

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 2449/20  
**Applicant:** Alexander John Mirow  
**Respondent:** Suez Recycling and Recovery  
**Date of Determination:** 19 August 2020  
**Citation:** [2020] NSWCC 279

The Commission determines:

1. The applicant sustained a psychological injury (deemed date of injury 17 April 2019) arising out of or in the course of his employment with the respondent to which his employment was the main contributing factor.

The Commission orders:

2. The respondent to pay the applicant weekly benefits compensation pursuant to section 37 of the *Workers Compensation Act 1987* from 18 September 2019 to 30 June 2020 at the rate of \$1,025.64 per week.
3. The respondent is to pay the applicant's reasonably necessary medical and treatment expenses pursuant to section 60 of the *Workers Compensation Act 1987*.

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

Jill Toohey  
**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 JILL TOOHEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

**Sarojini Naiker**  
**Senior Dispute Services Officer**  
As delegate of the Registrar



## STATEMENT OF REASONS

### BACKGROUND

1. The applicant, Alexander Mirow, claims compensation for a psychological injury arising out of or in the course of his employment as a driver with the respondent, Suez Recycling and Recovery. The deemed date of injury is 17 April 2019.
2. Mr Mirow claims he developed an adjustment disorder with depressed and anxious mood as a result of bullying, isolation and discrimination after reporting unsafe working conditions to his supervisor. He went off work on 30 May 2019 and has not returned to work in any capacity since.
3. By a notice issued on 23 August 2019 under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998*, the respondent disputed that Mr Mirow had sustained a psychological injury within the meaning of s 4 of the *Workers Compensation Act 1987* (the 1987 Act). In particular, the respondent disputed that his employment was the main contributing factor, and that he had sustained a psychological injury within the meaning of s 11A(3).
4. On 30 September 2019, the respondent withdrew its decision to dispute liability pursuant to ss 4 and 11A(3) of the 1987 Act but maintained that Mr Mirow's employment was not the main contributing factor to his psychological injury.
5. By an Application to Resolve a Dispute (ARD) lodged with the Commission on 5 May 2020, Mr Mirow claims weekly benefits payments from 18 September 2019 and continuing pursuant to s 37 of the 1987 Act, and reasonably necessary medical expenses pursuant to s 60.

### ISSUES FOR DETERMINATION

6. The parties agree that the only issue remaining in dispute is whether Mr Mirow's employment was the main contributing factor to his psychological injury.

### PROCEDURE BEFORE THE COMMISSION

7. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.
8. The parties attended a conciliation conference and arbitration hearing by telephone on 10 July 2020. Ms Nicole Compton of counsel appeared for Mr Mirow and Mr Sam Kennedy appeared for the respondent.
9. Following parties' efforts at the hearing to resolve the dispute, there was insufficient time for both to make oral submissions. It was agreed that they would make written submissions. Submissions were filed on behalf of Mr Mirow followed by submissions for the respondent. There were no submissions in reply.

## **EVIDENCE**

### **Documentary evidence**

10. 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.

### **Oral evidence**

11. There was no oral evidence.

## **FINDINGS AND REASONS**

### **Mr Mirow's evidence**

12. Mr Mirow's evidence is set out in written statements given to an investigator in June 2019, and in a further statement dated 29 April 2020, and summarised below. As the only issue now in dispute is whether his employment was the main contributing factor to his injury, it is not necessary to recount all of the evidence concerning his allegations of bullying and the responses of other employees.
13. Mr Mirow started work for the respondent as a permanent, full-time driver in November 2017. His role included curbside collections of waste bins. He passed a pre-employment medical examination and related tests. He underwent induction, and three days of training in operating the trucks, and passed all assessments.
14. Mr Mirow's supervisor, Mark Beasley had an aggressive management style and was intimidating from the outset. Mr Mirow's first bad experience with him was in March 2018 when he was not paid for a Saturday, and Mr Beasley responded with an abusive text message. Mr Mirow's manager said he would sort it out. He was finally paid two or three months later.
15. There were further problems with his pay in May 2018. Given his previous encounter with Mr Beasley, he raised them with his manager, Sean Williams, who said he would speak to Mr Beasley. From that day, Mr Beasley was abusive and threatened he would "get him" if he was late or sick. Mr Beasley left the following week.
16. In July 2018, Ambre Thompson took over from Mr Beasley. Her management style was different, she was strict about safety and approachable.
17. Problems continued with Mr Mirow's pay and he was docked several hours each week. Ms Thompson followed up with Mr Williams who said it was because Mr Mirow was arriving late. There was a discussion about start times on the rosters being unclear, which Mr Mirow had raised multiple times with Mr Williams. Ms Thompson rectified the problem from mid-August 2018, but he was still not paid leave owing from the weeks he had been docked. He escalated the issue in an email to Mr Williams' superior, Mark Muttdon on 17 August 2018. He sent the email again in September 2018 after Mr Muttdon had not replied. Mr Muttdon sent the email to Mr Williams and left it to him to respond.
18. After this, Mr Williams began targeting him. He claimed Mr Mirow had left the site early without permission when it was normal for employees to leave if they finished their daily run before their 7.6 hour shift.
19. At a meeting on 30 October 2018 with Mr Williams and a union representative, it was agreed that Mr Mirow would be back-paid. He had still not been paid at the date of his statement.

