

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 5711/19  
**Applicant:** Nathan Jai Heston  
**Respondent:** F.E. Anderson Pty Ltd  
**Date of Determination:** 27 February 2020  
**Citation:** [2020] NSWCC 53

The Commission determines:

1. The applicant sustained a psychological injury pursuant to s 4(b)(i) and 11A(3) of the *Workers Compensation Act 1987*.
2. The injury was not wholly or predominantly caused by reasonable action with regard to discipline or performance appraisal pursuant to s 11A(1) of the *Workers Compensation Act 1987*.
3. The applicant was incapacitated for work and had a need for medical treatment as a result of the psychological injury.

The Commission orders:

4. The respondent to pay the applicant weekly benefits pursuant to ss 36 and 37 of the *Workers Compensation Act 1987* as follows:
  - (a) from 5 May 2017 to 14 August 2017 at the rate of \$2,084.90;
  - (b) from 15 August 2017 to 30 September 2017 at the rate of \$1,184.90 per week;
  - (c) from 1 October 2017 to 31 March 2018 at the rate of \$1,201.70 per week;
  - (d) from 1 April 2018 to 30 September 2018 at the rate of \$1,228.50 per week;
  - (e) from 1 October 2018 to 14 January 2019 at the rate of \$1,245.30 per week;
  - (f) from 15 January 2019 to 31 March 2019 at the rate of \$795.30 per week;
  - (g) from 1 April 2019 to 7 June 2019 at the rate of \$827.40 per week;
  - (h) from 8 June 2019 to 30 September 2019 at the rate of \$377.40 per week; and
  - (i) from 1 October 2019 to 31 October 2019 at the rate of \$395.70 per week.
5. The respondent to have credit for any payments already made during the period above.
6. The respondent to pay the applicant's reasonably necessary medical expenses pursuant to s 60 of the *Workers Compensation Act 1987*, upon production of accounts, receipts and/or valid Medicare Notice of Charge.

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

Rachel Homan  
**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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

G Bhasin

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



## STATEMENT OF REASONS

### BACKGROUND

1. Mr Nathan Heston (the applicant) was an IT Manager employed by F.E. Anderson Pty Ltd (the respondent). The applicant claims that he sustained a psychological injury arising out of or in the course of his employment with the respondent.
2. The respondent has disputed liability for the alleged injury in four dispute notices issued pursuant to former s 74 and s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), dated 11 July 2017, 22 March 2018, 10 July 2018 and 28 October 2019.
3. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) filed in the Commission on 31 October 2019 seeking compensation for incurred medical expenses and weekly benefits from 20 July 2017 to 26 June 2019.

### PROCEDURE BEFORE THE COMMISSION

4. The parties appeared for teleconference on 29 November 2019 and conciliation conference and arbitration hearing on 5 February 2020. The applicant was represented by Mr Phillip Perry of counsel, instructed by Mr Amanda Knock. The respondent was represented by Mr Stephen Flett of counsel, instructed by Mr Mark Van Der Hout.
5. During the conciliation conference, an application was made and leave granted to the applicant to amend the claim for weekly benefits to run from 5 May 2017 to 31 October 2019. The parties agreed that the maximum statutory rate applied for the purposes of calculating any entitlement to weekly benefits. It was also agreed that an order of a general nature would be appropriate in respect of the claim for medical expenses in the event of a favourable determination on liability for the applicant.
6. 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

7. The parties agree that the following issues remain in dispute:
  - (a) Whether the applicant sustained a psychological injury pursuant to s 4 of the *Workers Compensation Act 1987* (the 1987 Act);
  - (b) Whether any injury was wholly or predominantly caused by reasonable action taken or proposed by or on behalf of the employer with respect to performance appraisal and/or discipline pursuant to s 11A(1) of the 1987 Act;
  - (c) The extent and quantification of any incapacity resulting from injury during the period of weeklies claimed; and
  - (d) The applicant's entitlement to medical expenses compensation pursuant to s 60 of the 1987 Act.

## **EVIDENCE**

### **Documentary Evidence**

8. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) ARD and attached documents;
  - (b) Reply and attached documents;
  - (c) Five medical certificates dated between 5 and 29 May 2017 issued by Caringbah Family Practice; and
  - (d) Complete clinical records of Caringbah Family Practice as at 19 December 2019.
9. Neither party applied to adduce oral evidence or cross-examine any witness.

### **Applicant's evidence**

10. The applicant's evidence is set out in six written statements, dated 16 June 2017, 9 November 2017, 24 May 2018, 5 October 2018, 8 March 2019 and 10 October 2019.
11. The applicant was responsible for managing the IT department of the respondent's business, Ace Gutters. The business previously ran on an enterprise resource planning (ERP) system called "Eclipse" which no longer met the business' needs. In 2015, the executive management team agreed to migrate to a new ERP system. Several ERP systems were evaluated and the Pronto Xi ERP system selected. Contracts were signed and preparation work commenced in the Spring of 2015.
12. The applicant said it was "quite an undertaking" to complete this project. The most time-consuming issue for the applicant was getting more than 17 years of company data out of Eclipse and into Pronto whilst ensuring data integrity. Pronto went live on 1 August 2016 and, apart from a couple of minor issues, was a success. The applicant managed the project but also had responsibility for business analysis, change management, user training, system testing, supporting infrastructure purchasing, rollout and more.
13. The applicant said he was subject to a high level of stress during this time and was overworked due to the executive management team's limited IT knowledge and their reluctance to actively engage in the implementation process. The applicant had to learn the business (sales, logistics, warehousing and distribution, manufacturing, inventory) during implementation. The applicant felt isolated and as though the whole changeover was up to him.
14. The applicant said that there was a complete lack of understanding or appreciation by management as to the number of people and issues he dealt with as an IT manager on a day-to-day basis. The applicant became frustrated and overwhelmed. The applicant felt as though he was being pulled in every direction by staff without sufficient or capable assistance. This had been the situation every day for years. When it came to implementing the Pronto system, the applicant's workload was amplified. The applicant's ability to psychologically withstand the demands placed upon him crumbled.

15. Over an eight-month period from January 2016, the applicant worked a lot of hours including overtime of four to eight hours on most working days. The applicant would work weekends, including most Sundays. In July 2016, the applicant worked 19 days straight for 12 to 14 hours per day. On the "go live" weekend of 30 and 31 July 2016, the applicant worked 30 hours, finishing close to midnight on 31 July before returning to work on 1 August at 3 AM. The additional hours gradually decreased after 1 August 2016 and the applicant took four weeks of annual leave in September to October 2016. The applicant said this was insufficient time for him to de-stress.
16. On 8 December 2016, the applicant suffered a mental breakdown and was unable to attend work. On that date, the applicant rang his supervisor, Geoff Hall, to advise him of his condition. The applicant attended a doctor's appointment and was diagnosed with depression and stress. The applicant was commenced on medication. The applicant had a couple of days away from the workplace but had been advised to keep busy so returned to work. The applicant felt better on the medication and took another four weeks of annual leave over Christmas. The applicant was managing his recovery well.
17. On 4 May 2017, the applicant sent an email to a member of his staff, Luke, with regard to a task he had failed to accurately complete. This had caused the applicant to be unable to progress planned IT infrastructure changes that night. The email asked Luke to improve his work performance and advised him that a meeting to discuss his performance would be set towards the end of May.
18. On 5 May 2017, the applicant arrived at work and noticed that Luke's car was not in the car park. The applicant asked a member of staff where Luke was and was told that "Geoff knows". The applicant went to see Mr Hall in his office. Mr Hall told the applicant that Luke was upset and in tears about the email from the night before and had gone home. The applicant said,

"He then advised that my attitude was the problem, that everyone has problems with me and that I have problems with my neighbours. At this point I was not happy. One of my staff members had gone home, no one had advised me Luke had left work, one of my other staff had acted disrespectfully towards me and completely ignoring the work performance issue I had identified with Luke, Geoff then claims that I am the problem and uses his knowledge of my private life to form part of his argument."
19. The applicant left the workplace after meeting with Mr Hall and consulted a doctor who issued a medical certificate certifying him as unfit for work that day. The applicant returned to see his usual doctor the next day and took sick leave from Monday to Wednesday the following week.
20. On 7 May 2017, the applicant sent an email to the Human Resources Manager, Carol Dean, advising her of his mental breakdown in December 2016 and the events leading up to his meeting with Mr Hall on 5 May 2017. The applicant advised that his thinking had started to revert to how it was prior to commencing treatment for depression. The applicant said Ace Gutters was not a safe environment for him and that he would be taking sick leave. The applicant had already applied for a day of carer's leave to care for his mother who had been diagnosed with breast cancer. The applicant planned to return to work on 12 May 2017.

