

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

MATTER NO: 5555/19
APPLICANT: Brett Richard John Campbell
RESPONDENT: Australian Native Landscapes Pty Ltd
DATE OF DETERMINATION: 13 January 2020
CITATION: [2020] NSWCC 18

The Commission determines:

1. The applicant sustained a psychological injury arising out of or in the course of his employment on 3 April 2019 (deemed).
2. The applicant's employment was the main contributing factor to his injury.
3. The applicant has had no current work capacity since 3 April 2019.
4. The applicant's psychological injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to discipline.

The Commission orders:

5. The respondent to pay the applicant weekly compensation in accordance with the *Workers Compensation Act 1987* as follows:
 - (a) \$866.40 per week from 3 April 2019 to 2 July 2019 pursuant to section 36(1)(a), and
 - (b) \$729.60 per week as adjusted from 3 July 2019 to date and continuing pursuant to section 37(1)(a).
6. The respondent is to have credit for payments already made during these periods.
7. The respondent to pay the applicant's reasonably necessary medical expenses pursuant to section 60 of the *Workers Compensation Act 1987*.
8. No order as to costs.

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

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Brett Richard John Campbell (the applicant) is 42 years old and commenced employment with Australian Native Landscapes Pty Ltd (the respondent) as truck driver on 23 August 2017. His services were terminated on 17 July 2019.
2. The applicant ceased work on 3 April 2019 and consulted his general practitioner, Dr Drabsch, who provided him with a certificate of unfitness due to severe anxiety and depression. The applicant was paid provisional payments of compensation from 3 April 2019 to 14 May 2019 and from 29 May 2019 to 11 June 2019.
3. On 12 June 2019, Insurance & Care NSW (icare) (the insurer) issued a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), disputing that the applicant had sustained an injury and that his employment was the main or a substantial contributing factor to his condition. The insurer denied that the applicant was incapacitated as a result of a work injury, and that medical and related treatment expenses were reasonably necessary.
4. In the alternative, the insurer denied that any compensation was payable for the applicant's psychological injury because it was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to discipline. It cited ss 4, 4(b), 9A, 11A (1), 33, 59 and 60 of the *Workers Compensation Act 1987* (the 1987 Act).
5. On 19 August 2019, the applicant's solicitor served a claim form and a notice of claim on the respondent and the insurer.
6. On 2 September 2019, the insurer reviewed its decision and issued a notice pursuant to s 78 of the 1998 Act confirming that it maintained its position, although it no longer disputed liability in respect of ss 4, 4(b) and 9A of the 1987 Act.
7. By an Application to Resolve a Dispute (the Application) registered in the Workers Compensation Commission (the Commission) on 25 October 2019, the applicant claims weekly compensation from 3 April 2019 to date and continuing pursuant to ss 36 and 37 of the 1987 Act and medical expenses pursuant to s 60 of the 1987 Act due to a psychological injury sustained during the course of his employment on 3 April 2019 (deemed).

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.

ISSUES FOR DETERMINATION

9. The parties agree that the following issues remain in dispute:
 - (a) whether the applicant's psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect of discipline – s 11A (1) of the 1987 Act;
 - (b) extent and quantification of the applicant's capacity – ss 36 and 37 of the 1987 Act, and

- (c) the respondent's liability with respect to the payment of medical expenses – s 60 of the 1987 Act.

Documentary evidence

- 10. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application and attached documents;
 - (b) Reply and attached documents;
 - (c) Application to Admit Late Documents received on 10 December 2019, and
 - (d) Application to Admit Late Documents received on 12 December 2019.

Oral evidence

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

REVIEW OF EVIDENCE

Applicant's statements and texts

- 12. The applicant provided a statement on 22 October 2019. He stated that his job was high-pressured and stressful due to a constant change of management, overload of duties that meant that he was often unable to take lunch breaks, and roster changes without notice which impacted on his family commitments.
- 13. The applicant stated that toolbox meetings were held only occasionally between August 2017 and March 2019, not daily as suggested by the respondent and the insurer. He was not provided with protective equipment and he had been asked to drive a forklift without a license.
- 14. The applicant stated that he had asked for payslips for two years to assist with his wife's Centrelink obligations and he had not been provided with details of the award under which he was being paid. On 30 March 2018, he requested this information from Jason White, who advised via a text message that he would provide the information after Easter, but he failed to do so.
- 15. The applicant indicated that on 10 April 2018, Mr White called him and promised to provide details of his award. The question of payment for overtime and holiday pay was also raised. The applicant was not provided with this information. He again sought copies of his payslips on 11 April 2018 and 19 April 2018.
- 16. The applicant stated that when he raised the issue of lunch breaks with Mr White, he agreed that he would look into it for him. This issue was not rectified, so the applicant started writing on his daily run sheet that he did not get a break. He became increasingly frustrated and stressed due to his workload.
- 17. The applicant stated that he had reported unsafe workplaces, and he cited an example of the use of a faulty loader in March 2019. He had asked for the air conditioning in his truck to be repaired, but his requests were ignored by his manager, Matthew Dalley. He was warned to keep his shirt on despite the hot temperature in his truck. He had reported inappropriate behaviour, but he had been ignored. This had made him feel more anxious.
- 18. The applicant stated that on or about 25 February 2019, Mr White contacted him at home and asked him to come to work to sign a new workplace agreement. Mr White refused to allow him to bring the agreement home to read before signing it. When he attended work on 2 March 2019, Mr White asked him to sign the agreement and told him there was no need to

read the document as the only change concerned a pay increase. His requests for a copy of the agreement were ignored. There were no changes made to his hourly rate on his payslips and this concerned him.

19. The applicant advised that he was prescribed blood pressure medication in March 2019. He asked to have a break each day before midday. However, he was still allocated many deliveries that stopped him having regular daily breaks. He felt that his requests had been ignored.
20. The applicant stated that he had become increasingly tired and stressed about work. He had difficulty sleeping and he became frustrated by the work issues. On 7 March 2019, his eyes were sprayed with hydraulic oil. He attended the Orange Health Service for treatment. He was told to avoid driving for at least a few hours and that he should not drive for two days whilst taking eye drops. Nevertheless, Mr White asked him to attend the yard because they were understaffed. He left work at around midday on 8 March 2019 because he found it difficult to work.
21. The applicant stated that he complained to Mr White on 13 March 2019 that his eye was still irritated. He later told Mr White that the problems about breaks and overwork were becoming an issue and he was becoming stressed. On 2 April 2019, Mr White advised him via text that payslips would be emailed to him.
22. The applicant stated that he was involved in an incident on 2 April 2019, when a request for a break was rejected by Kristen White. He stated that he threw his hands up in the air and said words to the effect of "Fuck this shit. I can't take it anymore". He walked out of the office, completed a delivery and when he returned to the yard, Mr White asked "What's your problem?". The applicant explained that he needed a break and Mr White said that they would discuss this later. He felt frustrated, stressed and overwhelmed.
23. The applicant stated that on 3 April 2019, when he was making a delivery, he started to feel overwhelmed with emotion and lost control. His hands were shaking, his heart was racing, he was sweating, and he started to cry uncontrollably. He contacted Mr White, who was very understanding, and he was allowed to go home. He later advised the manager that he did not feel safe driving a truck or a forklift.
24. The applicant stated that Mr White asked him via a text message to write down his grievances and to attend a meeting to discuss them. He consulted Dr Drabsch on 5 April 2019 and was prescribed medication. The doctor issued a certificate of unfitness and referred him to psychologists, Sene Hicks and Colette Mills.
25. The applicant advised that on 8 April 2019, he attended a meeting with Mr White and Mr Dally. His wife was also in attendance. He was very emotional and had difficulty speaking. Mr White expressed his concerns and offered him support. The applicant handed him the grievance letter and Mr White responded via email on 15 April 2019.
26. The applicant stated that on 18 June 2019, he received an email from Mr White requesting that he attend a meeting regarding a return to work. This caused him significant distress. He did not respond as he was communicating with Hannah Smith of Employers Mutual Ltd. His services were terminated via letter on 17 July 2019, because he had failed to attend work since 12 June 2019.
27. The applicant denied that he had ever received a performance meeting letter from Mr White dated 3 April 2019. The first time that he saw this letter was when he received the insurer's dispute letter. He disputed that Mr White had ever mentioned that he was to attend a performance meeting during their discussions on 2 April 2019 [sic].