During the meeting, Mr Williams said the Parramatta Council wanted him removed from the Parramatta contract because he had taken three weeks unpaid leave when his child was born.

20. From the time he was employed, Mr Mirow raised safety concerns about the trucks, the most serious being the extreme heat transferring from the engine to the cabin. The standard air conditioning was “useless”. Attempts by the respondent did not fix the problem. The trucks also tended to roll back in gear and their side mirrors were difficult to adjust, making it difficult to manoeuvre. He reported the problems many times to Mr Beasley, Mr Williams and Ms Thompson. She took a different approach and did not pressure drivers into using unsafe vehicles. If there were no suitable spare trucks available or if drivers were too affected from the heat and if there were no other options, they would be sent home.
21. In November 2018, the problems with the trucks still had not been resolved. Between October 2018 and mid-November 2018, Mr Mirow made 14 reports of safety hazards and vehicle maintenance problems.
22. On 26 November 2018, he received a text message from Ms Thomson inviting him to a meeting “to discuss obligations/work performance under the Parramatta Contract.”<sup>1</sup> He had never been notified previously of issues concerning his performance. The meeting took place on 4 December 2018. Mr Williams, Ms Thompson and two union representatives attended. Mr Williams alleged Mr Mirow would often not finish his work and would leave without notifying anyone but he had no evidence to back his claims. He then produced a written request from Parramatta Council for Mr Mirow’s removal from the Parramatta waste contract.
23. At the end of the meeting, it was agreed that Mr Williams would speak to the Council about having Mr Mirow fully reinstated, and no disciplinary action would be taken against him. Mr Williams would also let the Council know the temperatures in the trucks. He would call Mr Mirow later that day after meeting with the Council. He never called back.
24. On 5 December 2018, Mr Mirow spoke to Ms Thompson. She had not heard from Mr Williams and agreed Mr Mirow would report for work the following day. Shortly after starting work on 6 December 2018, she called to say he was to return to base immediately. Once there, Mr Williams said he had been unable to persuade the Council to leave Mr Mirow on the contract and he was to be stood down with pay immediately. He did not say for how long. He said the matter was with Council’s solicitors. There was discussion about Mr Mirow moving to other councils but nothing came of it.
25. Mr Mirow did not hear from his employer again until 27 March 2019 when he received a message from Ms Thompson asking if he was available the next day to discuss his return to work. After communications back and forth, the meeting was scheduled for 1 April 2019 and then rescheduled to 2 April 2019. Mr Muttdon attended and said the Council had agreed Mr Mirow could return to the Parramatta contract. He then made various allegations about Mr Mirow’s performance and said he would have to comply with his contract if he returned.
26. There followed various communications between Mr Mirow and Ms Thompson about why he thought the meeting was unfair. He was off sick from 8 to 16 April 2019 for which he submitted medical certificates.
27. On 14 April 2019, an incident occurred at Mr Mirow’s home. His partner, from whom he was separated at the time, came to the house with a woman who happened to be an employee of the respondent. Mr Mirow had been late handing over of his son. The other woman “attempted to snatch”<sup>2</sup> his son from his arms. Mr Mirow told her to get off his property and they left with the child. The police attended but left shortly after.

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<sup>1</sup> ARD at page 10.

<sup>2</sup> ARD at age 14.

28. On 17 April 2019 Mr Mirow returned to work. There was discussion about further problems with his pay while he had been off sick. On 18 April 2019, he received an email from Ms Thompson to say he was being stood down over a matter the previous day and asking him to attend a meeting on 23 April 2019. The meeting took place on 24 April 2019. Mr Muttdon alleged Mr Mirow had left work without permission on 17 April 2019. In response, Mr Mirow gave him a letter about the incident at his home on 14 April 2019, and about how he felt targeted at work. At the end of the meeting it was agreed he would return to work on 29 April 2019.
29. Following the meeting, Mr Mirow had further discussions with "HR" over his pay and there were various attempts to schedule a meeting to discuss them.
30. Mr Mirow returned to work on 29 April 2019. The following day, Mr Williams confronted him about stopping his truck to urinate by the side of the road. Mr Mirow did not deny doing so but felt he was being harassed by Mr Williams and things would only get worse.
31. On 2 May 2019, he saw his general practitioner because he felt sick and "overwhelmed from all the issues at work".<sup>3</sup> On 3 May 2019 he wrote to Ms Thompson asking for flexible working arrangements as he was not coping well. Throughout May, meetings were rescheduled several times and Mr Mirow was off sick. On 22 May 2019, he was notified by email from Ms Thompson that he was being stood down. He saw his lawyer who wrote to the respondent.
32. A further meeting on 23 May 2019 did not proceed. On 27 May 2019 Mr Mirow received a written warning letter about his lateness and absence from work. His lawyer sent a further letter to the respondent. He returned to work as directed on 28 May 2019 and submitted an application for parental/partner leave. He wanted a flexible arrangement because he had no support from his employer since becoming a parent with "constant bullying and regular reprisal"<sup>4</sup>. He was finding it difficult to feel safe in his employment, it did not matter what he said, he felt totally ignored and "just wanted to get away from the toxic workplace".<sup>5</sup>
33. By email on 30 May 2019 his request for partner/parental leave was refused. By this stage he was not coping. He saw his general practitioner, Dr Tun, who certified him unfit to 2 June 2019 and referred him to Dr Bianca Heng, psychologist. He has not returned to work since.