21. On 9 May 2017, Ms Dean called the applicant and notified him that a meeting with the company CEO, Donald Anderson, had been arranged for 12 May 2017 at 10am. On 10 May 2017, the applicant emailed Ms Dean and requested a meeting agenda and inquired as to the purpose of the meeting. On 11 May 2017, Ms Dean emailed the applicant advising that the meeting had been requested by Mr Anderson and no agenda was in place. On 11 May 2017, the applicant emailed Ms Dean requesting confirmation as to whether the meeting would be addressing any issues with regard to his employment that may result in disciplinary action. If so, the applicant said he required an agenda or outline of the issues so he could prepare for the meeting. On 12 May 2017 at 7:56am, Ms Dean replied advising that the meeting was about the incident on 5 May 2017 and any other matters Mr Anderson wished to discuss.
22. During the meeting with Mr Anderson, the applicant was advised that he would be receiving a final warning. The applicant did not have the assistance of a support person. The meeting was all about his interaction with Mr Hall. Mr Anderson did not listen or consider the applicant's responses.
23. The applicant said the written final warning stated that he had declined to have a support person present during the meeting when in reality the applicant was denied the opportunity to have a support person present due to the intent of the meeting not being made known to him beforehand. During the meeting, Mr Anderson raised issues regarding the applicant's performance without providing specific details such as dates and names. The applicant was unable to properly respond or consider how to rectify the situation. The applicant raised his concerns in an email to Ms Dean the same day.
24. The applicant left work in the early afternoon on 12 May 2017 and attended his doctor who issued a medical certificate covering the period to 23 May 2017. The applicant discussed with his general practitioner whether he should make a worker's compensation claim but decided against making a claim at the time.
25. On 15 May 2017, the applicant received an email from Ms Dean advising that a written final warning was being prepared. Ms Dean advised that Mr Anderson believed the applicant would benefit from an anger management course and a people skills course to assist him in his role as IT manager. The company offered to pay for these courses. The applicant received the final written warning by email.
26. The applicant emailed a response to the written warning to Ms Dean and Mr Anderson on 22 May 2017. The applicant expressed concern that he had been issued with a final warning after having not had any informal or formal warnings in his previous 10 years of employment. The warning made reference to issues and complaints that had not been raised with him in a formal sense previously. The applicant expressed concern that the warning letter made reference to his mental health. The applicant denied swearing during the incident involving Mr Hall and denied being invited to bring a support person to the meeting with Mr Anderson.
27. The applicant accepted that his conduct on 5 May 2017 had not been appropriate. The applicant said he had been subject to workplace stress for some time and required assistance, which had not been forthcoming. The applicant said he felt discriminated against as a result of being uninvited to a management dinner on 17 May 2017.
28. On 24 May 2017, the applicant was notified that a meeting with Mr Anderson, Ms Dean and a support person had been arranged for 29 May 2017. The applicant attended that meeting with his partner as a support person. The applicant was told that he was issued with the warning as he had not apologised to Mr Hall and declined to respond to the allegations about his performance during the meeting on 12 May 2017.

29. The applicant lodged a claim for compensation 1 June 2017.
30. On 17 June 2017, the applicant attended an appointment with his tax accountant/auditor to discuss the possibility of registering a company to allow him to pursue employment where he could be his own boss. The company was registered on 28 June 2017. The applicant said he had registered the company to bill short-term contract IT work that might come in from existing connections but he did not seek out such work.
31. The applicant's employment with the respondent was terminated on 15 August 2017 on the grounds that the applicant's position was made redundant. The applicant received an email from Mr Anderson explaining the reasons for the redundancy which the applicant felt was "incredibly belittling and dismissive of every effort" he had made.
32. The applicant noted that his performance had been rated as "outstanding" in his 2016 performance appraisal. The applicant felt he had sacrificed so much of his personal life to carry out the Pronto changeover. The manner in which he was treated by the respondent in the lead up to the changeover and afterwards until 5 May 2017 and in the termination of his employment left him feeling close to despair. There was no support and minimal and grudging appreciation for the successful implementation of the system.
33. The applicant said very little work was performed on or for his business during this time other than setting up a LinkedIn page in around August 2017 and learning how to build a website. The applicant provided a calendar showing no work done other than four hours for the month of September. The applicant did not work on the business in October and spent two hours working on the business in November. In December 2017, the applicant attended two networking events but felt awkward and anxious. The applicant received his first business enquiry in December 2017 and performed 10 hours of work for an overseas company, testing websites and applications.
34. The applicant said that he felt quite drained after concentrating for an hour or two and it was difficult to keep his mind on the situation at hand. The applicant only worked minimal hours for his new business and did not receive much in the way of income from it. During his most productive month, the applicant averaged just eight hours per week. The applicant found it difficult to maintain the standard of work that he used to and easily became sidetracked.
35. The applicant continued to engage in work-related activities in order to try to grow his business and promote it. Many of those engagements consisted of networking events and seminars to keep up his skills and meet people who may require his services. The applicant said that the kind of work he was engaged in was easier than it would be if he had returned to work for another employer. The applicant was able to work the hours he could, when he could. Although the applicant advertised that he was available between 8am to 6pm, 7 days per week, he was not actually working each day or working for all of those hours on any given day. The applicant said he did not have the resilience or mental capacity for the work he previously performed for the respondent.
36. In his most recent statement of 10 October 2019, the applicant stated that he performed no more than 30 hours per week on and in the business and did not feel capable of working any more than 30 hours per week. The applicant's work included behind-the-scenes work such as bookkeeping, office administration tasks, updating the website, reconfiguring customer facing systems, graphic design work, completing short training courses and keeping himself informed about IT trends and changes.

## Witness evidence

*Carol Dean*

37. Ms Dean signed a written statement on 19 June 2017 in which she said complaints had been made about the applicant by staff in September and November 2016 and previously. Mr Anderson started to have words with the applicant in September 2016 due to run in with a staff member and advised the applicant that he may need anger management to assist him in dealing with people. The applicant was presented with a final warning on 12 May 2017.
38. On 5 May 2017, one of the applicant's staff, Luke came into Ms Dean's office and said he wanted to go home on stress leave because of the applicant. Mr Hall told Ms Dean shortly afterwards that Luke had been sent an email by the applicant to which he was copied in. Mr Hall said he would have to talk to the applicant. Ms Dean saw the applicant arrive at approximately 8:20am. At about 8:30am, Mr Hall advised that the applicant had left and they had words.
39. Shortly afterwards, another member of staff came to ask what was happening as he had heard the applicant yelling and swearing at Mr Hall. Ms Dean went to see if this was true and Mr Hall confirmed this.
40. At 9:10am, Ms Dean received a call from the applicant stating that he was taking stress-related leave and would be going to the doctor. The applicant said the meeting with Mr Hall did not go well and told Ms Dean of his depression. The applicant said he was not supported by Mr Hall. Ms Dean said this was the first time she had been made aware that the applicant was suffering from depression.
41. Ms Dean confirmed that she received an email on 7 May 2017 regarding the applicant's condition and the events on 5 May 2017. The applicant said his condition had reverted back to where he was before receiving treatment for his depression and that Ace Gutters was not a safe environment for him. The applicant said he would be taking more time off. Ms Dean received a phone call from the applicant about the same matters on 8 May 2017.
42. On 11 May 2017, Ms Dean sent the applicant an email advising him that Mr Anderson would like to meet with him the next day. The applicant replied and asked if the meeting would be addressing any issues with regard to his employment that may result in disciplinary action. If so, he required an agenda in order to prepare. Ms Dean did not receive the email until she returned to work on 12 May 2017. Ms Dean advised the applicant that it was her understanding that Mr Anderson would be discussing the incident on 5 May 2017 and anything further could be taken up with Mr Anderson.
43. Mr Anderson told Ms Dean after the meeting that he thought the applicant would have come in and apologised but he did not. Mr Anderson had previously asked Ms Dean whether the applicant swearing and yelling at a direct manager warranted a Stage III warning. Ms Dean said she felt this conduct could warrant that level of warning but she did not know that Mr Anderson was going to issue one.
44. Ms Dean received an email from the applicant after the meeting in which he said he had received a formal warning and requested more details so he could respond. The applicant also asked how the respondent intended to provide support to him so that he could comply with his job requirements. Ms Dean had not been advised about the meeting and undertook to follow this up.

