WORKERS COMPENSATION COMMISSION

AMENDED CERTIFICATE OF DETERMINATION

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

Matter Number: **626/20**
Applicant: **AZ**
Respondent: **State of New South Wales**
Date of Determination: **13 May 2020**
Date of Amendment: **15 May 2020**

The Commission determines:

1. The Respondent to pay the applicant weekly compensation based on the pre-injury average weekly earnings of $1,782.97 with credit for payments made.

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

Carolyn Rimmer
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 CAROLYN RIMMER, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

1. On 6 February 2020 AZ (the applicant) lodged an Application for Expedited Assessment of a Dispute (the Application) in the Workers Compensation Commission (the Commission) in respect of a work capacity decision issued on 8 January 2020. The applicant's employer at the relevant time was the State of New South Wales (the respondent). The respondent's workers compensation insurer at the relevant time was Employers Mutual NSW Limited.

BACKGROUND

2. The applicant was employed by the respondent in the Local Health District on a full-time basis as an Occupational Therapist (Mental Health Professional) at the Mental Health Service in Campbelltown NSW.

3. The insurer issued previous work capacity decisions dated 12 July 2019 and 3 September 2019 which were subject of proceedings bought by the applicant in the Commission in Matter No 4846/19.

4. On 28 October 2019 the proceedings in Matter No 4846/19 before Arbitrator Harris were settled on the following terms:

> "1. The Application is discontinued.
>
> Notations
>
> A. The Respondent withdraws its decision dated 12 July 2018 and 3 September 2019.
>
> B. The Respondent agrees to voluntarily pay weekly compensation based on the pre-injury average weekly earnings of $1.543.31, with credit for payments made."

5. The applicant wrote to the respondent on 11 December 2019 seeking a review of the calculation of her pre-injury average weekly earnings (PIAWE). She relied on further material.

6. On 18 December 2019, the insurer indicated that it would review the PIAWE by 8 January 2020.

7. On 8 January 2020 the insurer wrote to the applicant pursuant to ss 43(1) and 44B of the *Workers Compensation Act 1987* (the 1987 Act).

8. On 17 January 2020 the applicant filed an application seeking to rescind the orders made on 28 October 2019 and have the matter heard by Arbitrator Harris. The applicant made an application for reconsideration based on further matters that had arisen following the arbitration hearing including evidence that had been obtained by the applicant since that date and a further work capacity decision made by the insurer on 8 January 2020.

9. Arbitrator Harris refused the application to reconsider the Consent Orders, noting in his decision that there was no logical reason to reinstate proceedings to enable a contest on previous work capacity decisions that the insurer had withdrawn. He noted that the applicant was entitled to dispute the work capacity decision dated 8 January 2020 and could file an Application in the normal course.

10. As noted above, the applicant lodged an Application for Expedited Assessment of a Dispute (the Application) in the Commission in respect of the work capacity decision issued on 8 January 2020.

11. The matter was set down for a telephone conference on 21 February 2020. The matter was transferred to the Commission and set down for a conciliation and arbitration on 17 March 2020.

12. A preliminary issue arose in relation to the production of documents by the respondent and, in particular, the production of an investigation report dated 8 August 2019. Both parties made written submissions in relation to this issue. In a decision dated 16 March 2020 I declined to make an order granting the applicant access to the investigation report of 8 August 2019.

ISSUES FOR DETERMINATION

13. The parties agree that the following issues remain in dispute:

    (a) Whether the reduction in the ordinary hours worked by the applicant during the period 14 April 2019 to 3 July 2019 was "voluntary" within the meaning of section 44D (2) of the 1987 Act, and
    (b) Capacity and entitlement to weekly benefits,

PROCEDURE BEFORE THE COMMISSION

14. The parties attended a conciliation conference and arbitration hearing on 17 March 2020.The proceedings in the Commission were sound recorded and a copy of the recording is available to the parties. The applicant was represented by her partner, Mr R, solicitor. The respondent was represented by Mr Adhikary, who was instructed by Ms Watts of SMK Lawyers.

15. 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.

EVIDENCE

Documentary evidence

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

    (a) The Application and attached documents;
    (b) Reconsideration Application and annexures in matter no WCC 4846/19 and submissions;
    (c) Email stream between AZ and W1 dated between10 January 2020 to 13 January 2020;
    (d) Supplementary statement of AZ and Award;
    (e) Policy Directive of NSW Health published 11 March 2019;
    (f) Reply and attached documents, and
    (g) Application to Admit late Documents dated 13 March 2020.

17. Following the arbitration, the respondent filed submissions as to capacity dated 25 March 2020. The applicant filed submissions in reply dated 14 April 2020. The applicant attached

some further documents to the submissions including a supplementary statement of the applicant dated 14 April 2020 and the Australian Bureau of Statistics ANSCO codes references for the classification of occupations and Health Share records. I considered it necessary that the respondent be given an opportunity to respond to the applicant's submissions concerning jurisdiction and an opportunity to advise whether there is an objection to the fresh evidence being admitted. Further, I considered that if the respondent does not object to the fresh evidence being admitted in the proceedings the respondent should be provided with an opportunity to make submissions in relation to the fresh evidence.

18. On 16 April 2020 the respondent was directed to file and serve written submissions in reply by 24 April 2020. The respondent filed further written submissions dated 6 May 2020 (x2) and the applicant filed further written submissions dated 6 March 2020 [sic] and 7 May 2020.

Oral evidence

19. Mr R made an application to cross examine W6 in respect of a number of issues. Mr R was given leave to cross examine her in relation to the evidence contained in her statement dated 7 February 2020 concerning policy directives and documents referred to in her statement.

FINDINGS AND REASONS

20. At the beginning of the arbitration the parties advised that they had reached agreement that the PIAWE was $1,782.97.

Evidence of the Applicant

21. In a statement dated 30 July 2019 the applicant said:

> "74. My work denied my request for working Sunday-Wednesday and this matter is currently before the Anti-Discrimination Board. As part of the Award which governs my employment relationship with Local Health District, there is to be no work stoppages during disputes.
>
> 75. As a result, I returned to work on 15 April 2019 and was working Mondays, Tuesdays and Wednesdays, 8.30am to 5.00pm and one weekend shift every fortnight of my employer's choosing, and that was 56 hours per fortnight, 24 hours 1 week and 32 hours the next. My employer advised me that I can request a second weekend shift if it is available. I was rostered to work on the weekend shift with the Emergency Team.
>
> 76. I wanted a consistent weekend shift, to have a fixed Sunday shift, to be able to work Sunday through to Wednesday, and it is that shift that is in dispute, as well as a fixed roster from Sunday-Wednesday. At present I am at the behest of my employer who chooses which weekend shift they will give me. Currently it has been Saturdays every second week.
>
> 77. When I asked for an additional weekend shift, that request was ignored by W2, who is the team leader of Emergency Team.
>
> 78. I went back to work, and I was working for two different teams, the adult care team and they work Monday to Friday 8.30am to 5.00pm, and then the second team, Emergency Team, was where I was getting one weekend shift a fortnight.
>
> 79. I went back to work and worked through until July 3, 2019."

22. In a statement dated 5 February 2020 the applicant said that she had been employed by Local Health District since September 2017 until 1 December 2019. She said that during this

period she was on maternity leave commencing 13 September 2018 and returned from maternity leave on 15 April 2019. She said that she was off work since the date of her injury, that is, 4 July 2019, to 1 December 2019.

23. The applicant said that she was continuously employed by the respondent for more than 52 weeks prior to the date of her injury. She stated that the insurer accepted liability for her claim and weekly payments commenced from 4 July 2019. She said that there was a dispute between her and the insurer as to the relevant period to be taken into account for the PIAWE calculation. She said that the insurer calculated her PIAWE on the basis that she allegedly voluntarily altered her hours of work and therefore the relevant period for the calculation of PIAWE was from 15 April 2109 to 4 July 2019.

24. The applicant stated that she and her employer were in dispute about her hours and days she would work and they were in the dispute resolution procedure prior to and during her return to work. She said that since she was in dispute with her employer there was no agreement between them as to her hours of work, and no voluntary alteration of hours on her part. She said that the dispute was ongoing and was presently before the Anti-Discrimination Board of NSW.

