# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** **172/20**
**Applicant:** **Joshua Peter Morkos**
**Respondent:** **Primo Retail Pty Ltd**
**Date of Determination:** **5 March 2020**
**Citation:** **[2020] NSWWCC 65**

The Commission determines:

1. The applicant sustained a psychological injury arising out of or in the course of his employment on 11 June 2019 (deemed).

2. The applicant's employment was the main contributing factor to his injury.

3. The applicant was incapacitated and paid provisional weekly compensation from 11 June 2019 to 20 October 2019.

4. The applicant had no current work capacity from 21 October 2019 to 26 November 2019.

5. Since 27 November 2019, the applicant has had the capacity to work in suitable employment for 15 hours per week with an ability to earn $405 per week.

6. The applicant requires medical treatment as a consequence of his injury and the respondent is liable to pay reasonably necessary medical expenses.

The Commission orders:

7. The respondent to pay the applicant $1,268.74 per week from 21 October 2019 to 26 November 2019 pursuant to section 37(1)(a) of the *Workers Compensation Act 1987*.

8. The respondent to pay the applicant $863.74 per week as adjusted from 27 November 2019 to date and continuing pursuant to section 37(3)(a) of the *Workers Compensation Act 1987*.

9. The respondent to pay the applicant's reasonably necessary medical expenses pursuant to section 60 of the *Workers Compensation Act 1987*.

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

Glenn Capel
**Senior 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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
**As delegate of the Registrar**

# STATEMENT OF REASONS

## BACKGROUND

1. Joshua Morkos (the applicant) is 22 years old and commenced employment with Primo Retail Pty Ltd (the respondent) as a Human Resources Officer on 12 March 2018. He last worked on or about 11 June 2019.

2. The applicant submitted a claim form on 19 July 2019, alleging that he was suffering from a psychological injury as a result of being verbally abused at work on 11 June 2019. Icare Workers Insurance (the insurer) commenced payments of weekly compensation and paid medical expenses on a provisional basis from 11 June 2019 to 20 October 2019.

3. On 9 October 2019, the insurer issued a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), disputing that the applicant sustained an injury. It disputed that the applicant was incapacitated and that his medical expenses were reasonably necessary. It cited ss 4, 11A(3), 33, 59 and 60 of the *Workers Compensation Act 1987* (the 1987 Act).

4. On 4 December 2019 and 14 January 2020, the applicant's solicitor requested that the insurer review its decision. It seems that the insurer did not respond to this request.

5. It is unclear whether the applicant's solicitor served a notice of claim on the insurer for weekly compensation and medical expenses. No issue was taken by the respondent's legal representatives in the absence of this evidence.

6. By an Application to Resolve a Dispute (the Application) registered in the Workers Compensation Commission (the Commission) on 16 January 2020, and amended at the arbitration hearing, the applicant claims weekly compensation from 20 October 2019 to date and continuing pursuant to s 37 of the 1987 Act and medical expenses pursuant to s 60 of the 1987 Act due to a psychological injury sustained on 11 June 2019 (deemed).

## PROCEDURE BEFORE THE COMMISSION

7. 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.

## ISSUES FOR DETERMINATION

8. The following issues remain in dispute:

    (a) whether the applicant suffered a psychological injury during the course of his employment with the respondent, and if so, whether he has recovered from the effects of the injury – s 4 and 4(b)(i) of the 1987 Act;

    (b) the extent and quantification of the applicant's entitlement to weekly compensation – s 37 of the 1987 Act, and

    (c) the respondent's liability for the payment of medical expenses – s 60 of the 1987 Act.

## EVIDENCE

### Documentary evidence

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

    (a) The Application and attached documents;
    (b) Reply and attached documents;
    (c) Medical certificate dated 19 February 2020 received on 26 February 2020, and
    (d) Medical account from Workers Doctors dated 14 February 2020 received on 26 February 2020.

### Oral evidence

10. Neither party sought leave to adduce oral evidence or cross examine any witnesses.

## REVIEW OF EVIDENCE

### Applicant's statement and attachments

11. The applicant provided a statement on 16 January 2020. He stated that he had been exposed to abuse, bullying, racial discrimination and harassment from his manager, who thought that he was not working enough hours in the office. He went off work on sick leave and when he escalated this to HR, he was told that they could not investigate his complaint until he returned to work. His email access was cancelled, but his employment had not been terminated. He had sought treatment from his general practitioner, and he had been referred to a psychiatrist.

12. The applicant claimed that he had anxiety and he was severely depressed. He was frustrated and prone to losing his temper. He had reduced energy levels, and reduced confidence and self-esteem as a result of being bullied and harassed at work.

13. In an unsigned statement dated 1 August 2019, the applicant described the events that led to his psychological injury. These included excessive workload, working and responding to calls and emails on weekends, on public holidays and when he was on leave.

14. The applicant stated that in December 2018, he was asked to reduce the part time hours of a staff member, but she did not agree. When the Central Coast Supervisor, Mick O'Leary, found out, his response was, "You really f***ed that up didn't you"? the applicant's complaint to Mr Carroll received no response.

15. When he did not respond to one weekend call, the HR Manager, Gary Bitmead, chastised him and said, "I told you this is a full time 24/7 job". On 19 February 2019, he responded to a text from Assistant Safety Manager, Gerry Black that he would arrive at work at 8.30 am, but his response was, "Geez don't get out of bed too early princess. Is this Paramatta time?".

16. On 29 November 2018, he raised an issue with the Chullora Store Manager, who was not wearing gloves. The following day, he was abused by the Area Manager. He had been instructed by Mr Carroll not to return to the store. A similar issue arose at the St Mary's store, and management told him that he had to stop pushing the issue.

17. The failure of butchers to wear gloves was a constant concern. Harry Tancred told him to ensure that employees were fired on the spot for not wearing gloves and that he had to make it happen. Therefore, there were mixed messages.

18. The applicant stated that he was expected to recruit based on age and nationality. Cashiers had to be under 16 years old and paid less, and the respondent did not want to employ old butchers. He had reported racial comments by the St Mary's Store Manager to Mr Bitmead in December 2018, but was told to not report it further as it was not a racial slur.

19. The applicant stated that he was told to focus on the payroll instead of a safety management system, but later Mr Carroll enquired how it was progressing. He was also blamed for the manner in which the $14 meal allowance was interpreted.

20. There were on-going issues with the payroll system that caused frustration. He resolved many if the issues by working overtime on weekends and eventually Payroll agreed to manage the system. He was often blamed by Mr Bitmead for calculation issues that the finance department could not explain. He was required to respond to late night questions from Mr Bitmead about the weekly pay report and he criticised him in emails that were copied to other managers. The workload had resulted in him losing relationships and he had been unable to see his family during the week. Eventually he was given assistance.

21. The applicant indicated that on 19 March 2019, Mr Bitmead said that he was so messy because he had read an article that said that Egyptians being well known hoarders, and that it was in "our genes", due to severe poverty. He felt that he had to defend himself and his culture. An issue also arose about an ill worker and the difficulties that he experienced when trying to get him to sign a release agreement. Mr Bitmead kept making comments about this and there were a number of heated discussions with management before he eventually secured the worker's signature. Instead of a positive acknowledgement, management was dissatisfied with the worker's pay-out calculations, which had nothing to do with him.

