Bulletin

Edited by Michelle Riordan

Independent Review Office

RECENT CASES

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

Decisions reported in this issue

1. Heise v Employers Mutual Limited [2022] NSWCA 283
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Court of Appeal Decisions

Compensation claim by former police officer upon the claims manager engaged by SiCorp - Claim not determined within relevant period – Appellant brought a private prosecution of the company - Whether criminal liability extends to parties engaged to manage and assess claims under Government managed fund schemes

Heise v Employers Mutual Limited [2022] NSWCA 283 – Mitchelmore JA, Kirk JA & Griffiths AJA – 21/12/2022

This matter has a lengthy history. The decision that was the subject of this appeal was reported in Bulletin 114, but the following summary is provided for easy reference.

On 11/04/2017, the appellant claimed compensation under s 66 WCA, but the respondent (the claims manager for SiCorp) did not determine the claim within the required timeframe. On 20/07/2018, she lodged an ARD with the WCC and on 19/12/2018, the WCC issued a COD which awarded her $43,600 under s 66 WCA.

On 26/09/2018, the appellant commenced a private prosecution against the respondent in the Local Court. The respondent denied criminal responsibility for the offences on 2 grounds: (1) The proceeding is incompetent because it is not a person capable of committing the offence charged as a matter of statutory construction; and (2) in the alternative, even if it were the appropriate defendant (this was denied), the prosecutor did not establish the elements of the offence beyond a reasonable doubt.

Magistrate Lacy held that the respondent was responsible for determining the claim and the decision rights were conferred upon it by SiCorp through the claims management agreement. The word "insurer" in s 281(2)(b) WIMA makes provision for both a licenced insurer and a self-insurer and she rejected EML's argument that it could only be considered the insurer's claims manager. If that argument was accepted, it would lead to an irrational outcome that is at odds with the purpose of the WIMA, which is to deliver its objectively efficiently and effectively. Therefore, EML was "the person" on whom the claim was made and "the person" who failed to determine the claim. The respondent did not determine the claim within the 2-month period required under s 281(1) and there was no reasonable excuse for that failure. Therefore, the offence under s 283(1) WIMA was established beyond a reasonable doubt and she adjourned the matter part-heard to 30/08/2021, for sentencing.

The respondent sought leave to appeal to the Supreme Court of NSW and alleged that the Magistrate erred: (1) in her construction of '[a] person who fails to determine a claim as and when required by this Part' pursuant to s 283(1) WIMA; and (2) in concluding that the expressions '[t]he person on whom a claim … is made' in s 281(1) WIMA and '[a] person who fails to determine a claim as and when required by this Part' in s 283(1) WIMA extend to a person who was neither an 'employer' nor an 'insurer' of the employer within the meaning of s 281 WIMA.

Adamson J granted the respondent leave to appeal on both grounds and allowed the appeal. She stated, relevantly:

> 61. In the present case, the question whether "a person" in ss 281 and 283 must be, as a matter of statutory construction, either an employer or an insurer involves a question of law alone. However, the real question, for present purposes, is whether EML is, relevantly, "a person" within the meaning of ss 281 and 283 in relation to the plaintiff's claim for lump sum compensation. In my view, this question involves a mixed question of fact and law. This is so because the challenge to her Honour's judgment is a challenge to the application of statutory provisions to the facts of the case. A mixed question of fact and law does not fall within the description of "question of law alone": *Attorney General for NSW v X* (2000) 49 NSWLR 653; [2000] NSWCA 199 at [44] (Spigelman CJ, Priestley JA agreeing); *Director of Public Prosecutions (NSW) v Illawarra Cashmart Pty Ltd* (2006) 67 NSWLR 402; [2006] NSWSC 343 at [60] (Johnson J).

Her Honour stated that if Parliament intended a party who provides services to an employer/self-insurer to be treated as a licensed insurer or insurer, it would have engaged in a similar process to that undertaken with respect to scheme agents of the Nominal Insurer, and would have included similar provision to s 154M with respect to claims managers who are also insurers. However, there is no corresponding section that provides that workers compensation claims management service providers such as the respondent be treated as licensed insurers or insurers for this purpose.