### **Other documents**

35. The documents include numerous emails and other correspondence between Mr Mirow and his supervisors and managers. It is not necessary to detail them here. Their relevance for present purposes is that they document incidents and alleged performance issues dating from around mid-2018.

### **Medical reports – treating professionals**

#### ***Dr Tun***

34. Dr Tun's clinical records commence on 9 April 2019 and end of 19 November 2019. They show Mr Mirow attended on 9 April 2019 and 12 April 2019 for a chest infection.<sup>6</sup>
35. On 16 April 2019, Dr Tun recorded that Mr Mirow was going through a relationship breakdown and noted the incident when the police were called to the house. She noted he was agreeable to seeing a counsellor. There is no reference to his employment.

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<sup>3</sup> ARD at page 20.

<sup>4</sup> ARD at page 22.

<sup>5</sup> ARD at page 22.

<sup>6</sup> ARD at page 711.

36. On 2 May 2019, Dr Tun recorded, relevantly<sup>7</sup>:

“ongoing stress with relationship breakdown  
has not seen son in 3/52  
person at work has somehow been involved in incident with ex-partner where  
police were called  
states feels like workplace trying to ‘find a way to let me go’ due to some prev  
unrelated issues

...

Discussion re psychology referral – would like to go ahead”

37. On 17 May 2019, Dr Kellie Wallace recorded<sup>8</sup>:

“Requesting medical certificate for past 3 days  
Hasn’t been to work since Tuesday  
Ongoing relationship and work problems - ?DV incident  
Hasn’t seen since prior to Easter  
Financial stress relating to family court proceedings – has had to put family  
court matters on hold as unable to afford  
Feels like he is a ‘target’ at work. Worried about losing his job. States pay  
has been withheld  
Had meeting with HR at work on Monday to address these issues”.

38. On 30 May 2019, Dr Tun recorded the reason for visit as “Workplace harassment”. She noted ongoing issues at work, that Mr Mirow had been stood down multiple times, that he felt they were “trying to get rid of him”, and problems with his pay and leave requests. He felt “all stems from reporting a safety issue back in November 2018” about the temperature in the trucks.<sup>9</sup>

39. In appointments throughout June 2019, Mr Mirow reported “ongoing issues with work”.

40. On 24 June 2019, Dr Tun provided a letter headed “Medical Certificate”<sup>10</sup> which appears to be in response to a letter from the insurer asking how Mr Mirow’s condition related to his employment. Dr Tun reported that Mr Mirow met the criteria for generalised anxiety disorder which affected his ability to perform usual daily duties, interpersonal relationships and physical symptoms. She said even though he currently had family stressors, she believed they “would not be as severe as they currently are without the employment issues.”<sup>11</sup> She stated that the dates on his initial Certificate of Capacity “were to facilitate him getting help for his condition, and so he could do that outside of the situation that is causing his symptoms.”

41. In a referral dated 4 July 2019 to Dr Mukesh Kumar, psychiatrist<sup>12</sup>, Dr Tun wrote that Mr Mirow “has been under significant amounts of stress related to work, as well as his personal life”; he was seeing a psychologist and being treated for adjustment disorder, and had a Workcover claim underway.

42. After 1 August 2019 when the Family Court proceedings are mentioned again, the rest of the notes are about unrelated matters.

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<sup>7</sup> ARD at page 372.

<sup>8</sup> ARD at page 373.

<sup>9</sup> ARD at page 713.

<sup>10</sup> ARD at page 707.

<sup>11</sup> ARD at page 707.

<sup>12</sup> ARD at page 709.

43. Dr Tun issued Workcover certificates from 30 May 2019 with respect to a workplace injury on 17 April 2019 described as “bullying/victimisation”. She recorded that Mr Mirow reported “ongoing issues with being paid incorrectly or not at all, not being paid for annual leave, being denied parental leave, being stood down from work multiple times, feeling targeted when at work”.<sup>13</sup>

### **Dr Kumar**

44. Dr Kumar saw Mr Mirow on 11 July 2019 on referral from Dr Tun. He took a history from Mr Mirow of events at work. He said “on one occasion he was quite upset by his personal situation when his ex-partner assaulted him and ‘snatched away’ their infant son from him.”<sup>14</sup> Dr Kumar said he deferred his opinion and would provide his recommendations once he had completed his assessment.
45. Dr Kumar completed his assessment on 18 July 2019. He reported to Dr Tun that Mr Mirow had described further incidents of harassment at work. Dr Kumar diagnosed Adjustment Disorder. He did not recommend Mr Mirow return to work until his symptoms had resolved. He did not comment directly on causation.