22. On 22 March 2019, the Chief Financial Officer, Peter Dilworth, complained that, "Joshua can't even count to five". He also received a number of abusive calls from managers when the server crashed on a weekend and all email accounts went down.

23. In April 2019, he was required to terminate a butcher within his probationary period. The worker was very upset and abusive. He continued to send constant messages after 5.00 pm regarding his separation certificate.

24. The applicant stated that in June 2019, he again raised the issue of time in lieu and past overtime payments with Ryan Carroll. Mr Carroll told him that overtime was expected as part of his role, in addition to working on leave days.

25. The applicant stated that Mr Bitmead abused him during a series of calls over a period of two hours when a butcher did not attend a mandatory drug test. He asked Mr Carroll for support, but he did not respond to his message until after the issue had been resolved. He often heard his name being mentioned in the meetings in a critical manner when he was not in attendance.

26. Finally, on 11 June 2019, Shane O'Leary called and blamed him for payroll errors that had been made by his assistant. He reported the abuse to Mr Carroll, and he told him that he needed to take some time off due to workplace stress. He also requested payment for overtime worked. Mr Carroll indicated that the overtime was suitable, but he claimed that he had never previously formally reported any harassment by managers, other departments, and stores.

27. The applicant stated that he consulted a doctor and was told that he had high blood pressure. He was certified unfit, but when he returned to work, Mr Carroll questioned him about not working for nine hours. His attitude had changed, and he wanted him to sign a release agreement.

28. The applicant stated that his complaint was referred to the Corporate HR section. He was interviewed by Bernie Sewell on 21 June 2019. He anticipated that there was only going to be a short discussion, so he was not prepared. He did not have a support person. Ms Sewell sought examples of his complaint, he told her that he would need to examine his emails. She would not allow this and said, "This is my investigation, I'll run it how I want to".

29. The applicant stated that the discussion became very heated, and he told her that he could not continue with the meeting. He sought advice from Fair Work and the union. Ms Sewell advised via email that her investigation had been completed and there was no evidence to substantiate his allegations. He was later advised by his doctor to submit a claim.

30. The applicant stated that he had never experienced symptoms of stress and anxiety to this extent. He had not been socialising and he felt very isolated. He had to move out of his shared accommodation due to a lack of funds. He no longer had access to his emails, so he could not obtain evidence.

31. There is a timeline attached to the applicant's statement that provides more detailed comment about various events. This document is consistent with the applicant's statements.

32. The applicant sought a response from Ms Sewell regarding her investigation on 25 June 2019. He sent a further email on 8 July 2019 and he raised the possibility of a general protections claim. She finally informed him via email on 10 July 2019 that there was no pattern of bullying and harassment. He stated that his attempts to gain access to his emails were unsuccessful, although there are emails in evidence.

**Emails**

33. In an email dated 26 April 2019, the applicant told Mr Bitmead and Mr Carroll that he would not be attending work because he was "still not feeling well after the persecution I received from the management team in the finance meeting earlier this week". He was also waiting for a reply to an email dated 15 April 2019 about changes to be made to payroll, emails being sent before and after hours and IT issues. He wanted these issues addressed so that he could avoid the abuse that he received every week.

34. The applicant complained that it was unfair that he was interrogated and made to feel like a failure in front of everyone, when the date entry mistakes were made by others. He felt that the inactivity by management had shown that they had no concerns about how he was being treated.

35. In an email dated 29 April 2019, Shane O'Leary complained to the applicant about the pay that a third year apprentice received, describing it as "utterly ridiculous".

36. On 18 June 2019, the applicant sent a lengthy six page email to Mr Carroll in response to his comment that he had not formally told him about any abuse and harassment. The email describes numerous incidents, some of which were referred to in his statements.

**Report of Dr Lim and certificates from Workers Doctors Practice**

37. Dr Lim reported on 19 July 2019. He confirmed that the applicant presented with symptoms of anxiety, depression, worry, teariness, hopelessness, social withdrawal, overthinking, sleeping problems, loss of motivation and panic attacks due to workplace stressors. He was required to work overtime on the weekends without payment and he was criticised by senior management. He felt that the work he was doing was unethical and unlawful, and when he tried to discuss this with management, he was subjected to further bullying.

38. Dr Lim noted that the applicant had suffered depression in 2010, but he had recovered. The doctor diagnosed an Adjustment Disorder with Depression and Anxiety due to his work and he considered that the applicant's employment was the main contributing factor to his psychological injury. He recommended psychological therapy and psychiatrist review.

39. Drs Lim, Calvache-Rubio, Lee and Mo issued certificates that certified that the applicant had no current work capacity from 19 July 2019 to 11 March 2020 due to Major Depression and anxiety resulting from the nature of his work prior to 11 June 2019.

**Report of Carl Nielsen**

40. There is no report from the applicant's psychologist in evidence, however, in an Allied Health Recovery Request document that appears to have been completed on 30 August 2019, Mr Nielson indicated that the applicant had a Major Depressive Disorder with Anxious Features, characterised by low mood, irritability, sleep disturbance, impaired memory, impaired concentration, anergia, anhedonia and helplessness. He advised that the applicant was unfit for work.

**Report of Dr Kumagaya**

41. Dr Kumagaya reported on 5 September 2019. He noted that the applicant denied any past psychiatric issues. He recorded that the applicant was expected to work seven days per week without pay for overtime, and he was frequently criticised by his senior colleagues. He was the victim of disparaging racial comments, and "pranks" such as having cars driven by his senior colleagues close to him. He began to develop depressive and anxious symptoms due to workplace stressors, and he had been unable to work since 11 June 2019.

42. Dr Kumagaya noted that the applicant's symptoms included low mood, insomnia, appetite attenuation, poor concentration and subjective feelings of low energy. He also described anxiety about his finances and general life circumstances. He denied other symptoms, including self-harm or suicidal ideation.

43. Dr Kumagaya diagnosed a Major Depressive Disorder and he recommended that he have medication and psychological counselling. The doctor did not comment on the applicant's fitness.

**Report of Dr Khan**

44. Dr Khan reported on 13 January 2020. He first saw the applicant on 11 December 2019. He reported a consistent history regarding the applicant's weekend work without payment for overtime, and being blamed for errors in payroll reports. His concerns regarding safety issues were ignored and dismissed. There were numerous other work-related stressors, but the doctor had difficulty obtaining details due to the applicant's significant emotional distress.

45. Dr Khan noted that the applicant's mental state gradually deteriorated. He developed low mood, anxious ruminations, panic, amotivation, anhedonia, social withdrawal, reduced appetite, impaired concentration, sleep disturbance and feelings of hopelessness. He was seeing a psychologist and taking medication.

46. Dr Khan diagnosed Major Depressive Disorder with anxious distress due being subjected to numerous work-related stressors that made him feel unsupported, undermined, ignored, dismissed, bullied and harassed, and this resulted in the gradual deterioration in his mental health and capacity.

47. The doctor was satisfied that the applicant's employment was the main contributing factor to his psychiatric/psychological conditions. He stated that the applicant was unfit for his pre-injury duties or any other work. He recommended on-going psychological treatment every one to two weeks for at least two years, and consultations with his general practitioner and psychiatrist every two to four weeks for at least two years.

**Report of Dr Rastogi**

48. Dr Rastogi reported on 27 November 2019. She recorded that the applicant worked beyond his allocated duties and did overtime to correct payroll issues. He was also responsible for implementing safety processes and driving safety initiatives. He worked very hard and sacrificed his weekends. He was reassured that he would get a pay rise.