45. A reply was emailed to the applicant on 15 May 2017. Ms Dean provided the applicant with a copy of the written warning signed by Mr Anderson together with an interoffice memorandum of Mr Hall's account of the incident and her file notes.
46. The applicant emailed Ms Dean with regard to the formal warning on 22 May 2017. Ms Dean replied and asked the applicant to attend a meeting with Mr Anderson to address his comments on 24 May 2017. The meeting was later rescheduled to 29 May 2017.
47. During the meeting on 29 May 2017, the applicant had a support person present. The applicant wanted the warning revoked but this was declined by Mr Anderson. The applicant requested an apology from Mr Anderson. Mr Anderson said he would not apologise and said he believed the applicant's doctor was not fully aware of his behaviour. Ms Dean said they attempted to discuss several other examples of the applicant's behaviour, including staff going to Mr Hall rather than the applicant.
48. Ms Dean received lengthy email from the applicant after the meeting and was later informed that the applicant had made a claim for workers compensation. Ms Dean said she was surprised when she discovered that the applicant had lodged a claim for workplace bullying.
49. Ms Dean said she was not aware of the impact of the stress the applicant was under in 2016 with the Pronto project as he never told her about it or asked for assistance. Ms Dean said she believed the respondent had acted in accordance with policy and procedure during this time. The applicant had never told her that he was being bullied in the workplace.
50. Ms Dean said she was aware the applicant was excluded from the managers' dinner but this was because Mr Anderson thought it would have been an uncomfortable night for the applicant. Ms Dean said she had not observed Mr Anderson talking to the applicant using offensive comments or unjustified criticism. Ms Dean had not observed Mr Anderson using company policies or procedures to launch a personal attack on the applicant to anyone else.
51. During the meeting on 29 May 2017, Mr Anderson was sitting back and was calm. He said several times in the meeting that he wanted the applicant back at work. Ms Dean denied that Mr Anderson had laughed at the applicant when he said he wanted Mr Anderson to apologise and revoke the warning. Ms Dean recalled that the applicant had denied swearing.

*Geoff Hall*

52. In a statement signed on 19 June 2017, Mr Hall said he had been employed by the respondent for 14 years as a finance manager. Mr Hall said he did not know the applicant prior to him working for the respondent. Mr Hall said he had been to lunch and dinner with the applicant and he had been to his house for lunch.
53. Mr Hall said that the applicant's interactions with his colleagues gradually declined through the Pronto system project. This resulted in Mr Hall having numerous conversations with colleagues and management. In July 2016, the applicant abused a fellow employee in front of other staff.
54. There was negative feedback about the applicant and a number of staff felt they could not approach him or talk to him as the applicant was aggressive and demeaning. There was an incident with another staff member in September 2016 and other minor issues. A credit manager had commented that they couldn't go to the applicant as he was always agitated and they couldn't talk to him.
55. Mr Hall said he talked to the applicant a number of times about his interactions with people and suggested that he speak to people the way he would expect to be spoken to. The claimant took the feedback on board and was always fine with Mr Hall. The applicant was under pressure as they all were.

56. Mr Hall said Pronto had given an undertaking to the business that consultants would be available as and when needed. The applicant was given a *carte blanche* to use the consultants as he saw fit. There was a steering committee consisting of the applicant, Mr Hall, a project manager from Pronto, her manager and a sales representative. They also had access to the state general manager of Pronto. There were numerous consultants used throughout the project as well as internal members of staff who acted as “champions”. Mr Hall believed that the applicant was supported throughout the process.
57. Mr Hall said there was no expectation from him that the applicant would work excessive hours. The “go live” date was pushed out twice due to not being ready. The applicant was given time off in lieu for working hours outside the norm.
58. On 8 December 2016, Mr Hall received an email from the applicant saying that he had seen his doctor and been prescribed with medication. The applicant asked for a couple of days off and asked Mr Hall to keep the matter between himself and Mr Anderson, which Mr Hall did. Mr Hall said he supported the applicant through this period as he knew he was under pressure and taking antidepressants.
59. On 5 May 2017, the applicant came into Mr Hall’s office. Mr Hall advised him that Luke had gone home and suggested that the applicant would have been similarly upset if he had received a similarly worded email. The discussion started to deteriorate and Mr Hall said that the applicant’s attitude to everyone was a problem. Mr Hall said the applicant had problems with his neighbours before. After this, the yelling, swearing and shouting started. Mr Hall said he was attempting to say that there was a pattern in the applicant’s attitude in general and not only at work. The applicant would not let him speak. Mr Hall asked the applicant to stop swearing at him and listen but the conversation was not going anywhere. Mr Hall asked the applicant to leave his office and go home.
60. Mr Hall said he had been copied into an email from the applicant on 8 May 2017. Mr Hall said he was extremely upset with the content of the applicant’s email and disappointed with the comments made by him. Mr Hall had given the applicant his full support and stood up for him on numerous occasions in regard to his behaviour. Mr Hall said he was the only one that had supported the applicant. Mr Hall said the applicant had been paid \$30,000 bonus for the Pronto project. Mr Hall paid for a team lunch at the end of the project out of his own money, but let it appear that the applicant was paying for it.
61. Mr Hall did not attend the meeting on 12 May 2017 when the applicant was issued with a formal warning for his behaviour on 5 May 2017.
62. Mr Hall said he had not observed Mr Anderson talking to the applicant using offensive comments or unjustified criticism. The applicant was excluded from the managers’ meeting dinner because it would have been uncomfortable as everyone had known what went on. Mr Hall said he never observed Mr Anderson using company policies or procedures to launch a personal attack on the applicant or anyone else.
63. Mr Hall said no one else had complained about the stress of the Pronto project. The applicant was given every tool available to assist him. The applicant never advised that he was suffering anxiety due to workplace bullying. The applicant had referred to his condition as depression. There was no other support Mr Hall could give the applicant as he was already receiving the maximum Mr Hall could offer.
64. Mr Hall said he believed the formal warning was warranted as he could not have people swearing and acting aggressively in the workplace. Mr Hall believed that the respondent had acted in accordance with company policies and procedures and acted within reason when dealing with the applicant.

*Donald Anderson*

65. Mr Anderson provided a statement signed on 19 June 2017. Mr Anderson said he had a strictly professional relationship with the applicant. There had been a lot of issues with different people over the years due to the applicant's behaviour. The applicant was not formally performance managed over these issues but they were dealt with by Mr Hall.
66. Mr Anderson said the applicant attended a meeting on 12 May 2017 to discuss an incident from the previous week. Mr Anderson had checked with two or three other staff and Mr Hall as to what had happened. There was a lot of swearing and yelling. Mr Anderson had expected the applicant to come in and offer an apology. Instead, the applicant sat there blank faced and said nothing happened. Mr Anderson was absolutely stunned. The meeting was quick.
67. A further meeting took place with the applicant's wife and Ms Dean in attendance. The applicant raised some issues about matters Mr Anderson had spoken to him about quite sternly. The applicant wanted Mr Anderson to apologise to him but Mr Anderson did not know what he was talking about.
68. A further meeting was going to be arranged with Mr Hall, Ms Dean and two other staff in attendance. They wanted the applicant to come back to work. Before the meeting took place, the applicant told Ms Dean that he was not coming back and he was going to lodge a claim. Mr Anderson said this was very strange.
69. Mr Anderson said the applicant had not advised that he was being bullied in the workplace at any stage during his employment. Mr Anderson denied bullying anyone himself. Mr Anderson said he did not believe that the applicant's doctor was fully aware of his condition. It had been his intent to get some sense into the applicant. Mr Anderson offered the applicant counselling that he would pay for.
70. About three months earlier, Mr Anderson had called the applicant in and asked him what was wrong. The applicant said he was fine. Mr Anderson told the applicant he was not fine. The applicant then revealed his condition. Mr Anderson offered to pay for counselling and later repeated the offer but it was not taken up. The applicant said he was okay and that the pills were working. The applicant never told Mr Anderson that his depression was due to the workplace. The way he was treating everyone was not appropriate and they had to take action.
71. Mr Anderson agreed that the Pronto project had an effect on the applicant. Mr Hall was helping the applicant and they also had people in from Pronto. The applicant did not make any complaints but would have worked a lot during this period.

**Other correspondence**

72. Amongst the materials filed with the ARD are file notes dated 14 September 2016 made by Ms Dean. These record that a staff member reported that he felt intimidated by the applicant. The staff member and another colleague had asked the applicant to show them how he wanted some scanning done. The applicant did not show them and walked away swearing and kicked a door.
73. A file note dated 15 September 2016 records that the applicant was advised of the complaint and was extremely upset by it. Mr Hall had said that the applicant was frustrated and very stressed.

74. A performance review document dated 13 December 2016, rated the applicant's overall performance as "outstanding". The document noted that 2016 had been a big challenge for IT with a number of projects implemented or in the process of implementation. The document said the applicant was extremely important to the respondent and the applicant,

"..needs to be on top of his game and while easier said than done try not to become stressed. Like all of us he can become exasperated with staff and colleagues on occasion. As noted earlier this has been evident with Pronto. Issues that have arisen during the last part of the year would not have normally been an issue for him prior to this."

75. File notes made by Mr Hall and Ms Dean with regard to events on 5 May 2017, consistent with their written statements are also in evidence. Email correspondence between the applicant and Ms Dean referred to above is also in evidence.

76. A document titled, "Disciplinary Procedure/Warning Form", dated 12 May 2017 states that the applicant had been given a level III formal written warning due to an incident on 5 May 2017 between himself and Mr Hall. The document states:

"You have been issued with a Final Warning due to your extremely unsatisfactory performance during the meeting with your manager Geoff on Friday 5/5/17.

I told Nathan, what do you have to say about the event because if I was here on Friday, 5/5/17 you may not have had your job. No comment forthcoming from Nathan.