### **Dr Heng**

46. Dr Bianca Heng, clinical psychologist, reported on 10 December 2019 that she had seen Mr Mirow 14 times between 13 June 2019 and 19 September 2019. He had to stop seeing her for financial reasons. At his first appointment he reported he had ceased work due to severe levels of anxiety arising from bullying and harassment by his managers.
47. Dr Heng took a detailed history from Mr Mirow of events at work between December 2018 and June 2019. She diagnosed Adjustment Disorder with Anxiety in response to multiple psychological injuries sustained during his employment with the respondent. She noted no pre-existing physical or psychological conditions.
48. Dr Heng reported that she understood Dr Ahmed had diagnosed Major Depression in the context of stress surrounding the birth of Mr Mirow’s son and separation from his partner. She stated her reasons for disagreeing with his conclusion. She outlined the history of the relationship that she took from Mr Mirow and said these circumstances were “understandably distressing”<sup>15</sup> for him; he reported “momentary feelings of sadness”, frustration and worry, and he felt “overwhelmed” by the combined paperwork involved in the Family Court proceedings and his compensation claim.
49. In Dr Heng’s opinion, Mr Mirow’s “emotional response to his personal life circumstances [was] understandable (ie. not excessive) and therefore not indicative of a depressive disorder”.<sup>16</sup> She did not think his symptoms met the criteria for Major Depressive Disorder.
50. In response to the question whether she considered Mr Mirow’s employment was “a substantial contributing factor” to his injury, Dr Heng wrote that his Adjustment Disorder:
- “... arose primarily due to multiple psychological injuries (the most significant occurring on 17 April 2019) in the form of bullying and harassment by his managers. ... I believe these series of events, especially feeling punished for taking action to protect himself (and others) by Suez managers, were a substantial contributing factor to his [injury]”.<sup>17</sup>

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<sup>13</sup> ARD at page 721.

<sup>14</sup> ARD at page 695.

<sup>15</sup> ARD at page 74.

<sup>16</sup> ARD at page 704.

<sup>17</sup> ARD at page 705.

51. Dr Heng outlined the treatment she thought Mr Mirow would need in order to return to work (with a different employer) and said she was “hopeful he would have returned to some form of employment within 12 months of therapy resuming”.<sup>18</sup>

### **Medical reports – independent assessors**

#### ***Dr Ahmed***

52. Dr Tanveer Ahmed, consultant psychiatrist, saw Mr Mirow for assessment on 12 August 2019. He noted that Mr Mirow had separated “from late last year”<sup>19</sup> and there was a Family Court dispute. He recorded a brief history of events at work from the end of 2018. He noted that Mr Mirow “denies outright abuse or being yelled at inappropriately.”<sup>20</sup>
53. Dr Ahmed noted that Mr Mirow’s reported difficulties at work “coincided with the birth of his son and separation from his partner soon afterwards”<sup>21</sup>. When asked about the conflict, Mr Mirow said it related to not always being able to support his partner especially after the child was born. Dr Ahmed noted that the separation occurred within a month of his son being born. He thought it “most likely he was already in psychological decline which then affected his work performance.”<sup>22</sup>
54. Dr Ahmed diagnosed Mr Mirow as suffering from a Major Depression.
55. In response to the question whether Mr Mirow could have developed his condition even in the absence of workplace stressors, or whether his reaction to the work stressors could have been “more of an emotional reaction or normal level of distress on top of the pre-existing personal stressors”, Dr Ahmed said:

“There is no question Mr Mirow was suffering stressors outside of work namely in his marriage. His son was born late last year. According to him, the couple separated within a month of the son being born. He attributes the problems related to work.

In my view, it is unlikely that within a month of his son being born that the work difficulties were the primary contributor. It is highly likely there were challenges that were pre-existing. He also describes his problems at work beginning at the exact time when his marriage was collapsing.

It is my view that he was psychologically declining which then affected his performance at work.”

56. Dr Ahmed reported that it was unlikely that the actions of Mr Mirow’s employer were the predominant cause of his psychological injury. There was no question that his challenges at work were a contributor but it was “more likely that the end of his marriage and greater difficulty accessing his child is the bigger contributor”.<sup>23</sup> In response to the question whether his employment was the main or substantial contributing factor, Dr Ahmed stated:

“... his employment difficulties while a contributor is not the substantial contributing factor”.<sup>24</sup>

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<sup>18</sup> ARD at page 705.

<sup>19</sup> ARD at page 650.

<sup>20</sup> ARD at page 651.

<sup>21</sup> ARD at page 651.

<sup>22</sup> ARD at page 653.

<sup>23</sup> ARD at page 653.

<sup>24</sup> ARD at page 653.