49. Dr Rastogi noted that the applicant's manager refused to support a payment for his overtime and there was an expectation that even when he was on annual or sick leave, he was expected to do the payroll. He was constantly interrogated by management regarding the payroll and there was constant conflict with payroll department and executive team. Managers of butcher shops would refuse to comply with safety issues. He was in middle of their dispute and conflict. There were constant pressures and stress with the focus on profitability without adhering to protocols. Even though he was focussed on payroll, he was held responsible for any safety incidents.

50. The applicant told the doctor that Mr Bitmead abused him constantly, gave him conflicting messages and was derogatory and critical in his responses. He would make inappropriate racial comments. The applicant's complaints were dismissed and ignored. There were negative comments, constant changing and ongoing conflicting goals between the managers and other teams, and he was caught in the middle. He sent emails to his managers about bullying and discrimination, but they offered him no support. There were no meetings to address his grievances and his performance reviews were constantly rescheduled.

51. Dr Rastogi reported that Mr Bitmead and a group manager tried to run him over in April 2019 and laughed at him. The HR Manager told him that he had to work Monday to Friday in office even though in the last 12 months, he had flexible hours. Mr Bitmead abused him for not answering his phone on one weekend and since then he had always kept the phone on him, and he carried his laptop on weekends. His work commitments had impacted on his personal and family relationships. He felt that he was being treated negatively and he struggled to cope. He had a breakdown, stopped working in June 2019 and sought treatment.

52. Dr Rastogi noted that the applicant had low self-esteem, was tearful and emotionally labile. He experienced feelings of anger, blame and frustration. He had lost interest in activities and had given up things also due to financial constraints. He was able to attend to self-care, avoided driving because he lacked confidence and he had limited social activity. He saw a psychologist very two weeks and was taking medication.

53. Dr Rastogi diagnosed an Adjustment Disorder with Depressed Mood due to a culmination of work related stressors. She considered that his work was the main contributing factor for his psychological injury, in the absence of any comorbid stressors.

54. Dr Rastogi believed that the applicant had some capacity to work, as he had been applying for employment. She thought that he had the capacity to work with another employer in a supportive and less stressful environment on a part time and graded basis. She noted that the applicant was still concerned about unresolved grievances and unfair treatment. His confidence was poor, but she expected that this would improve with vocational rehabilitation support and new work environment. Nevertheless, he had issues coping with stress and he remained vulnerable.

55. Dr Rastogi stated that the applicant required six to seven sessions of psychological counselling, vocational retraining and rehabilitation with a different employer.

**Report of Dr Miller**

56. Dr Miller reported on 16 September 2019. She recorded a history by reference to the statement provided by the applicant to the investigators retained by the insurer. The doctor noted that the applicant felt constantly harassed and bullied by his managers. He experienced feelings of distress, teariness, anger, diminished concentration and panic attacks. He was unable to sleep, but he denied experiencing depressed mood, social withdrawal, anhedonia, helplessness, hopelessness, ruminations or suicidal ideation.

57. Dr Miller reported that the applicant was concerned about his finances and he had started to attend job interviews. He had not seen a psychiatrist and he was not taking any medication. He had attended four sessions of counselling with two psychologists in June 2019.

58. Dr Miller stated that the applicant did not have a diagnosable psychiatric injury and he did not require treatment. She stated that although he had experienced workplace conflict with his supervisors, he had not developed a psychiatric illness that prevented him from returning to work. This was an industrial issue.

59. Dr Miller stated that the applicant was fit to return to his substantive duties on a full-time basis, but he was unwilling to do so. He was looking for work elsewhere.

**Respondent's statements**

60. The respondent relies on a number of statements obtained in August 2019 and attached to the ProCare factual investigations. All of the statements were signed by the witnesses apart from those of Mr Bitmead and Mr Black.

**Statement of Gary Bitmead**

61. Gary Bitmead, the Retail General Manager, advised that it was made clear to the applicant at his interview that the job involved working for seven days per week. He confirmed that he had challenged the applicant for not responding to one of his calls and texts over a weekend. He denied that he criticised the applicant about a butcher's drug test, but questioned him why he was taking so long to arrange it.

62. Mr Bitmead agreed that he mentioned the article about Egyptians being hoarders, but the applicant did not react. He denied that he had told the applicant not to follow through with the double glove policy. Non-compliance by butchers can result in termination.

63. Mr Bitmead stated that Shane O'Leary was very placid, and he was present when Mr O'Leary spoke to the applicant about the payroll issue. He thought that there was nothing of concern about the call.

**Statement of Ryan Carroll**

64. Ryan Carroll, the HR Manager, confirmed that during his employment interview, the applicant was made aware that he would be dealing with "rough and tumble blue collar workers and would be exposed to colourful language and potentially other interesting scenarios".

65. Mr Carroll stated that the applicant was expected to undertake reasonable overtime and to return calls on weekends from senior managers within six to eight hours. He was unaware that this was an issue for the applicant until June 2019. He had counselled the applicant about working on weekends when the applicant asked for payment, but the applicant told him that this was impossible. The applicant's replacement, Tina, had been able to complete payroll data entry on Fridays and on Mondays. A review of the applicant's hours and emails showed that he never worked beyond 4.00 pm, his longest shift was 6 hours and 40 minutes and he did not work overtime. He conceded that telephone records had not been examined.

66. Mr Carroll could not recall the applicant mentioning that Mr Bitmead was upset with him about a butcher's drug test. He was aware that there had been incidents when Mr Bitmead had become upset and ranted at the applicant. He was also aware of Mick O'Leary's comments. He was unaware of any issues regarding the release and payout for the ill employee.

67. Mr Carroll was aware that the applicant had received texts from the butcher who he had terminated, but they were not threatening. He was shocked that the applicant felt unable to handle the situation.

68. Mr Carroll confirmed that he was in the vehicle when Mr Tancred was skylarking in the car-park and beeped his horn while slowly moving towards the applicant. Mr Tancred had no intention of running the applicant over.

69. Mr Carroll stated that the respondent had a two glove policy, but there was no requirement for instant dismissal for a breach of this policy. He gave the applicant advise how to deal with this policy by providing a brief reminder and only proceed with termination for repeated behaviours. He was unaware of any issues arising at the Chullora store, but the applicant told him about non-compliance by the St Mary's Manager and Area Manager. A meeting was organised, and the issue was discussed in the applicant's presence.

70. Mr Carroll stated that he was responsible for the safety management system and the applicant was driving it. He did not know whether the applicant followed through with the fire extinguisher program. He was not aware of the meal allowance issue. The applicant mentioned the comments made by the St Mary's Manager about an apprentice, but he told him that I did not consider this one comment to be a racial slur.

71. Mr Carroll sated that the applicant did not complain about being bullied by payroll staff. He acknowledged that there were payroll issues, but the applicant was not blamed for this. On one occasion, the applicant stormed out of a weekly meeting when payroll errors were being discussed. The applicant ignored his calls until the next day. Some of the payroll complaints raised by the applicant were petty.

72. Mr Carroll agreed that the applicant had complained about comments made by Mr Dillworth, but he did not raise this until June 2019. No one was upset with the applicant when there was an outage over the weekend that resulted in pay delays.