It was asked to Nathan – "do you want to work here" Response from Nathan – "yes I do"

I extended to my comments by adding to Nathan how disappointed I am regarding:

- Yelling, shouting and swearing at your direct manager, Geoff who also is senior management
- Your performance displayed showed complete disrespect towards Geoff
- Not happy at all with your attitude in recent times towards all staff
- Improvement is required in his position as IT manager and show respect to the IT staff
- I believe would benefit from an Anger Management course, which I have already raised with you and stated I would find it. Offer hasn't been accepted to date
- I now suggested, also People Skill training as you don't have any people skills
- I don't believe your doctor is fully aware of your behaviour in your condition

Should further occurrences of this type of behaviour from you continue it may result in termination of your employment. **THIS IS A FINAL WARNING.**"

77. The document is signed by Mr Anderson but not signed by the applicant. The document notes that the applicant did not request to have a support person present when the warning was issued on 12 May 2017. Space was provided in the document for "employee comments" but these were blank.

## Evidence from the applicant's treating practitioners

78. A report from clinical psychologist Michael Guy, dated 8 May 2019, indicates that he saw the applicant on one occasion on 15 May 2017. The applicant reported a history of difficulties encountered during the implementation of a change of IT software that went live on 1 August 2016. The applicant felt unsupported and spent long hours in order to make sure the change went smoothly. There was an incident where the CEO came into the applicant's office and yelled at him in a rage because there were no labels for the printer. The applicant reported a breakdown in December where he had uncontrollable crying. The applicant took two days off and started taking antidepressant medication. He had been experiencing depressed mood, irritability and disturbed sleep. The applicant took four weeks off at Christmas.

"Two weeks prior to seeing me he had issues with one of his staff members. He sent an email to him on a Thursday night and then went home from work on the Friday after making a complaint to Nathan's manager. His manager then said to him that no one gets on with you. The week before seeing me he had a meeting with the CEO who made comments about him but when challenged to make specific criticisms was unable to do so."

79. The applicant reported anxiety and depressed mood in response to events at work. Mr Guy said,

"In my opinion the psychological symptoms reported to me were associated with stress he experienced at work in relation to implementing a new software system and then being criticised for the way he managed one of the employees that reported to him."

80. Mr Guy expressed the view that the applicant met the diagnostic criteria for an adjustment disorder as the applicant had experienced considerable ongoing stress during the implementation of the change in IT system resulting in anxiety and depression that significantly impacted on the applicant's social and occupational functioning.
81. The applicant's general practitioner, Dr Peter Parkes, prepared a report dated 23 May 2019. Dr Parkes said that the applicant was diagnosed with reactive depression at a consultation on 8 December 2016. The applicant had reported a difficult three years leading up to his presentation and reported depressed mood for two to three months and significant work stress. The applicant felt isolated in his role, had insomnia with early wakening, was feeling exhausted, had reduced motivation and anhedonia. The applicant was commenced on sertraline following the completion of a depression questionnaire. Three weeks later on 29 December 2016, the applicant reported significant improvement.
82. The applicant presented to Dr Parkes' colleague on 5 May 2017 reporting a heated argument with his employer that morning. The applicant was counselled and provided with a medical certificate. Dr Parkes consulted with the applicant on 6 May 2017. The applicant reported alleged harassment and bullying by his employer.
83. On 12 May 2017, the applicant presented to Dr Parkes' colleague reporting that he felt uncared for by his employers:

"He told Dr Gleeson that he had sent an email to a staff member advising them that they were under-performing. That staff member went on to make a complaint about Nathan. Since then, Nathan reported poor sleep and found it difficult to attend work. He did not feel comfortable returning to work given the current circumstances. Dr Gleeson recommended he see a psychologist."

84. On 22 May 2017, the applicant reported being summoned by the CEO on 12 May 2017 and being advised that all staff had a problem with him. The applicant was given a final warning despite having never previously received a warning or any other disciplinary action. The applicant reported feeling down again on some days:
- “Nathan had been exercising and undertaking relaxation tips on the advice of his psychologist. He reported his sleep was not ideal but not as bad as it had been prior to commencing treatment with sertraline in December 2016. He reported his motivation and energy levels remained reasonable with no anhedonia. Nathan informed me he has an IT consulting business which he was focussing more of his attention on as he felt he did not have a long term future at ACE gutters.”
85. The applicant requested a WorkCover claim be submitted on 1 June 2017.
86. On 15 June 2017 the applicant discussed his case with Dr Parkes. Dr Parkes noted,
- “Nathan had been looking into upskilling and undertaking further training courses. He reported ups and downs in mood, typically triggered by contact with work. He remained on sertraline 50mg daily and was continuing regular exercise in the form of a daily walking routine.”
87. On 14 August 2017, Dr Parkes noted that the applicant,
- “...reported that he had paid leave until the end of September 2017 and that his own business was almost ready to be launched. Nathan continued to exercise, walking 50- 60km per week. He remained on sertraline 50mg daily.”
88. A further prescription for sertraline was dispensed on 12 January 2018. On 27 August 2018, the applicant reported “being well more than 12 months after being made redundant.” Dr Parkes discussed weaning the applicant off his antidepressant at some stage but they decided that the time was not yet right.
89. A review was conducted on 14 January 2019 in respect of which Dr Parkes said,
- “Nathan came in on 14 January 2019 to review his mental health issues. He reported increased irritability, anxiety and depressed mood since the birth of his daughter, Holly, 7 weeks earlier. This was further exacerbated following a family altercation on Christmas day. Nathan cited family issues as the predominant cause for this exacerbation in his condition. He undertook appropriate action to deal with his family issues. Nathan reported being self-employed since August 2017.”
90. On 11 February 2019, the applicant reported significant improvement in mood, irritability and anxiety. The applicant’s sleep was much improved as were his motivation and energy levels.
91. Dr Parkes expressed the view that based on a review of his medical records, the applicant’s employment with the respondent was a substantial contributing factor to his condition. With regard to his fitness to perform duties in the role of IT manager, Dr Parkes noted that the applicant reported on 22 May 2017 that he was busy setting up his own IT consulting business. Dr Parkes said his understanding was that the applicant was now functioning in this role. Dr Parkes said that the applicant was unable to perform his duties in his previous role with the respondent but was capable of working in his own private IT consultancy business.
92. Dr Parkes’ full clinical records are in evidence.

## **WorkCover certificates**

93. General medical certificates certifying the applicant as unfit for work were issued by doctors at the Caringbah Family Practice for the periods 5 to 10 May 2017 and 12 May to 4 June 2017.
94. Dr Parkes issued a WorkCover certificate on 1 June 2017 certifying the applicant as having no current work capacity until 14 June 2017 in respect of anxiety due to alleged workplace bullying.
95. The applicant continued to be certified as having no current work capacity in WorkCover certificates until 29 July 2017.

## **Dr Christopher Canaris**

96. The applicant relies on medicolegal reports prepared by consultant psychiatrist, Dr Christopher Canaris, dated 1 January 2018, 18 June 2018 and 8 June 2019.
97. Dr Canaris first saw the applicant on 21 December 2017 and noted that the applicant was supporting himself with a redundancy payment coupled with financial support from his partner. The applicant was also trying to set up his own business at the time.
98. Dr Canaris took a history of the applicant working 10 to 14 hour days including Sundays while continuing in his normal role during the Pronto implementation project. The applicant said that as time went on, he got more and more worn down and was stressed. Although the project had gone live in early August the job was not done yet. The applicant still found himself working long hours and in early December had a breakdown and his wife's urging, he saw his general practitioner who diagnosed reactive depression and prescribed sertraline and lifestyle changes. The applicant took a couple of days off.
99. The antidepressant helped and the applicant returned to work. The applicant confided in his immediate manager and CEO and thought his employer would support him. The applicant managed to cut back on his working hours and bring on board another employee.
100. One of the applicant staff was not performing. The applicant sent an email asking to have a conversation which upset the staff member and he went off work. The applicant was blamed for his staff member's absence and told that he had problems with numerous people. The applicant was shocked by the meeting. As late as December he had been evaluated as "outstanding" in his performance review. The applicant felt the meeting had come entirely "out of left field" and he was very angry with his manager. During the meeting, his manager had alluded to difficulties the applicant had with his neighbour which took him aback.
101. Shortly afterwards, the applicant went off work. The applicant tried going back to work and met with his CEO on 12 May but was issued with a level III third and final warning.
102. Dr Canaris concluded that the applicant's presentation was consistent with an adjustment disorder with depressed mood. The adjustment disorder had been impartial but not complete remission at the time of the applicant's departure from work in May 2017. The adjustment disorder was attributable to his stressful workplace situation including his inordinately long hours implementing a new IT system. Dr Canaris thought there was a modest contribution from the applicant's mother's breast cancer diagnosis. Dr Canaris said,

"I consider that your client's departure from work reflected an exacerbation of a partially remitted work related condition that had been present since the end of 2016. While his anger with his employer may have been inappropriate, I believe on balance that it reflected irritability stemming from his adjustment disorder and his perception that he had not been adequately supported by his employer.

