

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 1597/19  
**Applicant:** Emily Stevens  
**Respondent:** Secretary, Department of Education  
**Date of Determination:** 22 January 2020  
**Citation:** [2020] NSWCC 24

The Commission determines:

1. The applicant sustained injury in the form of aggravation, acceleration, exacerbation or deterioration of her psychological condition arising out of or in the course of her employment with the respondent over the period from 2008 to 17 December 2011.
2. The applicant's employment with the respondent was a substantial contributing factor to injury.
3. The applicant is not barred by the provisions of sections 254 or 261 of the *Workplace Injury Management and Workers Compensation Act 1998* from recovering compensation.
4. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for assessment of whole person impairment as a result of injury deemed to have occurred on 17 December 2011.
5. The documents to be referred to the Approved Medical Specialist are:
  - (a) Application to Resolve a Dispute and attached documents;
  - (b) Reply and attached documents;
  - (c) Application to Admit Late Documents dated 17 May 2019 lodged by the applicant with reports dated 20 August 2013 and 7 July 2015 of Tony Merritt, clinical psychologist, attached;
  - (d) Application to Admit Late Documents dated 4 June 2019 lodged by the respondent with report of Professor Gordon Parker dated 12 July 2018 attached;
  - (e) Application to Admit Late Documents dated 11 June 2019 with clinical notes from the following attached:
    - (i) Tony Merritt;
    - (ii) Dr Bruce Stewart;
    - (iii) Dr Mehrabad (Glebe Medical Centre);
    - (iv) Dr Nilusha Arachchige;
    - (v) Dr Emma Wakeling;
    - (vi) Dr Adam Bayes.
  - (f) Clinical notes of Dr S V Prabhala (Ex A in the applicant's case);

- (g) Medical Assessment Certificate of Dr Wayne Mason, Approved Medical Specialist dated 28 August 2019, and
- (h) This Certificate of Determination and Statement of Reasons.

6. The respondent is to pay the applicant's costs and expenses pursuant to s 60 of the *Workers Compensation Act 1987*.

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

Brett Batchelor  
**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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A Sufian*

Abu Sufian  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. Emily Stevens (the applicant/Ms Stevens) claims compensation for permanent impairment pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) as a result of psychological injury arising out of or in the course of her employment as a school teacher with the NSW Department of Education (the respondent) at Castle Hill High School over the period 2008 to 2010.
2. The applicant last worked for the respondent on 17 December 2010 and resigned her employment on 15 April 2011.
3. The applicant did not give the respondent notice of injury or make a claim for compensation until a claim form was submitted on or about 6 June 2017<sup>1</sup>.
4. The respondent denies liability for the applicant's claim, putting the following matters in issue:
  - (a) injury (s 4 of the 1987 Act);
  - (b) whether the applicant's employment with the respondent was a substantial contributing factor to the injury (s 9A of the 1987 Act);
  - (c) notice of injury to employer (s 254 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act)), and
  - (d) time within which claim for compensation must be made (s 261 of the 1998 Act).
5. The applicant originally claimed weekly benefits from 17 December 2010 and expenses pursuant to s 60 of the 1987 Act. The claim for weekly benefits was discontinued during proceedings before the Commission on 12 June 2019, the day on which the matter was first listed for conciliation/arbitration. With the consent of the parties the claim for lump sum compensation was remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for an opinion as to whether the applicant's employment with the respondent between 2008 and 17 December 2010 substantially contributed to the aggravation, acceleration, exacerbation or deterioration of the applicant's psychological condition.
6. Dr Wayne Mason, AMS, examined Ms Stevens on 16 August 2019 and prepared a Medical Assessment Certificate (MAC) dated 28 August 2019. At [10] thereof he found:

"In my opinion the applicant's employment with the respondent did substantially contribute to the aggravation, acceleration, exacerbation and deterioration of the psychological condition. I reached this conclusion because the applicant coped reasonably well with study prior to her work with the Department of Education."

### ISSUES FOR DETERMINATION

7. The parties agree that the following issues remain in dispute:
  - (a) Did the applicant suffer injury arising out of or in the course of her employment with the respondent (s 4 of the 1987 Act)?
  - (b) Was the applicant's employment with the respondent a substantial contributing factor to the injury (s 9A of the 1987 Act)?