25. The applicant said that prior to her return to work from maternity leave she was in negotiation with Local Health District in relation to coming back to work four days per week. She said that she initially made contact with her team leader, W1, and requested that she return to work four days a week full-time. She stated that W1 could not accommodate that request, and suggested Sunday-Wednesday with available shifts on those days. She stated that negotiations commenced. The applicant explained that the reason why she selected those days was because she was able to obtain childcare close to work but that was only available from Monday to Wednesday. She stated that she had to care for her child on Thursdays and Fridays as her partner worked those days.

26. The applicant stated that the negotiations were unsuccessful, and her “work” was unwilling to allow her to work the days she had requested. She said that as a result of this they entered the dispute resolution procedure outlined in her Award and the matter was referred to the Anti-Discrimination Board. The applicant stated that in an email to W3, Director of Community Mental Health and Partnerships dated 11 April 2019, she advised W3 that she did not accept his proposal, however, due to the work resolution procedure in the Award, there were to be no work stoppages and she had to work.

27. The applicant stated that the NSW Health leave matters policy in relation to “right to request” provision allowed people on maternity leave to return to work on reduced hours until their child was of school age. She stated there was a requirement that under this policy if she was to return to work on reduced hours, she must complete and submit a leave without pay form to action the reduced hours and maintain her status as a full-time employee. She said that to date no such form had been completed by her as the reduced hours matter was currently in dispute and there had been no agreement.

28. The applicant said that on her return to work in a new health district in early December 2019 she accessed the email archive and located an email from W4 dated 27 June 2019 in which she stated that as a result of the applicant asking to utilise an ADO, she identified that her “reduced hours” had not been set up in StaffLink and an e-form had not been generated.

29. The applicant stated she had accessed an e-form step by step guide which applied when an employee returned to work on reduced hours post maternity leave. She noted that on page 1 the document stated that in order to submit the e-form a copy of the baby’s birth certificate and a letter from her asking for reduced hours must be attached to the form. The applicant stated that no such documents had been provided by her. She noted that on page 4 of the guide under step 6, it stated that the work hours must be entered. She said that at no time did she ever request a reduction in work to 28 hours per week. The applicant stated that her

employer was only giving her a weekend shift once a fortnight and would not accede to her request to work every weekend. She stated that even when she requested to work every weekend and complied with her team leader's instruction in how to request that, her employer chose not to give her a shift every weekend.

30. The applicant stated that on her return to work her employer only gave her shifts every Monday to Wednesday and one weekend shift every fortnight. She stated that that weekend shift had been a Saturday despite her request to work every weekend and for that to be a Sunday. She stated that at no time did her employer allow her to work from Saturday to Wednesday every week, full-time during the dispute resolution procedure, which she was available to do, whether that be over four days or five days per week.

Evidence of W1

31. In a statement dated 31 July 2019, W1 (W1) said that she was employed by the Local Health District as a team leader at the Treatment Team. She stated that the team had 20.4 full-time equivalent roles, and 16 full-time equivalent employees. She stated that her role included the operational running of the team and that team members worked in accordance with a 7-day rotating roster. She said that between Monday to Friday team members worked two shifts one from 8.30 am to 5.00pm and another from 12.30 pm to 9.00 pm. W1 said that there was a single shift on Saturday and Sunday from 10.00 am to 6.30 pm.

32. W1 stated that the applicant was expected to go on maternity leave in mid-October 2018 but her baby was born in mid-September, approximately one month early. She stated that in January 2019 she received an email from the applicant relating to her coming back to work and childcare arrangements for the baby, and at the time her projected return to work was for August 2019. She stated that there were emails "back and forth as it wasn't clear to me what her actual request" was.

33. W1 said that the applicant wanted to return to work on full time hours over four days, but this was not easy to accommodate as she would have to create shifts to do that and did not have such shifts. W1 stated that in order to work full time hours over four days, the applicant would have to work at least 10 hours a day, such as working until 8.00 pm. W1 wrote:

> "…amidst all that I could not understand how she could work those hours and then attend to childcare arrangements such as picking up the child at the end of the day, when most childcare centres are shut by 6.30pm."

34. W1 stated that there was a lot of "back and forth" to clarify what the applicant wanted and then the applicant wanted to work four days a week, Sunday to Wednesday. W1 stated that because of the seven day rotating rosters which all other staff work within, she could not guarantee that the applicant could have a set shift every Sunday. W1 wrote:

> "There has to be equity and equality for other staff members on that rotating roster so I couldn't justify every Sunday. Working the Sundays is an incentive available to all staff because of the Sunday rates of pay."

35. W1 stated that in order to accommodate four days a week, it would have to be a Saturday or Sunday, and the applicant would have to put in a roster request for her preference like anybody had to do, but she could not guarantee her every Sunday. She stated that it was agreed that the arrangement would support set day shifts Monday to Wednesday (8.30 am-5.00 pm), to accommodate childcare arrangements.

36. W1 stated that in about February 2019 the applicant advised that she wanted to bring her return to work date forward to mid-April. W1 stated that she then became aware there had been a notification of a complaint of bullying and harassment and that a decision was made that when the applicant returned to work on 15 April 2019 she would not return to her team

whilst a review was to be completed, and would be placed with the Adult Care Coordination Team.

37. W1 said that there were negotiations with senior management and the applicant would have access to one weekend shift a fortnight and she would be placed with the Emergency Team for that shift.

Evidence of W3

38. In a statement dated 31 July 2019, W3, Director, Community Mental Health and Partnerships, stated that in February 2019 he received an email from the applicant requesting a meeting to discuss her return to work following maternity leave. He said that the request was premised by the fact that the applicant was not happy with what W1 was organising for her. He stated that the meeting occurred on 19 March 2019 and was attended by the applicant, Mr R, the applicant's partner and the workforce manager.

39. W3 stated that at the meeting the applicant indicated she wanted fixed Saturday to Wednesday shifts. W3 said that she was employed, like all the other members of her team, on a seven day roster. He wrote:

> "36. Despite being on a 7 day roster we were able to offer her Monday to Wednesday day shifts only with no requirement to work evening shifts. The point of contention was that she wanted 2 weekend shifts guaranteed, but we could not offer that guarantee. We requested that AZ use the roster request system to seek the weekend shifts, as is the system for all staff working extended hours rosters.
>
> 37. We did offer one guaranteed weekend shift per fortnight and advised AZ that the second shift could be obtained by using the roster request system."

40. W3 stated that he thought this was a reasonable offer and in addition to this he moved her to a different team, a Monday to Friday team, to suit the day shifts that she required, and then approved her to work in another team again so she could get access to weekend shifts which would be one per fortnight guaranteed and additional shifts if she was able to do them.

41. W3 stated that it was clear that the applicant and Mr R were unhappy with this offer, and they maintained the position that she wanted the shifts she asked for. W3 wrote:

> "We have to look at the operational needs of the team, of the whole roster, and not just one person."

42. W3 said that there was then email communication and "we reiterated a number of times to them what the offer was".

43. W3 stated that at the time of the applicant's return to work prior to going on workers compensation leave that:

> "…at no time did she make any request through the roster request system to obtain extra weekend shifts. She was able to participate in that time period but she did not do so. I am aware there would have been shifts available for her to take had she made those applications."

Evidence of W6

44. In a statement dated 7 February 2020, W6 said that she had been employed by Local Health District for about five years and was currently the workforce manager and business partner with six portfolios including the Mental Health Service. She stated that the applicant was employed by Local Health on 17 September 2017 as a Mental Health Professional

(Occupational Therapist Level 1) by the Treatment Team on a full-time basis. She said that the applicant resigned from her position effective 1 December 2019 to take up employment elsewhere in NSW Health.

45. W6 wrote:

> "8. AZ emailed Ms W1 on 31 January 2019 stating that she is happy to do full-time hours over 4 days and did not specify any days of the week in this email. On the same day there was an email exchange between AZ and W1 to clarify her preferred working days and hours so she could work full-time over 4 days. However, on 31 January 2019 at 22:31 hours AZ again sent another email to W1 advising her to disregard her previous email and that the following days and hours would be great, which include Sunday (10.00-18.00), Monday-Wednesday (08.30-17.00). AZ's last email demonstrates that she did request in writing to return to work on reduced hours."