Her Honour rejected the appellant's argument that all that needs to be proved to establish an offence under s 283 is that the respondent in fact received the claim and failed to determine it within the requisite period at a time when it happened to hold a licence as an insurer.

First, the respondent received the appellant's claim, not in its own right, but as agent for SICorp and the State of NSW, pursuant to an agreement made by SICorp in the exercise of its function under s 8(1)(b) under the NSW Self Insurance Corporation Act.

While the respondent may have had a contractual obligation, pursuant to its agreement with SICorp, to determine the claimant's claim (as to which no judgment can be made as the agreement was not tendered in the Court below), it does not follow that it had a statutory obligation under the WIMA to determine the claim. Its status as a licensed insurer for other unrelated purposes is, in this context, irrelevant since it was not the insurer for the plaintiff's claim (the self-insurer being the State of NSW).

Her Honour stated that as the respondent was not itself obliged under the WIMA to determine the claim, it cannot be criminally liable for failing to determine it. Her Honour stated, relevantly:

> 83 As claims manager, EML may have been in a position to prevent the commission by the State of NSW of an offence under s 283(1). However, for the reasons given by Handley JA in *Iannelli,* more is required to impose criminal liability on EML. That additional factor is not, as the claimant contended and as the Court below held, to be found in the circumstance that EML happened to be a licensed insurer (on the basis of a licence granted under the 1926 Act). To establish an offence against s 283(1), the claimant (as prosecutor) needed to establish that EML had a statutory duty to determine the claimant's claim and had failed to determine it. In the circumstances of the present case, this required the claimant to prove that EML was her employer (there being no separate insurer as the State of NSW is a self-insurer with respect to its workers compensation liability for its employees). It could not do so since, as a matter of mixed fact and law, EML was not her employer.

Accordingly, her Honour set aside the conviction and the costs order against the respondent.

The appellant sought leave to appeal to the Court of Appeal and relied upon five main arguments, namely: (1) She made a claim on respondent, which had a contractual duty to determine it; (2) It was significant that the respondent was itself (or had been in the past) a licensed insurer; (3) The Guidelines supplied content with respect to who was to be treated as an insurer; (4) The status and role of EML as claims manager rendered it an insurer; and (5) The State itself could not be prosecuted, and this meant the respondent as claims manager should be capable of prosecution.

The Court (Kirk AJA, Mitchelmore JA and Griffiths AJA agreeing) granted the appellant leave to appeal, but dismissed the appeal with costs. Their Honours held, relevantly:

> ***With respect to argument (1)***
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> It is evident that the obligation to determine a claim in s 281(1) applies to a recipient of the claim who has the power to determine it. The Parliament cannot sensibly have intended that a person breach a duty which they do not have the legal ability to comply with. Employers or insurers may contract with others to enable them to perform these duties. But whether or not that is done, the statutory duties and potential criminal liability still apply to those employers or insurers. In circumstances where contract cannot override or transfer the statutory duties away from employers and insurers, it would be odd if someone could become subject to those duties by contracting to undertake them on behalf of the employer or insurer: at [40]-[41].
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> ***With respect to argument (2)***
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> Whether or not the respondent was licensed as an insurer, it was not the relevant insurer for the State with respect to the applicant's claim. Even if it was in fact an "insurer", that was mere happenstance; it was not the relevant insurer: at [47].
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> ***With respect to argument (3)***
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> The statute contains no Henry VIII clause allowing the Guidelines to effectively rewrite the 1998 Act. The sections of the 1998 Act which refer to the Guidelines confer no power to determine who is to be treated as an insurer or employer. Even if the Guidelines said in terms that the respondent is to be treated as an insurer for the purposes of the legislation, that would have no effect on the issue of statutory construction on which this case turns, the Guidelines being subject to the Act: at [53]. In any event, the Guidelines did not state that: at [57]-[59].
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>> *Fletcher International Exports Pty Ltd v Barrow* [2007] NSWCA 244 at [41]-[43]; *Tan v National Australia Bank Ltd* (2008) 6 DDCR 363; [2008] NSWCA 198 at [34], referred to.
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> ***With respect to argument (4)***
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> The mere fact that the State, or a body corporate, engaged other persons to deal with and determine claims on its behalf does not require or suggest that such other persons are themselves subject to the relevant duties, and potential criminal liability. There is no statutory reference to "claims manager" in either the 1998 or 1987 Acts. There is no statutory footing for distinguishing a body such as the respondent from other third parties acting on behalf of the State or corporations. The applicant's argument would seem to lead to potential direct criminal liability of employees of the State or corporations who had been allocated decision-making responsibility for claims. That does not appear a likely intention of the Parliament: at [64]-[65].
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> ***With respect to argument (5)***
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> If the State cannot be prosecuted that is because of the strong general presumption to that effect, a presumption which recognises the distinctive character of governments. That presumption and recognition does not support seeking to stretch statutory provisions so as to find other means of effectively holding the State to account. Doing so is not required by the principle, and to do so would at the least be in tension with it: at [74].
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>> *Bropho v Western Australia* (1990) 171 CLR 1 at 22-23; [1990] HCA 24, *State Authorities Superannuation Board v Commissioner of State Taxation for Western Australia* (1996) 189 CLR 253 at 293; [1996] HCA, *Telstra v Worthing* (1999) 197 CLR 61; [1999] HCA 12 at [22], considered.