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<sup>1</sup> ARD p 17.

- (c) Was the respondent prejudiced in respect of the proceedings by the failure of the applicant to give notice of injury in accordance with s 254(1) of the 1998 Act, that is, as soon as possible after the injury happened and before she voluntarily left her employment with the respondent (s 254(2)(a) of the 1998 Act)?
- (d) Was the applicant's failure to give notice of injury in accordance with s 254(1) of the 1998 Act, occasioned by ignorance, mistake, absence from the State or other reasonable cause (s 254(2)(b) of the 1998 Act)?
- (e) Was the applicant's failure to make a claim for compensation in accordance with s 261(1) of the 1998 Act, that is within six months after the injury happened, occasioned by ignorance, mistake, absence from the State or other reasonable cause and (if so) has the injury sustained by the applicant resulted in serious and permanent disablement (s 264(4)(b) of the 1998 Act)?

## **PROCEDURE BEFORE THE COMMISSION**

- 8. 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.
- 9. The parties attended a conciliation conference/arbitration hearing on 2 December 2019. Mr G Young of counsel appeared for the applicant briefed by Mr J Dufour. The applicant was present at the Commission but, at her request, did not attend the hearing. Ms L Goodman of counsel appeared for the respondent briefed by Mr B McLean.

## **EVIDENCE**

### **Documentary evidence**

- 10. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) Application to Resolve a Dispute (ARD) and attached documents;
  - (b) Reply and attached documents;
  - (c) Application to Admit Late Documents (AALD) dated 17 May 2019 lodged by the applicant with reports dated 20 August 2013 and 7 July 2015 of Tony Merritt, clinical psychologist, attached;
  - (d) AALD dated 4 June 2019 lodged by the respondent with report of Prof Gordon Parker dated 12 July 2018 attached;
  - (e) AALD dated 11 June 2019 with clinical notes from the following attached:
    - (i) Tony Merritt;
    - (ii) Dr Bruce Stewart;
    - (iii) Dr Mehrabad (Glebe Medical Centre);
    - (iv) Dr Nilusha M Arachchige;
    - (v) Dr Emma Wakeling;
    - (vi) Dr Adam Bayes;
  - (f) clinical notes of Dr S V Prabhala (Ex A in the applicant's case);

- (g) MAC of Dr Wayne Mason dated 28 August 2019, and
- (h) the respondent's written submissions dated 23 December 2019.

### **Oral evidence**

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

### **SUBMISSIONS**

- 12. The submissions of counsel for the applicant are recorded in the transcript of the arbitration hearing on 2 December 2019 (T). At the conclusion of that hearing the respondent was directed to lodge and serve by 16 December 2019 written submissions (this date extended by consent to 23 December 2019). The applicant was directed to lodge and serve by 23 December 2019 any further submissions in response on which she wished to rely.
- 13. Written submissions dated 23 December 2019 were received from the respondent. The applicant indicated by email to the Commission dated 24 December that she did not wish to file any further submissions in response to the respondent's submissions.
- 14. A summary of the parties' submissions is as follows.

### **Applicant**

- 15. The applicant relies upon her evidence in two documents attached to the ARD in response to the respondent's defences under ss 254 and 261 of the 1998 Act, namely:
  - (a) her letter dated 1 August 2017 to the Case Manager of Allianz Australia Insurance Limited (Allianz) (which acted as agent for the NSW Self Insurance Corporation)<sup>2</sup>, and
  - (b) her supplementary statement dated 23 February 2018<sup>3</sup>.
- 16. The applicant submits that her failure to make a claim within the period required was occasioned by ignorance as she did not know that there was a time limit on claims. This is confirmed by what she says at [49] of the supplementary statement that she did not know that she was able to make a claim nor understand the process. It was only when she investigated a TPD (totally and permanently disabled) claim in response to a television advertisement in 2016 that she became aware of a potential workers compensation claim.
- 17. The applicant submits that, based on the assessment of Dr Leonard Lee, psychiatrist, to whom she was referred by her solicitor on 6 June 2018, she is seriously and permanently disabled. Dr Lee, in his report dated 8 June 2018<sup>4</sup>, assesses the applicant as having sustained either 20% or 26% whole person impairment (WPI) as a result of psychological injury. This is the only evidence of such impairment, not challenged by the respondent<sup>5</sup>.
- 18. In respect of the requirement of the applicant to demonstrate that the respondent has not been prejudiced in the proceedings by the failure to give notice of injury, and thereby demonstrate a special circumstance within the meaning of s 254(3)(a) of the 1998 Act, she submits that although the respondent has been on notice of the claim since at least 14 July 2017, it has not commissioned a factual investigation into the claim nor arranged a medical examination of her. In short, the respondent has not demonstrated any prejudice.