73. Mr Carroll confirmed that the applicant left work on 11 June 2019 following a discussion with Shane O'Leary about payroll Issues. He did not respond to calls and he did not attend work the following day. When he returned to work on 13 June 2019, the applicant told him that Mr O'Leary had spoken to him aggressively. Mr Bitmead was present at the time of the call and he confirmed that Mr O'Leary was calm and did not raise his voice.

74. Mr Carroll stated that during a telephone call, he encouraged the applicant to submit his complaints in writing, but the applicant responded that they had not taken action in the past and nothing would happen. He reminded the applicant that he had previously not wanted to pursue any complaints, so he encouraged the applicant to do so. The applicant explained that he wanted to be back paid for his overtime, but he had never raised this before. The applicant then became agitated and told him that he was bullying him. The applicant then hung up.

75. Mr Carroll was told that the applicant worked for about five hours. When he questioned the applicant, he became upset and said that he could not believe that he was addressing him about his hours as he was aware of how many hours he worked. The applicant was very agitated, disrespectful, and continued to raise the same issues as the previous day. Mr Carroll suggested that there had been a serious breakdown in their relationship. He then raised the possibility of discussing the end of the employment relationship and a Deed of Release.

76. Mr Carroll was told by Ms Sewell that he had difficulty obtaining information from the applicant and he questioned the manner in which she was conducting the investigation, so he terminated the call. Ms Sewell advised that she did not believe that the applicant was fit to participate in a telephone call regarding his grievance and the investigation. She wanted a medical clearance that allowed him to participate in the investigation, but none was forthcoming. When it became apparent that the applicant would not be providing any further information, Ms Sewell conducted interviews and concluded the investigation.

**Statement of Gerry Black**

77. Gerry Black, the Assistant Group Safety Manager, indicated that the applicant was responsible for rectifying issues with fire extinguishers and he had told him that he was getting “pushback” from managers. He advised the applicant to proceed slowly and professionally. He agreed that he sent a text to the applicant about his late starting time, but this was a standing joke.

78. Mr Black could not recall hearing any conversation between the applicant and the Area Manager about the applicant telling the Chullora manager to wear two gloves. The applicant told him that he received resistance to this from both retail managers and his managers about this policy. He agreed that he had not finalised a sample safety plan folder when the applicant was still at work.

**Statement of Harry Tancred**

79. Harry Tancred, the Group General Manager, stated that the applicant reported directly to Mr Carroll and Mr Bitmead, so he did not liaise often with the applicant. He agreed that the applicant often took breaks during meetings because he felt that the managers were picking on him. However, he believed that the applicant did not come prepared to provide explanations regarding the issues. Peter Dilworth was assigned to assist the applicant’s preparation for the meetings.

80. Mr Tancred agreed that he had tooted the horn on his car when the applicant was coming out of a building. He could not recall the applicant’s reaction, but there was no malice. He could not recall “going off” at the applicant about the glove policy.

**Statement of Peter Dilworth**

81. Peter Dilworth, the Finance and Administration Manager, stated that the applicant did not arrive at work until 9.00 am or 9.30 am and he generally left work at 2.30 pm, although he conceded that the applicant may have been visiting stores. He expressed concerns about some of the reasons provided by the applicant for absenteeism and often observed him watching car videos on his mobile phone.

82. Mr Dilworth advised that the respondent was cost conscious and every cost was scrutinized by Mr Tancred. There was an emphasis on issues with payroll, rostering and overtime. He had never observed Mr Tancred raise his voice or bully the applicant during meetings, although he may have been annoyed when the applicant was unable to respond to a question. He had never heard Mr Bitmead speaking harshly to the applicant.

83. Mr Dilworth advised that the applicant's replacement, Tina Montgomery, was completing payroll on half the day on Fridays, and half the day on Mondays, unlike the applicant. He could not recall making a comment about the applicant not being able to count to five, but if he did make the comment, it would have been done in jest.

**Investigation Report**

84. The investigation report into the applicant's grievance that was submitted on 18 June 2019 details the enquires made by Ms Sewell. She confirmed that she was unable to properly interview the applicant because he did not provide a medical certificate that certified that he was fit to do so.

85. Ms Sewell advised that in respect of the allegation of a failure to pay for back pay and overtime, her enquires revealed that the applicant's time recording was inconsistent, and he rarely worked full shifts during the week. Further, an analysis of his emails showed that he sent very few emails each day, and rarely after hours or on weekends. His replacement was managing the payroll duties during normal work hours during the week.

86. Ms Sewell described the various instances of alleged bullying and harassment identified by the applicant in his email. She commented that many of the examples were independent and isolated events that were not directly related to Mr Tancred, Mr Carroll or Mr Bitmead. She noted that when pressed by Mr Carroll, the applicant was unable to describe any specific incidents.

87. Ms Sewell commented that there had been numerous training and support strategies Implemented to support the applicant. Although the applicant had described multiple examples of being spoken down to and receiving abusive texts and aggressive phone calls the documentary evidence showed that Mr Bitmead and Mr Carroll responded in kind, supportive and friendly manners.

88. Ms Sewell indicated that there were examples of employees making comment about the state of his desk and making jokes about the hours that he worked, but these had never been articulated or raised formally in order to be investigated. She considered that these seemed more like banter rather than bullying.

89. Ms Sewell concluded that there was no evidence to substantiate the allegation that the applicant was bullied and harassed by Mr Tancred, Mr Carroll or Mr Bitmead.

90. The document does not include the allegations matrix which presumably contains the responses from Mr Tancred, Mr Carroll and Mr Bitmead to the applicant's allegations.

## RESPONDENT'S SUBMISSIONS

91. The respondent's counsel, Mr Grimes, submits that the respondent relies on the evidence of Dr Miller in respect of the injury dispute. Dr Miller reported that the applicant had denied having a depressed mood, poor appetite, ruminations, suicidal ideation, helplessness and hopelessness. The doctor was not supportive of an on-going diagnosis and this was confirmed by her findings. Therefore, her evidence supports the conclusion that the applicant did not suffer an injury in terms of s 4 and 11(3) of the 1987 Act.

92. Mr Grimes submits that Dr Kumagaya did not express an opinion regarding the applicant's capacity. Dr Miller stated that the applicant did not suffer a psychological injury, he was not incapacitated, and he did not require treatment. Further, she noted that the applicant was looking for work.

93. Mr Grimes submits that Dr Rastogi was aware that Dr Lim had certified that the applicant had no current work capacity, but she noted that the applicant was looking for work. She believed that he was fit to work elsewhere in a supportive environment on a graded basis. He submits that any graded period should last no longer than 12 weeks. The doctor only suggested some further counselling.

94. Mr Grimes submits that the applicant can work part-time with support, but this is difficult to quantify. If the applicant has been looking for employment, he thinks that he has a capacity for work.

95. Mr Grimes submits that in his statement, the applicant did not dispute that he was looking for work. The history in the medical reports describes how he has been seeking employment and no reasons have been provided for his lack of success.

96. Mr Grimes submits that two qualified specialists support a capacity to work and care should be taken regarding the weight given to the medical certificates of Dr Lim, which seem to only have changed dates.

97. In reply, Mr Grimes submits that the applicant has not disputed that he has been looking for jobs as reported by Drs Miller and Rastogi. The fact that he needs on-going treatment does not mean that he is unable to work.

## APPLICANT'S SUBMISSIONS

98. The applicant's counsel, Ms Grotte, submits that Dr Miller is the only doctor to dispute that the applicant suffered a psychological injury. Dr Khan saw the applicant in December 2019, and he recorded a history that is not disputed. He identified the applicant's work stressors and his history differed that that recorded by Dr Miller.