28. The applicant indicated that he had issues adjusting to his medication and at times he suffered from shaking hands and a racing heart. He had also been grinding his teeth. He experienced panic attacks and emotional outbursts. He found this embarrassing and it had impacted on his social interactions. He had issues with his sleep, weight loss, communication and emotions.
29. The applicant provided a statement to investigators retained by the insurer on 23 April 2019. He commented that he had witnessed unsafe work practices, inappropriate behaviour and comments, and there had been a lot of staff coming and going. He had tried to do the right thing and report any issues to the relevant manager or supervisor, but he had been treated in a poor fashion and he had been mostly ignored. When he made a complaint about a co-worker, Tara, he was asked to sign a letter to say that he was going to be nice to her. He felt that this was unfair.
30. The applicant stated that he asked Mr White every fortnight for the past two years for payslips so that accurate figures could be given by his wife to Centrelink, but these had not been provided. Mr White had suggested that this was his fault. He had not received payment for the time that he took off work following his eye injury.
31. The applicant stated that he was uncomfortable at work, because it appeared that he was always getting into trouble for doing things that others did without criticism. On 3 April 2019, he felt completely overwhelmed and left work because he was not coping.
32. The applicant complained that he was given his own work as well as the work of others. This meant that he had insufficient time to complete the deliveries and he could not take breaks. There were safety issues in the yard, which caused him worry and stress. He had raised these issues with management, but he had been told that he was the issue. No action had been taken by management in relation to his concerns. He felt that he had been treated unfairly and he had been given a written warning for doing things that many other staff had done without being reprimanded.
33. The applicant stated that as a result of these work issues, he had become overwhelmed, anxious and stressed to the point that he had not been sleeping, eating and functioning normally.
34. The applicant provided a further statement on 3 December 2019 in response to the statement of Mr White. He denied that he was at any stage told by the respondent that he was being performance managed. He agreed that his wife's ill health was upsetting, but he was suffering workplace stress since the commencement of his employment in August 2017.
35. The applicant denied that he was advised that the meeting on 8 April 2019 was a performance management meeting. Mr White and Mr Dalley described the meeting as a grievance meeting to deal with the work issues that had caused him stress. Mr White confirmed this in his text message dated 3 April 2019. Further, Mr White made no mention of the disciplinary meeting letter dated 3 April 2019.
36. The applicant explained that on 2 April 2019, he was overloaded with deliveries. He had not been given time for a break and he had not received information regarding his pay. When he raised his concerns, he felt brushed off as usual. He felt frustrated, overwhelmed and dizzy. He then had the confrontation with Ms White. He could not recall threatening Mr White.
37. The applicant stated that in his email dated 15 April 2019, Mr White referred to the written grievances provided at the meeting. There was no mention of a performance management or disciplinary meeting.
38. The applicant stressed that he had raised the payslip issue repeatedly with Mr White prior to 7 March 2019, as disclosed in the text messages in March and April 2018. He also raised the issue regarding lunch breaks before prior to April 2019, as shown in his run sheets.

39. The applicant disputed that tool box meetings were held daily. Not all issues were addressed as evidenced by the respondent's failure to provide a copy of the employment contract after this was raised at the tool box meeting on 30 March 2019.
40. The applicant denied the suggestion made by Mr Dalley that there was a meeting on 2 April 2019 to discuss his grievance letter. This letter was not done until 8 April 2019.
41. The applicant stated that in the text messages sent by Mr Dalley in April 2019, there was no mention of him being performance managed.
42. The applicant disputed Ms White's comment that he was not exhibiting any signs of stress at work. He could not recall threatening to assault her brother. He explained that he was very upset and frustrated because he had not received information about his pay, and he had not been able to have a meal break. He confirmed that he completed the delivery before going home. He observed that there was no mention of any performance management or a disciplinary meeting following the incident on 2 April 2019.

Text messages

43. The applicant relies on a series of text messages that passed between him and his managers.
44. Text messages dated 30 March 2018 and 11 April 2018 refer to the provision of information, although it is unclear if this related to his award, contract or payslips. The applicant indicated in his statement that the first of these texts related to his award and contract, whereas in the second text, he provided his wife's email address so he could receive his payslips.
45. On 2 April 2019, the applicant was advised that payslips would now be emailed.
46. On 3 April 2019, the applicant sent a text to Mr Dalley to inform him that he did not feel comfortable coming to work due to his stress and he wanted to see his doctor. Mr Dalley told the applicant to look after himself and forget about work
47. On 3 April 2019, Mr White sent the applicant a text as follows:

"Good morning Brett,

I understand you have left site this morning stating you felt stressed and had anxiety around the way you are being managed by ANL.

It's imperative that we meet to discuss any grievances you have, can you please document these prior to the meeting.

As per ANL's grievance policy issues of this nature are taken seriously, please advise of a time that you might be able to discuss."
48. The applicant responded that he needed to see his doctor and he agreed to compile a list of issues. On 5 April 2019, the applicant advised Mr White that he could attend a meeting on the following Monday, namely 8 April 2019.
49. On 5 April 2019, the applicant advised Mr Dalley that his doctor had certified him unfit until 12 April 2019. He also mentioned that he was meeting with Mr White on the following Monday. Further texts discussed the prospects of a return to work and his workers compensation claim.

Statements of Jason White

50. Jason White, the regional manager, provided a statement on 29 April 2019. He advised that the applicant appeared to be frustrated about being performance managed. He was not showing any signs of stress and he did not complain of being stressed as a result of work. He was aware that the applicant's wife had been suffering from a medical condition and the applicant had taken time off work when she had surgery.
51. Mr White stated that on 2 April 2019, the applicant had raised an issue regarding his pay following his eye injury. He told the applicant that he would contact the relevant pay officer, although that person was off work that day. Later that day, when Mr White called the office, he heard screaming in the background. He was told that the applicant was screaming and making accusations that he was a liar, as the pay officer was in fact at work. He decided to come into work, although his sister, Kirsten, warned him that the applicant had made comments that he was going to assault him.
52. Mr White attended the office and his enquiries confirmed that the pay officer was not at work. When he informed the applicant about this, the applicant changed the topic and complained about an email that he had sent two years earlier. The nature of that email was not disclosed. In the presence of Mr Dalley, Mr White advised the applicant that they were only there to discuss the pay issue. The applicant then raised his voice and used foul language.
53. Mr White stated that he instructed the applicant to attend a disciplinary meeting on 8 April 2019, when he returned from leave, to discuss his inappropriate behaviour towards him and other staff members. He advised the applicant to bring a support person with him.
54. Mr White stated that the applicant was disruptive and tendered to only hear bad things rather than the good. He had mood swings, was unpredictable and staff members felt threatened by him. He questioned the merits of the applicant's claim.
55. Mr White advised that staff were encouraged to report any concerns at daily toolbox meetings, and the applicant had done this on two occasions. Those concerns were addressed on the days that he raised them.
56. Mr White stated that the applicant did not get into trouble regarding his complaints about Tara. The applicant was asked to provide a statement and then discuss the issues with him.
57. Mr White stated that the first time that the applicant raised the payslip issue was on 22 March 2019, and this was resolved that same day.
58. Mr White agreed that the applicant was not paid for the time that he took off work following his eye injury, because his certificate certified that he could return to work. The respondent offered to pay him sick leave, but the applicant declined, and he had not provided an alternative certificate.
59. Mr White rejected the applicant's claim that he had raised the issue of overwork and breaks with him. After he received the applicant's grievance letter, he told him that all drivers were entitled to meal breaks, and they were to advise the office when they took their breaks so their load priorities could be adjusted. This was clarified at tool box meetings.
60. Mr White stated that the applicant had only received one warning for abusing and intimidating a co-worker in 2017. He disagreed that employees took long lunch breaks. Any concerns raised were dealt with confidentially and all staff were treated equally. Safety was a priority and at no stage was unsafe equipment operated. Safety issues were discussed at the tool box meetings. Protective equipment was available for all employees and daily tasks were allocated by management of the office.