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<sup>2</sup> ARD p 11.

<sup>3</sup> ARD p 13.

<sup>4</sup> ARD p 53.

<sup>5</sup> T p 9.30.

19. The applicant submits that the finding of the AMS as to injury supports the finding of Dr Lee. The history taken by Dr Mason is consistent with the proposition that she had done well in her tertiary studies and was targeted by the respondent to be employed by it. This demonstrates that she had a competent level of functioning leading up to the time of her commencement of employment with the respondent and psychological and psychiatric symptoms which allowed her to undertake the role.
20. Ms Stevens refers to the support which she received from her colleague Ms Anne Blythe, who was her mentor, a good listener and a sounding board. When Ms Blythe was diagnosed with a terminal illness, and subsequently died, Ms Stevens lost the support of Ms Blythe and the ability to cope. This coupled with a heavy and increasing workload, caused her to have difficulties in the workplace. She says that she expressed concerns to her colleagues but was not directed to the school's EAP or any programme of a similar nature.
21. The applicant submits that none of this evidence is challenged by the respondent, and that therefore the history related by her and recorded by the AMS and Dr Lee should be accepted.
22. The further increased workload in 2010 is also relied upon by the applicant, causing her to cope less well and leading to her cessation of work in December 2010. Notwithstanding an email sent to her mentor teacher, the applicant says that nothing changed and the pressure on her and her anxiety just worsened. An email to Clarissa Greenhalgh, who has not put on any evidence, went unanswered.
23. The applicant refers to attendances on general practitioner Dr Prabahala at Epping<sup>6</sup> in 2009 and 2010 with psychological symptoms in support of her claim that she was not coping at school in 2009 and 2010. She was, according to the clinical notes, self-medicating with alcohol.
24. Attendances on treating practitioners after cessation of her employment are referred to, and the absence of reference in the clinical records is explained by the applicant's ignorance at that of her ability to make a workers compensation claim. Attendance at St Vincent's Hospital with psychological symptoms and depression is also referred to and relied upon.
25. The applicant submits that the breakup of a relationship in 2013 is not "...some sort of intervening event"<sup>7</sup> such as to prevent a finding that her employment with the respondent was not a substantial contributing factor to her injury. This relationship breakup is referred to in the records of the treating psychologist, Tony Merritt.
26. The applicant's attendances on other treating psychologists such as Dr Jennifer Flatt<sup>8</sup> and Dr Natalie Shavit<sup>9</sup> are submitted to be supportive of the fact that Ms Stevens was "burnt out" by teaching, and that therefore her employment with the respondent was a substantial contributing factor to her injury, in the form of aggravation of the pre-existing psychological condition.
27. All this evidence is submitted to corroborate the finding of the AMS that the applicant's employment with the respondent was not only a substantial contributing factor, but the most important contributing factor.

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<sup>6</sup> Ex A

<sup>7</sup> T p 31.20.

<sup>8</sup> Report dated 18 August 2017 at ARD p 75.

<sup>9</sup> Report dated 16 July 2016 at ARD p 62.