46. W6 noted that for employees returning from maternity leave a return to work/reduced hours e-form was completed by a manager and a copy of the employee's written request was attached to a new form. She stated that the employee was not required to sign the e-form or required to complete any other forms. W6 noted that AZ had been transferred to another team when she returned to work on 15 April 2019, and the required e-form had not been completed in StaffLink. She noted that W4, in her email of 27 June 2019, when dealing with a request for an ADO, noted that the reduced hours that the applicant was currently working had not been actioned and that this would now be corrected to reflect the hours she had been working since 15 April 2019. W6 said the reduced hours e-form was actioned according to AZ's response to W3 on 11 April 2019 confirming she was returning to work and even though her second weekend shift had not been guaranteed.

47. W6 stated that the applicant advised W3 in her email of 11 April 2019 that she would return to work on 15 April 2019 at the days and hours offered, however, she was lodging a dispute under the Award to resolve the one weekend shift per fortnight that she was not guaranteed as part of her return. She noted that a complaint has been to the NSW Anti-Discrimination Board and that matter was still pending.

48. W6 stated that the email the applicant sent to W3 on 11 April 2019 confirmed that the applicant was returning to work on reduced hours, and also confirmed the applicant had no intention of working full time hours. She stated this was supported by the roster during the period where the applicant only worked 56 hours per fortnight.

Emails, letters and other documents

49. In an email dated 25 January 2019 to the applicant, W1 wrote:

> "I did receive your email on Wednesday … As soon as I can confirm what the options are, I will get in touch with you".

50. In an email dated 31 January 2019 and sent at 9:09am to W1, the applicant wrote:

> "I should add that I am more than happy to do full-time hours over 4 days. This would be my ideal preference."

51. In the next email in the chain dated 31 January 2019 and sent to the applicant, W1 wrote:

> "I don't have a definite answer as yet, but can you clarify your ideal preference? (FT hours over 4 days?)
>
> Might not be that difficult to achieve."

52. In an email dated 31 January 2019 and sent at 6:31pm to W1, the applicant wrote:

> "Full-time over four days would be ideal.
>
> I would just need to have the same days due to childcare arrangements – ideally Sunday-Wednesday if possible."

53. In the next email in the chain dated 31 January 2019 and sent to the applicant, W1 wrote:

> "So just to be sure
>
> Mon-Wed 08.30 – 17.00 hrs
>
> Sunday – 10.00 – 18.00 hrs."

54. In the next email in the chain dated 31 January 2019 and sent to W1, the applicant wrote:

> "Those days look great. However, the hours as they are, I would fall short by 8 hours to do full time. Is it possible to make up the hours by working longer for each shift?"
>
> In an email dated 31 January 2019 and sent at 10:31pm to W1, the applicant wrote:
>
> "Please disregard my earlier email.
>
> I sat down and looked at the Sunday - Wednesday
>
> S- 10-1800
> M- 830-1700
> T- 830-1700
> W- 830-1700
> These days and hours would actually be great.
>
> If these days and hours are okay from your perspective, I can probably come back to work around April/May (pending the childcare stuff is all sorted).
> Once I have confirmation on your end days and times I can work, I will get the childcare side of things sorted and then I will be able to come back."

55. In an email dated 27 February 2019 to the applicant, W1 confirmed that she had discussed the applicant's suggested return to work proposal with a community manager and with input from HR. She advised that in the context of the Treatment Team's operational needs, the outcomes of the discussion were as follows:

> "1. Treatment Team is able to support a return to work on reduced hours (0.8FTE).
>
> 2. Your contracted arrangement is on a 7 day rotating roster, you have indicated that ideally your preference is set days and shifts (Sunday C shift (10hrs-18hrs) and Mon-Wed A shift (8.30hrs-17.00hrs)). I am not able to guarantee that I will be able to give you these set shifts in each roster period. However, each roster your request will be assessed and best efforts will be made to accommodate, where I am unable to, I will discuss with you and work together to come up with a solution."

56. In an email dated 21 March 2019 to the applicant, W3 noted that they had an informal meeting to discuss her return to work on reduced hours following maternity leave. He noted she indicated in her request that she was dissatisfied with the response she received from W1 in relation to the request.

57. W3 said that in relation to the request to return work on a fixed roster pattern (Sunday-Wednesday), 32 hours per week, morning shifts only, they were able to accommodate her request to return to work on a part-time basis of 32 hours per week once she had secured her childcare arrangements. He wrote:

> "We were not able to accommodate your request for return on a set roster pattern to a 7 day rotating roster team."

58. He confirmed they had offered the applicant set working days in three other teams that operated business hours only and could accommodate staff on set days. He stated they also offered a similar set roster in other business hours teams at Bankstown and Liverpool but noted that these locations did not provide the applicant with better options around travel or childcare. W3 noted they also offer Emergency Team but it was noted that the team operated on a seven day roster and therefore a set roster could not be guaranteed.

59. In an email dated 22 March 2019, to W3 the applicant noted that she was unable to arrange childcare on a Thursday or Friday. She wrote:

> "In summary, this leaves us with the only following option; you have my availability - from Saturday through to Wednesday. On Monday - Wednesday, I am only available between the hours of 0830 – 1700 because of childcare. I am unable to work on Thursday or Friday, because I must care for my daughter. If you cannot accommodate this, that means I cannot return to work. If I am rostered on Thursday or Friday, or after 5pm on any weekday, I cannot attend work."

60. In an email dated 27 March 2019 to the applicant, W3 offered the applicant a return to her substantive position in Treatment Team on Monday, Tuesday and Wednesday from 8.30 – 17.00 with no evening shifts and one rostered (guaranteed) weekend shift per fortnight which would be either a Saturday or Sunday. He noted the option for the applicant to pick up an additional weekend shift when available.

61. In an email dated 2 April 2019 to W3, the applicant wrote:

> "I can accept the Monday- Wednesday shifts as stated.
>
> However, I will still be requesting a weekend shift every week, I have no issue whether it is Saturday or Sunday or if they alternate weekly.
> My request is to return to work 4 days a week, 8 days in a fortnightly period.
> If this can't be accommodated within the parameters of what I'm asking for, then please continue with my request of escalating the matter to the CEO…"

62. In an email dated 8 April 2019 to the applicant, W3 reaffirmed the offer of set shifts Monday-Wednesday (8.30-17.00) and one guaranteed weekend shift per fortnight.

63. In an email dated 9 April 2019 to W3, the applicant stated that in relation to her return to work the return to work date was 15 April 2019. She wrote:

> "As you're aware I wish to return to work Mon-Wed between 8.30am and 17.30pm due to my childcare responsibilities. I am also able to work either Saturday or Sunday any time. I wish to return to work 4 days a week. You are offering me a guarantee of returning to work Mon-Wed 8.30am to 17.30pm which I am happy to accept.
>
> The only issue we have is weekend work, where you are only able to guarantee one set shift per fortnight. I am still requesting 1 set weekend shift a week. This is in line with my childcare arrangements, availability and return to work 4 days per week, as is my entitlement.

The escalation will be to get a set weekend shift per week, either day.

In order to come to a compromise, I am willing to work at another location on the weekend shifts, if that will make it easier for you to offer me a shift every weekend. I don't have childcare issues on the weekend, so I can travel to another location.

An alternative to that is, that since we are on a 2 week pay period, I can work two weekend shifts one week, and no weekend shifts the next week. That still equates to 4 days per week/8 days per fortnight."

64. In an email dated 10 April 2019 to the applicant, W3 reaffirmed the offer made to the applicant on 8 April 2019. He stated that the request for two weekend shifts one weekend and none the next could not be accommodated, nor the request to work anywhere in the district for the other weekend shift. W3 asked the applicant to confirm at her earliest convenience if she accepted this offer.

65. In an email dated 11 April 2019 from the applicant to W3, the applicant wrote:

> "As previously stated on numerous occasions my request is to return to work Mon-Wed 8.30am to 17.30pm and every Sunday.
>
> To be accommodating I amended that to be any day on the weekend each week. That is still my preference and request.
>
> Further I have asked you refer this matter to the Chief Executive, so please do so in accordance with the dispute resolution procedures outlined in the Award.
>
> Obviously I have to return to work on 15 April 2019.
>
> However I will still be pursuing the additional weekend shift as a guarantee as it is my right to return to work 4 days a week, under flexible work arrangements due to my childcare responsibilities and the work is available.
>
> Under the Award, there is to be no work stoppages, until the dispute is resolve.
>
> So please do not take this an acceptance of your offer, and if you do, it is under duress."

