah reported:

"The consultation revealed he has a chronic Major Depressive Disorder with anxiety symptoms. It developed in the setting of significant workplace stressors in his role with NewsCorp. These work role stressors dated back to 2013. His mood symptoms dated back to that time period."

35. Under the heading “details related to workplace stressors”, Dr Scurrah noted:
- He held a long-time senior position with NewsCorp in the Casino office.
 - A number of workplace changes began in 2013. These were stressful. They included budget changes, staff number reductions, staff illnesses, a change in his role, a new supervisor, feeling undermined by his supervisor and a workload that exceeded his working hours.
 - Mood symptoms consistent with a chronic depressive disorder with anxiety symptoms slowly, progressively emerged in the setting of workplace stressors. His mood lowered. There were periods of ambivalence for life. Enjoyment reduced. Sleep deteriorated. Energy lowered. Concentration reduced. Tolerance to stressors reduced. He began to worry pervasively regarding his health, finances and future. On a mood rating scale, he self-rated his mood around my interview time at ‘40%’ (0% is lowest mood ever and hundred percent is absence of depression).”
36. Dr Scurrah noted “He is also now are [sic – aware] of the link between depression and his cardiac status which is negative if untreated.”

Dennis Ford, the Applicant

37. I have set out the observations of the medical practitioners whose reports were in evidence at some length as they provide reasonably accurate summaries of the extensive history which is set out in the statements of the applicant which are in evidence.
38. In his statement dated 20 June 2018 Mr Ford sets out in detail his employment history since leaving school, his employment with the respondent from 1997 for seven years until he suffered thyroid problems which led him to resign and accept work in the real estate industry for a year after which he returned to work with the respondent.
39. During his first period of employment Mr Ford had been employed as Sales Manager at the Richmond River Express. He returned to that position in about November 2007. He said that he worked long hours and coped with his duties. He said he had achieved good results as a Sales Manager. He noted that increased use of information technology which he said made the job easier.
40. In 2013, a restructure took place. Mr Ford was summoned to a meeting at Ballina and was told that there was a reduction of 50% in staff and that he was to become a “Key Account Manager” which was basically a sales representative role. He was told that he was to report to the new sales director, Natalie Angel, whose role included Mr Ford’s former role as Sales Manager.
41. Mr Ford said that under the new structure he “ideally only looked after a client base” and there was no definition as to who was to perform other roles such as site security, promotions, reader complaints and distribution.
42. Mr Ford said that, as well as his own client base he was also expected to manage a client base of another sales representative, Terry McDonald, who “went off on sick leave due to stress”. He said that he ultimately ended up doing the role of three sales representatives.
43. As a result Mr Ford said he was managing more than 80 clients whereas he previously had a client base of 20 to 25 clients.
44. Mr Ford described the problems with advertising copy. He would have to travel from Casino to Ballina to take photographs for a car sales yard which would occupy half a day.

45. Mr Ford said that the respondent's expectations did not match his capacity to deliver. He cited as an example that management believed that "the production department would take care of advertising, but they didn't as they couldn't go out and take photos and write the ad copy."
46. Mr Ford said that he was told by his manager that he would be "managed out of the company" if he didn't do what was asked of him. Mr Ford said the next three years involved constant change with client bases being sent to Brisbane. When this was unsuccessful, the work was sent to a new company on the Gold Coast but ultimately returned to the respondent.
47. Mr Ford said that the new system led to other sales representatives contacting other people's clients against company policy. He said that "Lismore Features department would contact your client and they weren't supposed to and that caused a lot of aggression." This was done to enable the Features Department to achieve "their figures". Mr Ford said this was against company policy but a lot of people were breaking the "rules of engagement" by approaching clients of other sales representatives.
48. Mr Ford said that he had gone off work in April 2017 to have a hernia repaired. In the two weeks that he was off, two of his clients were given to another sales representative. His manager had acknowledge that this "probably shouldn't have happened". Although Mr Ford was concerned that two of his clients had been given to another representative, Mr Ford acknowledged that his client base was "excessive and there should have been three reps running it".
49. Mr Ford said that he felt that his manager, Natalie Angel, was aggressive in requiring work to be done the way she wanted with threats "if you don't reach your KPIs you'll be managed out of the company." Mr Ford said the work was stressful and other employees left.
50. Mr Ford cited other examples of issues that occurred in 2013. He said that he had been abused over the phone by "a prominent businessperson" because of an editorial that appeared in the paper and this had occurred more than once. He said that his manager had emailed him to say that he was not meeting expectations.
51. Mr Ford recounted having attempted to complain to the respondent's HR department but received no response. He had attended his general practitioner with high blood pressure and in tears. He said that he was off work from 22 April to 27 May 2013.
52. Mr Ford said that he submitted a general medical certificate but that while he was off work he received a letter from his manager relating to "a number of performance related issues" which were to be discussed on 29 May 2013. Mr Ford said that he was then contacted by another manager and asked to return. He said he would not return while Natalie Angel was there but this problem was overcome when she was transferred to the Sunshine Coast. This removed a lot of the pressure.
53. Mr Ford said at this time he had noticed he was suffering memory loss and was stuttering. He returned to work and a new regional general manager was appointed and introduced a "much better" structure. Mr Ford and two other representatives were again designated as sales managers while remaining as "account managers". He said this represented a change of role "as a feature schedule is done by the sales manager then other reps sell it."
54. Mr Ford said his client base was reduced and by August 2013 he was starting to feel better. A new structure was introduced which worked well but the regional manager left after about a year.