99. Ms Grotte submits that Dr Khan diagnosed a Major Depressive Disorder and stated that the applicant's employment was the main contributing factor to his injury. The doctor recommended on-going treatment and the statement of account provided by the Workers Doctors practice shows that the applicant had been attending for treatment on a regular basis from 19 November 2019 to 7 February 2020.

100. Ms Grotte submits that the history recorded by Mr Nielsen differed from that recorded by Dr Miller. There is a consistency in the applicant's complaints and Mr Nielsen recommended treatment. He stated that the applicant was unfit for work.

101. Ms Grotte submits that Dr Lim recorded a history of numerous symptoms that were not recorded by Dr Miller. Dr Lim observed significant findings and diagnosed an Adjustment Disorder with Depression and Anxiety. He stated that the applicant was unfit for work.

102. Ms Grotte submits that Dr Kumagaya saw the applicant at around the same time as Dr Miller, He was satisfied that the applicant had a Major Depressive Disorder and he recommended long term treatment. It was not necessary for him to express an op9ojnion regarding the applicant's capacity.

103. Ms Grotte submits that Dr Miller recorded none of the symptoms noted by the other doctors. She did not accept that the applicant suffered an injury and attributed the applicant's complaints to an industrial dispute. Her opinion is at odds with the other medical evidence. Therefore, her opinion is difficult to accept.

104. Ms Grotte submits that Dr Rastogi saw the applicant on one occasion, and she agreed that the applicant had an Adjustment Disorder with depressed mood. Her opinion is sufficient to make a finding of a primary psychological injury due to work.

105. Ms Grotte submits that there are no clinical notes in evidence, but the report of Dr Lim confirms that the applicant was receiving treatment. This is consistent with the statement of account, and Dr Rastogi's diagnosis is consistent with that of Dr Lim. Dr Miler did not see all of the material and was not in the best position to comment on the applicant's injury.

106. Ms Grotte submits that Dr Kumagaya was only concerned about treating the applicant and he made no comment about the applicant's capacity. Dr Miller's opinion cannot be accepted, because her views on the applicant's capacity are coloured by her views on causation.

107. Ms Grotte submits that Dr Rastogi was told that the applicant had applied for a job, but he had been unsuccessful. He was still receiving treatment, and Dr Lim was issuing certificates of unfitness. She submits that Dr Rastogi was hopeful that the applicant could work, but she noted that he needed vocational retraining and rehabilitation. She said that the applicant was motivated, but he had not been able to get back to work. He was trying hard to get a job, but Dr Lim and Dr Khan indicated that he was not ready.

108. Ms Grotte submits that Dr Rastogi indicated that the applicant had unresolved grievances and was holding onto this. His confidence was poor, and he remained vulnerable because of inability to cope with stress. One could accept that the applicant has no current work capacity as certified by Dr Lim. Any capacity would be very limited, and it would be questionable whether he could work for 10 hours per week, earning $440 per week.

109. Ms Grotte submits that in his statement, the applicant stated that he was in need of treatment and he was unfit. The applicant believes that he is unable to work, and this is consistent with the opinions of Dr Lim and Dr Khan.

**REASONS**

**Was the applicant exposed to bullying and harassment during the course of his employment up to 11 June 2019?**

110. The first question to be considered is whether the alleged events relied upon by the applicant did in fact occur, and if so, whether those events amounted to bullying and harassment. Then one needs to consider whether these events caused a psychological injury.

111. In his statements, the applicant identified various incidents of bullying and harassment. These comprised excessive workload, weekend work to resolve payroll issues, being on call seven days per week, abuse from managers about the payroll and email issues, bullying, racial discrimination and harassment by his manager about his office hours. When he made a formal complaint, he was advised that the investigation could not proceed until he was able to return to work.

112. The applicant claimed that Mick O'Leary was critical of the manner in which he dealt with a staff member's working hours, Gerry Black made comments about his late arrival at work and Mr Bitmead chastised him when he failed to respond to his calls. There were issues regarding the enforcement of the two glove policy at the Chullora and St Mary's stores, and after he was abused by the area manager, Mr Carroll told him to stay away from Chullora. He received mixed messages from Mr Tancred about this. He reported racial comments by the St Mary's Store Manager but was told by Mr Bitmead that there was no racial slur.

113. The applicant stated that he was often blamed by Mr Bitmead for payroll calculation issues. Mr Bitmead made racist comments about Egyptians and he abused him when a butcher had not attended a mandatory drug test. There were heated discussions about securing a signed release from an ill employee. Mr Dilworth complained about the applicant's counting skills and he was abused by a butcher who he terminated.

114. Matters came to a head on 11 June 2019, when Shane O'Leary blamed him for payroll errors that had been made by Tina. When he requested payment for overtime. Mr Carroll agreed that overtime was available, and he later questioned him about his work hours. It seems that the overtime issue was never addressed. Mr Carroll also told him to make a formal complaint about any harassment.

115. Although the applicant lodged the complaint, he was not able to give a proper response because he was not allowed to access his emails. His discussions with Ms Sewell became heated and he halted the meeting. She subsequently completed the investigation without interviewing him properly. All of these stressors led to him seeking treatment for stress and anxiety.

116. Some of the applicant's allegations are corroborated by the emails that he sent to the respondent. On 29 April 2019, he complained about how he had been treated at a finance meeting as well as other unresolved matters that he had raised. He also received an email from Shane O'Leary complaining about pay issues that he described as ridiculous.

117. The statements provided by the respondent's employees tend to corroborate the applicant's allegations about many of the events. Mr Bitmead agreed that the applicant was obliged to work seven days per week and that he had challenged the applicant for not responding to calls and texts over a weekend. He denied that he criticised the applicant about a butcher's drug test, but conceded that it was the topic of some discussion. He acknowledged that he had mentioned the article about Egyptians, but denied that he had told the applicant not to follow through with the double glove policy. He was not concerned about the call that the applicant received from Shane O'Leary.

118. Mr Carroll stated that he was unaware about the overtime issue until the applicant raised the matter in June 2019. He told the applicant that payment of overtime was not possible, and the work should be done within the working week. He could not recall the applicant telling him about the issue of the butcher's drug test, but he was aware of Mr O'Leary's comments and the texts that the applicant received from the terminated butcher. He agreed that there were times when Mr Bitmead ranted at the applicant.

119. Mr Carroll confirmed that he witnessed the car park incident, but he was unaware of any issues arising at the Chullora store in respect of the two glove policy. He knew about the non-compliance by the St Mary's Manager and Area Manager and the alleged racial comments, which he dismissed. He agreed that there were payroll issues and that the applicant stormed out of a meeting when payroll issues were being discussed, but he stressed that the applicant was not held responsible. He was aware of the incident involving Mr Dilworth, but this was not mentioned until June 2019. He also disputed that anyone was upset with the applicant when there was a weekend outrage.

120. Mr Carroll confirmed that the applicant told him that Mr O'Leary had spoken to him aggressively, but Mr Bitmead said that Mr O'Leary was calm and did not raise his voice. He encouraged the applicant to make a formal complaint, although he had not wished to do so in the past. Mr Carroll disputed that the applicant had raised the overtime payments before June 2019 and when he said this, the applicant became agitated and hung up. He agreed that he questioned the applicant about his work hours, and he became upset. He then raised the possibility of a termination of employment by deed. He confirmed that Ms Sewell completed her investigation without the applicant's involvement.