## Respondent

28. The respondent submits that it has suffered prejudice because of the failure of the applicant to provide notice of injury in accordance with s 254 of the 1998 Act. However there are no further submissions as to what this prejudice is.
29. The respondent's submissions in respect of s 261 focus on whether the applicant has suffered serious and permanent disablement as a result of the injury claimed. The respondent notes that it is unclear as to whether Dr Lee assess 20% or 26% WPI as a result of injury, and that if the applicant is successful in her claim in respect of injury, she will then be referred to an AMS who will then be in a position to make a proper assessment of the applicant's WPI.
30. The respondent submits that the injury needs to result in both serious (as in great or weighty) and permanent impairment, that is, the injury needs to seriously impair the applicant's ability to lead a normal life, and that this impairment needs to be permanent (as in, it will not change). The respondent then submits that further submissions may have to be made in respect of this aspect after any assessment by an AMS.
31. The respondent submits that at this stage the applicant is unable to satisfy *serious and permanent disablement* (emphasis in submissions).
32. The respondent's principal submissions are directed to the issues of injury (s 4) and substantial contributing factor (s 9A). It submits that the only two doctors who accept that the applicant has suffered an injury arising out of or in the course of her employment with the respondent are the AMS, Dr Mason, and Dr Lee, qualified by her solicitors. It submits that neither of these doctors paid sufficient attention to the applicant's history nor to the contemporaneous complaints and history given by her after leaving work on 17 December 2010.
33. The respondent points to the attendance of the applicant at St Vincent's Hospital Emergency Department on 2 May 2011 and the history given on that occasion of attendances on her general practitioner for depression for the last four months after quitting her job as a teacher. The respondent observes that there do not appear to be any records before the Commission from a general practitioner in early 2011.
34. The respondent refers to the report dated 9 May 2011<sup>10</sup> of Dr Eric Lim, consultant psychiatrist, who saw the applicant on 5 and 6 May 2011. Dr Lim noted that Ms Stevens sustained periods earlier in the year of increased energy, talkativeness, feelings of being more creative, inability to sleep, racing thoughts and goal directed activities (making plans to return to New Zealand). That was precipitated by her decision to take extended leave from teaching; she took a year to contemplate whether she wanted to pursue a career as an Art teacher. Dr Lim referred the applicant to see Prof Philip Mitchell
35. Prof Mitchell who saw the applicant on 26 May 2011 considered that Ms Stevens had largely recovered back to her normal self after having been commenced on Prtisiq about a month prior to the appointment. The respondent submits that neither Dr Lim nor Prof Mitchell considered that the applicant to be suffering from a work-related condition.
36. The respondent submits that in the event that it is found that the applicant did sustain a work-related condition, by August 2011 she had largely recovered from the effects of that injury. The respondent notes that there are no details in evidence as to what hours the applicant worked in bar work in New Zealand or her earnings in that work.

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<sup>10</sup> Reply p 120.

37. The respondent refers to the various treatment providers the applicant consulted after her return to Australia from New Zealand, including Dr Arachchige, Dr Mehrabad and Tony Merritt, and to attendances at the Royal Prince Alfred Hospital on 11 June 2013 and Missenden Psychiatric Unit of that hospital on 29 August 2013.
38. The applicant relies on the history given by the applicant to Dr Mason and submits that, although Dr Mason mentions Prof Mitchell's diagnosis of Bipolar disorder superimposed upon a personality with features of obsessionality and social anxiety, he does not say whether he agrees with Prof Mitchell's diagnosis.
39. The respondent submits that neither the reports of Drs Mason nor Lee should be given any weight, noting that both doctors saw the applicant in 2018 and 2019 as compared to when Prof Mitchell assessed Ms Stevens in 2011. Further, Dr Lee did not get a history of the applicant being involved with another student for three and a half years which ended on a mutual basis in 2009<sup>11</sup>, nor did he get a history of the support that the applicant received from Anne Blythe until she was diagnosed with terminal breast cancer and died six months later.
40. The respondent submits that these are important factors as there is a history given to Tony Merritt of the applicant decompensating when a relationship comes to an end<sup>12</sup>.
41. The respondent submits that the Commission would not be satisfied that the applicant suffered a work-related injury within either s 4(a) of s 4(b) (of the 1987 Act), and that there should be an award for the respondent.
42. In the alternative the respondent submits that if the Commission is satisfied that the applicant suffered an aggravation, acceleration, exacerbation or deterioration of her psychological condition, this was short lived and that she had recovered from this by the time she went to New Zealand to live and work.
43. The respondent notes that there can be no award for the applicant in respect of medical expenses in the absence of any entitlement to weekly compensation.