55. Mr Ford said that a situation developed where he was doing the work of a sales representative but having to do the manager's job. He said:
- “We are expected to do all the managerial jobs but not be managers. I was ringing reps in Lismore to chase them for the features but I wasn't their manager so there wasn't much I could do if it wasn't done. This was making my job much harder and more time-consuming. We were just seen as another rep calling them.”
56. Mr Ford said that he was not empowered to make decisions. These had to be referred to the General Manager of Communities, Paul Spotswood. There would be delays and he would be under pressure from clients. Mr Ford said that he lacked the autonomy to keep the business moving.
57. Mr Ford recounted an incident that occurred in May 2014 when he was required to attend the scene of a motor vehicle accident where a child had been trapped between a car and a fence. Mr Ford said that this had required him to attend at the childcare centre and ask to take pictures. He said “staff and parents were distressed and I felt absolutely awful being there as I never had to deal with anything like this previously.” He said he had been too upset to take photographs.
58. Mr Ford said that he been the only salesperson in the office for 12 months as two other sales representatives had left. He complained to Paul Spotswood that he could not manage it by himself. A support person was provided but Mr Ford was warned that this person had “an anger issue and could throw things”. Mr Ford said “I was supposed to look after him but I wasn't a manager.”
59. Mr Ford said that he attempted to manage the new representative ‘lightly’ but he would “blow up if I asked him how he was going with a feature”. Mr Ford said he was threatened by the new employee and he informed Paul Spotswood that he could not manage him. Paul Spotswood took over management of that employee and his position was terminated after he failed to meet his KPIs.
60. Mr Ford said that he sought clarification of his role in December 2014 but this did not happen. He said that he continued to be working by himself for a further six months. Although he did not visit his doctor to complain of this he said that he was “getting teary”. He said that he found himself becoming negative. He recounted an incident when a female employee showed him pornographic material. He had reported this in writing in November 2015. The female employee informed Mr Ford that Paul Spotswood had shown how to delete her Internet search history.
61. Mr Ford described difficulties he was having with production of advertisements which he could not raise because there were no sales meetings. The problem related to the production of “props” which were examples of advertising designed to be shown to potential clients. He said that he was not told until Christmas 2017 that he could get these done and had been working for two to three years without them.
62. Mr Ford said he continued to have to deal with abusive phone calls. He referred to problems with a fellow employee's dog which caused difficulties in the workplace. He said that he was not supported by his manager Paul Spotswood. Following an OHS audit the employee was told not to bring a dog to the workplace but did not comply and brought in a second dog to keep the other dog company.

63. In 2017, Mr Ford said that the employee on the front counter at Casino had been relocated to Lismore and then given a redundancy in early 2018. He said that he was then on his own in the Casino office with a light caseload of about 40 clients. Another employee would come in for two hours one day a week.
64. Mr Ford said that he was attending sales meetings in Lismore when reference was made to "old people" in the sales team which he described as a "slap in the face". Another older employee complained about this comment but nothing was done.
65. Mr Ford said that he had again been abused by a business owner. He attempted to report the complaint but received no assistance or support.
66. Mr Ford said he had been on a performance management plan since December 2017. He said "This was because I wasn't meeting targets, but I had no control over it." He said that he received two warnings prior to this and that if he had received a third warning he would have been terminated. He said a meeting had been scheduled for 2 January 2018. He said no steps were taken to assist him to help reach his targets and that he was "just being monitored".
67. Mr Ford had asked if there were any voluntary redundancies coming up, but was told that he would not be receiving a payout. He said there had been a large number of redundancies and he could not understand why he was not being offered one. On 2 January 2018, he said that he had woken with chest pain. He consulted a general practitioner and was referred to a heart specialist. He described the treatment he received in respect of his cardiac condition.
68. A number of further statements by Mr Ford were in evidence. The statement dated 2 August 2018 confirms his earlier, detailed, statement but does not add to the understanding of the work situation in any significant way. The statement dated 2 November 2018 deals with the post-employment situation, noting that his employment had been terminated by letter dated 18 October 2018.
69. Mr Ford's statement dated 30 November 2018 sets out in detail Mr Ford's response to various statements which are noted below. The main thrust of that statement is to confirm his original statement and emphasise the points he has made. The statement dated 28 July 2019 deals with Mr Ford's activities of daily living since he ceased work.
70. A statement by Mr Ford's wife, Louise Ford, deals with her observations of Mr Ford after he ceased employment with the respondent and not relate to the issue of injury arising from employment.
71. The applicant's claim form dated 1 June 2018 was in evidence. The applicant described the injury:

"I have received a psychological injury during the regional restructure that occurred during early 2013 and has continued and worsened through to the present. This was caused by a huge increase in workload due to a loss of staff, bullying and a lack of management support. I returned to work from 4 weeks sick leave hoping that I would improve and heal at work after being told that the workplace was going to change for the better. Unfortunately the workplace only exacerbated the original injury."
72. Mr Ford recorded his condition:

"Depression, extremely high blood pressure, memory loss, stuttering, lethargic, loss of sleep and bad quality sleep due to dreams associated with work, during the last six months I now realise depression has been the cause of angina attacks while in the workplace. The depression can and is having a negative effect on my ischaemic heart disease and the frequency and intensity of my angina attacks."