121. Mr Black agreed that he sent a text to the applicant about his late starting time, but this was a standing joke between them. He was also aware of the issues with the compliance with the two glove policy by various managers.

122. Mr Tancred agreed that he beeped his horn at the applicant in the carpark, but he had no intention of hitting him. He could recall being angry at the applicant and confirmed that the applicant often left meetings because he felt that managers were picking on him.

123. Finally, Mr Dilworth conceded that Mr Tancred may have been annoyed when the applicant was unable to respond to questions, but he had never heard Mr Bitmead speaking harshly. He could not recall making a comment about the applicant's counting ability, but if he did make the comment, it would have been done in jest.
124. Little weight can be given to investigation report of Ms Sewell, and she only described the applicant's grievances and she did not include a summary of the responses by the three witnesses that she interviewed.

125. In *Attorney General's Department v K*[1], Deputy President Roche summarised relevant authorities in relation to a worker's perception of real events at work:

> "(a) employers take their employees as they find them. There is an 'egg-shell psyche' principle which is the equivalent of the 'egg-shell skull' principle (Spigelman CJ in *State Transit Authority of NSW v Chemler* [2007] NSWCA 249 (*Chemler*) at [40]);
>
> (b) a perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in *Chemler* at [54]);
>
> (c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in *Chemler* at [69]);
>
> (d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in *Leigh Sheridan v Q-Comp* [2009] QIC 12);
>
> (e) there is no requirement at law that the worker's perception of the events must have been one that passed some qualitative test based on an 'objective measure of reasonableness' (Von Doussa J in *Wiegand v Comcare Australia* [2002] FCA 1464 at [31]), and
>
> (f) it is not necessary that the worker's reaction to the events must have been 'rational, reasonable and proportionate' before compensation can be recovered."[2]

[1] [2010] NSWWCCPD 76 (*Attorney General's Department v K*).
[2] *Attorney General's Department v K*, [52].

126. The applicant has identified a number of instances where he perceived that he was being bullied, abused and harassed by Mr Bitmead, Mr Carroll and various managers. Many of the events have been corroborated by the statements from respondent's witnesses and emails. There has been an acknowledgement that some of the events did in fact occur, and in other instances, the witnesses have merely indicated that they have no recollection.

127. On review of the applicant's evidence and the evidence as a whole, I am satisfied that some of the events raised by the applicant did in fact occur and were not imaginary. He had issues with his treatment during the course of his employment and with the investigation into his complaint. The applicant viewed these interactions as bullying and harassment, and I have no reason to doubt the veracity of his evidence or his perception of these real events. Indeed, the applicant's evidence is largely unchallenged.

128. Therefore, I am satisfied on the balance of probabilities that the applicant was exposed to bullying and harassment during the course of his employment with the respondent. The next question to consider is whether the applicant sustained an injury in terms of s 4(b)(i) of the 1987 Act.

**Did the applicant sustain a psychological injury – s 4(b)(i) of the 1987 Act?**

129. In *Stewart v NSW Police Service*[3], Neilson CCJ referring to his earlier decision of *Kirby v Trustees of the Society of St Vincent de Paul (NSW)*[4], unreported, stated:

> "To succeed in this Court, the applicant must prove that the conduct complained of constituted 'injury' within the meaning of the Act. Where, as here, a psychiatric injury is alleged the applicant must prove either:
>
> (i) that the nervous system was so affected that a physiological effect was induced, not a mere emotional impulse: *Yates v South Kirkby Collieries Ltd* [1910] 2KB 538; *Austin v Director-General of Education* (1994) 10 NSWCCR 373; *Thazine-Aye v WorkCover Authority (NSW)* (1995) 12 NSWCCR 304; *Zinc Corporation Ltd v Scarce* (1995) 12 NSWCCR 566, or
>
> (ii) the aggravation, acceleration, exacerbation or deterioration of a pre-existing psychiatric condition: *Austin's* case.
>
> Frustration and emotional upset do not constitute injury: *Thazine-Aye's* case; nor, semble, where a mere 'anxiety state': the *Zinc Corporation* case per Meagher JA at 575B. A 'straight litigation neurosis' is not compensable: *Karathanos v Industrial Welding Co Ltd* [1973] 47 WCR (NSW) 79 at 80. A misperception of actual events, due to the irrational thinking of the worker leading to a psychiatric illness is not compensable: *Townsend v Commissioner of Police* (1992) 25 NSWCCR 9.
>
> It follows that subsequent rationalisation of earlier innocuous events, which rationalisation leads to psychiatric illness is also not compensable. Furthermore, once the applicant has established 'injury' she must prove that an incapacity for work resulted therefrom…"[5]

[3] [1998] NSWCCR 57; (1998) 17 NSWCCR 202, [6].
[4] NSWCC, No. 20708/94, 11 April 1997 (*Stewart).*
[5] *Stewart*, [52].

130. Further, in *Commonwealth of Australia v* Smith[6], Handley JA stated:

> "Thus the law does not recognise that emotional and mental problems constitute an injury unless they constitute a psychiatric illness that has been recognised as such by 'professional medical opinion'."

131. The issue for me to determine is whether the applicant sustained a psychological injury arising out of or in the course of his employment prior to 11 June 2019 (deemed). This requires a consideration of s 4 of the 1987 Act.

132. Section 4 of the 1987 Act defines injury as follows:

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

133. In order to be satisfied that an injury has occurred, there must be evidence of a sudden or identifiable pathological change: *Castro v State Transit Authority (NSW)*[7], or as stated by Neilson CCJ in *Lyons v Master Builders Association of NSW Pty Ltd* [8], "the word 'injury' refers to both the event and the pathology arising from it".

134. The issue of causation must be determined based on the facts in each case. The accepted view regarding causation Is set out in *Kooragang Cement Pty Ltd v Bates*[9] where Kirby J stated:

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

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[6] [2005] NSWCA 478, [16].
[7] [2000] NSWCC 12; 19 NSWCCR 496.
[8] (2003) 25 NSWCCR 422, [429].
[9] (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*), [463].

135. In *Department of Education & Training v Ireland*[10], President Keating considered the principles regarding the discharge of the onus of proof. He stated:

> "The principles relevant to the discharge of the onus of proof were discussed in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 (16 October 2008) ('*Nguyen*') where McDougall J (McColl and Bell JJA agreeing) said at [44] – [48]:
>
> '44. A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* (1940) 63 CLR 691 at 712.
>
> 45. Dixon CJ put the matter in different words, although to similar effect, in *Jones v Dunkel* (1959) 101 CLR 298 at 305 where his Honour said that '[t]he facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied'. Although his Honour dissented in the outcome of that case, the words that I have quoted were cited with approval by the majority (Stephen, Mason, Aickin and Wilson JJ) in *West v Government Insurance Office of NSW* (1981) 148 CLR 62 at 66. See also Stephen J in *Girlock (Sales) Pty Limited v Hurrell* (1982) 149 CLR 155 at 161–162, and Mason J (with whom Brennan J agreed) in the same case at 168.
>
> 46. It is clear, in particular from *West* and *Girlock*, that the requirement for actual satisfaction as to the occurrence or existence of a fact is one of general application, and not limited to cases where the fact in question, if found, might reflect adversely on the character of a party or witness.
>
> 47. In *Malec v JC Hutton Pty Limited* (1990) 169 CLR 638 Deane, Gaudron and McHugh JJ said at 642-643:
>
> "A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred."
>
> 48. On analysis, I think, what their Honours said is not inconsistent with the requirement that the tribunal of fact be actually persuaded of the occurrence or existence of the fact before it can be found. On their Honours' approach, what is required is a determination of the respective probabilities of the event's having occurred or not occurred. There is nothing in that analysis to suggest that the determination in favour of probability of occurrence should not require some sense of actual persuasion.'"[11]

136. Therefore, in order for the applicant to discharge the onus that he sustained an injury on 11 June 2019, I "must feel an actual persuasion of the existence of that fact".