While his illness was exacerbated by his being given a "level three" warning, which the insurer has used to invoke a Section 11A issue, it appears from the history on offer that your client has understandable reasons for perceiving his employer's behaviour as unreasonable at the time in question."

103. Dr Canaris said the applicant had been receiving appropriate treatment from his general practitioner and might benefit from seeing a psychologist the prognosis was for a full recovery. Dr Canaris said the applicant was not well enough to continue employment with the respondent and would have difficulty trusting another employer. Dr Canaris thought the decision to set up his own consultancy was "very appropriate".
104. In a supplementary report on 18 June 2018, Dr Canaris confirmed that the applicant's psychological injury was present from at least 8 December 2016 if not before but was further exacerbated by the events of May 2017. Given the setting in which symptoms emerged, the injury was predominantly work-related.
105. Dr Canaris said that the condition did not appear to be an aggravation, acceleration, exacerbation or deterioration of a disease in that the applicant appeared to have been healthy and well-adjusted before the workplace predicament arose. Dr Canaris said,

"His employer's actions on 5 May 2017 were neither the whole nor the predominant cause of his psychological injury, which I believe was already present in December 2016 or even before. The May 2017 events would not have had as much impact if your client had not already been in a debilitated state feeling as though his efforts had not been valued or appreciated. An exact apportionment of events before and after May 2017 is of necessity artificial. However, a 50% apportionment of events before May 2017 and a 50% apportionment to May 2017 seems reasonable."
106. Dr Canaris expressed the view that the applicant remained totally unfit to perform preinjury duties and would have significant difficulties working in a similar job with another employer because of his mistrust for his previous employer. Dr Canaris said,

"He would be fit to embark on a job with significantly lower workload and responsibilities for another employer, which at this stage would need to be a part time load (say 20 hours per week) though with time he might build up the confidence to undertake a full time load at a higher level. I note in this context his ongoing problems with concentration, motivation, and lack of energy."
107. In his report of 8 June 2019, Dr Canaris noted that the applicant's sertraline prescription had been increased in response to some family difficulties around Christmas time. The applicant was feeling better since increasing the medication but was working no more than 20 or 30 hours per week including admin tasks. The applicant was reluctant to increase his hours as he worried that he could take a step back.
108. Dr Canaris noted that the general practitioner's notes referred to a depressive illness in 2005 coming on and setting of workplace difficulties which was self-limiting. The applicant had not been prescribed antidepressant medication at the time.
109. Dr Canaris summarised his opinion on the applicant's capacity from 5 May 2017 to the present time as follows:

"He was not well enough to work at the time of his departure from ACE Gutters Pty Ltd. Subsequent events led to the irretrievable breakdown of his relationship with his employer. Consequently, he could not have returned to work in that setting because he would have been in what he understandably perceived as a psychologically toxic setting."

He was thus totally unfit for his preinjury employment up until now and he remains totally unfit currently even if the prospect of a return to ACE Gutters Pty Ltd was open to him. He would be very vulnerable to relapse that workplace. He would also find it difficult to work for another similar employer given his lack of trust.

He has however returned to work for himself doing similar work but initially did little work other than the inevitable networking involved and setting up his business. He now works 20 to 30 hours per week but that he tends to refer on more complex or difficult jobs. Consequently, his capacity is somewhat limited though it is difficult to quantify these limitations because of the considerable difference between working for an employer and being self-employed. However, given the history of depression, he would be well advised to steer clear of employment involving very long hours and high volumes of work.”

### **Dr Lee Ingram**

110. The respondent relies on medicolegal reports prepared by consultant psychiatrist, Dr Lee Ingram, dated 22 June 2017 and 15 October 2018.

111. Dr Ingram took a history broadly consistent with that taken by Dr Canaris and the applicant’s evidence, with the exception that the applicant reported that the main cause of him feeling anxious about work was the final warning and the meeting which took place with Mr Anderson on 29 May 2017:

“He reported that he asked the CEO if he would reconsider the status of the final warning, and he said he would not.

Mr Heston reported that this was the main cause of him feeling anxious about work. He reported that he has not had any disciplinary action in 10 years, and now he is on a final warning. He reported that it feels like there’s an executioner’s axe over his head and he did not feel like a return to work was in his best interests.

He reported that the prime comment was having lied to his doctor in the final warning. He reported that who decides if he is not lying to his doctor.”

112. Dr Ingram expressed the opinion the best on the history and his examination, the applicant did not fulfil the criteria for any recognisable psychiatric condition:

“He does report some emotional symptoms with fluctuating anxiety, however there is no consistent change in his mood and the symptoms are relatively mild. He reported that he struggles a little with motivation, however he is able to push through with things. He denied any problems with concentration or changes in his appetite, or any significant problems with his energy.

...

There is also no evidence of any significant impairment in Mr Heston's psychosocial functioning. He reported that he is enjoying things including doing some labouring jobs around the house. He reported that there is enjoyment in his relationships although there is some mild irritability, however this does not significantly impair the relationship.”

113. Dr Ingram said that the symptoms the applicant did report were related to the incident on 5 May 2017 and the subsequent treatment by the workplace including the final warning given to him on 12 May 2017. Dr Ingram reiterated that those emotional symptoms were relatively mild, not significantly impairing the applicant’s functioning and would not fulfil the criteria for any mental health condition.

114. Dr Ingram expressed the view that the applicant had developed depressive symptoms in December 2016 consistent with a diagnosis of major depression. These were subsequently treated with antidepressant medication and the illness was in remission for several months before the incident on 5 May 2017.
115. Dr Ingram considered that the applicant was fit to return to his pre-injury duties from an emotional perspective although the unresolved issues with the employer required resolution.
116. Dr Ingram considered that the treatment the applicant was undertaking was appropriate maintenance's treatment for the depressive disorder to reduce the risk of relapse.
117. Dr Ingram saw the applicant again on 27 September 2018. Dr Ingram found that the applicant continued to present with some emotional symptoms but they were relatively mild. These continued relatively unabated including some difficulties with concentration and motivation but they were not significantly impairing the applicant's functioning. Dr Ingram remained of the view that the applicant's symptoms did not currently fulfil the criteria for any psychiatric disorder.
118. With regard to the applicant's capacity for work, Dr Ingram said,

"In my opinion, Mr Heston is fit for full time work. He is currently building his business and the business only started in January. Although he notes that he is concerned about increased stress levels he also told me that he is optimistic to progress the business and increase his client load. In my opinion he is fit for continuing this work on building his business."

### **Applicant's submissions**

119. Mr Perry noted that the applicant had been diagnosed with a psychological or psychiatric disorder by three practitioners. Clinical psychologist, Dr Guy, on 8 May 2017 diagnosed an adjustment disorder. Dr Canaris had also diagnosed an adjustment disorder with depressed mood. The applicant's general practitioner, Dr Parkes, had diagnosed a reactive depression on 8 December 2016. Dr Canaris took the view that the condition diagnosed by Dr Parkes in December 2016 was in partial remission by the time of the events in May 2017, but not in complete remission. That condition was caused by the stressful nature of the applicant's work and the long hours he was working
120. In contrast, Dr Ingram accepted that the applicant had emotional symptoms but did not find a diagnosable disorder. Mr Perry noted, however, that Dr Ingram did not challenge the diagnosis made by Dr Parkes in December 2016. Mr Perry submitted that the weight of evidence favoured a determination that the applicant had sustained a diagnosable psychological or psychiatric disorder. Mr Perry noted Dr Canaris had expressed a persuasive view about the nature of the applicant's condition and the events in May 2017.
121. Mr Perry submitted that the applicant had provided an account as to the events leading up to his significant decompensation in December 2016. The applicant was placed under enormous stress and serious overwork. Mr Perry submitted that Mr Hall's statement and the clinical notes of Dr Parkes were consistent with the applicant's evidence.
122. From December 2016 the applicant was prescribed medication and remained on that medication with an increase in dosage after some time. The drug had a beneficial effect and the applicant's ability to work was restored but the applicant's condition remained.