73. The date of injury is indicated as “March April 2013”.
74. A handwritten memorandum headed “phone call from Dennis” dated 7 July 2017 records a telephone call from Mr Ford advising the writer that he had left work early the previous day following an editorial complaint which had angered a customer. The note includes a comment “Dennis seemed stress [sic]”.
75. A handwritten memo dated 7 December 2017 records a “21 min phone call” which records complaint that Mr Ford suffered:
- “cronic [sic - ?chronic] nightmares since 2013. Wants redundancy - will not go without a fight - wants to involve the union – pains in the chest and nose – has permanent damage from what the company has done to him – will not quit - must walk away with his head in the air. – His solicitor has doctor’s records he can use against (sic). Has had 10.15 [sic] nights sleep in 4 year - horrendous nightmares – will ring HR – Sharlee [?] today – has had enough of this place – ‘I don’t want to take it where I can take it’ legal wise
- EC offered Dennis EAP – to which Dennis said ‘so the company can cover up it’s (sic) mistakes’. ‘This company has ruined my life’.”
76. A general medical certificate dated 26 April 2013 certifies Mr Ford as unfit for work “due to a medical condition” from 22 April 2013 to 27 May 2013. A WorkCover NSW certificate of capacity which is undated certifies incapacity from 16 March 2018 to 13 April 2018. The general practitioner recorded “feels has been bullied and mistreated in the workplace – stemming from restructure of company at this time”. Further certificates of capacity repeat this information.
77. A Centrelink medical certificate by Dr McDornan was in evidence. The handwritten portions are difficult to read and the certificate was not referred to in submissions. It does not assist in the determination of the issues.
78. Performance Improvement Program documents were in evidence. The document dated 7 August 17 notes with respect to monetary targets: “Dennis needs to lift monthly actuals. Finished July at 62%. Newscorp minimum is 100%.” Under the heading “Training and Support to Be Provided” the form records “Dennis to stick to basics, continue to service top clients, identify new business in Casino area by hitting required calls/visits daily.” The form notes “Together we’ll keep track at weekly 1:1’s”.
79. With respect to “KPI, Salesforce usage” the form notes “Dennis to bring salesforce into his daily routine, 100% KPI achievements is a must.”. Under the heading “Training and Support to Be Provided” the form notes “Dennis to utilise Riita again if needed, Dennis to ask for assistance if required. Set aside 30 mins each afternoon to complete KPI’s daily”. The form notes that “Evan to assist Dennis weekly until it is part of Dennis’s workweek.”
80. A similar form dated 12 September 2017 notes the area requiring improvement as “KPI, salesforce usage” and is otherwise in the same terms as the previous month although the consequences of falling short of 100% of the monthly KPIs in September well “now result in a formal performance meeting”.
81. The Performance Improvement Program form dated 8 November 2017 again notes failure to achieve KPIs since June (2017). Similar observations are made with respect to “Training and support to be provided”. The consequences of falling short of 80% monetary targets or falling short of 100% of monthly KPIs will result in a “formal performance meeting”.

82. A record of the meeting on 26 May 2017 between Mr Ford, Steve Bowden and Evan Crandon, (Advertising Manager Lismore) notes that Mr Bowden raised concerns with Mr Ford that clients had complained that Mr Ford didn't care about his work and was only waiting for redundancy. Mr Bowden recorded that Mr Ford "seemed to deny this but was more interested in finding out who said it".
83. Mr Ford expressed the wish to be a manager again but was told that this was no longer the structure of the business. He recorded "Steve confirmed to Dennis that this is no longer the structure of the business to have an Ad Manager in each site and that it has not been the case since 2013."
84. The meeting concluded with Mr Bowden emphasising to Mr Ford that he was a "Key account executive" with responsibility for "an individual Rep budget" and this was not going to change. He expressed concern over Mr Ford's work ethic and told Mr Ford he did not wish to receive similar complaints about Mr Ford's attitude in the future. It is noted that Mr Ford is to report to Evan Crandon who is to "continue to manage Dennis [Ford] as he would any other Rep".
85. An earlier draft of Mr Ford's statement of 20 June 2018 was in evidence together with an unsigned copy of that statement. I have relied upon the signed version which appears to be identical with the later unsigned copy.

Stephen Bowden

86. A statement by Stephen Bowden who was the respondent's Northern New South Wales Manager until late 2017 was in evidence. At the time of making the statement he was the Regional General Manager of North Queensland employed by Newscorp.
87. Mr Bowden confirmed that he had known Mr Ford. He said that Evan Crandon had been Mr Ford's direct supervisor.
88. Mr Bowden commenced in his role in 2001. At that time his interaction with Mr Ford was "limited". He said he recalled Mr Ford leaving at some point to go into real estate but then Mr Bowden had left to take up a different role, returning in 2014 to manage the Northern New South Wales area.
89. Mr Bowden said he had little firsthand knowledge about the restructure although his wife had been made redundant in the course of it. He understood that, although Mr Ford had previously been a manager, he was at that time termed a "Key Account Executive". He said "my understanding was that this didn't really affect his role to any great extent."
90. Mr Bowden was not aware of any problems in 2013 as he did not take up his role until 2014. He said that Mr Ford had repeatedly failed to achieve his KPIs "in terms of salesforce" in 2014/2015 and had been counselled by his managers and offered support by trainers.
91. Mr Bowden explained that there were a minimum number of weekly interactions required of each sales representative which had to be entered onto "salesforce". Mr Bowden said that Mr Ford was resistant to this.
92. Mr Bowden said that although he knew Mr Ford "fairly well" on a personal level he did not have knowledge of his personal life other than that "his son had an illness which had him worried". He recalled a meeting at which Mr Ford had raised this issue suggesting that his son may have had suicidal tendencies.
93. Mr Bowden said: "I don't think Dennis adjusted well to not being a manager. He wanted the title after his name. I felt it was more about the title than the role as there wasn't much management to be done in Casino." Mr Bowden doubted that Mr Ford had taken on the role of three representatives after the restructure saying that there had never been three representatives at Casino but he said "in truth I couldn't really comment".

94. Mr Bowden said he was unaware of the situation when Natalie Angel was managing the business. He denied that Mr Ford had been on his own at Casino saying there had been a journalist or another sales rep based there. There was also a “front counter person” although she was to move in June 2017. He said that Mr Ford often asked to be left alone at Casino to run the place.
95. Mr Bowden confirmed that he had heard that Mr Ford had been upset by the restructure. With regard to the availability of “props” he said that these were always available “if the sales rep is selling in the appropriate timeframes”.
96. Mr Bowden was aware of the problem with the employee bringing a dog to work. He did not recall the incident where the hotel licensee had rung Mr Ford “screaming about an editorial” but did recall a motel owner who had complained about an editorial.
97. Mr Bowden denied that he ever told Mr Ford to “take your kids, family, dog and hat and fuck off”. He thought that he got on well with Mr Ford but had infrequent contact with him.
98. With respect to the meeting on 26 May 2017, Mr Bowden said that Mr Ford had denied that he had given a client the impression he did not care about the business. He confirmed that there was no prospect of Mr Ford returning to his former role and status. He said: “His attitude was just to leave him alone and he would get on with it. He felt interfered with, but that wasn’t what was happening. We were just managing him to his targets and compliance nothing more.”
99. Mr Bowden noted that Mr Ford had expressed interest in a redundancy but had been told that it was not available. He had been offered some additional weeks’ pay if he wished to leave. Mr Bowden said he had not been involved in the performance management program.