[10] [2008] NSWWCCPD 134 (*Ireland*).
[11] *Ireland*, [89].

137. According to the applicant's evidence, his stress and anxiety was caused by the abuse, bullying and harassment, and racial discrimination by his managers. He was blamed for issues with the payroll system, he was expected to be available seven days per week, and he was not paid for any weekend work or overtime. I have accepted that these were real and not imaginary events.

138. Unfortunately, the applicant's most recent statement has been poorly drafted and does not properly describe the applicant's symptoms or address the differing record of complaints recorded by Dr Miller.

139. The only doctor to take issue with the diagnosis of a psychological injury is Dr Millar. Although she relied upon the applicant's statement as part of her history, she seems to have had little regard for his complaints, or the views expressed by Dr Lim in his report dated 19 July 2019 and by Dr Calvache-Rubio in his two certificates of dated 2 August 2019 and 15 August 2019.

140. Dr Miller did not explain why her opinion differed from the two general practitioners, whose evidence was before her and who diagnosed an Adjustment Disorder with depression and anxiety. She was also provided with copies of the factual investigations and statements, but made no comments about their contents.

141. Dr Miller did not examine the applicant until 9 September 2019, so her views regarding the applicant's alleged injury in June 2019 are not strictly contemporaneous. She made no concession about the possibility of any injury having been sustained three months before she examined the applicant, or of a recovery by the time of her examination.

142. The history of complaints recorded by Dr Miller included feelings of distress, teariness, anger, diminished concentration, panic attacks and sleeping problems. These complaints were reported elsewhere.

143. However, she reported that the applicant denied symptoms of depressed mood, social withdrawal, anhedonia, helplessness, hopelessness, ruminations or suicidal ideation.

144. This history of the applicant's symptoms is at odds with the complaints recorded by the other doctors. Dr Lim reported symptoms of anxiety, depression, worry, teariness, hopelessness, social withdrawal, overthinking, sleeping problems, loss of motivation and panic attacks. Mr Nielsen recorded symptoms of low mood, irritability, sleep disturbance, impaired memory, impaired concentration, anergia, anhedonia and helplessness.

145. Dr Kumagaya, who saw the applicant at around the same time as Dr Miller, recorded low mood, insomnia, appetite attenuation, poor concentration and low energy. Dr Khan reported low mood, anxious ruminations, panic, amotivation, anhedonia, social withdrawal, reduced appetite, impaired concentration, sleep disturbance and hopelessness.

146. In November 2019, Dr Rastogi recorded symptoms of low self-esteem, teariness, anger, blame and frustration, lack of confidence and limited social activity.

147. The history regarding treatment differs, but there seems to be an explanation for that. Dr Miller recorded that the applicant was not taking medication, and that seems to have been the case in August 2019, because Dr Calvache-Rubio did not mention any medication in his certificates. Dr Miller was also of the view that treatment was not required.

148. In the certificate dated 5 September 2019, Dr Lee advised that the applicant had been prescribed Mirtazapine, an antidepressant. This seems to have been on the recommendation of Dr Kumagaya.

149. On 8 January 2020, the applicant was prescribed Mirtazapine and Quetiapine for depression by Dr Lim. On 19 February 2020, Dr Mo prescribed Melatonin, a medication for sleep disorders.

150. Therefore, Dr Miller's opinion regarding the need for treatment differs from the views of three general practitioners, who had seen the applicant on a regular basis, and had been treating him for some time. Drs Rastogi, Kumagaya and Khan all recommended that the applicant have counselling and/or medication.

151. It seems that the applicant had some treatment from Mr Nielsen in the early stages, but it appears that this ceased. According to the statement of account from the Workers Doctors Practice, the applicant has seen four different psychologists from 19 November 2019 to 7 February 2020. Further, he has seen Drs Khan and Kumagaya four times during this period. It is remarkable that further reports and copies of the clinical notes of the applicant's treating clinicians were not obtained and attached to the Application.

152. The applicant has the support of Drs Lim, Calvache-Rubio, Lee, Mo, Kumagaya, Khan and Rastogi in respect of a psychological injury caused by work related stressors Their diagnoses include an Adjustment Disorder with Depressed Mood/Depression and Anxiety, a Major Depressive Disorder with anxious distress. Mr Nielsen also diagnosed Major Depressive Disorder with Anxious Features. Drs Lim, Khan and Rastogi indicated that the applicant's employment was the main contributing factor to his condition.

153. Dr Miller had access to the factual investigation, which confirmed that many of the incidents that concerned him did in fact happen. She dismissed the applicant's complaints and stated that they merely stemmed from an industrial dispute.

154. Dr Miller's opinion that the applicant did not have a diagnosable psychiatric injury and that he did not require treatment is totally at odds with the opinions of four general practitioners, a psychologist and three psychiatrists. Her record of complaints differs from that of the other doctors and she has not addressed the opinion of Dr Lim and the contents of the medical certificates.

155. It would have been prudent for the insurer or its solicitor to obtain a supplementary report from the doctor addressing these issues and the views of the applicant's psychiatrists. In the circumstances, the evidence of the applicant's doctors and psychologist are more persuasive and should be preferred.

156. Bearing in mind the statutory requirements of s 4(b)(i) of the 1987 Act and the principles set out in *Kooragang*, I am satisfied that the applicant sustained a primary psychological injury arising out of or in the course of his employment on 11 June 2019, and I accept the evidence of Drs Lim, Khan and Rastogi that the applicant's employment was the main contributing factor to his injury.

157. Further, given my rejection of Dr Miller's evidence, I accept the opinions of the applicant's treating doctors, and that of Dr Rastogi, that the applicant is still suffering from the effects of his psychological injury sustained on 11 June 2019 (deemed).

**Extent of the applicant's capacity – s 37 of the 1987 Act**

158. An assessment of the applicant's capacity after 1 January 2013 involves a consideration of whether the applicant has no current work capacity or a current work capacity as defined in s 32A of the 1987 Act.

159. Section 32A of the 1987 Act defines the relevant terms as follows:

> "**current work capacity**, in relation to a worker, means 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.
>
> **no current work capacity**, in relation to a worker, means 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.
>
> **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."

160. Section 43 of the 1987 Act in existence prior to the 2012 amendments and the authorities suggested that regard was to be had to "the realities of the labour market in which the employee was working or might reasonably be expected to work"[12]. Such a requirement is no longer the case according to s 32A of the 1987 Act.

161. Following the 2012 amendments, it is clear that "total incapacity" differs from "no current capacity". "No current work capacity" requires a consideration of a worker's capacity to undertake not only his or her pre-injury duties, but also suitable employment, irrespective of its availability. This was confirmed by Deputy President Roche in *Mid North Coast Local Health District v De Boer* [13] and *Wollongong Nursing Home Pty Ltd v Dewar* [14].