PIC - Presidential Decisions

Procedural fairness – whether Member failed to engage with the evidence and submissions made – dealing with 'uncontradicted' evidence – section 11A WCA

Success Ventures Pty Ltd v Gacayan [2022] NSWPICPD 50 – Acting Deputy President Parker SC – 20/12/2022

On 15/08/2018, the worker commenced employment as the Assistant Chief Engineer at the Park Royal Hotel Darling Harbour. He reported to Chief Engineer, Gary Roberts. He was dismissed by way of a letter dated 10/01/2019.

The worker alleged that on 15/08/2018, he engaged a contractor to perform work at the Hotel. However, Mr Roberts disapproved and told him that he was not to call any contractors or suppliers. He did this in a loud screaming voice in the presence of all the engineering teams. He said that he was shamed and treated with disrespect and was publicly insulted and he felt bullied physically and shocked "as no one [had] put [him] in such a position in public."

The worker alleged that thereafter, Mr Roberts made public insults and humiliating actions "every day" making him feel "unwelcome, harassed, bullied around exerting [him] pressure not to do the work" he was employed to do and excluded him from work meetings and activities. Mr Roberts passed on his normal activities to less experienced personnel with no experience in engineering management and he became scared to go to work.

He discovered irregularities in the procurement and management systems and on 26/09/2018, he wrote to the head office with respect to Mr Roberts' activities as Chief Engineer and a subsequent audit process revealed procurement irregularities at the hotel. Mr Roberts resigned and left the appellant's employment on 16/11/2018, after giving 3 weeks' notice.

On 12/11/2018, the worker submitted an Expression of Interest for the role of Chief Engineer. On 19/11/2018, he was interviewed for this position by Megan Knoetze (the Area Director Human Capital and Development Oceania) and Jeroen Meijer (the Acting General Manager).

There is conflicting evidence regarding that interview.

The worker alleged that he was victimised, ambushed and belittled by Ms Knoetze and Mr Meijer who "took revenge for Gary leaving on my raising and whistleblowing". He said that Ms Knoetze threatened him and in a loud screaming voice said he should not be in Australia and should be deported. He said that he felt threatened, and feared for his safety and wellbeing. He became concerned for his and his family's future life in Australia. He felt intimidated, humiliated and discriminated against because of his background from the Philippines. At the end of the interview, he almost called an ambulance as he was vomiting and stressed. After the interview the respondent withdrew his application for the Chief Engineer's position.

On 20/11/2018, the worker wrote 2 letters to the Chief Executive Officer of the appellant located in Singapore. The first letter referred to a previous letter to Mr Soon Hup dated 20/09/2018 in which he detailed his allegations against Mr Roberts with respect to procurement improprieties. He repeated the contents of the earlier letter. The second letter detailed his bullying claims against Ms Knoetze and Mr Meijer arising out of the interview, and against Mr Roberts who was said to have bullied him "as well".