John Martin

100. A statement was in evidence by John Martin who was responsible for the respondent’s workplace health and safety including at the Casino office. He said that he had known Mr Ford since 2013. He did not know him well on a personal level. He did not have knowledge of Mr Ford’s previous role. With respect to the restructure he felt that it was not major. He said “it never struck me that there were many changes and not a lot of people movement.”
101. He was not aware of the situation with regard to Natalie Angel or Lisa Corcoran. He had conducted polls to identify areas of concern but had not become aware of any problems. Mr Ford had not raised any complaints with him until the incident of the employee bringing her dogs to work. He commented “there was a bit of upheaval in 2017 as we are moving to Newscorp and we didn’t really know what to expect.” He was not aware of whether Mr Ford was reaching his targets.
102. If that was only later that he learned about the performance management plan in 2017. He detailed his dealings with Mr Ford in 2018 but was unaware of the problems that Mr Ford may have been having with the respondent.

Paul Spotswood

103. A statement by Paul Spotswood was in evidence. Mr Spotswood said that he had occupied various positions as a General Manager from 2002 onward. From 2014 he had been General Manager for “community papers New South Wales”. He had taken redundancy in 2017.
104. Mr Spotswood said that he had known Mr Ford since 2007. At that time Mr Ford had been the sales manager at Casino. He described Mr Ford’s role as “controlling the sales and revenue generation for that area across his own community title the Richmond River Express, Northern Star and any associated papers”.

105. Mr Ford had three or four people reporting to him at that time and Mr Spotswood thought that he “he would have worked between 38 – 50 hours a week.” He said that he had known Mr Ford well on a personal level and was not aware of any problems in his private life. He noted that Mr Ford was consistently hitting his targets in 2007 and said “the paper itself was a standout performer. At this stage he was doing well in his role.”
106. Mr Spotswood said that in the 2013 restructure his position became redundant and he was given a new role. He said:
- “Any sales manager, including Dennis, became Key Account Executives, Dennis no longer had anyone reporting to him. This was a significant change for Dennis. He lost the ability to manage his paper and his standing in the community changed. It was visibly and audibly obvious that this had an impact on Dennis. This was a demotion.
- The function of Dennis’s role may have changed only slightly but the issue was really how the change was managed. Whereas Dennis would have previously controlled the sales process for his community, that was now being controlled centrally. He had been successful and ran a successful paper and now he was expected to continue with this without having any real control.
- The sales structure for Casino was taken out and they had a lot of centralised sales resources. Dennis was left sitting on his own and couldn’t control how the process took place.”
107. Mr Spotswood said; “Those of us who had been there a while and experience [sic] across other companies realised that structure wasn’t going to work.” He said: “There was also a feeling that the older, more experienced people were being made way for a new generation. We each prided ourselves on being the face in our communities and reputation was important.”
108. Mr Spotswood said that Mr Ford’s administrative role had increased. He noted the appointment of Natalie Angel as Sales Director and Lisa Corcoran as Regional Manager, describing them as “unempathic, childish and had a lack of knowledge.” He said that it was a major restructure “with a lot of changes”.
109. Mr Spotswood described a negative attitude in the company towards older employees under Natalie Angel and Lisa Corcoran. He said “Natalie did say words to the effect; ‘if they didn’t do what was asked they would be managed out of the company’. This would have been in a NSW senior executives group meeting.”
110. Mr Spotswood said that the transformation had affected Mr Ford “in terms of his health”. He said “It affected all of us, but we all have different levels of resilience. From time to time Dennis docs stressed. I don’t recall any change to his physical appearance.” He said that Mr Ford had felt that he was not respected.
111. Mr Spotswood said that an ongoing issue was that “reps were contacting other people’s clients. This was an ongoing issue due to the rules that were created.” He said that he had advised Mr Ford to contact HR regarding Mr Ford’s allegations of bullying by Natalie Angel. He was aware that Mr Ford had gone off work due to “stress”.
112. Following changes in management in 2014, Mr Spotswood said he was given the role of “General Manager NNSW Community Titles”. Mr Spotswood described the situation at that time:

“There was a dotted line management system at the Northern Star that it was a bit cloudy. Dennis would have had to come to me for some decisions. I can’t recall if there was any delay in me responding but they were looking to close the Tweed business unit at that time and I was given the task of trying to make it profitable again and it did take a lot of my time.”

113. Mr Spotswood recalled Mr Ford having problems with Rod Carter when that employee was moved to Casino. Mr Spotswood had attempted to performance manage Rod Carter but his employment had eventually been terminated. Mr Spotswood noted that Mr Ford had complained of not having clarity in his role and having spoken to Steve Bowden. He said:

“There was still a legacy in the transformation and nobody wanted to tackle some of the sales structures again. Everyone was asked to work with some of the old structures. Dennis had issues with that process, where half of the clients were now handled with people over the telephone and they didn’t call him if there were going to contact one of his clients.”

114. Mr Spotswood described the introduction of “salesforce” in 2012 as a customer management system. He noted that it had become a “sales manager system” because failure to appropriately interact with the program allowed other employees to contact ‘your’ clients. He said “in order to get your commission, you needed to comply with the KPIs governed by that system.” He said that Mr Ford had had issues with the system and had resisted its use despite training. Because of this Mr Ford lost commission.

115. Mr Spotswood stated:

“May be if he sat at his desk and complied, it’s possible his job wouldn’t have been done as effectively. People like Alf Boston did do it but would do it out of hours. In some of the offices, there wasn’t enough time in the day to do the job efficiently and to comply with KPIs. Dennis’s office was one of these because he was pretty much doing it himself half the time and there should have been more consideration for this”.

116. Mr Spotswood confirmed clashes between Mr Ford and Sharon Heugh. He recalled that Mr Ford had spoken to him about offensive material being shown to him but could not recall the nature of that material. He said he had not shown Sharon how to wipe her internet history.

117. Mr Spotswood confirmed Mr Bowden’s statement that “props” were available to reps provided they were submitted to the art department “several days before they were needed”. Mr Spotswood said he was aware of the problem with the dog in the office. He could not recall particular complaints from clients but said this was a regular part of the newspaper business.