66. In an email dated 15 April 2019 to the applicant, W2 stated that as part of the return to work from maternity leave, the applicant was going to be working one weekend shift per fortnight with the Emergency team. W2 stated that she had been rostered on the following shifts until 26 May 2019: Saturday 20 April 2019 – AM shift, Saturday 4 May 2019 – AM shift, and Saturday 18 May 2019 – AM shift. W2 said that there was a roster request for the rostering period 27 May 2019 to 23 June 2019 currently available for staff to complete. He stated this was available on the Emergency Team roster folder or alternatively the applicant could email those requests to him.

67. In an email dated 18 April 2019 from the applicant to W2, the applicant wrote:

> "In relation to the next roster period my return to work request is to work two weekend shifts a fortnight. They can be on one weekend or spread amongst two. Before anyone is to receive weekend shifts as overtime those shifts should be offered to me first in line with my request for two weekend shifts a fortnight (not to mention saving the service money). My preference is always Sunday AM as I work Monday mornings, otherwise Saturday AM or PM is fine. As a last resort Sunday PM would be okay."

68. In an email dated 15 April 2019 to the applicant, W2 stated he had not rostered the applicant on the next roster period as he understood she was going back to Treatment Team at the

start of the roster period. He advised he had rostered her on shifts on Sunday 28 July 2019 and Saturday 10 August 2019. He wrote: “Until informed by the Service Manager otherwise, I will continue to roster you on the Emergency Team roster”.

69. In an email dated 21 June 2019 to W5, W6 confirmed that until the matter was resolved no changes would occur to the applicant’s current working arrangements. She noted it was also agreed that this matter would be further discussed through a “dispute meeting” with the applicant and the Health Services Union (HSU). She requested clarification of whether the applicant was progressing her discrimination complaint through the ADB. She wrote:

> “We will not be discussing the reduced hours matter if it is going to be addressed through the ADB.”

70. In an email dated 27 June 2019 to the applicant, W4 stated that the applicant’s reduced hours had not been set up in StaffLink correctly and a new form had now been generated to rectify that. She wrote:

> “HR has advised, while you are working reduced hours you are not entitled to accrue or take ADOs. They have also advised in relation to ADOs that have been accrued under your previous full-time arrangements, you are entitled to have those days paid out to you.”

Medical Certificates

71. In a Certificate of Capacity/Certificate of Fitness, Dr Daniel Llambi certified the applicant as having no current capacity for work from 4 July 2019 to 18 July 2019. The certificate was dated 4 July 2019. Dr Llambi issued a further certificate certifying no current capacity for any work dated 31 July 2019.

72. Dr Llambi issued a certificate dated 21 November 2019 certifying capacity for some type of work five days a week with the comment that “AZ is not to work in SW Health District”. The number of hours the applicant was certified to work was not clear in the certificate as the copy filed was of poor quality.

73. In a Certificate of Capacity/Certificate of Fitness dated 29 January 2020, Dr Mazzaferro certified the applicant as fit for pre-injury duties from 29 January 2020 noting “Resumption of full-time work on 02/2/2019 @new location.”

Work Capacity Decision

74. In a letter dated 10 December 2019 the insurer informed the applicant that a work capacity decision had been made and as a result of that decision the weekly payments would not change. The decision took effect on 10 December 2019.

75. The decision was summarised as follows:

> “The amount of weekly payments that can be paid to you is based on your pre-injury average weekly earnings (PIAWE), your capacity for work, how long you have received weekly payments for, whether you have been able to return to work, your ability to earn a suitable employment and whether there are any applicable deductions.”

76. The insurer stated that they had made a decision under section 43(1)(a) of the 1987 Act and believed that the applicant was currently able to work in suitable employment identified below eight hours a day, five days a week. The suitable employment was described as that of an Occupational Therapist and it was noted that the applicant was currently working in a new role as an Occupational Therapist.

77. Weekly payments were calculated as being zero, with PIAWE assessed as $1,543.31 x 95%, less earnings of $1,480.86.

78. In an email dated 11 December 2019 to the insurer, the applicant sought a review of her PIAWE. She stated she had come into possession of an email which confirmed she did not agree to reduced hours at 28 hours a week, and that her employer had in fact inputted that into the system and generated the data. She attached an email from W4 dated 27 June 2019.

79. In a letter dated 8 January 2020 EML advised the applicant that they had reviewed their decision of her pre-injury average weekly earnings following the applicant's request for an internal review made by email on 11 December 2019. The insurer issued a notice to advise that the PIAWE rate had been changed and the rate would be $1,143.31 per week from 21 April 2020. It was noted that this was a reduction to current PIAWE.

80. In a notice under section 43(1) and section 44BB of the 1987 Act dated 8 January 2020, a Work Capacity Decision was made in which the applicant was deemed to have a capacity to work 40 hours per week and an ability to earn of $1,480.86 gross per week (as per Work Capacity Decision dated 10 December 2019). It was noted that her current weekly earnings were $1,550.16 per week based on the pay slip dated 19 December 2019. The PIAWE was calculated at $1,143.31 per week, and the weekly entitlement calculated under section 37(2)(a) was $1,143.31 x 95% - $1550.16 which equalled $0.00 and meant no further weekly compensation payments were payable.

Submissions

81. The respondent submitted that the evidence demonstrated that the applicant initiated a voluntary alteration in her ordinary hours and while the respondent sought to accommodate the request, the applicant and respondent could not reach agreement about the hours to be worked. The respondent maintained that the applicant requested altered hours on her return from maternity leave and the dispute arose later after her requests were not met.

82. The respondent submitted that the legislation does not require that the reduction in hours be voluntary but rather that the alteration in ordinary hours of work which may lead to reduced hours be voluntary. The respondent stated that a worker's PIAWE should be calculated in keeping with the reduced hours of work performed upon her return to work from maternity leave on 15 April 2019 following her voluntary request to alter her ordinary work hours and the nature of her work in terms of the application pertaining to rotating shift rostering.

83. The respondent submitted that the applicant's voluntary request from alteration of her ordinary hours of work on returning from maternity leave was accommodated by the employer and an agreement was reached in that respect, and the issue in dispute referred by the applicant pertained to the nature of her duties and whether her voluntary request for guaranteed beneficial weekend shift rostering, as opposed to rotating shift rostering, could be accommodated. The respondent submitted that the determination of this rostering issue should not have a bearing on the applicant's voluntary altered hours of work in accordance with section 44D(2)(a), but rather the rate she was paid for the altered hours worked.

84. The respondent submitted that the applicant made a request for altered ordinary hours to reduced work hours and this was voluntary, initiated at her request to accommodate childcare. The evidence identified that the applicant's request for an alteration to the nature of her work performed, namely her request for guaranteed weekend shifts, was voluntarily made to meet her childcare needs, albeit, unable to be accommodated by the employer, which resulted in reduced hours the subject of the PIAWE calculation. The respondent submitted by seeking to alter her ordinary hours to accommodate childcare the applicant's request cannot be construed as anything other than voluntary.

85. The respondent argued that alteration in the days of work complied with section 44D(2)(a).

86. The respondent also argued that there was an alteration in the nature of work not just the ordinary hours of work.

87. The applicant submitted that the issue in dispute was what is the "relevant period" to take into account when calculating PIAWE. The applicant argued that the relevant period to be taken into account was 52 weeks from the date of injury, being 4 July 2018 to 12 September 2018, being the last day of work before the applicant went on maternity leave. The applicant after noting that the respondent had argued that she voluntarily altered her ordinary hours of work which led to a reduction in earnings, submitted no voluntary alteration has occurred.

88. The applicant submitted that there had been no agreement as to the hours of work. The applicant submitted that apart from the various statements of the applicant, W1, Mr Girgin and W3 and the emails referred to in the statements, none of the paperwork, policies and procedures had been followed in order to effect the respondent's assertion that 28 hours per week was agreed upon by the applicant.