## **FINDINGS AND REASONS**

### **Notice of injury/failure to make a claim within time (ss 254/261 1998 Act)**

44. It is convenient to deal with these two issues together.
45. Section 254(2) provides that the failure to give notice of injury as required by the section (or any defect or inaccuracy in a notice of injury) is not a bar to recovery of compensation if in proceedings to recover compensation it is found that there are special circumstances as provided in the section.
46. Section 254(3) sets out seven matters that constitute special circumstances. The first two are relevant to the applicant's claim, namely:
  - (a) the person against whom the proceedings are taken has not been prejudiced in respect of the proceedings by the failure to give notice off injury or by the defect or inaccuracy in the notice,
  - (b) the failure to give notice of injury, or the defect or inaccuracy in the notice, was occasioned by ignorance, mistake, absence from the State or other reasonable cause,"

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<sup>11</sup> MAC p 5.

<sup>12</sup> Reply pp 153 & 154.

47. In *Visy Board v Nguyen*<sup>13</sup> O'Grady DP discussed the distinction between notice of injury within s 254 and notice of claim within s 261. He held at [59] that the provision of a claim form constituted both notice of injury and notice of claim. That is the situation in the current proceedings, with the applicant providing a claim form dated 6 June 2017<sup>14</sup> to the respondent at about that time, to which Allianz responded with a notice pursuant to s 74 of the 1998 Act dated 14 July 2017<sup>15</sup>.
48. The onus of proving "special circumstances" rests on the applicant<sup>16</sup>, and once one of the matters being "special circumstances" set out in s 254(3) is satisfied it does not matter that other matters are not also satisfied.
49. In my view the applicant has discharged this onus. Although the respondent asserts in submissions that it has suffered prejudice, it has not outlined how it has been prejudiced. The respondent did not arrange a factual investigation into the applicant's claim on receipt of the claim form, nor has it arranged for Ms Stevens to be medically examined. It has not produced evidence from potential witnesses referred to by the applicant in her evidence, namely, colleagues at the Castle Hill High School including Clarissa Greenhalgh, to suggest that the conditions under which the applicant says she worked at the school were other than as described by her, or alleged that because of the lapse of time it is no longer able to obtain such evidence. The respondent has been able to access records of the doctors and practitioners who treated the applicant after she left her employment with the respondent.
50. The mere effluxion of time may form a reasonable basis upon which a presumption of prejudice may be made (see *Westlake v Sydney Symphony Subscribers Committee*<sup>17</sup>). In that case the Commission was dealing with a period of three decades since date of injury. However in this case the effluxion of the time from when the applicant ceased work with the respondent in 2010 until she notified the respondent of her injury in 2017, considered along with the other matters I have discussed above, is insufficient to show that the applicant has failed to discharge the onus on her to show a special circumstance within the meaning of s 254(3)(a) of the 1998 Act.
51. The respondent has not put on any evidence to gainsay the applicant's evidence in her letter dated 1 August 2017 or in her supplementary statement dated 23 February 2008 that she was ignorant of the fact that she was able to make a workers compensation claim, that notice of injury had to be given to the respondent as soon as possible after the injury happened and before she voluntarily left her employment, and that a claim had to be made within a certain time frame. I accept the reason put forward by the applicant in respect of this ignorance, and that for this reason she was ignorant of her obligations under ss 254 and 261 of the 1998 Act.
52. In respect of s 261(4)(b), the respondent urges that the opinion of Dr Lee as to the WPI of the applicant as a result of the injury claimed to give rise to that impairment should not be accepted. That is the only evidence of WPI currently available in the proceedings. The respondent says that further submissions may have to be made in respect of the "serious and permanent disablement" aspect of the claim after any assessment by an AMS who "will then be in a position to make a proper assessment of the Applicant's whole person impairment."<sup>18</sup> Such a submission presupposes that the applicant will be referred to an AMS for assessment. That can only occur if there is a finding of injury and substantial contributing factor to injury in favour of the applicant, and if she is not barred by s 261 from pursuing her claim.

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<sup>13</sup> [2010 NSWCCPD 101 at [55]-[62].

<sup>14</sup> ARD p 17.

<sup>15</sup> ARD p 21.

<sup>16</sup> *Gregson v I & MR Dimasi Pty Ltd* [2000] NSWCC 47; NSWCCR 520.

<sup>17</sup> [2009] NSWCCPD 12 at [69].

<sup>18</sup> See respondent's submissions at [8].