61. Mr White provided an unsigned statement on 2 December 2019. He denied that the applicant's roster was changed without notice and consultation. The only time that rosters were changed was if employees were sick or had unforeseen leave.
62. Mr White agreed that toolbox meetings were held in the timeframes described by the applicant, presumably meaning that they were not held daily. He was not aware that the applicant had been asked to operate a forklift unlicensed.
63. Mr White stated that the text message that the applicant sent on 30 March 2018 was only in respect of the award. He denied having a conversation with the applicant on 10 April 2018 regarding his award and workplace agreement, and on 19 April 2018 regarding his payslips. He denied having conversations with the applicant regarding his employment contract on 25 February 2019 and 2 March 2019.
64. Mr White stated that he asked the applicant via a text message to attend a meeting and he requested the applicant to document his grievances. The meeting on 8 April 2019 was confirmed via a text message on 7 April 2019. The applicant provided his letter of grievances at the meeting. A response was provided on 15 April 2019. The letter of termination was sent via email to the applicant and a copy was sent by registered post.
65. Mr White stated that on 2 April 2019, he and Mr Dalley spoke to the applicant about attending a performance meeting. Mr White sent a copy of the letter dated 3 April 2019 to the General Manager at 3.00 am on that date for approval. The applicant was not given the letter because he had left the site before Mr White could give it to him.

Statement of Matthew Dalley

66. Matthew Dalley, the branch manager, provided a statement on 29 April 2019. He confirmed that the applicant kept mentioning issues at work prior to going off. He suspected that the applicant's problems were not work related and concerned issues with his wife's health. He had spoken to him a number of times about oversteering about work things in an effort to calm him down, but he had been unsuccessful.
67. Mr Dalley stated that when he saw the applicant on 2 April 2019, he appeared to be manic in his thought patterns. He was also depressed, anxious and confused. He stated that the meeting on 2 April 2019 was called so that the applicant could openly discuss the issues he had raised in his letter to Mr White. He confirmed that at the meeting, Mr White advised the applicant that he was required to attend a disciplinary meeting on 8 April 2019 to discuss threats, intimidation and harassment of work colleagues.
68. Mr Dalley denied that he had asked the applicant to return to work. Rather, he merely called him to check that he was receiving payslips and that the grievances in his letter had been addressed.
69. Mr Dalley stated that the applicant had regularly raised issues with management and his concerns were taken seriously and not ignored. He did not treat the applicant as if he was annoying. He had little contact with Tara and the applicant's concerns were only raised in passing and not informally in writing.
70. Mr Dalley could not recall telling the applicant that he would not be fit to work for the remainder the day when he injured his eye. He told the applicant that he needed another certificate as he had been cleared to return to work.
71. Mr Dalley denied that the applicant was overworked and that he was unable to take lunch breaks. He stated that every morning at toolbox meetings, he told the staff that it was company policy that they have a lunch break, preferably between 12.00 pm and 2.00 pm.

He advised that staff were instructed to inform them if they could not complete their deliveries, so customers can be informed of any delay and so they can have a break.

72. Mr Dalley confirmed that the respondent was short staffed, but he claimed that the applicant had only done the bare minimum that was required of him. He stated that he had treated all staff the same and the applicant had in fact been given more leeway.

Statement of Kirsten White

73. Kirsten White, the administration officer and sister of Mr White, provided a statement on 29 April 2019. She confirmed that she organised the shift schedules and provided the drivers with details of their deliveries each day.
74. Ms White stated that the applicant did not show any signs or complain that he was stressed and/or anxious as result of work. She was aware that the applicant's wife had health issues and he appeared to be quite stressed about this.
75. Ms White stated that she found it hard to work with the applicant because of comments he made about the respondent, Mr White and a co-worker, Luke. He was also aggressive towards her.
76. Ms White stated that on 2 April 2019, the applicant was worked up and was yelling about the wages that had not been paid following his eye injury. When she spoke to her brother, she advised him not to attend work because she thought that the applicant would assault him. She stated that her brother met with the applicant to discuss his behaviour and following the meeting, the applicant was very worked up and aggressive. He then went home.
77. Ms White stated that at the tool box meeting the next morning, the applicant was very aggressive. She told the applicant that he had to follow protocol and he became aggressive about her paperwork. She spoke to the applicant about a delivery, and a short time later, he advised her that that he could no longer handle the stress and that he was leaving work.

Statement of David Robertson

78. David Robertson, a driver, provided an undated statement. He advised that staff were required to take meal breaks and this had been raised and discussed at tool box meetings. He stated that he reported any safety issues to the office, and he confirmed that the office did not require staff to drive unsafe vehicles.
79. Mr Robertson indicated that he had witnessed inappropriate behaviour by the applicant, and he had attempted to remove the applicant from conversations when he started to get worked up.

Applicant's grievance letter

80. The applicant identified a number of issues in the grievance letter dated 8 April 2019. These concerned unsafe work practices, inappropriate behaviour and comments, staff turnover and the respondent's failure to provide payslips to assist with his wife's Centrelink payments, despite regular requests for same.
81. The applicant complained that when he reported these issues, his concerns were mostly ignored. He had issues working with a colleague, Tara, who made sexual and degrading remarks and was always talking about her personal life. He was unhappy that he had to sign a letter in which he agreed to be nice to her. He thought that it was unfair that he got into trouble instead of her. He claimed that he was the only one getting into trouble and he felt that others were being treated differently.

82. The applicant complained that after he suffered his eye injury on 7 April 2019, he was not paid for the time taken off work. He stated that he was unable to take lunch breaks due to his workload and this was taking its toll on him.
83. The applicant indicated that he was overwhelmed and anxious. He was stressed and he had high blood pressure. He had not been sleeping or eating properly. This had affected his family life, as well as his physical and mental health. His medication made him feel very tired and dizzy.

Performance meeting letter

84. In an unsigned letter dated 3 April 2019, Mr White indicated that as discussed on 2 April 2019, the applicant was to attend an employee performance meeting at 8.00 am on 8 April 2019, in order to address recent unacceptable behaviour. The applicant was invited to bring a support person. The applicant denies that he ever received this letter.

Respondent's response to grievance letter

85. Mr White responded to the applicant's grievance letter via email on 15 April 2019. He stated that safety issues were raised at daily tool box meetings and he invited the applicant to provide details of unsafe practices. He noted that a previous grievance concerning Tara was resolved with an agreement that both parties would move forward in a positive and professional manner. Mr White commented that the issues about Tara that were raised by the applicant in his letter had not been the subject of his previous complaint.
86. Mr White confirmed that the payslip issue was raised at the tool box meeting on 22 March 2019, and these were sent via email on 2 April 2019. He was not aware of any issues as payslips should have been received since then. The situation prior to that time was not mentioned.
87. Mr White explained that no salary was paid when the applicant was absent from work following his eye injury, because the medical certificate did not certify that he was incapacitated. Mr White indicated that the applicant would be paid if an appropriate certificate was provided, or alternatively he could be paid sick leave.
88. Mr White stated that drivers were encouraged to take mandatory meal breaks and this had been confirmed at tool box meetings. He stated that drivers were encouraged to advise the office or management when they intended to take a break, so that deliveries can be allocated to others.
89. Mr White stated that safety concerns were raised at daily tool box meetings and these issues were taken seriously and resolved urgently. Unsafe equipment should not be used, and safety equipment was available to all staff. He stressed that all staff were treated equally, and any issues raised by staff were treated in private and in a confidential manner. He requested further information regarding the applicant's concerns of unfair treatment.

Emails

90. On 31 July 2018, Mr White sent an email, presumably to head office, about the grievance between the applicant and Tara Beer. When he asked whether a formal complaint had been made by the applicant, Mr Prior told him "nothing official just usual Brett complaining".
91. According to a report from Robert Millington, the applicant and Ms Beer had clashed, and each had complained about the manner in which they were spoken to. Mr Millington was then approached by Ms Beer's partner, who asked if he was going to deal with the applicant, otherwise he would.