## **Dr Allan**

57. Dr Martin Allan, consultant psychiatrist, saw Mr Mirow for assessment on 12 February 2020. He took a history that Mr Mirow lived with his partner from 2013 until their final breakup in March 2019. Their child was currently the subject of a dispute over custody. Mr Mirow had had no contact with him since September 2019.
58. Dr Allan took a detailed history from Mr Mirow of his difficulties at work dating from late 2018. Mr Mirow also referred to “a significant stress” on his relationship over the preceding months since going off work. He said there had been some difficulties in the relationship before then but the stress of being off work had caused more tension in the relationship resulting in him and his partner living separately at times. Mr Mirow reported that the relationship was improving somewhat with efforts to reconcile but clearly difficulties had persisted. Mr Mirow told him about the incident in April 2019 over the late return of his son.
59. Dr Allan reported that, while Mr Mirow recognised his personal circumstances had contributed to his mental difficulties, including the ongoing “family court saga”<sup>25</sup>, he was strongly of the opinion that the workplace frustration had significantly worsened any prior relationship issues.
60. Dr Allan diagnosed Mr Mirow as having developed an Adjustment Disorder with depressed and anxious mood. He said:
- “I am satisfied that his personal situation does contribute to a smaller degree to his condition. It is my opinion the predominant cause of his issues relate to the saga of workplace difficulties that are described above.”
61. In response to the question whether Mr Mirow’s employment was “a substantial contributing factor” to his injury, Dr Allan stated:
- “In my opinion, the substantial contributing factor to Mr Mirow’s condition is the saga of poor treatment [while employed by the respondent].”
62. With respect to Mr Mirow’s capacity for employment, Dr Allan stated he was unfit for any employment currently but within three to four months with treatment, he should be considered for employment with a new employer. Ideally he would be supported in vocational rehabilitation commencing in around three to four months’ time, with treatment.

## **The applicant’s submissions**

63. Ms Compton submits the crux of this case is whether Mr Mirow’s employment has been the main contributing factor to his injury. This is a question which is to be determined in regards to the medical evidence on the file.
64. Ms Compton refers to the decision in *Attorney General's Department v K*<sup>26</sup> in which Deputy President Roche summarised the principles to be applied in determining causation in cases of psychological injury.
65. Ms Compton relies on the opinion of Dr Heng where she says Mr Mirow’s Adjustment Disorder with Anxiety arose primarily due to multiple psychological injuries, the most significant occurring on 17 April 2019, in the form of bullying and harassment from his managers.

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<sup>25</sup> ARD at page 689.

<sup>26</sup> *Attorney General's Department v K* [2010] NSWCCPD 76; 8 DDCR 120 (*Attorney General's Department v K*).

66. Ms Compton further relies on Dr Kumar's opinion where he recorded that Mr Mirow said the reason for him to cease his work was stressors at work. Ms Compton submits that Dr Kumar noted that Mr Mirow had personal problems but he also recorded the further instances of harassment at work cited by Mr Mirow.
67. Ms Compton submits that Dr Allan noted Mr Mirow's personal issues but formed the clear opinion that Mr Mirow's personal situation contributed to a smaller degree to his condition. He considered the predominant cause of his issues related to "the saga of workplace difficulties" that he described.
68. Ms Compton refers to Dr Tun's letter of referral dated 4 July 2019 citing "significant amounts of stress related to work, as well as his personal life". She refers also to Dr Tun's statement that:
- "Even though he does currently have family stressors, I believe his symptoms would not be as severe as they are currently without the employment issues. The dates provided on his initial Certificate of Capacity were to facilitate him getting help for his condition, and so he could do that outside of the situation that is causing his symptoms."
69. Ms Compton submits that Dr Heng obtained perhaps the most comprehensive history. She was clear in her conclusion that, while Mr Mirow had personal issues, his employment was the substantial contributing factor to his injury. Ms Compton submits that I would be comfortably satisfied on the evidence that the workplace issues were the substantial contributing factor to Mr Mirow's injury.
70. As to Mr Mirow's capacity for work, Ms Compton relies on Workcover medical certificates certifying he had no current capacity for the periods from 30 August 2019 to 27 September 2019 and 28 October 2019 to 25 November 2019. Ms Compton submits that, despite the lack of further certificates, his continuing incapacity is clear from Dr Allan's report where he says Mr Mirow's prognosis was guarded; he remained unfit, his Adjustment Disorder would likely continue for at least the next 6 to 12 months given his current circumstances.
71. Ms Compton submits that Mr Mirow's injury remains unabated. He is currently reliant on Centrelink and unable to afford further treatment. He is entitled to past payments pursuant to s 37 of the Act from 18 September 2019 to date and continuing at a rate of 80% of Pre-Injury Average Weekly earnings, being \$1,025.64.

### **The respondent's submissions**

72. The respondent's written submissions were prepared by Ms Kavita Balendra of counsel.
73. The respondent submits that the substance of the dispute is whether Mr Mirow's employment was the main contributing factor of his psychological condition. The respondent refers to the decision of Deputy President Snell in *AV v VW*<sup>27</sup> at [66] where he set out the test of "main contributing factor".
74. The respondent submits that the deemed date of injury is 17 April 2019 but the first record of Mr Mirow complaining of psychological symptoms was to his general practitioner on 2 May 2019 when he complained of "ongoing stress with relationship breakdown" and not having seen his son for three weeks. Dr Tun also noted that Mr Mirow thought his workplace was trying to "find a way to let me go".