162. In *Dewar*, the Deputy President stated:

> "…employment for which the worker is currently suited is determined 'regardless of' whether the work or employment is 'available' and regardless of whether it is 'of a type or nature that is generally available in the employment market'. However, other aspects of *Lawarra Nominees* and *Woods* remain relevant in determining whether a worker is 'suited' for suitable employment." [15]

[12] *Arnotts Snack Products Pty Ltd v Yacob* [1985] HCA 2; 155 CLR 171
[13] [2013] NSWWCCPD 41.
[14] [2014] NSWWCCPD 55 (*Dewar*).
[15] *Dewar* [56].

163. The Deputy President continued:

> "However, while the new definition of suitable employment has eliminated the geographical labour market from consideration, it has not eliminated the fact that 'suitable employment' must be determined by reference to what the worker is physically (and psychologically) capable of doing, having regard to the worker's 'inability arising from an injury'. Suitable employment means 'employment in work for which the worker is currently suited' …. However, whether, under the new provisions, he or she would be found to have no current work capacity will depend on a realistic \ assessment of the matters listed at (a) and (b) of the definition of suitable employment. Depending on the evidence, it is difficult to see that work tasks that are totally artificial, because they have been made up in order to comply with an employer's obligations to provide suitable work under s 49 of the 1998 Act, and do not exist in any labour market in Australia, will be suitable employment." [16]

164. Therefore, if the applicant had "no current work capacity", I need to assess whether he has been unable to return to both his pre-injury duties and suitable employment since provisional payments ceased on 20 October 2019.

165. In this matter, apart from the views of Dr Miller, whose opinion I have rejected, there is no medical evidence that suggests that the applicant can return to his pre-injury duties.

166. The next question to consider is whether the applicant was fit for suitable employment as defined in s 32A of the 1987 Act. This requires a consideration of the nature of the incapacity and the details provided in medical information, the worker's age, education, skills and work experience, any return to work plan, and any occupational rehabilitation services that have been provided to him, irrespective of whether the work was available to him or of a type or nature that was generally available in the employment market.

167. The applicant is 22 years old. I have already commented on the inadequacy of his most recent statement and the statement obtained by the investigator silent as to his past work experience and the nature of his symptoms.

168. Dr Rastogi reported that the applicant had graduated from university in 2010 and he had worked as a librarian and in various HR positions, so the applicant is obviously intelligent and would have the skills required in many positions.

169. Dr Lim's report was completed three months before payments ceased. I do not have the benefit of a recent report from him or the three other general practitioners to explain why they certified that the applicant has had no current work capacity. Similarly, Mr Nielsen's report was completed in August 2019, and is of limited assistance.

170. Unfortunately, Dr Kumagaya did not comment on the applicant's fitness. According to Dr Khan, the applicant was unfit for his pre-injury duties or any other work. He did not provide detailed reasons for his conclusion. Given that these doctors have continued to treat the applicant, up to date reports would have been of assistance.

171. The most persuasive evidence rearguing the applicant's capacity is contained in the report of Dr Rastogi. Whilst it is true that she only saw the applicant on one occasion, she obtained a comprehensive history of the applicant's injury, symptoms and treatment. She reported that he had been looking for work, something that was not recorded, or perhaps divulged, to Dr Khan, who saw the applicant only two weeks after Dr Rastogi.

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[16] *Dewar* [57] to [60].

172. We do not know whether the applicant told his general practitioners and psychologists that he had been seeking employment. Had he done so, then they may have changed their opinions regarding his capacity. Therefore, this means that less weight can be given to their views regarding the applicant's capacity.

173. The fact that the applicant was looking for employment does not necessarily mean that he had the capacity to work. It seems that he had concerns about his finances, and he had moved out of his share house accommodation. Therefore, he may have been forced to look for work even though he had limited capacity. However, the applicant has not provided any evidence about this in his statements.

174. According to Dr Rastogi, the applicant was fit to work with another employer in a supportive and less stressful environment on a part time and graded basis. What this means is not the subject of any evidence.

175. Dr Rastogi stated that the applicant required six to seven sessions of psychological counselling, vocational retraining and rehabilitation with a different employer.

176. Ms Grotte submits that the applicant's capacity, if any, is very limited, and she questioned whether he could work for 10 hours per week. Mr Grimes submits that based on the opinion of Dr Rastogi, the applicant could work on a graded basis, but this restriction should only last for 12 weeks at most.

177. Doing as best as I can on the limited medical evidence before me and in the absence of any comment in the applicant's statements, and having regard the relevant factors identified in s 32A of the 1987 Act, I am satisfied that the applicant would have had no current work capacity for the first 13 weeks until he was examined by Dr Rastogi on 27 November 2019. Thereafter, he would have been fit for some work in a less stressful position, perhaps in a library where he has had some experience, for three hours per day, five days per week.

178. According to the Local Government Industry Award 2010, a mid-range council employee is paid approximately $27 per hour. Therefore, the applicant has the ability to earn $405 per week in suitable employment.

**Quantification of the applicant's capacity – ss 36 and 37 of the 1987 Act**

179. The parties agree that the PIAWE as at 11 June 2019 was $1,576.30. This figure would be subject to indexation on 1 October 2019, resulting in a PIAWE of $1,585.92.

180. According to the list of payments in the Application, the applicant was paid weekly compensation until 20 October 2019. Therefore, the claim will commence from 21 October 2019.

181. In accordance with s 37(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period is as follows:

    (a) 21 October 2019 to 26 November 2019:
    (AWE × 80%) – D =
    ($1,585.92 x 80%) - $0 =
    $1,268.74 - $0 = $1,268.74 per week.

182. In accordance with s 37(3)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the second entitlement period is as follows:

    (a) 27 November 2019 to date and continuing:
    (AWE × 80%) – D =
    ($1,585.92 x 80%) - $405 =
    $1,268.74 - $405 = $863.74 per week as adjusted.

183. Therefore, the applicant will be entitled to an award in accordance with the above calculations.

**Medical expenses – s 60 of the 1987 Act**

184. As the applicant has been successful in his claim, he is entitled to recover the cost of reasonably necessary medical, hospital and related expenses pursuant to s 60 of the 1987 Act.

**FINDINGS**

185. The applicant sustained a psychological injury arising out of or in the course of his employment on 11 June 2019 (deemed).

186. The applicant's employment was the main contributing factor to his injury.

187. The applicant was incapacitated and paid provisional weekly compensation from 11 June 2019 to 20 October 2019.

188. The applicant had no current work capacity from 21 October 2019 to 26 November 2019.

189. Since 27 November 2019, the applicant has had the capacity to work in suitable employment for 15 hours per week with an ability to earn $405 per week.

190. The applicant requires medical treatment as a consequence of his injury and the respondent is liable to pay reasonably necessary medical expenses.

**ORDERS**

191. The respondent to pay the applicant $1,268.74 per week from 21 October 2019 to 26 November 2019 pursuant to s 37(1)(a) of the 1978 Act.

192. The respondent to pay the applicant $863.74 per week as adjusted from 27 November 2019 to date and continuing pursuant to s 37(3)(a) of the 1987 Act.

193. The respondent to pay the applicant's reasonably necessary medical expenses pursuant to s 60 of the 1987 Act.