92. Mr Millington approached the applicant, who complained that he could not deal with Ms Beer. She had caused him much trouble and had provided dockets with no or wrong delivery addresses and no delivery charges. The applicant said that he had already put in two formal complaints to Mr Prior, but nothing had been done. He complained that he was having trouble sleeping and his blood pressure had gone through the roof.
93. Mr White advised that he met with the applicant, who indicated that he had sent two to three formal complaints to Mr Prior about Tara, but no action had ever been taken. The applicant complained that Tara's daughter was in the office and was playing on the computer, her partner and dogs were in the yard for two hours on a Saturday, she was using her mobile phone in work hours and she was using eBay on our system. These issues had never been raised with Mr White or Mr Millington.
94. Mr White indicated that there was an issue between the applicant and Tara, and the applicant complained that Mr Prior was becoming quite friendly with Tara, which was why he felt that his concerns had not been addressed.
95. Mr White stated that he met with Tara, who complained that the applicant was very loud and rude at times. She admitted her part in the argument and she had already apologised. She also apologised for her partner's behaviour towards Mr Millington.
96. Mr White advised that the applicant agreed to put the grievance behind him and move forward. They both signed a document that confirmed that the issue had been resolved.
97. The terms of the agreement signed by the applicant were as follows:

"Brett agrees to speak to Tara Beer regarding work related business in a professional and civil manner.
Brett requires Tara to speak to him in a civil and professional manner.
Both Brett and Tara will work on opposing weekends.
Brett please sign to confirm that this issue is now resolved and all parties can continue to move forward and work in a positive manner for the best interest of ANL and its employees."
98. There are emails in evidence that relate to the provision of payslips. On 22 March 2019, Mr White advised that it was taking up to a week before staff received payslips and he indicated that this needed to be rectified. It was decided to send payslips via email. On 2 April 2019, Mr White gave the pay office the email details of the applicant's wife.

Tool box records

99. There are copies of the records of 18 tool box meetings that were held from 13 November 2017 to 14 April 2019. These contained comments about safety issues in the yard, at delivery sites and near school zones, as well as maintenance requirements on plant and equipment.
100. On 9 May 2018, it was noted that staff should take breaks separately and within the correct time lines. On 26 June 2018, staff were directed to read the respondent's bullying and harassment policy and they were warned that any offenders would receive a written warning.
101. On 22 March 2019, staff were told that they needed to assist each other because there was only a small team of workers and there needed to be better communication between management and staff. It was noted that payslips needed to be provided in a timely manner. Staff were directed to raise any concerns to Mr White if these issues were not addressed.

102. On 30 March 2019, it was noted that the applicant had approached Mr Dalley about the new contracts on 20 March 2019 and he had not yet received a copy. Mr White was asked to contact the applicant and let him know when the contract would be available.
103. On 3 April 2019, staff were reminded that meal breaks were their responsibility and if staff chose not to take a break, they were acting against the company policy.

Clinical notes and certificates of Dr Drabsch

104. The clinical notes of Dr Drabsch commence on 11 September 2001 and conclude on 22 November 2019.
105. On 20 April 2017, Dr Drabsch recorded that the applicant had previously suffered from stress due to long periods of truck driving. He was again under pressure and he was having issues with his father-in-law. The doctor provided some counselling.
106. At the consultation on 21 February 2019, the applicant complained of stress and panic attacks. His wife had undergone surgery, he had been demoted, he had exposed to human waste at work, his employer was not providing a safe workplace. The applicant told the doctor that he was struggling, had poor sleep and concentration and he had had enough. He was trying to hold it all together.
107. On 26 February 2019, the applicant indicated that he had raised his safety concerns with his manager at work. There had been frequent changes of managers.
108. At the consultation on 5 April 2019, Dr Drabsch recorded that the applicant had anxiety, depression and sleep disturbance. He prescribed Lexapro and gave the applicant a certificate of unfitness. The doctor recorded a history as follows
- “work - reg change management, feels discriminated against, trying to stick to guidelines/rules, pay issues, same work with less drivers, no help when approach managers ('given run around'), often not able to take lunch, formal complaints ignored
anxiety - worse approaching work not sleeping - initiation, mid waking
increase smoking
hard to focus
frustration, trying not to lose it
financial stress
2/52 ago - gauge broke in truck, fluid into R eye
went to OHS, given certif for 2/7 off
not paid for time off
3/4/19 - finally came to a head.”
109. On 12 April 2019, the applicant told the doctor that he had a meeting at work and his employer was supportive, but promises had not been kept. He had not been paid for time off following his eye injury and he had continued to ask for payslips. His thoughts were scattered, and he ruminated about work. He was unable to switch off and he felt overwhelmed. He was anxious and he was grinding his teeth, but his sleep had improved. The doctor referred the applicant to Ms Hicks.
110. On 23 April 2019, Dr Drabsch recorded that the applicant was feeling harassed by his manager and he was suffering from anxiety and panic attacks. He was withdrawn and he had low mood. He had lost interest, had poor self-care and sleep, and he was ruminating. The doctor increased the applicant's medication.

111. On 10 May 2019, the applicant complained that he thought about work and was unable to switch off. He was sleeping poorly, and he suffered from anxiety and panic attacks. He was withdrawn, unkempt and upset. He also had issues with the insurance company. Similar complaints were made on 28 May 2019 and 22 November 2019.
112. On 7 March 2019, Dr Drabsch issued a certificate in respect of the applicant's eye injury sustained on 7 March 2019. He certified that the applicant had the capacity to do some work on 7 March 2019 although he did not identify any restrictions. The doctor cleared the applicant to return to his pre-injury duties as from 8 March 2019.
113. Dr Drabsch certified that the applicant had no current work capacity as a result of work related anxiety and depression from 3 April 2019 to 20 December 2019.

Clinical note of Sene Hicks

114. On 26 April 2019, Ms Hicks recorded that the applicant was agitated, shaking, nervous and teary. This was on a background of an increased workplace related stress approximately six months earlier in October 2018. She recorded that the applicant had increased his alcohol intake. He had issues with his sleep, and he ruminated about work.
115. Ms Hicks noted that the precipitating factors were overwork, inadequate breaks, dangerous working conditions, exploitation of his low education and the requirement to sign a workplace agreement without the opportunity to take it away to show his wife who could read. The lack of payslips was also an issue. She recommended that steps be taken to remedy these issues to enable a gradual return to work.

Report of Dr Whetton

116. Dr Whetton reported on 1 August 2019. He recorded that the applicant's problems commenced about three months after he commenced employment with the respondent. He had issues with his managers. He was unable to find out details of the award rate under which he was employed. He suspected that he was being underpaid, and he was not provided with payslips until early 2019. He was concerned about safety issues and the lack of work breaks, but these issues were not addressed. There was a build-up in frustration in his attempts to gain his entitlements and he thought that Mr White had lied to him.
117. Dr Whetton noted that the applicant experienced increased tension, anxiety and panic. He eventually had a breakdown and ceased work. He consulted his general practitioner, was prescribed medication and he was referred for psychological treatment.
118. Dr Whetton recorded that the applicant's condition had deteriorated since he ceased work. He had issues with self-care, and he was depressed. His sleep was disturbed, he had suicidal thoughts and there was a loss of appetite, concentration, interest and motivation. His social and recreational activities were diminished. His marital and family relationships had been affected by his condition.
119. Dr Whetton diagnosed a Major Depressive Disorder on the background of increasing levels of tension and frustration from at least the beginning of 2019. The doctor believed that the applicant's injury did not particularly relate to the incident that occurred on 2 April 2019 [sic] with Ms White but to the build-up of frustration over the preceding months. He stated that the applicant was totally unfit for work, and he had not yet achieved maximum medical improvement. He recommended psychiatric treatment.