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<sup>27</sup> *AV v VW* [2020] NSWCCPD 9 (*AV v VW*).

75. Dr Tun's report of 24 June 2019 shows that, even though Mr Mirow had current family stressors, she believed his symptoms would not be as severe as they were without the employment issues. In the respondent's submission, this falls short of confirming that work is the main contributing factor as required by s 4.
76. The respondent submits that Dr Allan was asked to provide an opinion as to whether or not employment was a substantial contributing factor to Mr Mirow's injury. Dr Allan answers in the affirmative but this is not the relevant test. At no point was Dr Allan asked, and nor does he express the view, that the "main contributing factor" to Mr Mirow's injury was his employment. Further the reports from Dr Kumar, Mr Mirow's treating psychiatrist, are not definitive as to causation.
77. The respondent submits that Dr Heng's opinion that Mr Mirow displayed an "understandable" response to his personal life circumstances that was "not indicative of a depressive disorder" does not mean that personal issues were not contributory. Her statement that the injury "arose primarily" due to his employer's behaviour is the only opinion that appears to come close to the requirement that employment be the main contributing factor but her report falls short of explicitly stating that was the case. Her finding that employment was a 'substantial contributing factor' is not necessarily 'the main factor'.
78. In the respondent's submission, limited weight that should be given to Dr Heng's report because she is Mr Mirow's treating psychologist and not qualified to provide a medico-legal opinion. Further, her opinion is based solely on Mr Mirow's discussions with her and she has not been provided with any objective evidence of the alleged events at work as factors contributing to his illness. In contrast, the respondent submits, Dr Ahmed was unequivocal. When asked whether employment was the "main or substantial contributing factor" he stated unequivocally that Mr Mirow's employment difficulties were a contributor but not the substantial contributing factor.
79. The respondent submits that Mr Mirow did not report psychological symptoms until after the significant incident on 14 April 2019 involving handover of his child. That he considered this of similar significance as his work issues is evidenced by the fact that he gave Mr Muttdon a letter at the meeting on 24 April 2019 that identified that incident as well as work issues as a reason for his absence. Clearly he equated his personal issues and his work difficulties as causative of his need for time away from work. In those circumstances, his employment cannot therefore be the "main contributing factor" to his injury.
80. With respect to capacity for work, the respondent submits that Mr Mirow has no current medical certificates as to incapacity. The best evidence he has in relation to incapacity beyond December 2019 is Dr Allan's report where he says Mr Mirow's current incapacity for work will continue for three to four months after which "he should be considered fit for employment with a new employer". The respondent submits that he has a capacity for work equivalent to his pre-injury income and has no ongoing entitlement to weekly benefits.
81. There were no submissions in reply.

**Was Mr Mirow's employment the main contributing factor to his injury?**

82. Section 4 of the 1987 Act relevantly provides:

"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”

83. Mr Mirow bears the onus of proving, on the balance of probabilities, that his employment is the main contributing factor to his psychological injury. I must feel an actual persuasion or affirmative satisfaction of that fact: *Department of Education and Training v Ireland*<sup>28</sup> and *Nguyen v Cosmopolitan Home*<sup>29</sup>.
84. In *Meaney v Office of Environment and Heritage – National Parks and Wildlife Service*<sup>30</sup>, Arbitrator Capel considered the meaning of “main contributing factor” and interpreted the word “main” to mean “chief” or “principal”. This approach has been followed by the Commission since.
85. In *Goodson v Wingecarribee Shire Council*<sup>31</sup>, Deputy President Snell considered the different tests of “a substantial contributing factor” in s 9A and “the main contributing factor” in section 4(b), and relevant authorities. He concluded at [78]:
- “The following may be taken from the above:
- (a) The test of ‘main contributing factor’ in s 4(b)(ii) is more stringent than that in s 4(b)(i) in its previous form, which applied in conjunction with the test in s 9A. There will be one ‘main contributing factor’ to an alleged aggravation injury.
  - (b) The test of ‘main contributing factor’ is one of causation. It involves consideration of the evidence overall, it is not purely a medical question. It involves an evaluative process, considering the causal factors to the aggravation, both work and non-work related. Medical evidence to address the ultimate question of whether the test of ‘main contributing factor’ is satisfied is both relevant and desirable. Its absence is not necessarily fatal, as satisfaction of the test is to be considered on the whole of the evidence.
  - (c) In a matter involving s 4(b)(ii) it is necessary that the employment be the main contributing factor to the aggravation, not to the underlying disease process as a whole.”
86. The requirement of “main contributing factor” is equally applicable to the contraction of a disease for the purposes of s 4(b)(i).
87. The respondent does not dispute that Mr Mirow sustained a psychological injury in the course of his employment as a result of the behaviour of its employees. Mr Mirow does not dispute that stresses in his personal life contributed to his psychological condition.
88. The evidence is finely balanced but, considering the whole of the evidence, for the reasons that follow I am satisfied that Mr Mirow’s employment was the main contributing factor to his injury.