As a result of the interview process, Ms Knoetze and Mr Meijer concluded that there were significant discrepancies and inconsistencies in the worker's claimed work history. Ultimately, his employment was terminated by letter dated 10/01/2019 on the basis that he had misrepresented his employment with Pearl Corporation (company in which he and his wife were directors).

The worker alleged that he suffered a psychological injury as a result of Mr Roberts' conduct and the conduct of Ms Knoetze and Mr Meijer in the interview.

However, the appellant disputed the claim and relied upon s 11A WCA and it also asserted that the psychiatric condition was caused by MVA's suffered by the worker in 2012 and 21/05/2018. It noted that there was a report from a psychologist dated

Member Burge conducted an arbitration and noted that the issues in dispute were: (1) whether the worker suffered a psychological injury in the course of his employment with the appellant; and (2) if yes, whether the injury was wholly or predominantly caused by reasonable action with respect to performance appraisal, discipline and/or promotion of the worker.

The Member declined to grant leave to the parties to cross-examine various witnesses. The appellant wanted to cross-examine the worker and the worker identified 3 witnesses (employed by the appellant) that he wished to cross-examine. The Member ruled:

> Given the fairly voluminous documentation involved in this matter, I have declined those respective applications. The witnesses have been excused. If anything arises during the course of the day that may change but I'm hopeful and expect that it will not.

On 14/03/2022, the Member issued a COD which found that the worker suffered a psychological injury in the course of his employment with the appellant (deemed date: 26/11/2018) and that his employment was the main contributing factor to the injury. He also found that the injury was not caused by reasonable actions of the appellant with respect to promotion and/or performance appraisal and he remitted the matter to the President for referral to a medical assessor to assess WPI.

The appellant appealed on 6 grounds and alleged that the Member erred as follows:

(1) in law in concluding that the respondent's evidence regarding the hostility and intimidation by Mr Roberts should be accepted because it was uncontradicted.

(2) In failing to take into account a material and relevant consideration, namely the respondent's failure to report the bullying of Mr Roberts until after the November 2018 meeting.

(3) In failing to find that the respondent's major depressive disorder was caused by the May 2018 MVA and by rejecting the opinion of Dr Vickery on the basis that there was no contemporaneous diagnosis of such a disorder.

(4) He committed a jurisdictional error or otherwise engaged in conduct constituting a constructive failure to exercise jurisdiction by failing to assess the respondent's credibility and in failing to find that the respondent had engaged in deliberate acts of dishonesty.

(5) In relation to the test of causation pursuant to s 11A WCA and by failing to properly determine the s 11A defence.

(6) In law by failing to take into account and make findings in respect of the evidence adduced by the appellant and alternatively denied the appellant procedural fairness.

Acting Deputy President Parker SC determined grounds (5) and (6) first, as if these were established there would be a finding of a failure to afford procedural fairness, which would warrant the remittal of the matter for rehearing. He upheld grounds (4) and (6) and stated, relevantly (citations excluded):

> 71. The appellant's complaint is that the Member failed to engage with and address a major part of its case. At the hearing before the Member, the appellant addressed arguments and submissions based on the evidence of Ms Knoetze and Mr Meijer. The Member did not in his reasons provide any analysis of the evidence or response to the submissions based on that evidence. The consequence was that the appellant submits it was denied procedural fairness and the hearing miscarried.
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> 72. In *Day v SAS Trustee Corporation* Meagher JA said:
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> > ... a constructive failure to exercise jurisdiction (or a purported exercise, in the sense that there is an appearance of an exercise of jurisdiction) as alleged by the appellant is not a mere failure to consider evidence or to address an argument or submission, which may be contingent or otherwise insignificant, but a failure to understand and determine a case or claim. The ultimate question is whether a failure to consider and address certain issues or arguments involved a failure to address central or critical elements of the case or claim: compare, in relation to failures to consider evidence, *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99; [2013] FCA 317 at [69], [111]. It will be insufficient for the appellant to show that his 'three key issues' were not stated and determined

discretely. What he must show is that they raised 'substantial' (in the sense of clearly material) arguments or questions which the primary judge in substance failed to address in determining the appellant's claim to have been incapable, by reason of a chronic adjustment disorder, of exercising the functions of a police officer at the time of his resignation.