123. Mr Perry submitted that the events on 4 and 5 May 2017 could not be described as action with respect to “discipline”. If a different view were taken, the action was clearly unreasonable. In any event, the aetiology of the applicant’s condition was multifactorial and no events with respect to discipline were the whole or predominant cause of the applicant’s condition.
124. The applicant was taken by surprise when told on 5 May 2017 that his attitude was the problem. The applicant felt shocked and betrayed, particularly in the context of his previous disclosure of his condition to Mr Hall. A heated discussion ensued. The applicant went off work and did not return. Throughout the month of May there continued to be stressful work events. These events effectively undid the work done by the sertraline in managing the applicant’s condition, leading to him being totally incapacitated for work.
125. Mr Perry noted that the certificates in evidence showed no current capacity for work until 29 July 2017. The termination of the applicant’s employment shortly after the last certificate in August 2017 was done in a belittling manner causing a further exacerbation of the applicant’s condition. Mr Perry submitted that the medical evidence showed setbacks in the applicant’s condition whenever he had contact with work.
126. Mr Perry reiterated that the applicant’s condition was caused by a number of factors. The respondent bore the onus of establishing the whole or predominant cause for the purposes of s 11A(1) having regard to *Hamad v Q Catering Ltd*<sup>1</sup>. Mr Perry noted that Dr Ingram had given an opinion that the predominant cause of the applicant’s condition was not the final warning but the altercation on 5 May 2017. Mr Perry submitted that Dr Ingram had not taken into account the effect of the overwork in 2016.
127. At the time of the applicant’s statement of 9 November 2017, the applicant had no capacity for work. Although the applicant had seen his tax accountant and set up a company with the intention of obtaining an income, he was not there yet. Mr Perry submitted that there were no credibility concerns with regard to the applicant’s evidence. The applicant’s evidence was not indicative of capacity for any work.
128. Mr Perry submitted that the applicant first commenced to have a capacity for work on 1 December 2017. The applicant’s evidence was that it was in that month that he commenced attending networking events. Mr Perry submitted that the applicant initially had capacity to work no more than eight hours per week. The evidence showed that the applicant was doing his level best to maximise his ability to work. The applicant’s capacity remained largely at the same level until 30 November 2018. Mr Perry suggested that a finding that the applicant had a capacity to earn around \$500 per week in this period might be appropriate.
129. Mr Perry suggested that the applicant had capacity to earn approximately \$1000 per week after 1 December 2018 for the balance of the period. However, the applicant’s condition left him uncompetitive in an open labour market. Having regard to Dr Canaris’ comments, it was difficult to see what would constitute “suitable employment” pursuant to s 32A of the 1987 Act.

### **Respondent’s submissions**

130. Mr Flett said it was important to look at the antecedent history of the applicant and the way in which he interacted with those with whom he worked.

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<sup>1</sup> [2017] NSWCCPD 6; BC201701872.

131. Mr Flett took me to the clinical notes and noted that on 23 December 2005 the applicant sought the advice of Dr Parkes with regard to psychological symptoms and was prescribed medication. The applicant later gave a history of no previous psychological problems. Mr Flett said this raised a credibility issue when considering the applicant's evidence.
132. Mr Flett submitted that the suggestion from the applicant's evidence that the interaction with Mr Hall on 5 May 2017 involved a superior in a position of authority speaking inappropriately to the applicant was not authentic. Mr Hall's evidence was that he and the applicant had a social relationship. The evidence also showed previous incidents of staff complaining of the applicant's behaviour and interactions with staff. Mr Hall had discussed these issues with the applicant on a number of occasions. The conversation on 5 May 2017 was not an isolated conversation with a superior. To suggest that Mr Hall was dealing with the applicant in anything other than a respectful way until the applicant changed the dynamics of the conversation was inaccurate. Mr Flett noted that at one point the applicant had denied swearing or raising his voice, which was contradicted by the other evidence. Mr Flett submitted that Mr Hall was a social acquaintance of the applicant as well as his supervisor and was trying to diffuse the situation. Mr Hall had knowledge of the applicant's issues with his neighbours through their social relationship.
133. Mr Flett submitted that the disciplinary action taken by the respondent commenced with the event of the applicant yelling and swearing at Mr Hall on 5 May 2017. The issuing of the final warning was the end of the disciplinary process. Mr Flett submitted that I must look at the whole of the disciplinary process, including the meetings in the intervening period in May 2017. The applicant's account of that process did not mesh with the other witness evidence. If the respondent's action with respect to discipline was the whole or predominant cause of the applicant's condition and was reasonable, the applicant's claim would be defeated in its entirety.
134. Mr Flett noted that the clinical notes of Dr Parkes did not reveal complaints of symptoms related to work in the three years prior to the applicant going off work in December 2016. The immediate effect of the medication prescribed at that time was a significant improvement in the applicant's mood and other symptoms. If there was a reaction to work in December 2016, it resulted in only a short absence from work.
135. Mr Flett said the events in May 2017 were completely separate. What took the applicant to the doctor on 5 May 2017 were the events on that day, which the applicant described as bullying and harassment.
136. Mr Flett said the applicant's evidence with regard to his capacity for work were affected by credibility concerns. A publication on the Internet with regard to the applicant's business advertised that the applicant's hours for work were 8am to 6pm, 7 days per week. The applicant held himself out as available to provide IT support 24/7. This was contradictory to the applicant's written evidence.
137. Mr Flett said Dr Canaris' evidence suggested the applicant had a capacity for work. Mr Guy had recommended that the applicant return to work. Dr Ingram also said the applicant had no functional impairment and was fit for his pre-injury duties. The medical evidence was consistent in indicating the applicant had capacity for work. The applicant's actual earnings were irrelevant. The applicant's statement was prepared for the purposes of the proceedings and unsupported by the medical evidence. Mr Flett submitted that there should be an award for the respondent on the claim for weekly benefits based on the medical evidence as to the applicant's capacity.
138. To the extent there was any incapacity, Mr Flett said it would not extend beyond June 2017.

## FINDINGS AND REASONS

### Injury and causation

139. Section 9 of the 1987 Act provides that a worker who has received an ‘injury’ shall receive compensation from the worker’s employer in accordance with the Act. The term ‘injury’ is relevantly defined in s 4 as:

“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”

140. “Psychological injury” is further defined in s 11A(3) of the 1987 Act:

“(3) A psychological injury is an injury (as defined in s 4) that is a psychological or psychiatric disorder. The term extends to include the physiological effect of such a disorder on the nervous system.”

141. A worker who receives a psychological injury which meets the statutory definitions will not, however, be entitled to compensation if the defence in s 11(A)(1) of the 1987 Act is made out:

“(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.”

142. Subsection 11(A)(1) is a disentitling provision and an employer who wishes to rely upon it carries the onus of establishing that defence<sup>2</sup>.

143. The requirements of s 11A(1) were considered in *Manly Pacific International Hotel v Doyle*<sup>3</sup> where Fitzgerald JA (Mason P agreeing) at [4] said:

“...the Compensation Court was required to decide whether (i) the whole or predominant cause of Mr Doyle’s psychological injury was the appellant’s action with respect to Mr Doyle’s transfer from one position to another, and, (ii) if so, whether the appellant’s action with respect to Mr Doyle’s transfer was reasonable.”

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<sup>2</sup> *Pirie v Franklins Ltd* [2001] NSWCC 167; *Department of Education and Training v Sinclair* [2005] NSWCA 465.

<sup>3</sup> [1999] NSWCA 465; 19 NSWCCR 181.

144. In considering the question of causation, Snell DP in *Hamad v Q Catering Ltd*<sup>4</sup> found that in many cases there will need to be medical evidence to establish that the employer's action was the "whole or predominant cause" of the injury:

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

145. There is in this case a medical dispute as to whether the applicant had a diagnosable psychological condition. Dr Ingram, who examined the applicant for the respondent in June 2017 expressed an opinion, which he maintained in October 2018, that although the applicant was experiencing psychological symptoms, they were not at a level or frequency which would meet the criteria for a diagnosable condition.
146. Importantly, however, Dr Ingram accepted that the applicant had developed symptoms consistent with a diagnosis of major depression in December 2016. Dr Ingram expressed the view that that condition had been in remission for several months by the time of the events of 5 May 2017. Consistently with Dr Ingram's opinion, the respondent argues that the symptoms which came on in May 2017 were completely separate.
147. The applicant's treating practitioners and Dr Canaris took a different view of the applicant's condition from December 2016. Dr Canaris clearly expressed the view that the condition in December 2016, which he diagnosed as an adjustment disorder with depressed mood, was only in partial remission by 5 May 2017. That condition remained present and was exacerbated by the events on that date. The applicant's reaction to the discussion with Mr Hall reflected irritability stemming from his adjustment disorder and his perception that he had not been adequately supported by his employer.
148. The clinical psychologist consulted by the applicant on 15 May 2017, Mr Guy, also attributed the applicant's presentation on that date to stress the applicant experienced at work in relation to the implementation of a new software system and then being criticised for the way he had managed his employees. In a view which was consistent with Dr Canaris' later opinion, Mr Guy said the considerable, ongoing stress the applicant had experienced during the change in IT system had resulted in anxiety and depression that significantly impacted on the applicant's social and occupational functioning.
149. Dr Parkes' evidence does indicate that treatment of the condition diagnosed by him on 8 December 2016 with antidepressant medication and lifestyle changes had resulted in a significant improvement in the applicant's symptoms by 29 December 2016. Dr Parkes' clinical notes do not, however, indicate there was complete resolution of those symptoms. Dr Parkes recorded on that date that the applicant's mood had "improved" and he felt "more relaxed, less weighed down, not as worked up". The applicant was sleeping better but "not perfect". His motivation and energy levels were "improving". The applicant was continued on 50 mg sertraline daily.

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<sup>4</sup> [2017] NSWCCPD 6; BC201701872.