Report of Dr Bisht

120. Dr Bisht reported on 15 May 2019. He noted that there has been a change of several managers and the applicant had experienced ongoing problems related to safety, inappropriate comments from other staff, salary issues, and issues with lunch breaks. The applicant had raised his concerns with management, but insufficient action had been taken.
121. The doctor noted that the applicant started to ruminate intermittently about his workplace stressors even when he was at home. He had difficulty sleeping and he became anxious when he was at work. He had recently had an altercation with Ms White because he felt that he was being overworked. He felt intimidated by his manager during a conversation about the way that he had spoken to Ms White. The following morning when he went to work, he had a breakdown during a conversation with another manager about the incident on the previous day. Since that time, he had been constantly anxious, and he had experienced problems with his concentration, cognitive tasks and sleep. He had decreased interest in previously pleasurable activities. He felt constantly on edge, but he admitted that there had been some improvement in his symptoms.
122. Dr Bisht reported that the applicant had not been attending social gatherings as much as before, but he was able to self-care without prompting. He could not drive for long distances, and his family relationships had suffered. He denied suicidal, homicidal or self-harm ideation.
123. Dr Bisht diagnosed an Adjustment Disorder with Mixed Anxious and Depressed Mood that was related to various workplace stressors over the last two years, including his concerns with safety, workload, salary, the interaction with his co-worker on 2 April 2019 and the actions of the respondent in relation to that incident. The applicant's employment was the main contributing factor to his condition.
124. Dr Bisht considered that the actions of the respondent were the predominant cause of his condition, because prior to the events on 2 April 2019, the applicant had been stressed about certain work related issues, but his symptoms were subsyndromal. He stated that the applicant was unfit for his pre-injury duties and he required further psychological treatment including a referral to a psychiatrist.

APPLICANT'S SUBMISSIONS

125. The applicant's counsel, Ms Grotte, submits that the respondent bears the onus of showing that the applicant's psychological condition was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to discipline.
126. Ms Grotte submits that according to Dr Whetton, the applicant's injury was caused by a number of factors and was not merely caused by incidents that occurred in the latter part of the applicant's employment. The applicant identified these issues that included problems with his managers, changes in his roster without notice, the lack of details of his award, the failure by the respondent to provide payslips and a copy of his employment agreement, safety issues, overwork and the lack of work breaks. The applicant explained how these issues caused stress which led to his breakdown and cessation of work.
127. Ms Grotte submits that the applicant had sent text messages about his issues and claimed that he had been requesting copies of his payslips since August 2017. The information was promised by Mr White in March 2018, but this was not provided. He did not receive payslips electronically until April 2019.

128. Ms Grotte submits that the respondent's witnesses stated that it was the policy that drivers were to take meal breaks, but the applicant's deliveries were organised in such a way that he was unable to take breaks. This led to the confrontation that he had with Ms White in April 2019.
129. Ms Grotte submits that the applicant was pressured into returning to work following his eye injury and when he did so, he found it difficult to perform his duties. Mr Dalley was aware of his issues with stress and he sympathised with him.
130. Ms Grotte submits that the applicant was requested to attend a grievance meeting by Mr White via a text message. There was a series of texts and the applicant set out the issues in his grievance letter dated 8 April 2019. Mr White provided a response to the letter on 15 April 2019. He did not refer to any discipline or a disciplinary meeting.
131. Ms Grotte submits that the grievance made by the applicant in July 2018 was resolved by apologies. This was not a one sided incident and Ms Beer admitted to inappropriate behaviour.
132. Ms Grotte submits that the letter dated 3 April 2019 did not include the applicant's residential address. Mr White conceded that he had not given this to the applicant because he had left work before he could do so. According to Mr White, he asked the applicant to attend a disciplinary meeting because the applicant had told Ms White that he was going to assault him. The statements regarding this conversation are self-serving and one cannot be satisfied that this happened, when the texts and the grievance correspondence are considered. Even if the conversation regarding the meeting had occurred, it was insufficient for the respondent to say that this was a disciplinary meeting and that the applicant suffered an injury as a result of this.
133. Ms Grotte submits that the last statement of Mr White is unsigned. He referred to the fact that he had discussed performance management of the applicant with Mr Dalley but not discipline. Mr White did not give the letter dated 3 April 2019 to the applicant and only sought approval from the General Manager at 3.00 am. The applicant was denied procedural fairness as he was expecting a grievance meeting, not a performance management or disciplinary meeting.
134. Ms Grotte submits that the clinical notes of Dr Drabsch show that the applicant complained about safety issues, exposure to hazardous materials and the change of managers at the consultations in February 2019. The applicant reported details of the work issues at the consultation on 5 April 2019. On 12 April 2019, the applicant told the doctor that his employer had been supportive at the meeting. There was no reference to any disciplinary meeting. There was a consistency in his complaints of being overwhelmed and anxious. Further complaints were made during later consultations.
135. Ms Grotte submits that the statement of Mr Robertson refers to the applicant's inappropriate behaviour, but the issue with Tara in 2018 was resolved. If there had been ongoing behavioural problems, the employer would have instigated disciplinary proceedings against the applicant at an earlier stage.
136. Ms Grotte submits that Ms White referred to being uncomfortable because of the applicant's aggressive behaviour, but he was frustrated, and he may well have expressed his frustrations. The applicant denied that he threatened to assault Mr White. If Ms White had been unable to work with the applicant, one would have imagined that the applicant would have been called in for disciplinary action at an earlier stage.

137. Ms Grotte submits that Mr White described the applicant as a competent worker who appeared to be frustrated about being performance managed, but there is no evidence to support this. Mr White claimed that the applicant showed no signs of stress, but this was evident in the way that he expressed his frustrations. The incident with Ms White occurred a few hours after Mr White had spoken to the applicant about the grievance meeting.
138. Ms Grotte submits that Mr Dalley indicated that the applicant kept raising issues and he had counselled him about oversteering. This shows support for the applicant's claim. He commented that when he last saw the applicant on 2 April 2019, he appeared to be manic, depressed, anxious and confused. Mr Dalley's evidence regarding the discussions on 2 April 2019 relating to a disciplinary meeting cannot be accepted, as there was no evidence to support this.
139. Ms Grotte submits that the applicant disputed that he was to attend a performance management meeting. The texts and emails only referred to his grievances, not discipline.
140. In reply, Ms Grotte submits that the exchange with Ms White was a clear expression of the build-up of the applicant's frustration because he felt that he was not being listened to. The respondent knew about his grievances, and by that stage, the applicant had already decompensated.
141. Ms Grotte submits that the applicant's text messages show that he was grateful that things were being done. He was still working, and he was not going to react badly. She submits that the evidence shows that there were not daily tool box meetings, and there was no evidence to suggest that tool box meeting records were missing.
142. Ms Grotte submits that Dr Bisht was incorrectly told that the applicant was sent a request to attend a performance meeting, which is inconsistent with the evidence of Mr White. The applicant was only off work for half a day following his eye injury, but the non-payment of wages was important to him. The provision of payslips was on on-going issue and the applicant was frustrated by the respondent's lack of action. One could not be satisfied that a disciplinary meeting was or was proposed to be taken. The applicant's injury was caused by events that occurred prior to 2 April 2019.

RESPONDENT'S SUBMISSIONS

143. The respondent's counsel, Mr Doak, submits that there is confusion regarding the disciplinary meeting and the intention of the respondent when the applicant was notified on 2 April 2019. The applicant had concerns about the provision of payslips, but Mr White stated that this was not raised until April 2019. The applicant's response to Mr White's text message in March 2018 is not consistent with someone who had waited months and months for this information.
144. Mr Doak submits that the applicant was volatile, and he admitted that he was extremely upset. He did not deny that he was threatening and swearing, only that he could not recall this. The event was sufficient to warrant disciplinary action. The unchallenged evidence of Mr White and Mr Dalley was that the applicant was told to attend a disciplinary meeting. The applicant merely stated that this conversation never occurred.
145. Mr Doak submits that the applicant stormed off from work on 2 April 2019 and he was not at work on 3 April 2019. Therefore, Mr White was unable to give him the disciplinary letter. It was Mr White's intention to conduct a disciplinary meeting and to thrash out issues on 8 April 2019 when he returned from leave. The applicant acknowledged that he was getting into trouble, which is consistent with him being told to attend a disciplinary meeting. He reacted because the pay officer was not at work and he ranted and swore at Ms White. He also threatened violence against Mr White.