89. The applicant submits that the 28 hours were selected by the employer and that information was inputted into the system by W4. The applicant submitted that W4 in the email dated 27 June 2019 advised the applicant that W4 and another staff member had changed the applicant's hours on StaffLink and this email was evidence that the applicant did not voluntarily alter her hours, as she and the respondent were locked in a dispute. The applicant argued that this was an active action on the part of the respondent to go into the system and input data which changed the hours the applicant worked. The applicant submitted that the respondent chose 28 hours per week with no agreement from the applicant as the matter was disputed.

90. The applicant submitted that the issue of "voluntary" and its interpretation in the context of section 44D(2) of the 1987 Act was considered in *Whaley v Upper Shire Council* (2016) NSW WCC 280 at [71]-[85]. At [78] the word "voluntary" was held to mean "freely and under no obligation" with reference to historical authorities. At [79] reliance was placed on Campbell J in *Tonkiss v Graham & Ors* (2000) NSW SC 890. In his reasons Campbell J said:

> "One acts freely and voluntarily when one acts free from circumstances constraining one's action."

91. The applicant submitted that in the present case, she was constrained by the terms of her Award in that during a dispute there was to be no work stoppages. Dispute clause 24 of the *Public Hospitals (Professional and Associate Staff) Conditions of Employment (State) Award 2019*, relevantly states at (iii) that there is to be "no stoppages of work …" during a dispute.

92. The applicant submitted that a further constraint was that despite the applicant requesting additional work, her manager did not respond to it. The applicant and employer were clearly in dispute about the hours of work and that dispute is currently before another place. As such, there has been no agreement by either party as to hours of work and therefore there had been no voluntary reduction or alteration on the part of the applicant.

93. The applicant submitted that she first requested a return to work on full-time hours over four days. She argued that it was the respondent employer who could not accommodate that, and the parties then started negotiating which led to the dispute. The applicant argued that there was no voluntary alteration of hours.

94. The applicant contended that it was her employer who chose the hours for her to work, and as such she was constrained by that fact. The respondent could have had the applicant working five days per week but chose not to offer that.

95. The applicant referred to the email to W3 dated 11 April 2019, in which she stated:

> "Under the Award, there is to be no work stoppages, until the dispute is resolved … so please do not take this as my acceptance of your offer, and if you do, it is under duress."

96. The applicant stated that the Local Health District recognised that they were in a dispute in relation to working hours, as evidenced by an email sent from W6 on 21 June 2019 to W5, Industrial Officer at the Health Services Union, in which she stated:

> "We will not be discussing the reduced hours matter if it is going to be addressed by the ADB."

97. The applicant submitted that she had requested additional weekend shifts from W2 because she had not been provided with the shifts she had requested as there was no agreement.

98. The first issue to be determined was whether the reduction in hours for the period 15 April 2019 to 3 July 2019 was voluntary within the meaning of section 44D(2) of the 1987 Act.

99. Sections 44C and 44D of the 1987 Act provide:

> **"44C Definition-pre-injury average weekly earnings**
>
> (1) In this Division, "**pre-injury average weekly earnings**", in respect of a relevant period in relation to a worker, means the sum of:
>
> (a) the average of the worker's ordinary earnings during the relevant period (excluding any week during which the worker did not actually work and was not on paid leave) expressed as a weekly sum, and
>
> (b) any overtime and shift allowance payment that is permitted to be included under this section (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable).
>
> (2) If a worker has been continuously employed by the same employer for less than 4 weeks before the injury, "**pre-injury average weekly earnings**", in relation to that worker, may be calculated having regard to:
>
> (a) the average of the worker's ordinary earnings that the worker could reasonably have been expected to have earned in that employment, but for the injury, during the period of 52 weeks after the injury expressed as a weekly sum, and
>
> (b) any overtime and shift allowance payment that is permitted to be included under this section (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable).
>
> (3) If a worker:
>
> (a) was not a full time worker immediately before the injury, and
>
> (b) at the time of the injury was seeking full time employment, and
>
> (c) had been predominantly a full time worker during the period of 78 weeks immediately before the injury,

"pre-injury average weekly earnings", in relation to that worker, means the sum of:

(d) the average of the worker's ordinary earnings while employed during the period of 78 weeks immediately before the injury (excluding any week during which the worker did not actually work and was not on paid leave) **("the qualifying period**"), whether or not the employer is the same employer as at the time of the injury expressed as a weekly sum, and

(e) any overtime and shift allowance payment that is permitted to be included under this section (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable).

(4) In relation to a worker of a class referred to in Column 2 of an item in Schedule 3,

"**pre-injury average weekly earnings**" means the amount determined in accordance with Column 3 of that item, expressed as a weekly sum.

44D Definitions applying to pre-injury average weekly earnings-relevant period

(1) Subject to this section, a reference to the "relevant period" in relation to pre- injury average weekly earnings of a worker is a reference to:

(a) in the case of a worker who has been continuously employed by the same employer for the period of 52 weeks immediately before the injury, that period of 52 weeks, or

(b) in the case of a worker who has been continuously employed by the same employer for less than 52 weeks immediately before the injury, the period of continuous employment by that employer.

(2) The relevant period, in relation to pre-injury average weekly earnings of a worker who, during the 52 weeks immediately before the injury, voluntarily (otherwise than by reason of an incapacity for work resulting from, or materially contributed to by, an injury that entitles the worker to compensation under this Act):

(a) alters the ordinary hours of work, or

(b) alters the nature of the work performed by the worker, and, as a result, the worker's ordinary earnings are reduced, does not include the period before the reduction takes effect.

(3) If, during the period of 52 weeks immediately before the injury, a worker:

(a) is promoted, or

(b) is appointed to a different position,

(otherwise than on a temporary basis) and, as a result, the worker's ordinary earnings are increased, the relevant period in relation to the worker begins on the day on which the promotion or appointment takes effect."

100. Section 44H (a) of the 1987 Act provides:

"**44H Definition applying to pre-injury average weekly earnings and current weekly earnings—ordinary hours of work**

In relation to pre-injury average weekly earnings and current weekly earnings, the ***ordinary hours of work***:

(a) in the case of a worker to whom a fair work instrument applies are:
    (i) if the ordinary hours of work in relation to a week are agreed or determined in accordance with a fair work instrument between the worker and the employer—those hours, or
    (ii) in any other case, the worker's average weekly hours (excluding any week during which the worker did not actually work and was not on paid leave) during the relevant period, or

(b) in the case of a worker to whom a fair work instrument does not apply:
    (i) if the ordinary hours of work are agreed between the worker and the employer, those hours, or
    (ii) in any other case, the worker's average weekly hours (excluding any week during which the worker did not actually work and was not on paid leave) during the relevant period."

Discussion

101. Prior to the arbitration commencing the parties agreed that if the alteration in hours is not voluntary for the period from 15 April 2019 to 3 July 2019 within the meaning of section 44D(2), then the hours to be taken into account for the calculation of PIAWE were from 4 July 2018 to 12 September 2018.

102. The parties reached agreement on PIAWE in the conciliation conference. The PIAWE was agreed to be $1,782.97 and that was the figure to be applied if there was no voluntary alteration in hours.

103. It is necessary to first consider the meaning of "ordinary hours of work" in s 44D(2)(a).

104. Section 44H (a) defines "ordinary hours of work" as those hours of work in relation to a week that are agreed or determined in accordance with a fair work instrument between the worker and employer. The applicant is a worker to whom a fair work instrument applies, namely, the Public Hospitals (Professional and Associated Staff) Conditions of Employment (State) Award 2019 (the Award). The Award on page 2 under the heading of "Hours" sets out what ordinary hours are. As the applicant was a shift worker, her ordinary hours fall under (ii), which is 152 hours per 28 calendar days.

105. I do not accept the respondent's submission that an alteration made by a worker in respect of the particular days of work complies with section 44D(2)(a). It is clear in my view that the ordinary hours of work are the number of hours worked by the applicant each week and not the particular hours or shifts worked by a worker. In this case, a request to alter the particular days worked or shifts did not amount to voluntary alteration in the ordinary hours of work or the nature of the work performed. This approach is consistent with the other provisions in Division 2 of the 1987 Act relating to the calculation of PIAWE.