118. Mr Spotswood said that Mr Ford had continued to raise concerns about issues that arose from the restructure “that we couldn’t do a lot about”. He said: “You had to work within that framework. There was constant frustration and Dennis would air it is much as the rest of us. I think Dennis struggled. He couldn’t see any logic in it and he questioned why it couldn’t be fixed.”

119. Mr Spotswood said that he left his position at the end of March 2017 and was not aware of the position with regard to the performance management of Mr Ford later that year. His opinion was that “the restructure certainly impacted Dennis. I think he was treated differently to others in 2013. There was no respect or empathy from Natalie or Lisa in 2013.”

120. Mr Spotswood said that, during the transformation,

“I don’t think any of us were really supported by the company and the new regime only really supported itself. When it all dissipated, select, original APN executive staff were put back in charge and we all felt a little more secure. The problem was that the legacy that remained made it hard to be productive and efficient. It was a pretty tough time and a lot of resilience was needed.”

Rodney Harris

121. A statement by the respondent’s Regional General Manager, Rodney Harris, was in evidence. Mr Harris said that he started in his role in July 2017. He had not known Mr Ford at a personal level and first became involved with him when he was asked to attend the meeting on 12 December 2017 with regard to the performance plan.
122. Mr Harris said that he had encouraged Mr Ford to join meetings to help Mr Harris to understand the business. He understood that the performance plan was being put in place because Mr Ford “wasn’t meeting his targets or KPIs”.
123. Mr Harris said at the meeting Mr Ford had said that nothing like this ever occurred to him in 30 years. Mr Ford had explained that he had not had time to “do salesforce” and had said that the local structure was not right for Casino. Mr Ford felt that his result of 79% KPIs was satisfactory. Evan Crandon had read the warning letter to Mr Ford and Mr Ford had said that he would not reach the target.
124. Mr Harris said that he could not recall any conversation about redundancies at the meeting. He said that he had not had much to do with Mr Ford by way of face-to-face contact and had no involvement since the meeting.

Evan Crandon

125. Evan Crandon stated that he was an Advertising Manager for the respondent, looking after local newspapers in the northern New South Wales area. He had become Mr Ford’s manager in May 2017 following Paul Spotswood leaving the position.
126. Mr Crandon said that he first met Mr Ford in 2013. At that time Mr Ford had been Advertising Manager in Casino. He said that Mr Ford’s role involved “looking after three sales reps and one journalist” at that time. He said that he had known Mr Ford well on a personal level and was not aware of anything in his personal life that affected his psychological well-being.
127. Mr Crandon noted that the 2013 restructure involved many redundancies – “It was a big chunk of the workforce that were made redundant. Ad offices, front offices, senior reps and senior players were made redundant.” He confirmed that three other Advertising Managers as well as Mr Ford were moved to become “Key Account Managers”. He said “That meant they had no staff reporting to them and they were targeted on managing the big businesses in the area.” He said that although this was a “step down”, the other three were “thriving” and making more money than they had previously. He thought this was attributable to those employees working harder.
128. Mr Crandon acknowledged that the restructure had caused him to have sleepless nights. He said “The restructure was managed as well as it could be, but it was the day to day work that wasn’t managed well at the time.”
129. Mr Crandon was aware that Mr Ford “was struggling”. Paul Spotswood told Mr Crandon that Mr Ford wasn’t coping with not being in his old role as a manager. He said “Paul just reported Dennis and others were not coping that well with changes to their role.”

130. Mr Crandon did not agree that Mr Ford was expected to assume the role of three reps. He said that when Terry had left, that work had been divided up between two other employees and had not been handed to Mr Ford. Mr Crandon disputed Mr Ford's estimate of his client load.
131. By 2015, Mr Crandon regarded the situation as being back to "normal". He explained the circumstances under which advertising reps were able to approach other reps' clients which was allowed if there had been no contact for some time. He said it was common for businesses to complain about editorials but did not recall any businesses complaining about the internal affairs of the company. He had not been subject to complaints.
132. Mr Crandon said that he had not been in a position to observe how Mr Ford got on with Natalie Angel. He described the succession of regional General Managers. He said that Mr Ford had not spent a lot of time on his own at Casino. There was an employee on the front desk and journalists were in and out. He said that Mr Ford should also been in and out. All staff were able to get "props" done when they required them.
133. Mr Crandon said that at the time he started managing Mr Ford, Mr Ford had been achieving his targets but "was not keeping on top of his KPIs" and so was not getting his commission. He said "They needed to create 15 opportunities and complete 25 sales a week then they got paid commission." Mr Ford was not prepared to do this. He said that he arranged for Mr Ford to be shown how the entries were to be made. Mr Crandon said that he had driven to Casino to show Mr Ford how to log calls and create opportunities but Mr Ford did not do this. Mr Crandon said that Mr Ford had complained that it would take him all night to do this.
134. Mr Crandon noted the meeting with Mr Ford and Steve Bowden in May 2017. He said that he did not feel that Mr Ford understood the problem, seeing it in terms of a problem with the local newspaper rather than with himself. He said "It was an odd meeting".
135. Mr Crandon denied that he had denied responsibility for the complaint by the customer. He said that he had told Mr Ford that it was not Mr Ford's responsibility to take on the clients' concerns "as it was an editorial situation and he was an ad rep." He said that Mr Ford did seem stressed.
136. Mr Crandon noted the problems with Mr Ford not meeting his targets and KPIs. He said he had offered to assist Mr Ford with this and told him he needed to be more proactive. He said:

"He was on a performance improvement plan from August to October 2017. His KPI targets that let him down the most. This was just interaction with the businesses and I couldn't understand why he was not doing this." He recorded the invitation to attend the meeting on 5 December 2017 which was rescheduled to 12 December. He said: "on 7 December 2017, I received a call from Dennis. He said he had suffered chronic nightmares since 2013. This was the first time he had mentioned this."
137. Mr Ford informed Mr Crandon that he wanted a redundancy and he would fight to get it. Mr Crandon said:

"I was really shocked how quickly he turned. I had a feeling that he felt he was about to be found out. That he had done what he wanted for a long period of time. I know staff had reported seeing him with his head on the desk."
138. At the meeting on 12 December 2017, Mr Crandon said that he and the new General Manager, Rod Harris, discussed budget figures and KPIs but had not discussed Mr Ford's health. He said that Mr Ford had not raised any issues of bullying or stress or health matters. Mr Ford was told that "he needed to make 100% for the next six months". Mr Ford had said that he would be out of the business by March.