53. Dr Lee saw the applicant on 6 June 2018 at the request of her solicitor. He took a history of the applicant's pre employment (with the respondent) medical condition, her employment with the respondent and the problems that she experienced in the course thereof, and a comprehensive history of her treatment after she left that employment. As the respondent points out, Dr Lee did not get a history of a relationship break up with her boyfriend in 2009 (who, as I read the history of this relationship at the top of page 5 of the MAC, was a fellow art student at the National Art School) nor a history of the loss of support that the applicant experienced with the death of Anne Blythe.
54. In respect of the applicant's condition after she left the respondent's employ in 2010, Dr Lee notes her treatment by Dr Eng Lim in May and November 2011 (the latter with reference to the diagnosis of Prof Mitchell at Prince of Wales Hospital), and at the hands of Tony Merritt, psychologist, in 2013 and 2015. He also refers to the treatment of the applicant by Dr Natalie Shavit, clinical psychologist in 2015 and 2017, Dr Mark Rowe, psychiatrist in 2017 and Dr Siefken in 2017. Dr Lee has regard to the excessive workload that the applicant experienced with the respondent (which I note is not put in issue by the respondent), the complication of her condition by alcohol abuse and the lack of substantial improvement since Ms Stevens left teaching.
55. With this history and having regard to his examination of the applicant, Dr Lee makes a diagnosis of "Bipolar affective disorder type II" and assesses that impairment is permanent. His opinion is that the applicant's condition has been precipitated by her employment and has not substantially improved since she left it.
56. In submissions, counsel for the applicant was unsure as to whether Dr Lee had assessed 20% WPI or 26% WPI. My reading of his calculations is that it should be 41% WPI. Chapter 11 of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment*, 4th ed, 1 April 2016 (the Guidelines) provides for the assessment of psychiatric and psychological disorders using the psychiatric impairment rating scale (PIRS). Table 11.7 on p 58 of the Guidelines is a conversion table using the aggregate score and median class score of the classes in the PIRS into which an assessor places a person being assessed.
57. Dr Lee's assessment and calculations appear on the last two pages of his report<sup>19</sup>. He correctly calculates the aggregate score at 20 but incorrectly calculates the median score at 3; it should be 4. The average of the two middle scores (3 and 4 = 3.5) is rounded up to 4 (see [11.14] of the Guidelines). Using Table 11.7, an aggregate score of 20 and median score of 4 results in 41% WPI.
58. Any final (and binding) assessment of WPI will be a matter for an AMS should the applicant be successful in her claim. The assessment of Dr Lee is indicative of the seriousness of the applicant's condition; he assesses impairment as permanent. In the absence of any other evidence on the issue of serious and permanent disablement, and having regard to Dr Lee's assessment, I accept this evidence.
59. I find that the failure of the applicant to make a claim for compensation within the period required by s 261 of the 1998 Act was occasioned by ignorance. Although the claim was not made within three years after the injury, such injury (if it is found to be an injury arising out of or in the course of the applicant's employment with the respondent which employment was a substantial contributing factor to injury) resulted in serious and permanent disablement of the applicant.
60. The applicant is not barred by the provisions of ss 254 or 261 of the 1987 Act from recovering compensation

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<sup>19</sup> ARD pp 58 & 59.

#### **Injury s 4, substantial contributing factor, s 9A**

61. The applicant and respondent consented to the referral of the matter to an AMS for:

**“An opinion as to whether the applicant’s employment with the respondent between 2008 and 17 December 2010 substantially contributed to the aggravation, acceleration, exacerbation or deterioration of her psychological condition.”<sup>20</sup> (emphasis in original)**

62. The AMS, Dr Mason, at [9] on pp 7-9 of the MAC exhaustively reviewed the medical evidence in the case. This evidence included the evidence of Dr Eng Lim and Prof Philip Mitchel, relied upon by the respondent to submit that Dr Mason’s report ought not be given weight. The respondent acknowledges that Dr Mason mentions Prof Mitchell’s diagnosis, Bipolar disorder superimposed upon a personality with features of obsessionality and social anxiety but notes that he does not say if he agrees or disagrees with this diagnosis.