106. I am satisfied that the applicant requested a return to work from maternity leave on a full-time basis. I accept the evidence of the applicant that that she initially made contact with her team leader, W1, and requested that she return to work four days a week full-time. The email from the applicant to W1 dated 31 January 2019 supports this finding. I am satisfied that the applicant had initially requested a return to work on a full time basis working 40 hrs a week over four days.

107. The applicant stated and I accept that W1 did not accommodate that request. I accept that the applicant then suggested that she work Sunday-Wednesday. W1, in her statement,

confirmed that that the applicant then wanted to work four days a week, Sunday to Wednesday.

108. The applicant stated and I accept that negotiations commenced in respect of the hours and days the applicant was to work when she returned from maternity leave. The applicant requested that she work 32 hours a week from Sunday to Wednesday. Her employer offered her Monday to Wednesday shift and a Saturday or Sunday shift every second weekend. This amounted to an average of 56 hours a fortnight or 28 hours a week. No agreement was reached between the parties concerning the hours of work as her employer was unwilling to allow her to work the days she had requested.

109. The fact that no agreement was reached is clear from the email exchanges between W3 and the applicant. W3 on 10 April 2019 repeated the offer made to the applicant on 8 April 2019 stating that the offer comprised of set shifts Monday-Wednesday (8.30-17.00) and one guaranteed weekend shift per fortnight. W3 asked the applicant to confirm at her earliest convenience if she accepted this offer. On 11 April 2019 the applicant replied stating that her request was to return to work Mon-Wed 8.30am to 17.30pm and every Sunday. She asked that the matter be referred to the Chief Executive in accordance with the dispute resolution procedures outlined in the Award. The applicant noted that under the Award, there were to be no work stoppages, until the dispute is resolve. She wrote: "So please do not take this an acceptance of your offer, and if you do, it is under duress."

110. The applicant then entered the dispute resolution procedure outlined in her Award and the matter was referred to the Anti-Discrimination Board.

111. The applicant maintained that she had requested additional weekend shifts from W2 but was not provided with those shifts.

112. I accept that in the email dated15 April 2019, W2 said that there was a roster request for the rostering period 27 May 2019 to 23 June 2019 currently available for staff to complete. He stated this was available on the Emergency Team roster folder or alternatively the applicant could email those requests to him. On 18 April 2019 the applicant replied to W2 and requested:

> "In relation to the next roster period my return to work request is to work two weekend shifts a fortnight. …My preference is always Sunday AM as I work Monday mornings, otherwise Saturday AM or PM is fine. As a last resort Sunday PM would be okay."

113. I am satisfied that the applicant did request additional weekend shifts from W2.

114. The respondent submitted that the legislation does not require that the reduction in hours be voluntary but rather that the alteration in ordinary hours of work which may lead to reduced hours be voluntary.

115. The respondent must show that the alteration was "voluntarily".

116. The word "voluntarily" is used in the sub-section in the context of "alters". To fall with the meaning of the sub-section the worker must either:

    (a) Voluntarily alter the ordinary hours of work, or

    (b) Voluntarily alter the nature of the work.

117. The parties referred to the decision on Arbitrator Harris in *Robert Whaley v Upper Hunter Shire Council* [2016] NSW WCC 280. Although the facts in that case were quite different as it related to a redundancy the respondent in that matter submitted that the word "voluntarily"

was defined by the words that appear in the following brackets and that there was no requirement that the worker chose to reduce his hours and be pleased by the development.

118. Arbitrator Harris noted that the word "voluntarily" has been the subject of significant discussion at the highest judicial levels and that in *Attorney-General v Ellis* (1895) 2 Q.B. 466 (at 470) Lord Russell of Killowen C.J. and Charles J. construed the word "voluntarily" as meaning "freely" or under "no obligation". There is an extensive analysis on the meaning of "freely and voluntarily" by Campbell J. in *Tonkiss v Graham & Ors* [2002] NSWSC 891. After referring to various decisions (including decisions of the High Court), his Honour concluded (at [78]):

> "78. Of course, given the vastly different contexts in which the judicial statements which I have just been quoting about when an act is free and voluntary have been made, one cannot expect to transfer those statements directly into the context of section 13 of the Wills, Probate and Administration Act. They serve, though, to remind one that the notion of acting 'freely and voluntary' is one which has a relationship implicit in it. One acts "freely and voluntarily" when one acts free from circumstances constraining one's actions. The sort of circumstances which the cases I have quoted recognise as being ones which can, sometimes, result in action not being free and voluntary included duress, intimidation, persistent importunity, sustained or undue insistence or pressure, harassment, force, threats, fear, fraud, being induced by a threat or promise or some offered advantage, undue influence, and being deprived of relevant information or advice. However, as the discussion and the quoted extract from Meissner shows, the mere fact that an action occurs in a context where the actor is subject to one or more of these types of constraints, an action is not always sufficient, in itself, to lead to the conclusion that the actor has not acted freely and voluntary. One legal context in which one enquires whether an action is done 'freely and voluntarily' might require the absence of a different range of constraining conditions to a different legal context in which one enquires whether an action is done "freely and voluntarily". Or one such legal context might call for those factors to be weighted differently to the way they are weighted in a different legal context. Further, as the quoted extract from Cleland shows, whether an action is in fact not free and voluntary depends on the interaction of the constraining circumstances with the particular actor."

119. The structure of ss 44C and 44D is drafted with a clear beneficial purpose. That purpose is clearly seen with respect to an agreement advised in writing to increase pay through a promotion, offered prior to injury but not yet implemented, being considered as part of pre-injury earnings (section 44C(4) and item 9, schedule 3) whereas decisions to the opposite effect, not yet implemented, are irrelevant.

120. Seen in context, the meaning of "voluntarily" with respect to the applicant's decision to alter the hours or nature of the work is more closely aligned to a decision made by the worker's free will and free from circumstances constraining one's own actions.

121. This meaning of "voluntarily" fits in with the purpose of the section noting a beneficial construction.

122. The facts are that the applicant requested a return to work on full-time hours working four days a week. When those shifts were not made available to her, she requested a return to work working Sunday through to Wednesday (four days) and a total of 32 hours. The respondent and the applicant did not reach agreement over the hours to be worked and she returned to work, working an average of 28 hours a week. The dispute as to the hours is ongoing. The applicant's email to W3 on 10 April 2019 made it clear that she was returning to work the hours offered by the employer under duress and that under her award she had to return to work while there was a dispute.

123. A worker who has sought an alteration in ordinary hours and is “advised” that her hours will be reduced below what was requested, is usually under no compulsion to accept the change. However, in this case the applicant was bound by the terms of her award and required to work the hours that the respondent decided that she would work.

124. I do not accept that in this case the alteration in the ordinary hours of work was voluntary. The applicant initially wished to return to work with no alteration in her hours of work. She then requested a return to work from maternity leave working 32 hours a week. The respondent provided her with shifts that amounted to 28 hours a week. She was required to work those shifts and hours because of the terms of her award. There was, in my view, no voluntary alteration in the ordinary hours of work in those circumstances.

125. Section 44D(2) applies when the alteration of hours and duties has occurred prior to injury and the change is one properly described as “voluntarily”. In my view, it simply has no application to this situation. There was, in any event, no agreement reached about reduction in hours or change in duties prior to injury.

126. The applicant returned to work from maternity leave in the same job role. I am not persuaded that there was a voluntary alteration in the nature of the work performed by the applicant.

127. I do not believe that the meaning of “voluntarily” in these circumstances was intended to apply to a situation where a worker initiates discussions with an employer as to a potential change in working hours but no agreement is reached and the worker is under an award effectively compelled to work the hours selected by her employer. Voluntarily entering into a discussion about an alteration in the ordinary hours of work falls well short of a voluntary alteration in the ordinary hours of work. In making the findings above, I have accepted the submissions made by the applicant which were summarised above in paragraphs [87]-[97].

CURRENT WORK CAPACITY

128. The respondent raised the issue of current work capacity at the arbitration on 17 March 2020. The respondent argued that the applicant sought a review of the insurer’s work capacity decision and in doing so challenged the finding that she has a current work capacity and no longer an entitlement to any weekly compensation from on or about 1 December 2019.

129. The applicant during the arbitration on 17 March 2020 requested an opportunity to file submissions in relation to the issue of current work capacity as the applicant had no notice before the actual arbitration that this matter was disputed. At the conclusion of the arbitration on 17 March 2020, I directed the parties to file and serve submissions in relation to the issue of work capacity.