73. In *Minister for Immigration and Citizenship v SZRKT* the Federal Court considered an appeal from a Federal Magistrate in which the issue on the Minister's appeal was whether the Federal Magistrate erred in finding that the tribunal ignored evidence consisting of a certified copy of the first respondent's academic record and, if so, whether the tribunal's decision was affected by jurisdictional error.

74. In the course of the judgment, Robertson J said this:

> In relation to a decision-maker's consideration of the evidence, it is well established that no jurisdictional error occurs, if the decision-maker makes a 'mere' error of fact when considering or weighing a piece of evidence in the course of deciding an issue of fact or law arising in the matter ... Moreover, the Full Court has warned against drawing an inference that either an issue has been overlooked, or that evidence was overlooked, merely because a piece of evidence was not expressly discussed in the course of a decision-maker's stated reasons, since 'it is plainly not necessary for the tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons' ... However, an error in the assessment of a material piece of evidence is one thing, and failing to be aware of evidence which is material to the decision, and of which the decision-maker should be aware, is another.
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> The jurisdictional error of 'ignoring', or failing to be aware of, or totally disregarding, relevant evidence has been traced to a general duty implicit in a statutory power of decision, that the decision-maker 'is required to make his decision on the basis of material available to him at the time the decision is made'.

75. I acknowledge that the Member was not required to refer to every piece of evidence or every contention advanced by the appellant. Nevertheless, for the reasons that follow, in my view the absence in the reasons of reference to the evidence of the appellant's witnesses and the submissions based on their evidence indicates that the Member did not engage with and determine the case being advanced by the appellant. It follows that the hearing did not provide the appellant with procedural fairness. The matter must be remitted for re-determination.

76. The evidence of the respondent concerning his interactions with Mr Roberts was accepted by the Member for the following reasons:

> (a) the respondent had raised various issues with the internal auditors and senior management. He said that evidence confirmed the respondent's issues with Mr Roberts were plainly playing on his mind as early as October 2018;
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> (b) there was no evidence "proffered to contradict the [respondent's] statement in relation to Mr Roberts yelling at him and treating him poorly once the [respondent] become aware [sic] of irregularities in the [appellant's] procurement process";
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> (c) the interaction with the internal auditors was exemplified in the text messages which the Member said showed the respondent's concern over the outcome of their investigation and his concern for the future of his employment, and
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> (d) the appellant did not provide any evidence of efforts to obtain a statement from Mr Roberts to refute the respondent's evidence.

77. It is apparent that the Member accepted the evidence of the respondent which he said was "uncontradicted". However, he did so without referring to the evidence of Ms Knoetze and Mr Meijer…

79. The discussion of the evidence by the Member does not make any detailed reference to the evidence of Ms Knoetze or Mr Meijer. The only reference to this evidence is at [24] of the reasons where the Member notes that Ms Knoetze confirmed that Mr Roberts resigned having regard to irregularities in procurement.

80. The appellant was entitled to, and did, rely upon the statements of Ms Knoetze and Mr Meijer to show at the very least that:

(a) The respondent was untruthful in his interview as to his Curriculum Vitae and past employment activities.

(b) Ms Knoetze's evidence, if accepted, meant that at the very least the bullying alleged by the respondent was out of character in her experience with Mr Roberts. This meant the Member was required to assess the truthfulness and reliability of the evidence advanced by the parties.

(c) The conduct of Mr Roberts complained of by the respondent was inconsistent with Ms Knoetze and Mr Meijer's knowledge and experience of Mr Roberts' character.

(d) Before the meeting of 19 November 2018, the respondent had not reported "any bullying towards him from Mr Gary Roberts, never."

(e) It was only after the interview of 19 November 2018 that the claim for psychological injury arising out of the employment manifested itself.

(f) The statements provided evidence as to what occurred in the interview of 19 November 2018. The interview had a significant effect on the respondent, leading to him seek medical treatment and provide the history he did to the general practitioner.

81. The respondent submits that the evidence of Ms Knoetze and Mr Meijer could be disregarded because Mr Gacayan did not say that he reported the bullying to either of these witnesses. The Member does not say the evidence was not relevant to the complaints made to Mr Roberts.