139. Mr Crandon noted that Mr Ford gone off work in January for surgery. He had had no involvement with him since. Mr Crandon said there had been other reps who had been given final warning letters for not meeting their targets and “Dennis had not been singled out”.

Other Documentary Evidence

140. A 2006 Australian Workplace Agreement was in evidence. It was not referred to in submissions. The agreement notes (paragraph 6) that:

“The remuneration recognises the need for hours in excess of the regular office hours of the company. The employee will in addition to his/her ordinary weekly hours of work, also work additional hours on any day or additional days that are necessary to achieve the efficient production of publications.”

141. A letter of appointment as “Key Account Manager” dated 10 December 2012 notes a variation to the conditions of employment to apply from 4 February 2013 as “part of the Northern NSW transformation.” The Position Description was also in evidence but not referred to in submissions.
142. A further letter varying the conditions was in evidence dated 23 July 2013 this appears to relate purely to the supply of a mobile phone and has little relevance to the dispute.
143. A Grievance Resolution Policy, Misconduct Policy and Performance Improvement and Counselling Policy were in evidence but not referred to in submissions. It is unclear how they relate to the respondent as the respondent is not listed as one of the “NewsCorp Australia Companies” in the documents although it may be that the respondent is identified as a different entity in those documents.
144. Handwritten notes were in evidence headed “Dennis Ford” relating to the meeting on 12 December 2017. The balance of the notes are illegible and were not referred to in submissions.
145. An email chain between Mr Crandon and Mr Ford was in evidence. The significance of the “client interaction details” referred to appears to be an attempt by Mr Crandon to have Mr Ford understand the importance of entering his data into the respondent’s system. Mr Crandon says:

“It just doesn’t make sense to let this money go mate, how can I help you get these KPIs under control? Would you like me to set up a time for Heather show you how she gets her KPIs done weekly? She’d be happy to help.”

146. A document headed “newsFIT” and “injuryConnect” records conversation between Jon Martin and Mr Ford on 5 April 2018. Mr Martin records that he had contacted Mr Ford that morning. Mr Ford “could not give any specific details of his complaint except that he had had enough. He felt that he was not respected.” Mr Martin has recorded that he discussed the claims process with Mr Ford. He noted “Dennis has recently had a heart operation. He is of the opinion that work-related stress was part of the reason for it.” Further records disclose the progress of the claim.
147. Dinosaur’s personnel file was in evidence. It was not referred to in submissions except as the source of financial data.

Discussion

148. The applicant submitted that the medical evidence supported a conclusion that workplace interactions from about April 2013 through to 9 January 2018 were the main contributing factor to Mr Ford suffering psychological injury.

149. The respondent submitted:

“The fact that the applicant did not see a doctor between April 2013 and 22 February 2018 would suggest that the applicant did not suffer an injury arising out of or in the course of his employment. This is particularly so because what in fact causes the applicant to go off work in December is his heart condition.”

150. The respondent submitted that the WorkCover medical certificates should be given no weight because they attribute injury to March 2013 and “it is implausible that incapacity from 16 March 2018 would relate to injury in April 2013.”

151. The respondent submitted that “the evidence in this matter does not allow for a finding of “injury” to be made. There is no evidence the effect that the applicant suffered a physiological change, either sudden or identifiable.”

152. I do not accept those submissions. The decision in *Military Rehabilitation & Compensation Commission v May*³ establishes that the physiological change does not need to be “sudden”. Counsel for respondent submitted that “at most he may have suffered a temporary physiological change.”

153. I accept that there was a physiological change. The applicant’s statements establish that he suffered sleeplessness. Dr McDornan describes “neurovegetative disturbance”. Dr Rowe noted poor sleep, waking with a tight chest and vivid dreams. These are all indications of physiological change attributable to a psychological condition.

154. The three psychiatrists who have examined Mr Ford consider that he has a psychological condition attributable to his employment.

155. I accept Dr Rowe when he says:

“The most significant contributing factor is that of stress at work and that he felt he was being ‘managed out’.” And “the workplace restructuring was the most significant factor in the causation of his adjustment disorder. This was also aggravated by the performance management action”

156. It is clear from the evidence of the applicant which is largely corroborated by the evidence of Paul Spotswood that the events of 2013 had a profound effect upon Mr Ford’s mental state. That is confirmed by the contemporaneous note of the general practitioner.

157. The evidence of Mr Spotswood is that Mr Ford continued to be affected by the changes to the organisation. I accept the evidence of Mr Spotswood as he was the immediate superior of Mr Ford throughout most of the period between 2013 and March 2017. The account of what occurred given by the applicant and by Mr Spotswood establishes a fair climate for the acceptance of the opinion of Dr Rowe, Dr Scurrah and Dr McDornan that employment was the cause of the psychological condition. As noted above I accept Dr Rowe when he says that this was “the most significant contributing factor” which, in the absence of any other significant factor satisfies the test of “main contributing factor” in order to establish injury within section 4 of the 1987 Act.

158. Although there is reference to problems with Mr Ford’s son, it is clear that the employees who felt that they were personally close to Mr Ford did not regard this as a significant stressor for him.

³ [2016] HCA 19; 257 CLR 468

159. I accept that the psychological condition was caused by the restructure in 2013 as observed by Mr Spotswood and continuing stressors including client complaints, heavy workload, necessity to comply with KPI's which required out of hours work, competition for clients from other sales representatives as well as the performance management program.
160. Accordingly, I am satisfied that employment was the main contributing factor to Mr Ford suffering psychological injury.

Issue 2 - was the psychological injury due wholly or predominantly to the reasonable actions of the respondent with respect to transfer, performance appraisal, discipline and retrenchment/dismissal?