<sup>28</sup> *Department of Education and Training v Ireland* [2008] NSWCCPD 134.

<sup>29</sup> *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246.

<sup>30</sup> *Meaney v Office of Environment and Heritage – National Parks and Wildlife Service* [2014] NSWCC 339.

<sup>31</sup> *Goodson v Wingecarribee Shire Council* [2020] NSWCCPD 9.

89. It is not in dispute that Mr Mirow's difficulties with his supervisors started around March 2018 when there were problems with his pay. They continued after Mr Beasley left in May 2018 and increased around September 2018 when Mr Mirow complained about Mr Williams' inaction in resolving his pay. They continued throughout October 2018 when he learned that the Council wanted him removed from the Parramatta contract, November 2018 when his performance was questioned, and December 2018 when he was stood down. There was no direct contact with his employer until March 2019 when he was asked to meet to discuss his return to work, although Mr Mirow complained once or twice about his pay during that time.
90. Mr Mirow's evidence about events between March 2019 and 2 June 2019 when he ceased work is not challenged. During that time, a series of incidents occurred. On 17 April 2019, he returned to work. There was again discussion about problems with his pay. The following day, he was again advised that he was being stood down. He was asked to attend a meeting on 24 April 2019 at which it was alleged he had left work without permission on 17 April 2019. At the end of the meeting it was agreed he would return to work on 29 April 2019. There were further discussions over his pay and various attempts to schedule a meeting to discuss them. The day after he returned to work, Mr Williams confronted him about stopping his truck to urinate by the side of the road. Within several days, his application for parental leave having been refused, he left work and did not return.
91. The evidence shows fairly regular incidents and difficulties at work over more than a year, in particular between March and June 2019.
92. The evidence about the timing of Mr Mirow's separation and custody dispute is not entirely clear. His son was apparently born in September 2018.<sup>32</sup> Dr Kumar recorded that he separated within a month of his son being born. Dr Allan recorded the "final breakup"<sup>33</sup> was in March 2019 and Mr Mirow had no contact with his son from September 2019. By 2 May 2019, when he saw Dr Tun he had not seen his son for three weeks and, by 17 May 2019 when he saw Dr Wallace, Family Court proceedings had apparently commenced but were on hold for financial reasons.
93. I agree with the respondent's submission that Dr Tun's comment that Mr Mirow's family stressors "would not be as severe as they currently are without the employment issues" falls short of confirming that his employment was the main contributing factor.
94. The order in which Dr Tun recorded Mr Mirow's complaints on 2 May 2019 suggests that his relationship problems were the main reason for his visit and his workplace problems were secondary. Dr Wallace's record on 17 May 2019 suggest that relationship and work problems were equivalent. In contrast to her notes, Dr Tun's referral on 4 July 2019 to Dr Kumar states that Mr Mirow "has been under significant amounts of stress related to work, as well as his personal life", suggesting that work was the more significant stressor. The point being that clinical notes have to be approached with some care for reasons that are well-known: *Mason v Demasi*<sup>34</sup>; *Winter v New South Wales Police Force*.<sup>35</sup>
95. On 30 May 2019, Dr Tun recorded the reason for Mr Mirow's visit as "Workplace harassment". She noted ongoing issues at work, that he felt they were "trying to get rid of him", and that he felt "all stems from reporting a safety issue back in November 2018" about the temperature in the trucks. She issued Workcover certificates from 30 May 2019 with respect to a workplace injury on 17 April 2019 described as "bullying/victimisation". The certificates recorded "ongoing issues with being paid incorrectly or not at all, not being paid for annual leave, being denied parental leave, being stood down from work multiple times, feeling targeted when at work".

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<sup>32</sup> Applicant's statement at [64] ARD at page 6.

<sup>33</sup> ARD at page 685.

<sup>34</sup> *Mason v Demasi* [2009] NSWCA 227.

<sup>35</sup> *Winter v New South Wales Police Force* [2010] NSWCCPD 121.