146. Mr Doak submits that Dr Bisht accepted that the applicant had been exposed to various stressors, but he was satisfied that the predominant cause of the applicant's injury were the events on 2 April 2019. Care needed to be taken with the evidence of Dr Whetton, because his opinion was coloured by the history provided by the applicant.
147. Mr Doak submits that whilst the notes of Dr Drabsch refer to some issues before the applicant ceased work, he did not identify a number of matters raised by the applicant in his evidence. Dr Drabsch noted that the applicant had been demoted and that he had been exposed to human waste. There is no evidence to corroborate this. The notes show that the applicant had long standing issues and there were other stressors that were not work related.
148. Mr Doak submits that the applicant's evidence needs to be weighed up with the statements of the respondent's employees. There is no evidence to suggest that Mr Robertson was coerced to provide his statement. The applicant identified his concerns about safety issues, and Mr Robertson discussed how such issues were dealt with. It seems that tool box meetings were not held every day, but the records might be missing. According to Mr White, the applicant raised issues at the tool box meetings, and these were addressed.
149. Mr Doak submits that the applicant took no time off work due to stress or issues at work. Safety issues were dealt with and the respondent attempted to enforce meal breaks. This was confirmed by Mr Dalley. The applicant could be making up evidence to substantiate his claim, and even if there were issues that caused concern, he was not incapacitated. He left work after he was told about the meeting.
150. Mr Doak submits that the applicant did not mention the issue with Tara, so this was not of great importance to him. He raised issues at the meeting on 8 April 2019, but this did not equate to psychological stressors, and Dr Whetton did not take this into account.
151. Mr Doak submits that the applicant had issues regarding his pay following his eye injury, but the certificate that he presented did not certify that he was incapacitated. There is no suggestion that the pay issue was getting on top of him until the incident on 2 April 2019. Dr Bisht was correct when he said that the applicant's symptoms were in the background and were not the cause of him going off work.
152. Mr Doak submits that the applicant did not need to receive the letter dated 3 April 2019. He was told about the disciplinary meeting on 2 April 2019 and he was informed that it was to discuss his outburst. He attended the meeting on 8 April 2019 and other issues were discussed. He was given the opportunity to respond and it was not as if he was blind-sided. The respondent was trying to deal with discipline and the applicant's grievances at the same time.
153. Mr Doak submits that the evidence of Dr Bisht should be accepted. Dr Whetton recorded a similar history, but he placed no great weight to the events on 2 April 2019. The applicant confirmed in his statement that he was worked up and that he stormed off afterwards. He was then incapacitated. Counsel submits that there was no issue regarding the extent of the applicant's capacity and the need for medical treatment.

REASONS

Was the applicant's psychological injury wholly or predominantly caused by the reasonable action taken or proposed to be taken by the respondent with respect to discipline?

154. There is no dispute that the applicant suffers from a psychological injury. What I need to determine is whether the applicant's psychological injury was wholly or predominantly caused by the reasonable action taken or proposed to be taken by the respondent with respect to discipline in accordance with s 11A (1) of the 1987 Act.

155. Section 11A (1) of the 1987 Act provides:

“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.”

156. The issue of causation must be determined based on the facts in each case. This requires a consideration of the statutory provisions and the principles regarding causation set out in *Kooragang Cement Pty Ltd v Bates*¹.

157. In *Kooragang*, Kirby J stated:

“The result of the cases is that each case where causation is in issue in a workers compensation claim must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase ‘results from’ is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death ‘results from’ a work injury. What is required is a common-sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation.”²

158. The respondent carries the onus of establishing the action taken was reasonable in accordance with the principles discussed in *Pirie v Franklins Ltd*³ and *Department of Education & Training v Sinclair*.⁴

159. The test is objective, based on the facts, and involves questions of fairness. In *Irwin v Director-General of School Education*⁵, Geraghty CCJ stated:

“The question of reasonableness is one of fact, weighing all the relevant factors. That test is less demanding than the test of necessity, but more demanding than a test of convenience. The test of ‘reasonableness’ is objective and must weigh the rights of employees against the objective of employment. Whether an action is reasonable should be attended, in all the circumstances, by questions of fairness.”

160. When considering what is reasonable, it is also important to have regard not only to the end result, but to the manner in which it is done. This was discussed in some detail by Truss CCJ in *Ivanisevic v Laudet Pty Ltd*⁶, by Deputy President Roche in *St George Leagues Club Ltd v Wretowska*⁷, and by the Court of Appeal in *Northern NSW Local Health Network v Heggie*⁸ and in *Sinclair*.

161. In *Kushwaha v Queanbeyan City Council*⁹, which was cited with approval by Deputy President Candy in *ISS Property Services Pty Ltd v Milovanovic*¹⁰, Neilson CCJ considered the meaning of “discipline” in terms of s 11A (1) of the 1987 Act. He stated:

¹ (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*)

² *Kooragang*, [463].

³ [2001] NSWCC 167; 22 NSWCCR 346 (*Pirie*).

⁴ [2005] NSWCA 465; 4 DDCR 206 (*Sinclair*).

⁵ NSWCC No 14068/97 (unreported, Geraghty J, 18 June 1998) (*Irwin*).

⁶ (unreported, 24 November 1998).

⁷ [2013] NSWCCPD 64.

⁸ [2013] NSWCA 255 (*Heggie*).

⁹ (2002) 23 NSWCCR 339; [2002] NSWCC 25 (*Kushwaha*).

¹⁰ [2009] NSWCCPD 27.

“It can be seen, therefore, that the primary meaning of ‘discipline’ is learning or instruction imparted to the learner and the maintenance of that learning by training, by exercise or repetition. The narrow meaning of punishment, chastisement is secondary to the primary meaning although this word is often used in this sense in popular speech. It is this narrow meaning which weighed on my mind in *Bottle’s* case. However, the word used in an Act of Parliament must be given its full meaning, unless the context otherwise requires. Such a context does not appear to me to be called for in the interpretation of s 11A (1).”¹¹

162. It was confirmed in *Heggie* that the term “discipline” in s 11A (1) of the 1987 Act includes the whole of the disciplinary process. Sackville AJA stated:

“The following propositions are consistent both with the statutory language and the authorities that have construed s 11A(1) of the WC Act:

- (i) A broad view is to be taken of the expression ‘action with respect to discipline’. It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation;
- (ii) Nonetheless, for s 11A (1) to apply, the psychological injury must be wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer;
- (iii) An employer bears the burden of proving that the action with respect to discipline was reasonable;
- (iv) The test of reasonableness is objective. It is not enough that the employer believed in good faith that the action with respect to discipline that caused psychological injury was reasonable. Nor is it necessarily enough that the employer believed that it was compelled to act as it did in the interests of discipline;
- (v) Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of that action that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury, and
- (vi) The assessment of reasonableness should take into account the rights of the employee, but the extent to which these rights are to be given weight in a particular case depends on the circumstances (emphasis added).”¹²

163. According to the applicant’s evidence, he was employed in a high pressured and stressful job. There was a high turnover of managers and staff. He was overworked and the manner in which his roster was organised prevented him from having mandatory lunch breaks.

164. This evidence has been challenged by Mr White, who could not recall that the applicant had raised the issue of overwork and breaks with him. It seems to suggest that he was not aware of his issue until after he received the applicant’s grievance letter.

¹¹ *Kushwaha*, [152].

¹² *Heggie*, [59].