130. In the submissions from the respondent dated 25 March 2020, the respondent submitted that the applicant’s current weekly earnings should be the weekly amount that the applicant was able to earn in suitable employment and not her actual gross earnings.

131. In the written submissions dated 14 April 2020, the applicant raised an issue of jurisdiction in relation to the work capacity decision pertaining to “current work capacity”.

132. In a direction dated 29 April 2020, I noted that the applicant had raised an issue concerning jurisdiction over previously unnotified matters, that is current work capacity, and ordered the respondent to file and serve written submissions in reply by 6 May 2020.

133. The applicant, in the submissions dated 14 April 2020, noted that the respondent had asserted that the applicant had challenged her current work capacity and referred to the decision of 8 January 2020.

134. I have reviewed the various notices, correspondence and other documents relevant to this question.

135. In the Work Capacity Decision dated 10 December 2019, the covering letter noted "As discussed, a work capacity assessment has been completed on your claim and has confirmed that you have an increased earning capacity". The letter then stated: "As a result of this decision your weekly payments will not change. This decision will take effect on 10 December 2019". In the "Reasons for the decision section of the Work Capacity Decision" the following was included:

> "We have made a decision under section 43(1)(a) of the Workers Compensation Act 1987 and we believe you are currently able to work in the suitable employment identified below 8 hours a day, 5 days a week.
> We have made a decision under section 43(1)(b) of the Workers Compensation Act 1987 and we believe that the following vocational options are suitable employment for you.
> - Occupational Therapist
> …
> We have made a decision under section 43(1)(c) of the Workers Compensation Act 1987 and we believe that you can earn $1480.86 a week in this suitable employment.
> We note that you are currently working in a new role as an occupational therapist. We are currently waiting for you to provide us with pay slips to confirm your actual weekly earnings.
> Your doctor Dr Liambi has approved the suitable employment option as occupational therapist working full hours."

136. In an email dated 11 December 2019 to the insurer, the applicant sought a review of her PIAWE. The review was requested on the basis she had obtained new evidence, namely, an email from W4 dated 27 June 2019. It is clear that this email related to the question of whether the applicant had chosen to reduce her hours or whether the respondent had chosen to reduce her hours and "not offer me full-time work."

137. In an email dated 12 December 2019 to the applicant, the insurer in response to the request for a review, stated that the matter has been finalised.

138. In an email dated 12 December 2019 to the insurer, the applicant stated that the matter had not been finalised and requested a review. It is clear that the applicant had requested a review because she had recently obtained fresh evidence. This evidence, the email from W4 dated 27 June 19, in my view, related to the question of whether there was a voluntary agreement to alter or reduce her hours of work.

139. In an email dated 18 December 2019, the insurer advised the applicant that the decision would be reviewed.

140. On 8 January 2020 the insurer issued a Notice under ss 43(1) and 44BB (Notice of 8 January 2020). In the covering letter, the insurer noted that the applicant had sought a review of the work capacity decision determining the PIAWE dated 11 December 2019. The Insurer wrote:

> "I am now issuing the notice to advise that your PIAWE rate has changed.
>
> Your PIAWE will be $1,143.31 per week from 21 April 2020. Although you are not currently in receipt of weekly benefits, this is a reduction to your current PIAWE rate and is explained in more detail in the notice attached."

141. In the Notice, the insurer set out the respondent's response to the applicant's submissions as follows:

> 1. "It is our understanding that you seek a review of both the original PIAWE decision made on 3 September 2019, as well as the subsequent Work Capacity Decision to determine your entitlements under section 37 dated 10 December 2019.
> 2. In your request for review of your PIAWE dated 11 December 2019 you submit that you now possess new evidence which supports the submission that you did not voluntarily reduce your hours of work; namely the email correspondence of W4 dated 27 June 2019.
> 3. We maintain that s44D of the Workers Compensation Act, 1987, as applied in the calculation of your PIAWE, does not require that the reduction in hours be voluntary; but rather that the alteration in ordinary hours of work which may lead to reduced hours be voluntary.
> 4. The relevant period for the PIAWE is outlined in section 44D (2) of the WCA 1987 as set out below:
> 5. 44D Definitions applying to pre-injury average weekly earnings--relevant period
> (2) The relevant period, in relation to pre-injury average weekly earnings of a worker who, during the 52 weeks immediately before the injury, voluntarily (otherwise than by reason of an incapacity for work resulting from, or materially contributed to by, an injury that entitles the worker to compensation under this Act):
> (a) alters the ordinary hours of work, or
> (b) alters the nature of the work performed by the worker,
> and, as a result, the worker's ordinary earnings are reduced, does not include the period before the reduction takes effect.
> 6. Statement evidence submitted by both parties in the previous litigated proceedings clearly evidences that you sought to alter your ordinary hours upon your return from maternity leave. This is supported by the attached email correspondence.
> 7. In regard to the email correspondence of W4, upon which you rely, we submit that same has been taken out of context.
> 8. We are instructed that following your complaint against your manager, Ms Norma Albanez and others you were placed in W4' unit as a risk management strategy.
> 9. Ordinarily, Ms Albonoz was required to initiate an eform in Stafflink to update your status as 'fulltime reduced hours' in keeping with the changes to your ordinary hours of work that you had requested. This means you would retain your full-time status while working part-time hours for the next 12 months. Every 12 months this arrangement is reviewed to ensure it can be accommodated.
> 10. W4 did not have access to Stafflink and unknowingly agreed to your scheduling an allocated day off (ADO), however, staff working reduced hours are not entitled to ADOs. It was at this time that it was identified that Staffiink had not been updated and this was immediately rectified, and you were subsequently informed.
> 11. Accordingly, we do not accept that there is any new evidence that suggests your request to alter your ordinary hours of work was not voluntarily undertaken by you.
> 12. As you seek to rescind the voluntary agreement entered into between the parties on 28 October 2019, we maintain our original decision as to your PIAWE calculation as set out in our correspondence to you of 3 September 2019."

142. In the Notice of 8 January 2020, the entitlement was calculated as follows:

> "Because you have a current work capacity, your entitlement rate is determined by the following section of the WCA 1987:
> section 37(2)(a) = (PIAWE x 95%) - (E + D)

($1,143.31 x 95%) – ($1550.16 – your current weekly earnings as indicated in your payslip dated 19 December 2019)
= $0.00
This means that there are no further weekly compensation payments payable to you."

143. It is clear that the current weekly earnings were calculated to be as indicated on the applicant's payslip dated 19 December 2019, that is, $1,550.16.

144. As noted above the applicant filed an application on 17 January 2020 seeking to rescind the orders made on 28 October 2019. The applicant made an application for reconsideration based on further matters that had arisen following the arbitration hearing including evidence that had been obtained by the applicant since that date and a further work capacity decision made by the insurer on 8 January 2020.

145. In his decision relating to the reconsideration application dated 23 January 2020, Arbitrator Harris stated that the applicant had written to the respondent on 11 December 2019 seeking a review of the calculation of her PIAWE earnings and relied on further material.

146. On 6 February 2020 the applicant filed the Application in this matter, that being an Application for Expedited Assessment in respect of a work capacity decision issued on 8 January 2020. In the Reply filed by the respondent on 13 February 2020 confirmed that the matters in dispute were "as per dispute notice(s) attached to the Application." The dispute notice attached to the application was the Notice under ss43(1) and 44BB issued by the insurer on 8 January 2020.

147. In the telephone conference on 21 February 2020 the respondent confirmed that the main issue was whether there was a voluntary reduction in hours such that s 44D (2) applied. The secondary issue identified was the calculation of PIAWE. The respondent made no reference to the applicant's current work capacity and how that should be calculated.

148. In *Mateus v Zodune Pty Ltd t/as Tempo Cleaning Services* [2007] NSWWCCPD 227 (*Mateus*), Roche DP referred to the requirements of a s 74 notice at [45]:

> "Attaching a document to the section 74 notice and leaving it to the worker to work out exactly which issues are disputed does not satisfy those obligations. A section 74 notice must state in plain language, in the body of the document, the reason the insurer disputes liability and the issues relevant to that decision. An obscure reference to a document attached to the notice but dealing with a different issue to that identified in the notice, is not sufficient."