161. Section 11A of the 1987 Act provides:

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

162. Proof of these matters rests upon the respondent on the balance of probabilities.
163. Counsel for the respondent commenced her submissions with regard to this defence with the meeting on 26 May 2017, noting the complaints to management of lack of interest in his work on the part of Mr Ford. Counsel for respondent then set out the performance management steps that were put in place with respect to Mr Ford. The respondent noted “Dr Rowe was of the view that the workplace restructuring was the most significant factor in the causation of his adjustment disorder, which was also aggravated by the performance management action”. In his subsequent report “he clarified that he was of the opinion that the Adjustment Disorder was predominantly caused by the employment issues and performance management.”

164. Counsel for the respondent submitted:

“It is submitted therefore that the applicant’s condition was predominantly caused by the employment issues and the performance management and that in all the circumstances the employer’s actions in respect of the performance management was [sic] reasonable.”

165. I have some reservations as to whether the actions with regard to performance management were reasonable. I have noted above that Mr Spotswood stated:

“May be if he [Mr Ford] sat at his desk and complied it’s possible his job wouldn’t have been done as effectively. People like Alf Boston did do it but would do it out of hours. In some of the offices there wasn’t enough time in the day to do the job efficiently and to comply with KPIs. Dennis’s office was one of these because he was pretty much doing it himself half the time and there should have been more consideration for this”.

166. Mr Crandon stated that other representatives had been given a final warning for not meeting their KPIs. This raises the issue as to whether the KPIs were in fact achievable and accordingly, fair. However, for the reasons set out below, I am satisfied that it is not necessary to decide whether the actions referred to by counsel for the respondent in her submissions were in fact “reasonable”.

167. Accepting for the sake of argument that the steps taken with respect to performance management from July 2017 up to 12 December 2017 were reasonable, that is insufficient to satisfy the requirements of section 11A.
168. The evidence of the applicant and of Paul Spotswood is that the restructuring in 2013 caused a change in Mr Ford's mental state. I accept that the restructuring in 2013 had a severe emotional impact on the applicant and it continued to affect him throughout the remainder of his employment with the respondent.
169. I am satisfied that particular incidents such as the concern over the presence of a large dog in the workplace were stressful for Mr Ford. I am satisfied that Mr Ford found his workload stressful as well as the prospect of competition for clients among sales representatives.
170. I am satisfied that in order to achieve his KPIs Mr Ford was required to undertake data entry into the relevant computer system after his normal work hours. The requirement to spend time after work entering up data was also stressful for the applicant. This requirement existed for some years prior to the commencement of the performance appraisal.
171. I am satisfied that the events in 2013 relating to the restructuring of the organisation were a substantial factor in the onset of the psychological condition which continued to have effect upon Mr Ford's mind for the remainder of his employment. The combination of the events of 2013 and the ongoing concerns including the steps taken with respect to discipline, performance appraisal and the prospect of dismissal all contributed to the onset of the psychological injury and combined to be the main contributing factor to the onset of the psychological injury.
172. Although the action taken with respect to performance appraisal and discipline in the latter half of 2017 may have been reasonable in all the circumstances, I am satisfied that the psychological injury was caused by the totality of events in the workplace from about April 2013 onward and that the evidence does not establish that the actions of the respondent with respect to performance appraisal, discipline and ultimately dismissal, were wholly or predominantly the cause of Mr Ford's psychological injury.
173. There is no evidence that any actions of the respondent with respect to transfer contributed to the psychological injury. The defence pursuant to section 11A of the 1987 Act has not been made out.

Issue 3 – Incapacity

The Legislation

174. Section 32A defines "current work capacity" to mean:

"a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment."

It defines "no current work capacity" to mean:

"a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment."

175. The term "suitable employment" is defined to mean:

"suitable employment, in relation to a worker, means employment in work for which the worker is currently suited:

(a) having regard to:

- (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
- (ii) the worker's age, education, skills and work experience, and
- (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
- (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
- (v) such other matters as the WorkCover Guidelines may specify, and

(b) regardless of:

- (i) whether the work or the employment is available, and
- (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
- (iii) the nature of the worker's pre-injury employment, and
- (iv) the worker's place of residence."

176. Section 33 provides:

"If total or partial incapacity for work results from an injury, the compensation payable by the employer under this Act to the injured worker shall include a weekly payment during the incapacity."

177. Sections 35, 36 and 37 provide:

"35 Factors to determine rate of weekly payments

(1) For the purposes of the provisions of this Subdivision used to determine the rate of weekly payments payable to an injured worker in respect of a week:

AWE means the worker's pre-injury average weekly earnings.

D (or a deductible amount) means the sum of the value of each non-pecuniary benefit (if any) that is provided by the employer to a worker in respect of that week (whether or not received by the worker during the relevant period), being a non-pecuniary benefit provided by the employer for the benefit of the worker or a member of the family of the worker.

E means the amount to be taken into account as the worker's earnings after the injury, calculated as whichever of the following is the greater amount:

- (a) the amount the worker is able to earn in suitable employment,
- (b) the workers current weekly earnings.

MAX means the maximum weekly compensation amount.

(2) If the determination of an amount for the purpose of determining the rate of weekly payments payable to an injured worker results in an amount that is less than zero, the amount is to be treated as zero.

36 Weekly payments in first entitlement period (first 13 weeks)

(1) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the first entitlement period is to be at the rate of:

(a) $(AWE \times 95\%) - D$, or

(b) $MAX - D$,

whichever is the lesser.

(2) The weekly payment of compensation to which an injured worker who has current work capacity is entitled during the first entitlement period is to be at the rate of:

(a) $(AWE \times 95\%) - (E + D)$, or

(b) $MAX - (E + D)$,

whichever is the lesser.

37 Weekly payments in second entitlement period (weeks 14–130)

(1) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the second entitlement period is to be at the rate of:

(a) $(AWE \times 80\%) - D$, or

(b) $MAX - D$,

whichever is the lesser.

(2) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for not less than 15 hours per week is entitled during the second entitlement period is to be at the rate of:

(a) $(AWE \times 95\%) - (E + D)$, or

(b) $MAX - (E + D)$,

whichever is the lesser.