96. Dr Ahmed said there was no question that challenges at work were a contributor, but “not the substantial contributor”; it was more likely that the end of Mr Mirow’s marriage and difficulty accessing his child was the bigger contributor. Dr Ahmed took a relatively brief history of events in the workplace from the end of 2018, and he appears to have placed some weight on the fact that Mr Mirow “denies outright abuse or being yelled at inappropriately.” He thought it most likely he was already in “psychological decline” and it was “unlikely that within a month of his son being born that the work difficulties were the primary contributor” and it was “highly likely there were challenges that were pre-existing”.
97. Dr Ahmed’s report does not show that he asked Mr Mirow about pre-existing challenges. Dr Ahmed appears to conclude that the marriage breakdown issues had to be the greater contributor, without actually asking Mr Mirow about that, or really explaining why he came to that conclusion..
98. In contrast, Dr Allan took a detailed history of events at work dating from late 2018. He asked Mr Mirow about difficulties in the relationship before he went off work in December 2018. In my view, he had a fuller picture of both and was in a better position to assess and weigh the relative contributions of the work and personal stressors. His opinion was more considered. I prefer Dr Allan’s opinion to that of Dr Ahmed.
99. The respondent submits that only Dr Ahmed considered whether Mr Mirow’s employment was the *main* contributing factor as opposed to a substantial contributing factor to his injury. There is some force in that argument but the doctors were responding to the questions asked of them. It appears that only Dr Ahmed was specifically asked whether employment was “the main or substantial contributing factor”<sup>36</sup> and he said it was not “the substantial contributing factor” although elsewhere he was clear it was unlikely it was “the main contributor”.
100. Dr Allan was asked whether employment was a substantial contributing factor. He replied that it was “the substantial contributing factor”. The fact that he did not specifically state that employment was the main contributing factor does not in my view detract from his clear conclusion that “his personal situation does contribute to a smaller degree to his condition” and that “the *predominant* cause [was] the saga of workplace difficulties”. (emphasis added)
101. I am satisfied that Dr Allan considered Mr Mirow’s employment the main contributing factor to his injury and, for the reasons already stated, I prefer his opinion to Dr Ahmed’s. I agree with the respondent that Dr Kumar’s reports do not assist.
102. Dr Allan’s opinion is supported by Dr Heng. I do not accept that she is not qualified to offer an opinion. She is a clinical psychologist and saw Mr Mirow 14 times between June 2019 and September 2019. At his first appointment he reported having ceased work due to severe anxiety arising from bullying and harassment by his managers. She took the most detailed history of all, including of his relationship. She concluded that his condition “arose *primarily* due to multiple psychological injuries (the most significant occurring on 17 April 2019) in the form of bullying and harassment by his managers.” (emphasis added) Her response that his employment was “a substantial contributing factor” has to be read in light of what was asked of her. I am satisfied that Dr Heng considered employment to be the main contributing factor.
103. I do not accept the submission that Ms Heng’s opinion carries less weight because it is “based solely on Mr Mirow’s discussions with her and she was not provided with any objective evidence of the alleged events at work as factors contributing to his illness”. She had a detailed history from Mr Mirow, and his account has not been challenged. She had a history of his relationship difficulties and concluded his condition arose primarily from the workplace incidents.

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<sup>36</sup> ARD at page 653.

104. Considering the evidence as a whole, I am satisfied that the weight of the evidence favours the conclusion that Mr Mirow's employment was the main contributing factor to his psychological injury.

### **Capacity**

105. The respondent submits that the best evidence Mr Mirow has of incapacity beyond December 2019 is Dr Allan's report of 13 February 2020 in which he states that Mr Mirow has a current incapacity for work which would continue for three to four months after which he should be considered fit for employment with a new employer. The respondent submits that Mr Mirow has a capacity for work equivalent to his pre-injury income and has no ongoing entitlement to weekly benefits compensation.
106. For Mr Mirow it is submitted that Dr Allan reported that he would be fit for employment within three to four months with treatment, that he is currently on Centrelink benefits and cannot afford treatment, and his injury remains unabated. I note that, in August 2019, Dr Heng thought his prognosis for recovery was good with treatment, and she was hopeful he would have returned to some form of work within 12 months of therapy resuming.
107. Mr Mirow seeks an order that the respondent pay weekly benefits compensation pursuant to s 37 of the 1987 Act at 80% of PIAWE, being \$1,025.64, from 18 September 2019 and continuing. The respondent does not dispute the amount of PIAWE.
108. Mr Mirow has provided Workcover certificates for the periods 30 August 2019 to 27 September 2019 and from 28 October 2019 to 25 November 2019. No explanation has been offered for the intervening period but, considering all of the evidence, I am satisfied that, more probably than not, he had no capacity for work during that time.
109. In his statement dated 29 April 2020, Mr Mirow says he would like to return to Dr Kumar and Dr Heng but cannot afford to do so. He says he continues to see Dr Tun "on a regular basis."<sup>37</sup> He says he takes Sertraline which I understand to be an anti-depressant. He has not explained why Dr Tun has not provided Workcover certificates past 25 November 2019.
110. I accept Dr Allan's opinion that Mr Mirow had no current capacity for employment on 13 February 2020 and that his incapacity would continue for three to four months. In the absence of further evidence about the effects of not being able to see Dr Kumar or Dr Heng, and particularly without further evidence from Dr Tun, I consider it reasonable to make an award of weekly payments up to 30 June 2020, being approximately four months after Dr Allan's report. I do not consider it appropriate, on the evidence, to award weekly payments thereafter.

### **Medical expenses**

111. No submissions were made as to the extent of any entitlement to reasonably necessary medical expenses. In the ARD, Mr Mirow claims an amount of \$10,000 on the basis of Dr Allan's report and his estimate of ongoing treatment. There will be a general award for reasonably necessary medical expenses as a result of the injury pursuant to s 60.

### **SUMMARY**

112. For the reasons above, the Commission will make orders as set out on page 1 of this Certificate of Determination.

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<sup>37</sup> ARD at page 23.