149. I do not accept that the applicant raised any issue other than that of the PIAWE calculation. I do not accept the respondent's submission that the applicant raised an issue as to the current work capacity decision on 10 December 2019 in respect of her entitlement under s 37 in relation to her current weekly earnings. The Notices issued by the insurer on 10 December 2019 and 8 January 2020, which stated that the entitlement to further compensation was nil, simply stated that the applicant was earning more in her current employment that the determined PIAWE.

150. I consider that the comments made by Roche DP in *Mateus* concerning section 74 Notices would apply to other dispute notices issued by an insurer including a notice under ss 43(1) and 44BB. I find that the Notice dated 8 January 2020 did not state in plain language that there was a dispute as to current work capacity. I find that the respondent did not notify the applicant that there was a dispute concerning the applicant's current work capacity relating to current weekly earnings and how that should be calculated in the Notice of 8 January 2020.

151. The respondent therefore requires leave under s 289A of the 1998 Act to have the issue of current work capacity heard and dealt with by the Commission.

152. Section 289A of the 1998 Act provides as follows:

> **"289A Further restrictions as to when a dispute can be referred to Commission**
>
> (1) A dispute cannot be referred for determination by the Commission unless it concerns only matters previously notified as disputed.
> (2) A matter is taken to have been previously notified as disputed if:
> (a) it was notified in a notice of dispute under this Act or the 1987 Act after a claim was made or a claim was reviewed, or
> (b) it concerns matters, raised in writing between the parties before the dispute is referred to the Registrar for determination by the Commission, concerning an offer of settlement of a claim for lump sum compensation.
> (3) The Commission may not hear or otherwise deal with any dispute if this section provides that the dispute cannot be referred for determination by the Commission. However, the Commission may hear or otherwise deal with a matter subsequently arising out of such a dispute.
> (4) Despite subsection (3), a dispute relating to previously unnotified matters may be heard or otherwise dealt with by the Commission if the Commission is of the opinion that it is in the interests of justice to do so."

153. In *Mateus* Roche DP considered the circumstances in which previously unnotified matters may be heard or otherwise dealt with by the Commission. Similar issues were also considered in *Department of the Public Guardian v Manning* (2008) NSWWCCPD 94 (*Manning*) and a useful summary of the matters relevant to the exercise of the discretion pursuant to section 289A is found in *Manning* at [64]-[65] as follows:

> "64. In *Mateus* the arbitrator who initially dealt with the application, identified the following matters as being relevant to the exercise of her discretion under section 289A(4):
>
> - the degree of difficulty or complexity to which the unnotified issues give rise;
> - when the insurer notified that it wished to contest any unnotified issue/s;
> - the degree to which the insurer has otherwise fulfilled its statutory obligation to notify the worker of its decision disputing liability;
> - any prejudice that may be occasioned to the worker, and
> - any other relevant matter arising from the particular circumstances of the case."

154. Roche DP in *Mateus* agreed with the arbitrator's identification of these matters, and stated he would add the following observations (at [47]):

> "(a) a decision by an insurer to dispute a claim for compensation should not be made lightly or without proper and careful consideration of the factual and legal issues involved;
> (b) any insurer seeking to dispute an unnotified matter is seeking to have a discretion exercised in its favour and, accordingly, must act promptly to bring the matter to the attention of the Commission and all other parties;
> (c) any unreasonable or unexplained delay in giving notice of an unnotified matter will be relevant to the exercise of the discretion;
> (d) in exercising its discretion the Commission may have regard to the merit and substance of the issue that is sought to be raised;
> (e) in assessing prejudice to the worker it will be significant to consider when and in what circumstances the worker was first made aware of the unnotified issue that is sought to be raised;
> (f) though it will be relevant to the exercise of the discretion to keep in mind that the Commission must act according to equity, good conscience and the substantial

merits of the case, those matters will not be determinative, and

(g) the general conduct of the parties in the proceedings will also be relevant to the exercise of the discretion."

155. In *Mateus*, Roche DP referred to the requirements of a s 74 notice at [45]:

> "Attaching a document to the section 74 notice and leaving it to the worker to work out exactly which issues are disputed does not satisfy those obligations. A section 74 notice must state in plain language, in the body of the document, the reason the insurer disputes liability and the issues relevant to that decision. An obscure reference to a document attached to the notice, but dealing with a different issue to that identified in the notice, is not sufficient."

156. The applicant referred to the decision in *Harding v Westpac Banking Corporation* [2018] NSWWCCPD 7 (*Harding*) noting that a similar issue arose in that matter concerning an unnotified matter pertaining to capacity. In that case Snell DP said:

> "Section 289A of the 1998 Act restricts the issues which can be referred to the Commission for determination, to those that have been "previously notified as disputed". What is "previously notified as disputed" is described in s 289A(2). A dispute regarding whether Mr Harding suffered from continuing incapacity as a result of injury was not "previously notified as disputed". As a consequence, the Commission was precluded from hearing or otherwise dealing with such a dispute, by s 289A(3). There is provision in s 289A(4) for "previously unnotified matters" to be dealt with, if "it is in the interests of justice to do so". No application was made to the Arbitrator, pursuant to s 289A(4), to deal with such an issue. It follows that Mr Harding's submission is correct, the Arbitrator lacked jurisdiction to determine the unnotified dispute going to whether incapacity had ceased".

157. The granting of leave is discretionary on the basis of whether such leave is in the interests of justice.

158. The policy and procedure of the Commission is to have matters dealt with expeditiously. It is well known that it operates on a "front end loaded" system whereby all evidence is required to be lodged by each party once the issues in dispute have been identified, as provided by the legislation. Section 78 imposes the obligation for a respondent to notify the issues, and s 289A(1) prevents any matter not previously notified as being in dispute to be relied upon.

159. The discretion vested in the Commission by virtue of s 289A(4) permits an exemption to be made where it is in the interests of justice. These interests do not encompass, in my view, an opportunity for the respondent's insurer and solicitors to rethink its defence, and to investigate whether a further possible issue might be raised, after due procedure had already been observed by the respondent's insurer, which may be assumed to be conversant with NSW compensation law. The procedure within the Commission consists of an initial telephone conference between the parties, and the matter being set down for hearing as soon as possible thereafter. The policy is not intended to create an opportunity for a party to raise further matters in dispute.

160. This matter has some history and the respondent and insurer have had ample time to consider precisely what issues were to be disputed. The interests of justice also concern the interests of the applicant, and indeed the interests of the policies and procedures of the Commission. There has been no attempt by the respondent to explain the reason for the extreme delay in notifying the applicant that there was a dispute concerning the applicant's work capacity in respect of current weekly earnings and how that should be calculated.

161. In my view, the factors against the exercising the discretion outweigh those in favour. The respondent was aware that the applicant in this matter was self-represented. I accept that

her partner, Mr R, who is a solicitor, represented her in the proceedings but he does not usually practice in this jurisdiction. There was no attempt by the respondent to explain why there was such a significant delay in raising this issue. The applicant was effectively ambushed at the arbitration when this new issue was raised. Further, there is a prejudice to the applicant in that the applicant did not have an opportunity when the issue was raised at the arbitration to file further evidence.

162. The respondent and insurer in this matter gave notice that the arbitration would proceed on a very clear and discrete grounds, that of whether the provisions of s 44D(2) applied to the applicant and the calculation of PIAWE. To then appear at the arbitration and run an additional and different issue, that of current work capacity, was most unsatisfactory particularly where an applicant is self-represented. An insurer has an obligation to conduct litigation in the Commission as a model litigant and its conduct in this matter could be seen to fall below the standard required of a model litigant.

SUMMARY

163. I find that the alteration in the ordinary hours of work for the period 15 April 2019 to 3 July 2019 was not voluntary within the meaning of s 44D(2) of the 1987 Act.

164. The parties reached agreement on PIAWE in the conciliation conference. The PIAWE was agreed to be $1,782.97 and that was the figure to be applied if there was no voluntary alteration in hours.

165. The respondent is refused leave to dispute the issue of current work capacity.

166. The Respondent to pay weekly compensation based on the pre-injury average weekly earnings of $1,782.97, with credit for payments made.