165. Mr Dalley denied that the applicant was overworked and that he was unable to take lunch breaks, but this is inconsistent with the applicant's evidence. Whilst it may be the case that lunch breaks were mandatory, whether this policy was enforced has not been established.
166. Mr Dalley claimed that the need to take breaks was raised at every tool box meeting, but this is not reflected in the tool box meeting records. They show that this was only raised on two occasions. His concession that the respondent was understaffed would seem to add credence to the applicant's allegations of overwork. Mr Dalley also confirmed that the applicant regularly raised issues with management, but disputed that his complaints were ignored.
167. The applicant stated that there were only occasional tool box meetings and his evidence is consistent with the respondent's records that show that there were only 18 meetings in a period of 2.5 years. It seems that this was conceded by Mr White.
168. Although the respondent's witnesses confirmed that safety equipment was available, the applicant provided his own. He was asked to drive a forklift without being licensed. These were matters of concern and his evidence has not been challenged by the respondent. The incident with Tara also concerned him, because he thought that it was unfair that he had to sign a letter when he was the one to lodge the complaint.
169. The applicant was concerned by the respondent's failure to provide him with payslips that would assist his wife with her Centrelink payments and details of the award under which he was employed.
170. The applicant claimed that he had asked for details of his award and he sent a text to Mr White on 30 March 2018. Mr White promised via text to send him this information after Easter 2018, but this did not occur. In his last statement, Mr White agreed that this text message was in relation to the award details.
171. According to Mr White, the applicant thanked him in his text message for fixing the problem. However according to the applicant, the award details were never provided. There is no evidence, such as an email or text message, to support Mr White's suggestion that the award details were provided.
172. The applicant claimed that he called Mr White on 10 April 2018 about the award information and during that conversation, he asked about overtime and holiday pay. He sought copies of his payslips on 11 April 2018 and 19 April 2018.
173. The applicant claimed that he had asked Mr White for his payslips for two years, but this has been denied by Mr White, who stated the applicant did not request payslips before 22 March 2019. He claimed that this issue was rectified that day, and yet it seems that the payslips were not sent until early April 2019.
174. Mr White denied having the conversations with the applicant on 10 April 2018 and 11 April 2018. He did not comment on the text message dated 11 April 2018 which contained details of the email address of the applicant's wife.
175. According to the applicant, when he raised the lunch break issue with Mr White, he promised to investigate it. The applicant stated that he was increasingly frustrated and stressed due to his workload. He began to record the fact that he had not had a lunch break in his run sheets. One would have thought that this would have been brought to management's attention by the pay office.
176. In his statement, Mr White confirmed that he advised the applicant that drivers were entitled to have meal breaks and that they should keep the office informed. Therefore, whilst Mr White confirmed company policy, he has not denied speaking to the applicant about this issue before he received the grievance letter, only that he could recall doing so.

177. The applicant indicated unsafe work practices and faulty equipment made him anxious. He claimed that Mr Dalley ignored his request to repair the air conditioner in his truck. This has not been challenged by Mr Dalley. Mr White and Mr Robertson disputed that unsafe equipment was used. Neither made any comment about the loader issue in March 2019 identified by the applicant in his statement. The respondent's witnesses merely advised that the drivers were obliged to report faults, and these would be rectified.
178. The applicant was concerned about having to sign a new workplace agreement in early 2019. He claimed that he spoke to Mr White on two occasions. Mr White denied that he had any conversation with the applicant about this agreement and he made no further comment. Significantly, the tool box meeting record dated 30 March 2019 shows that the applicant had requested a copy of the agreement on 20 March 2019 and this was still an issue.
179. The applicant was concerned that he was not paid for the afternoon that he took off work following his eye injury. It seems that the respondent was justified in not paying him because he was not certified as unfit to work.
180. It is clear from the applicant's statement that matters came to a head when he was involved in the confrontation with Ms White on 2 April 2019. He claimed that he had not been able to have a break and when Ms White challenged him, he swore, threw his hands up in the air and walked out of the office.
181. After he completed the delivery, Mr White asked him what was wrong, and the applicant told him that he needed a break. Mr White stated that they would discuss this later. There was no mention of any meeting. The following day, he broke down at work and Mr White allowed him to go home.
182. Mr White sent the applicant a text message at 10.08 am on 3 April 2019. He noted that the applicant was stressed and anxious about how he was being managed by the respondent. He invited the applicant to a meeting in order to discuss any grievances that he had. At no stage did Mr White suggest that the meeting was to discuss disciplinary action arising from the incident on 2 April 2019. The applicant could not recall threatening Mr White, but it is possible that he did so, given his frustrated presentation on 2 April 2019.
183. On 5 April 2019, it was agreed that the meeting would be held at 10.30 am on 8 April 2019. Mr Dalley also kept in contact with the applicant via text messages at this time and he was clearly concerned about the applicant's mental state. There was no mention of any performance management or discipline in his texts.
184. Mr Dalley's recollection that there was a meeting on 2 April 2019 to discuss the applicant's grievance letter is incorrect, because the letter was not provided until 8 April 2019. Further, his evidence that they discussed the need for the applicant to attend a disciplinary meeting on 8 April 2019 is inconsistent with the applicant's evidence and the text messages.
185. According to the applicant's evidence, his workplace grievances were discussed, and Mr White offered him support. He submitted his grievance letter and Mr White provided a response via email on 15 April 2019. At no stage were any disciplinary issues identified. The applicant also stated that at no stage had he been performance managed by the respondent.
186. There is no dispute that the applicant did not receive the disciplinary meeting letter dated 3 April 2019. According to Mr White, the applicant had left work on 3 April 2019 before he had the opportunity to give it to him. The applicant confirmed that he had not been told that he was to attend a disciplinary meeting.

187. According to Mr White, the applicant appeared to be frustrated about being performance managed. The nature of the alleged performance management was not disclosed, and his evidence is uncorroborated.
188. The suggestion by Mr White and his sister that the applicant did not complain or show any signs of stress as a result of work seems inconsistent with the evidence of Mr Dalley, who commented about the applicant's manic and depressed presentation at work on 2 April 2019.
189. Mr Dalley confirmed that he had counselled the applicant about overstressing about work matters. Mr White also commented that the applicant was prone to mood swings, which is suggestive of some emotional issues.
190. Mr White indicated that the applicant complained about the pay issue when they spoke on 2 April 2019 and he raised the email sent two years earlier. The nature of that email was not disclosed, but it may have related to the provision of payslips.
191. Mr White claims that on 2 April 2019, he told the applicant to attend a disciplinary meeting to discuss his inappropriate behaviour towards him and other staff members which would be held on 8 April 2019 when he returned from leave. He advised the applicant to bring a support person with him.
192. I have some concerns regarding the reliability of this evidence. The contemporaneous text messages show that the meeting was arranged in order to discuss the applicant's grievances and the applicant was asked to document these. He was requested to advise a suitable time to do so. Therefore, the meeting was not arranged on 2 April 2019 and there was no reference to it being disciplinary in nature.
193. The disciplinary meeting letter was only addressed to the applicant. There was no postal or email address. The letter was unsigned. It did not identify who would be attending the meeting. It identified the time as 8.00 am, not 10.30 am. The nature of the inappropriate behaviour was not identified. There was no reference to any discussion regarding the applicant's grievances.
194. Mr White sought approval from the General Manager to send the applicant the disciplinary meeting letter. His evidence does not address whether the General Manager approved this. Whilst Mr White indicated why the letter was not given to the applicant on 3 April 2019, it begs the question why the letter was not sent via registered post or by email to the applicant on or after 3 April 2019 and before the meeting on 8 April 2019.
195. The matters identified by the applicant in his grievance letter are consistent with his statements. These concerned unsafe work practices, inappropriate behaviour and comments by Tara, staff turnover, the perception that he was being treated unfairly when compared to others, the pay issue following his eye injury, the failure to provide payslips and the inability to take lunch breaks due to his workload. The issue with the award details and the workplace agreement were also of concern. These matters had caused psychological symptoms.
196. Mr White's response sought details of unsafe work practices. He explained that safety issues and lunch breaks were raised at daily tool box meetings. This is consistent with some of the tool box meeting records, but whether the unsafe equipment was repaired expeditiously is unclear in the absence of maintenance records. Further, there is no evidence to confirm that mandatory lunch breaks were enforced.
197. Although Mr White advised that the incident with Tara had been resolved, this was still something of concern to the applicant. Mr White explained that the payslip issue was resolved on 22 March 2019, but he did not address the applicant's concerns regarding the provision of payslips in the past. His explanation for non-payment of wages following the eye injury was credible.