63. It is evident from Dr Mason’s summary of the medical evidence in the case that he has carefully read and analysed it. It is not incumbent on a decision maker to refer to all the evidence which forms the basis of his or her decision, if the reasons for the decision appear. The AMS concludes his summary of the other medical evidence in the case in the following terms:

*“In summary, Ms Stevens suffers from bipolar affective disorder (type 2) with some mild hypomanic episodes, but characterised mainly by treatment resistant major depressive episodes. A number of psychiatrists and 2 professors of psychiatry agree with this diagnosis.” (emphasis in original)*

64. At [10] of the MAC, Dr Mason answers the question posed in [61] above as follows:

“In my opinion the applicant’s employment with the respondent did substantially contribute to the aggravation, acceleration, exacerbation and deterioration of the psychological condition. I reached this conclusion because the applicant coped reasonably well with study prior to her work with the Department of Education.”

65. At [8] of the MAC Dr Mason recites the facts on which he based his assessment of the medical dispute as the history he obtained from the applicant, the documentation provided with the referral and the mental state interview he conducted during the interview. The material provided to him consisted of the ARD and attachments and Reply and attachments.

66. At [9 a] of the MAC, Dr Mason gives the reasons for his assessment. He reached the conclusion that the applicant’s employment with the respondent did substantially contribute to the aggravation, acceleration, exacerbation and deterioration of the psychological condition in the following terms:

“I reached this conclusion because the applicant coped reasonably well with study prior to her work with the Department of Education. While she had some minor episodes of anxiety and depression she was able to obtain treatment, continue with her studies and satisfactorily obtain a fine arts degree and a teaching degree. While it can be argued that she may have developed her condition regardless of the form of employment, I believe a less stressful role would have enabled her to seek treatment while continuing in her work. The loss of a boyfriend and an important colleague in 2009 may have made some contribution to her difficulty, but I do not believe they were the most important stressful factors.”

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<sup>20</sup> MAC p 10.

67. Dr Mason did have regard to the loss of the applicant's boyfriend and an important colleague in 2009, a factor that the respondent also submits should cause no weight to be given to the report of Dr Lee. I have referred to the findings, opinion and assessment of Dr Lee above at [53]-[55].
68. The respondent submits that Prof Mitchell, who saw the applicant on 26 May 2011, thought that she had largely recovered back to her normal self after being on Pristiq for about a month. It was after this that the applicant travelled to New Zealand where she was able to perform bar work. I observe that such work is not of the type for which the applicant was well qualified, and which she has pursued until December 2010 with the respondent. The evidence of the increasing pressure under which the applicant was obliged to work with the respondent until that time is not challenged. I do not find that the fact that the applicant was able to perform bar work in New Zealand as indicative of recovery in her condition.
69. The fact the applicant continued to pursue extensive treatment from psychologists and psychiatrists, and required attendances at hospitals, over the period from 2012 onwards puts paid to the submission that Ms Stevens had largely recovered by May 2011 (about five months after she ceased work for the respondent) when she saw Prof Mitchell.
70. The respondent has not had the applicant medically examined and assessed but relies on the evidence principally of Dr Eng Lim and Prof Mitchell in support of its submissions.
71. I find that the applicant suffered injury arising out of or in the course of her employment with the respondent. That injury consisted in the aggravation, acceleration, exacerbation or deterioration of her psychological condition as found by the AMS Dr Mason.
72. Section 9A of the 1987 Act provides that the employment concerned must be a substantial contributing factor to the injury. That is, a substantial contributing factor to the aggravation etcetera of the applicant's psychological condition. Dr Mason has so found.
73. Dr Lee cites the more onerous test when he sees the applicant's employment as being the main contributing factor in causing her condition to which she was probably predisposed. That test applies to injuries received on or after 19 June 2012. That is not the case here. The applicant's injury occurred in the period up to 17 December 2010 when she ceased work for the respondent.
74. Section 9A(2) sets out examples of matters to be taken into account for the purpose of determining whether a worker's employment was a substantial contributing factor to an injury. It does not limit the kinds of matters that can be taken into account for the purposes of such determination. The matters are as follows:
- (a) the time and place of the injury,
  - (b) the nature of the work performed and the particular tasks of that work,
  - (c) the duration of the employment,
  - (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,
  - (e) the worker's state of health before the injury and the existence of any hereditary risks,
  - (f) the worker's lifestyle and his or her activities outside the workplace."
75. Matters in (a)-(c) are relevant to the applicant in this case. Dr Mason addresses item (d) when he says that while it could be argued that the applicant may have developed her condition regardless of the form of employment, he believes that a less stressful role would have enabled the applicant to seek treatment while continuing her work. The applicant's state of health before the injury (item (e)) is addressed by Dr Mason and Dr Lee. In respect of item (f), the applicant's lifestyle and her activities outside the workplace, the respondent submits

that the breakup of a long term relationship with her boyfriend would suggest that the applicant's employment with the respondent was not a substantial contributing factor to her injury. Again, Dr Mason addresses this matter and I accept his opinion thereon. The loss of an important colleague, Anne Blythe, is not related to the applicant's lifestyle or her activities outside the workplace, but Dr Mason mentions this and discounts it as a most important factor.