150. There is no contemporaneous medical evidence as to the applicant's condition from that date until May 2017. The applicant's own evidence confirms that he returned to work, although he did take four weeks of leave over the Christmas period. A performance review document dated 13 December 2016 noted issues around the applicant being stressed and exasperated with staff. Matters which had not been a problem previously were now becoming issues. The applicant's evidence suggested he experienced some particular anxiety around the handling of an allegation that a member of staff was misusing surveillance cameras in April 2017. The lay evidence with regard to the applicant's handling of his staff's performance issues and his manner of communicating with his colleagues, together with his response to comments made by Mr Hall on 5 May 2017, all suggest that the condition diagnosed in December 2016 did indeed continue to impact on the applicant's social and occupational functioning. Mr Hall's evidence, for example, indicates that he perceived the applicant had "an attitude problem". The written warning signed by Mr Anderson notes that he was not happy with the applicant's attitude "in recent times" towards all staff.
151. At consultations with Dr Parkes' colleague, Dr White, on 5 May 2017 and with Dr Parkes on 6 May 2017, the applicant is recorded to have indicated that general work issues continued to affect him. On 5 May 2017 the applicant described having an argument with Mr Hall over the performance of one of his employees. The applicant reported "feeling stressed with work situation, feels like he can't get his job done properly". On 6 May 2017, Dr Parkes made reference to the "big stressful project at work last year" and recorded that the applicant felt bullied and harassed by his employer.
152. Having regard to the totality of the evidence, I find the views expressed by Dr Canaris and Mr Guy are more persuasive and more closely in alignment with the lay evidence than Dr Ingram's view that the condition diagnosed in December 2016 had resolved or was in remission.
153. Accordingly, I find that the psychological condition which was diagnosed in December 2016 remained present as at 5 May 2017. The evidence does not suggest that factors outside work were the main contributing factor to that condition. Although, as Mr Flett points out, Dr Parkes' clinical notes are silent as to psychological symptoms in the period leading up to 8 December 2016, and there is evidence of non-work stressors including the applicant's mother's cancer diagnosis around this time, the medical opinions are consistent in indicating that it was stress and long working hours associated with the implementation of the Pronto system, on top of an already demanding workload, which were the main factors leading to the diagnosed condition. I am satisfied, therefore, that employment was the main contributing factor to that psychological condition. I although accept that the applicant sought assistance for psychological symptoms in 2005, there is no evidence of a diagnosed condition or treatment during the nearly 11 years that followed. I am satisfied, therefore, that the applicant sustained a psychological injury in the course of employment which meets the criteria in ss 4(b)(i) and 11A(3) of the 1987 Act.
154. For the applicant's injury to be compensable in the present proceedings, the injury must have resulted in incapacity for work and a need for medical treatment. The applicant's injury will not, however, be compensable if the respondent is successful in establishing on the balance of probabilities that 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 performance appraisal and / or discipline.
155. The respondent argues that the applicant's psychological symptoms were wholly or predominantly caused by the disciplinary process which commenced on 5 May 2017 and ceased with the issuing of a final written warning.

156. Whilst Dr Canaris and Dr Guy both indicate that the events on 5 May 2017 had an exacerbating impact on the psychological condition which was already present, they do not suggest that Mr Hall's comments to the applicant that day or the action that followed were the whole or predominant cause of the applicant's psychological condition or any incapacity or need for medical treatment that resulted from it. Dr Canaris explicitly gave the opinion that the events on 5 May 2017 "were neither the whole nor the predominant cause" of the applicant's psychological injury. Dr Canaris explained:

"The May 2017 events would not have had as much impact if your client had not already been in a debilitated state feeling as though his efforts had not been valued or appreciated."

157. Dr Canaris' opinion is clearly at odds with that expressed by Dr Ingram. Dr Ingram's opinion is, however, heavily coloured by his view that the condition diagnosed in December 2016 had been in remission for several months and that the psychological symptoms being experienced by the applicant on and from 5 May 2017 were new. It is also notable that the history recorded by Dr Ingram placed greater emphasis on the final warning and meeting on 29 May 2017. Perhaps that is a reflection of the timing of his first examination of the applicant in June 2017.

158. I am, however, satisfied on the applicant's evidence, including the clinical notes and medical certificates certifying the applicant as unfit for work from 5 May 2017 onwards that the applicant was already incapacitated and in need of treatment as a result of his psychological condition from 5 May 2017. That is, before the meetings on 12 and 29 May 2017 and the issuing of the final written warning. I note that this view is consistent with the lay evidence of Mr Anderson that the applicant's conduct during his meetings with the applicant appeared "strange".

159. Even if I were to accept that the conversation between the applicant and Mr Hall on 5 May 2017 constituted action with respect to discipline or performance appraisal, for the reasons suggested above, I accept Dr Canaris' opinion that the aetiology of the applicant's condition was multifactorial and the events on 5 May 2017 were not "the whole or predominant cause" of the applicant's condition. It is unnecessary, therefore, for me to determine whether any action taken by or on behalf of the respondent on and after 5 May 2017 was reasonable.

160. The respondent has not discharged the onus of demonstrating that the applicant's psychological 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 performance appraisal or discipline for the purposes of s 11A(1) of the 1987 Act.

## **Incapacity**

161. The applicant seeks weekly compensation from 5 May 2017 to 31 October 2019.

162. In order to determine the applicant's entitlement to weekly payments it is necessary to determine whether he had "no current work capacity" or "current work capacity" as defined in s 32A of the 1987 Act during the period of weekly benefits being claimed.

163. 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."

164. The respondent argues that the applicant had no incapacity for work as a result of a psychological injury during the period of weekly benefits claimed, relying on the reports of Dr Ingram, evidence that the applicant started up and continued to operate a business during this time, and credibility concerns regarding the applicant's evidence.
165. Whilst I have not accepted Dr Ingram's opinion regarding injury and causation above, I have still given careful consideration to his reports as contemporaneous evidence of the applicant's functioning during the period of weekly benefits claimed.
166. Whilst I would not be prepared to find that the applicant's evidence regarding his capacity for work lacked credibility entirely, I do accept that the applicant's evidence appears at times to be at odds with what he reported contemporaneously to the practitioners involved in his case. The applicant's evidence generally suggests a lower capacity for work during most of the period of weekly benefits than the medical evidence.
167. Having regard to the evidence as a whole, I do accept that throughout the period in question the applicant had an inability to return to his pre-injury employment with the respondent. The relevant question is therefore whether the applicant had any ability to work in "suitable employment".
168. The applicant has provided non-WorkCover certificates and WorkCover certificates indicating that he was unfit for any employment from 5 May 2017 until 29 June 2017. Dr Ingram did not see the applicant until 22 June 2017. I am comfortably satisfied on the evidence that the applicant had no current work capacity in this period.
169. On and from 22 June 2017, the evidence is inconsistent. Dr Ingram at that date reported that the applicant wanted to return to work and felt he could do this. The applicant denied problems with concentration, pace and persistence. Although motivation was fluctuating, he was able to push himself. Although the applicant reported some irritability in his social relationships, Dr Ingram felt the applicant was fit for full-time hours.

170. After 29 June 2017 there are no medical certificates in evidence. It appears that WorkCover certificates were not obtained as the claim had been declined. The applicant consulted Dr Parkes on 24 July 2017 and he reported that he was “managing well given the circumstances” and “setting up his own business in IT services, has registered a company”. The applicant was advised to continue on sertraline and review as needed. On 31 July 2017, it appears a further certificate up until 14 August 2017 was issued by Dr Parkes, although that is not in evidence.
171. On 14 August 2017, the applicant told Dr Parkes he had received an email from his employer and was disappointed at the lack of support he received. No other psychological symptoms were described and the applicant’s business was reported to be “almost all set up and running”. No further certificates appear to have been issued.
172. From 14 August 2017 onwards, there is no evidence of treatment for psychological symptoms other than the applicant continuing on sertraline. The applicant consulted Dr Parkes in relation to other health issues on 12 October 2017 with no record of psychological complaints. Thereafter, the applicant reported being “well” on his medication.
173. In his statement dated 9 November 2017, the applicant talked mostly about his symptoms shortly after going off work. With respect to his current condition, the applicant confirmed that he continued to take antidepressant medication. The applicant described feeling frustrated at having to do so. The applicant said he was experiencing dry mouth, dizziness, tiredness, impotence, teeth grinding and impaired concentration.
174. The next medical opinion was that given by Dr Canaris on 1 January 2018, following his examination of the applicant on 27 December 2017. On that occasion, Dr Canaris said it was reasonable and necessary for the applicant to go off work when he did. With regard to his present condition, Dr Canaris said “the applicant would have difficulty trusting another employer and in this regard his decision to try to set up his own consultancy is very appropriate.”
175. The applicant described the work he had done on his business in this period in his statement of 24 May 2018. The applicant said he did little work other than setting up a LinkedIn page in around August and learning how to build a website. The applicant worked a total of four hours in September and two hours in November 2017. In December 2017, the applicant attended two networking events and received his first business enquiry, performing a total of 10 hours of work for the month. During his most productive month to date, the applicant had only worked an average of eight hours. The applicant said,
- “I do not have the mental strength and concentration that I did previously and despite only working a few hours at a time I find it extremely difficult to maintain the same standard of work that I used to and easily become side-tracked from the task at hand.”
176. While evidence has been produced by the respondent to indicate that the applicant advertised that his business was open from 8am to 6pm 7 days per week, I am prepared to accept that this reflected the hours during which the applicant was willing to take on work rather than his actual ability to work those hours.
177. A clearer opinion on the level of the applicant’s incapacity was given by Dr Canaris on 18 June 2018, when he said,
- “He would be fit to embark on a job with significantly lower workload and responsibilities for another employer, which at this stage would need to be a part time load (say 20 hours per week) though with time he might build up the confidence to undertake a full time load at a higher level. I note in this context his ongoing problems with concentration, motivation, and lack of energy.”