198. The email from Mr White shows that the pay office was provided with the email address of the applicant's wife on 2 April 2019. There is no explanation regarding any action taken following receipt of the text message with details of the email address on 11 April 2018.
199. In summary, the applicant has identified multiple issues that caused his stress during the course of his employment prior to his cessation of work on 3 April 2019. Some of his allegations have been disputed by the respondent's witnesses, but he has some support from Mr Dalley. There is contemporaneous material in the form run sheets and text messages to support his evidence.
200. The clinical notes of Dr Drabsch confirm that in late February 2019, the applicant was suffering from symptoms of stress and panic attacks following his wife's surgery and due to work issues. He was unable to sleep, and he lacked concentration. It is clear that he was struggling. There was no reference to the incident on 2 April 2019, which raises doubts as to its effect on the applicant in isolation from the earlier issues. The complaints made at the consultations on 5 April 2019 and 12 April 2019 were consistent with the applicant's statements.
201. The entry of 12 April 2019 referred to the applicant attending the work meeting and of his employer being supportive. It was not suggestive of any ill-will or of any discussions regarding discipline. The history recorded by Ms Hicks on 26 April 2019 is also consistent with the applicant's statements.
202. I find it remarkable that Mr Doak suggests that care should be taken with Dr Whetton's opinion because it was coloured by the history given to him by the applicant. There would only be merit in such a submission if the applicant was an unreliable historian, but there is a great deal of consistency in the applicant's statements and the histories given to the clinicians in this matter. I have no cause to question the reliability of the applicant's evidence.
203. Dr Whetton was satisfied that the applicant's Major Depressive Disorder was due to increasing levels of tension and frustration from at least early 2019, not merely to the incident on 2 April 2019 [sic]. The doctor has provided a credible and persuasive explanation for his opinion.
204. The history recorded by Dr Bisht was consistent with the applicant's statements, although he had more details regarding the incident on 2 April 2019 and how it had affected the applicant. He diagnosed an Adjustment Disorder with Mixed Anxious and Depressed Mood that was related to various workplace stressors over the last two years, the incident on 2 April 2019 and the respondent's actions in respect of the disciplinary procedure that flowed from the last incident. He thought that the disciplinary process was the predominant cause of the applicant's condition, as prior to 3 April 2019, the applicant had been able to work despite having psychological symptoms.

Conclusion

205. A review of the dispute notices shows that the insurer disputed liability because it considered that the applicant's psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent in relation to the disciplinary meeting that was to be convened on 8 April 2019 in order to address the applicant's behaviour at work on 2 April 2019.
206. It is true that the applicant's actions on 2 April 2019 may well have warranted disciplinary action. Although Mr White and Mr Dalley indicated that the applicant was told to attend a disciplinary meeting when they spoke to him on 2 April 2019, there is no documentary or other evidence to corroborate their evidence. The applicant denies that he was told about any disciplinary meeting. There are no minutes in relation to the meeting on 2 April 2019.

207. The text messages that passed between him and Mr White only referred to discussions regarding the applicant's grievances. Mr Dalley's texts did not refer to discipline. This casts doubts on the accuracy of their evidence.
208. The applicant was not provided with the disciplinary meeting letter and it was not sent to him before the meeting when there was ample opportunity to do so. There are no minutes of the meeting on 8 April 2019 in evidence and the entry in the clinical notes of Dr Drabsch dated 12 April 2019 is not consistent with there having been any discussions about discipline at the meeting on 8 April 2019.
209. In the circumstances, I am not satisfied that the applicant was told about any disciplinary meeting or that he was issued with notice of a disciplinary meeting. Further, I am not satisfied that the respondent had raised any issues of discipline at the grievance meeting on 8 April 2019.
210. Even if the applicant had received the letter dated 3 April 2019, it was totally inadequate as it did not properly explain the nature of the inappropriate behaviour or invite a response to the allegation. When the meeting was held on 8 April 2019, there were no minutes. The entire process was flawed and could not be construed as reasonable in the circumstances.
211. Further, Dr Bisht's opinion was predicated on the incorrect advice from the insurer that the respondent had provided the applicant with the letter dated 3 April 2019 which referred to aggressive behaviour on 2 April 2019. Not only did the letter not refer to aggressive behaviour, but the respondent acknowledged that this letter was never sent to the applicant. In the circumstances, Dr Bisht's comments regarding the impact of the alleged disciplinary process carry no weight.
212. The applicant relies on his statements, emails text messages and run sheets. He has the support of Mr Dalley regarding work related stress. Dr Drabsch and Dr Whetton provide support for a work related psychological condition that was caused by multiple issues during the course of the applicant's employment prior to 3 April 2019.
213. Even Dr Bisht acknowledged that the applicant's mental state was affected by multiple work issues. It is true that the applicant did not have any time off work and the health issues of the applicant's wife were a concern, but their effects were not incapacitating. The final straw that led to the applicant's breakdown was the incident that occurred on 2 April 2019, rather than any notice of any disciplinary meeting. The evidence supports the conclusion that the applicant was not involved in any disciplinary process and even if he was, the respondent's actions were not reasonable.
214. Therefore, having regard to the totality of the evidence and the common-sense evaluation test in *Kooragang*, I am not satisfied on the balance of probabilities that the respondent has discharged the onus of showing that the applicant's psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by it with respect to discipline.

Extent of the applicant's incapacity

215. An assessment of the applicant's capacity involves a consideration of whether the applicant has no current work capacity or a current work capacity as defined in s 32A of the 1987 Act.
216. 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."

217. "No current work capacity" requires a consideration of a worker's capacity to undertake not only his pre-injury duties, but also suitable employment, irrespective of its availability. This was confirmed by Deputy President Roche in *Mid North Coast Local Health District v De Boer*¹³ and in *Wollongong Nursing Home Pty Ltd v Dewar*.¹⁴

218. Therefore, if the applicant has "no current work capacity", I need to assess whether the applicant is unable to return to both his pre-injury duties and some suitable employment.

219. There is no dispute that the applicant is unfit for his pre-injury duties. The medical certificates of Dr Drabsch and the evidence of Drs Whetton and Bisht confirm that the applicant has no current work capacity. Indeed, Mr Doak conceded that there was no dispute regarding the extent of the applicant's capacity.

220. The applicant is only 42 years old. He left school in year 9 and has poor literacy skills. His recent employment has only been as a truck driver. He has a significant incapacity due to his largely untreated psychological symptoms. He has not been involved in any return to work plans or rehabilitation.

221. Therefore, having regard the relevant factors identified in s 32A of the 1987 Act, I am satisfied on the balance of probabilities that the applicant has had no current work capacity since he ceased work on 3 April 2019.

Quantification of the applicant's entitlement to weekly compensation

222. The parties agreed that the applicant's Pre Injury Average Weekly Earnings (PIAWE) was \$912. It seems that the applicant was not in receipt of any pecuniary benefits.

¹³ [2013] NSWCCPD 41.

¹⁴ [2014] NSWCCPD 55.

223. Although the applicant received some provisional payments of compensation prior to 11 June 2019, there were some periods that he was not paid. Accordingly, I propose to enter an award as from 3 April 2019, but will allow the respondent credit for payments already made.

224. In accordance with s 36(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the first entitlement period from 3 April 2019 to 2 July 2019 is:

$$\begin{aligned} & (\text{AWE} \times 95\%) - D = \\ & \$912 \times 95\% - 0 = \$866.40 \text{ per week.} \end{aligned}$$

225. In accordance with s 37(1)(a) of the 1987 Act, the applicant's entitlement to weekly compensation during the first entitlement period from 3 July 2019 to date and continuing is:

$$\begin{aligned} & (\text{AWE} \times 80\%) - D = \\ & \$912 \times 80\% - 0 = \$729.60 \text{ per week as adjusted.} \end{aligned}$$

Medical Expenses

226. As the applicant has succeeded in his claim, I accept the medical evidence that supports the need for payment of reasonable medical, hospital and related expenses. Accordingly, there will be a general order under s 60 of the 1987 Act.

Costs

227. There will be no order as to costs.

FINDINGS

228. The applicant sustained a psychological injury arising out of or in the course of his employment on 3 April 2019 (deemed).

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

230. The applicant has had no current work capacity since 3 April 2019.

231. The applicant's psychological injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to discipline.

ORDERS

232. The respondent to pay the applicant weekly compensation in accordance with the 1987 Act as follows:

- (a) \$866.40 per week from 3 April 2019 to 2 July 2019 pursuant to s 36(1)(a), and
- (b) \$729.60 per week as adjusted from 3 July 2019 to date and continuing pursuant to s 37(1)(a).

233. The respondent is to have credit for payments already made during these periods.

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

235. No order as to costs.