76. I find that the applicant's employment with the respondent was a substantial contributing factor to her injury.

### **Date of injury**

77. The date of injury is noted in Part 4 of the ARD as 17 December 2010, the date on which the applicant ceased work for the respondent. Although the applicant discontinued her claim for weekly benefits on 12 June 2019, it is quite clear from the evidence that she was incapacitated for work at that time. She says at [34]-[37] of her supplementary statement dated 23 February 2018 that by the time she finished work at the end of term in December 2010 it was "all too much and that she had increasingly used her sick days to try and help her get by." This is not challenged by the respondent.
78. Section 16 of the 1987 Act provides that if injury consists in the aggravation, acceleration, exacerbation or deterioration of a disease, the injury shall, for the purposes of the Act, be deemed to have happened at the time of the worker's incapacity, or, if incapacity has not resulted from the injury – at the time the worker makes a claim for compensation with respect to the injury.
79. The applicant's injury is a disease injury as defined in s 4(b)(ii) of the 1987 Act, that is, the aggravation etcetera in the course of employment of a disease to which the employment was a substantial contributing factor.
80. The (deemed) date of injury is 17 December 2010.

### **Section 60 expenses**

81. Section 60(1) of the 1987 Act provides:

"(1) If, as a result of an injury received by a worker, it is reasonably necessary that—

- (a) any medical or related treatment (other than domestic assistance) be given, or
- (b) any hospital treatment be given, or
- (c) any ambulance service be provided, or
- (d) any workplace rehabilitation service be provided,

the worker's employer is liable to pay, in addition to any other compensation under this Act, the cost of that treatment or service and the related travel expenses specified in subsection (2)."

82. The respondent submits that in the absence of any entitlement to weekly compensation there is of course no entitlement to medical expenses. That is not what section 60 provides.
83. Section 59A of the 1987 Act provides for limits on the payment of compensation for medical, hospital and rehabilitation expenses. It does not make the payment of such expenses dependent upon an entitlement to weekly benefits.
84. The applicant did not discontinue her claim for medical expenses. She is entitled to an order for the payment of such expenses pursuant to s 60.

## SUMMARY

85. The applicant sustained injury in the form of aggravation, acceleration, exacerbation or deterioration of her psychological condition arising out of or in the course of her employment with the respondent over the period from 2008 to 17 December 2011
86. The applicant's employment with the respondent was a substantial contributing factor to the injury.
87. The applicant is not barred by the provisions of ss 254 or 261 of the 1998 Act from recovering compensation.
88. The matter is remitted to the Registrar for referral to an AMS for assessment of WPI as a result of injury deemed to have occurred on 17 December 2011.
89. The documents to be referred to the AMS are:
- (a) ARD and attached documents;
  - (b) Reply and attached documents;
  - (c) AALD dated 17 May 2019 lodged by the applicant with reports dated 20 August 2013 and 7 July 2015 of Tony Merritt, clinical psychologist, attached;
  - (d) AALD dated 4 June 2019 lodged by the respondent with report of Prof Gordon Parker dated 12 July 2018 attached;
  - (e) AALD dated 11 June 2019 with clinical notes from the following attached:
    - (i) Tony Merritt;
    - (ii) Dr Bruce Stewart;
    - (iii) Dr Mehrabad (Glebe Medical Centre);
    - (iv) Dr Nilusha M Arachchige;
    - (v) Dr Emma Wakeling;
    - (vi) Dr Adam Bayes;
  - (f) Clinical notes of Dr S V Prabhala (Ex A in the applicant's case);
  - (g) MAC of Dr Wayne Mason dated 28 August 2019, and
  - (h) this Certificate of Determination and Statement of Reasons.
90. The respondent is to pay the applicant's costs and expenses pursuant to s 60 of the 1987 Act.