178. On 27 September 2018, Dr Ingram expressed the view that the applicant was continuing to experience some psychological symptoms but they were not significantly impairing his functioning. Dr Ingram considered the applicant was fit for full-time work.
179. There is evidence of a decline in functioning and an increase in the applicant's sertraline prescription around Christmas 2018, although this appears to have been related to family difficulties. The applicant's sertraline dosage was increased by Dr Parkes on 14 January 2019. By the time the applicant saw Dr Canaris in June 2019, the applicant was working up to 30 hours per week.
180. Considering the evidence as a whole, I am prepared to accept Dr Parkes' evidence and find that the applicant had no current work capacity until 14 August 2017. I make that finding notwithstanding some misgivings having regard to what was reported to Dr Ingram in June 2017. Although the applicant's employment was terminated around this time, there is no medical evidence to indicate this caused a further period of total incapacity.
181. After this date, having regard to the absence of certificates from or reported symptoms to Dr Parkes, the first report of Dr Ingram and the evidence that the applicant's business was "almost set up and running", I find that the applicant did have capacity to work in suitable employment. Although I accept that the applicant did not appear to have any paying clients until December 2017 and was not working extensively in the business until that time, the relevant question is whether he had "capacity" to do work in suitable employment. The actual hours worked are not determinative.
182. Dr Ingram thought that by this stage the applicant had capacity to work full hours. Dr Canaris quantified the applicant's capacity at 20 hours per week in June 2018 in employment with less responsibility. Whilst the applicant's actual capacity may have fluctuated from time to time, I am satisfied that the applicant was capable of working 20 hours per week in suitable employment from 15 August 2017.
183. By June 2019, the evidence indicates that the applicant was in fact working 20-30 hours per week. Dr Canaris reported on 8 June 2019 that the applicant had been enjoying his work since increasing his sertraline dosage at the beginning of the year. It is unclear when the applicant's actual workload increased to 20-30 hours per week. On 27 September 2018, the applicant told Dr Ingram that he was still working less than 10 hours per week although in part that was because his business was not yet widely known. Dr Ingram expressed the view once more that the applicant had capacity to work full-time hours.
184. With regard to the applicant's capacity at that time, Dr Canaris said
- "... he tends to refer on more complex or difficult jobs. Consequently, his capacity is somewhat limited though it is difficult to quantify these limitations because of the considerable difference between working for an employer and being self-employed. However, given the history of depression, he would be well advised to steer clear of employment involving very long hours and high volumes of work."
185. Whilst this opinion satisfied me that the applicant could not return to his pre-injury employment or employment involving long hours or a high workload, it does not satisfy me that the applicant could not engage in full-time employment. I find, therefore, that there was an increase in capacity to at least 30 hours per week after 14 January 2019 when the sertraline dosage was increased by Dr Parkes and then 40 hours per week from 8 June 2019.

186. To summarise, doing the best I can on the evidence before me, I find that the applicant had no current work capacity as a result of his psychological injury from 5 May 2017 to 14 August 2017. From 15 August 2017 to 14 January 2019, I find the applicant had capacity to work 20 hours per week in suitable employment. From 15 January 2019 to 7 June 2019, I find the applicant had capacity to work 30 hours per week in suitable employment. From 8 June 2019 to the end of the period on 31 October 2019, I find the applicant had the capacity to engage in full-time suitable employment at 40 hours per week.
187. The parties agreed at conciliation that the the maximum weekly compensation amount applied in the event the applicant was found to have sustained a compensable injury.
188. In the first entitlement period from 5 May 2017 to 3 August 2017 and on the basis that the applicant had no work current work capacity, the rate of weekly payments is determined by the calculation set out in s 36(1)(b) of the 1987 Act:
- “(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.”
189. In the second entitlement period from 4 August 2017 to 14 August 2017, on the basis that the applicant had no current work capacity, the rate of weekly payments is determined by the calculation set out in s 37(1)(b) of the 1987 Act:
- “(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.”
190. In the second entitlement period from 15 August 2017 to 14 January 2019, on the basis that the applicant had current work capacity but was working less than 15 hours per week, the rate of weekly payments is determined by the calculation set out in s 37(3)(b) of the 1987 Act:
- “(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.”
191. In the second entitlement period from 15 January 2019, on the basis that the applicant had current work capacity and was working greater than 15 hours per week, the rate of weekly payments is determined by the calculation set out in s 37(2)(b) of the 1987 Act:
- “(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.”

192. The term 'MAX' means "the maximum weekly compensation amount". The maximum weekly compensation amount as adjusted during the relevant periods pursuant to s 34 of the 1987 Act was as follows:

1 April 2017	to	30 September 2017	\$2,084.90
1 October 2017	to	31 March 2018	\$2,101.70
1 April 2018	to	30 September 2018	\$2,128.50
1 October 2018	to	31 March 2019	\$2,145.30
1 April 2019	to	30 September 2019	\$2,177.40
1 October 2019	to	31 March 2020	\$2,195.70

193. The term 'D' 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". There is no evidence before me of any non-pecuniary benefits provided to the applicant by the respondent.

194. The term 'E' means the amount taken into account as the worker's earnings after the injury, calculated as the greater of the amount the worker is able to earn in suitable employment or the worker's current weekly earnings.

195. With respect to the term 'E', the applicant has provided income statements indicating a total income for the financial year ended 30 June 2018 of \$3,554. For the year ending 30 June 2019 there was a total income of \$25,764.

196. I am satisfied that the applicant was able to work in his own IT consultancy business or similar employment utilising his IT skills. I accept that the applicant was not capable of managing an IT department or taking on employment at a senior level with the attendant responsibilities. Accordingly, I accept that the applicant's ability to earn was significantly reduced. Having regard to the applicant's extensive IT skills and experience, however, I am satisfied that the applicant would have been able to earn at least \$45 per hour or equivalent to a full-time salary of approximately \$90,000 per annum. I note that the applicant's pre-injury salary was \$160,000 per annum plus bonuses. Accordingly, the amount the applicant was able to earn was greater than current weekly earnings.

197. It follows from the findings above that the applicant is entitled to receive weekly benefits as follows:

- (a) from 5 May 2017 to 14 August 2017 at the rate of \$2,084.90;
- (b) from 15 August 2017 to 30 September 2017 at the rate of \$1,184.90 per week (\$2,084.90 - \$900);
- (c) from 1 October 2017 to 31 March 2018 at the rate of \$1,201.70 per week (\$2,101.70 - \$900);
- (d) from 1 April 2018 to 30 September 2018 at the rate of \$1,228.50 per week (\$2,128.50 - \$900);
- (e) from 1 October 2018 to 14 January 2019 at the rate of \$1,245.30 per week (\$2,145.30 - \$900);
- (f) from 15 January 2019 to 31 March 2019 at the rate of \$795.30 per week (\$2,145.30 - \$1,350);
- (g) from 1 April 2019 to 7 June 2019 at the rate of \$827.40 per week (\$2,177.40 - \$1,350);
- (h) from 8 June 2019 to 30 September 2019 at the rate of \$377.40 per week (\$2,177.40 - \$1,800); and
- (i) from 1 October 2019 to 31 October 2019 at the rate of \$395.70 per week (\$2,195.70 - \$1,800).

198. There is indication in the evidence that a small sum of weekly benefits may have been paid. It is also apparent that leave may have been paid to the applicant during part of the period above. The respondent will have credit for any payments of weekly benefits already made. Sections 49 and 50 of the 1987 Act will apply in respect of any leave payments.
199. There will be an award to the applicant of weekly benefits in accordance with the findings above.

### **Medical expenses**

200. The applicant has sought compensation for incurred medical expenses pursuant to s 60 of the 1987 Act. In view of my findings above and the parties' agreement at conciliation, it is appropriate to make an award of a general nature that the respondent is to pay the applicant's medical expenses pursuant to s 60 of the 1987 Act upon production of accounts, receipts and/or valid Medicare Notice of Charge.

### **SUMMARY**

201. The applicant sustained a psychological injury pursuant to ss 4(b)(i) and 11A(3) of the 1987 Act.
202. The psychological injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to performance appraisal or discipline pursuant to s 11A(1) of the 1987 Act.
203. The applicant was incapacitated for work and had a need for medical treatment as a result of the psychological injury.