(3) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for less than 15 hours per week (or who has not returned to work) is entitled during the second entitlement period is to be at the rate of:

(a) $(AWE \times 80\%) - (E + D)$, or

(b) $MAX - (E + D)$,

whichever is the lesser.”

Submissions

178. Counsel for the applicant submitted that Mr Ford had no capacity for employment in the period from 9 January 2018 to the expiration of the second entitlement period, 6 July 2020. She submitted that having regard to the applicant’s age, education and work experience the opinion of the general practitioner expressed in the various certificates of capacity should be accepted and the applicant be found to have no capacity for employment.

179. Counsel for respondent submitted that Mr Ford had a significant capacity for employment, noting the opinion of the general practitioner, Dr Amey, who felt that Mr Ford “could do an admin/sales job in the right environment with the appropriate supports, when angina is resolved.” Counsel for respondent noted that Dr Rowe felt that Mr Ford would have work capacity to work at least 20 hours a week in about three months’ time. She submitted that “at least by June 2018 the applicant could have done an admin/sales job full-time”.

180. Both parties referred to the decision of Roche DP in *Wollongong Nursing Home v Dewar*⁴ (*Dewar*) noting that “the phrase ‘employment in work’ in the definition of suitable employment, ‘in relation to a worker’, must refer to real work in the labour market. That is, it must refer to a real job employment for which the worker is suited.”
181. In his report dated 12 July 2018, Dr Rowe expressed the opinion “I feel he would have capacity to work at least 20 hours a week in approximately three months’ time.” He added “It may take at least three months before he recovers sufficiently to address his work possibilities.”
182. In the light of that evidence, I do not accept the respondent’s submission that “at least by June 2018, the applicant could have done an admin/sales job full-time”.
183. The treating psychiatrist, Dr McDornan reported in December 2018:
- “Mr Ford is not fit to work at present and remains essentially untreated in a biological sense despite some psychosocial adjustments to move away from his occupational role. In our last review he stated he was better although he was easily brought to tears and depressive phenomenology persisted.”
184. Dr Scurrah diagnosed a chronic Major Depressive Disorder with anxiety symptoms. In assessing Mr Ford as having no capacity for work under the Psychiatric Impairment Rating Scale he said:
- “I do not believe he is fit to undertake his original senior role due to his broad range of mood symptoms. His current lowered mood, reduced enjoyment for life, irritability, sleep disturbances and concentration impairments would not allow him to obtain/maintain any form of open market employment at either a full-time or part-time level.”
185. That opinion was given in February 2020.
186. The opinion expressed by Dr Rowe in regard to future employment is at best provisional. It is clear that Dr Rowe assessed Mr Ford as having no capacity for work at the time of that report in July 2018. The reports of Dr McDornan and Dr Scurrah, which I accept, establish that Mr Ford’s emotional state would preclude him from undertaking employment in a real job.
187. At the time that he ceased work Mr Ford was aged 59. Apart from a short period when he worked in the real estate industry Mr Ford had spent the past 20 years as an advertising representative in the local newspaper industry. Prior to that he had 11 years’ experience in retail as a store manager.
188. I accept the opinion of the psychiatrists, Dr Scurrah and Dr McDornan, that Mr Ford’s psychological state would preclude him from returning to his pre-injury employment.
189. In his statement dated 28 July 2019 Mr Ford speaks of his inability to concentrate and carry through tasks. His observations appear to support the views of the psychiatrists, Dr Scurrah and Dr McDornan.
190. The nature of Mr Ford’s psychological injury, as explained by the medical reports and his statements, establishes that he would be unable to engage in employment in the period from the date of injury to the expiration of the second entitlement period.

⁴ [2014] NSWCCPD 55

191. His previous experience in retail would not be able to be put to use because of his emotional state, his memory difficulties and lack of ability to concentrate and these would also preclude him from a clerical or administrative role.
192. Mr Ford has not been offered any rehabilitation assistance and no return to work plan is in evidence.
193. Having regard to these matters, I am satisfied that Mr Ford had no current work capacity in the period 9 January 2018 to 6 July 2020.
194. Counsel for the respondent-based her submission as to weekly payments on the figure of \$1193.60 as the pre-injury average weekly earnings. That is the figure that appears in the applicant's claim for Weekly Benefits Compensation in the Application to Resolve a Dispute. However, the Wage Schedules of both the applicant and respondent agree that the pre-injury average weekly earnings are somewhat more than this figure. The applicant asserts pre-injury average weekly earnings of \$1272.38 and the respondent in its Reply asserts a figure of \$1257.15.
195. The annexure A to the applicant's submission sets out the source of the figures relied upon in those calculations and I accept those figures⁵ as consistent with the evidence. I determine pre-injury average weekly earnings to be \$1252.41.
196. Pursuant to section 36(1)(a) Mr Ford is entitled to be paid weekly compensation in the sum of \$1189.79 in the first entitlement period, 9 January 2018 to 9 April 2018 and pursuant to section 37 (1)(a) in the sum of \$1001.93 throughout the second entitlement period to 6 July 2020.

SUMMARY

197. The applicant suffered psychological injury in the course of his employment with the respondent. That employment was the main contributing factor to the psychological injury which is deemed to have occurred on 8 January 2018.
198. The psychological injury was not wholly or predominantly caused by reasonable actions taken or proposed to be taken by or on behalf of the respondent with respect to transfer, performance appraisal, discipline or dismissal and the defence pursuant to section 11A of the 1987 Act has not been established.
199. The applicant has had no current work capacity during the period 9 January 2018 to 6 July 2020 it is entitled to be paid the sum of \$1189.79 in the first entitlement period and the sum of \$1001.93 in the second entitlement period.
200. The applicant is entitled to an order that the respondent pay the applicant's reasonably necessary treatment expenses in respect of the psychological injury deemed have occurred on 8 January 2018 pursuant to section 60 of the 1987 Act.

⁵ the data is given for 27 fortnightly periods but adjusting the data for a period of 52 weeks yields a similar average.