82. The point is that the Member did not engage with the evidence. He could, as the respondent submits, have found it of no relevance or of little weight. But he did not even refer to it in circumstances where the appellant made substantial submissions based on the evidence.

83 The Member was required to engage with the statement evidence of Ms Knoetze and Mr Meijer. It was patent that substantial reliance was placed on this evidence by the appellant. There is nothing in the reasons for the determination indicative of any engagement by the Member with the evidence of these witnesses who were plainly central to the appellant's case on the issue of injury.

84. The Member has failed to engage with the evidence and submissions made by the appellant and the appellant has made out the appeal on the basis that it was denied procedural fairness.

Otherwise, Parker ADP upheld ground (1). He stated that as a matter of principle the Member was entitled to accept the uncontradicted evidence of the respondent but, for the reasons provided in relation to grounds (4) and (6), he was required to also address the evidence of Ms Knoetze and Mr Meijer and provide cogent reasons why he could reach the conclusion he did with respect to the respondent's evidence notwithstanding the evidence of the appellant's witnesses.

In the absence of any discussion of the evidence of Ms Knoetze and Mr Meijer, he was persuaded that the finding accepting the respondent's evidence cannot be sustained. The credit of the respondent, both as to truthfulness and reliability, was in issue and the absence of statement evidence from Mr Roberts was not enough to overcome the failure to consider the evidence of the appellant's witnesses.

However, Parker ADP dismissed grounds (3) and (4). In relation to ground (5), he stated that if the appeal was not otherwise successful, he would dismiss this ground, but as the matter has to be re-heard, the findings in relation to s 11A and Dr Vickery's evidence should be set aside.

The test of 'injury' in the course of and arising out of employment – the drawing of inferences

Boccalatte v Burwood Council [2022] NSWPICPD 52 – Acting President Snell – 22/12/2022

The appellant was employed by the respondent from 23/01/1984. As at 1/01/2017, he was the Team Leader for Parks and his duties mainly involved maintenance at Burwood Park.

On 1/01/2017, the appellant had pre-approval to work overtime, commencing his shift at 4.30am (which he did) rather than his usual time of 5.30am. He was working alone and was approached by a male in the park who stabbed him 4 times. The male "took off" heading towards the Oval after the appellant hit him with a paper-grabber that was used for picking up garbage. The appellant placed a call to "triple 0" at about 5.15am. Police and an ambulance attended the scene. The appellant was taken to Royal Prince Alfred Hospital with four stab wounds.

The appellant was off work for 3 weeks and then resumed on light duties, slowly increasing his hours. He lodged claim forms dated 3/01/2017 and 5/01/2017. By June 2017 he was on the verge of resuming full-time work.

The respondent initially paid benefits in respect of weekly payments and treatment, but on 28/06/2017 it when it denied that the appellant suffered injury arising out of or in the course of employment.

On 8/06/2017, the respondent advised the appellant in writing that there were allegations that on "one or more" prior occasions he had engaged in exchanging illicit and illegal drugs within Burwood Park and the LGA and that he was in the process of participating/undertaking an illicit/illegal drug activity when the assault occurred.

In a letter dated 27/06/2017, the respondent said that the appellant had admitted participating in the exchange of cannabis to a homeless man, in Burwood Park, on at least 3 occasions before 1/01/2017 and that at least one of these incidents was in normal working hours, the other times being either before starting work or within a lunch break. It said that on all 3 occasions, the appellant was wearing his council uniform. Following intervention by the appellant's Union, he resigned effective 28/06/2017.

On 5/12/2017, the respondent issued a dispute notice, which asserted that the appellant did not seek approval to commence work before 5.30am and disputed that he was "acting in the course of [his] employment at the time the assault occurred". It was "not satisfied that the only reason [the appellant] arrived at Burwood Park at 4.23am was to commence [his] rostered shift, particularly as [he] moved to a part of the Park that was not covered by the CCTV cameras and this was where the assault took place". It stated that it was "more likely that [he] arrived much earlier than [his] normal starting time in order to meet a person or persons in relation to [his] illegal activities", which placed the appellant "outside [his] employment". It relied also on an allegation of 'serious and wilful misconduct'.

The appellant was examined by Dr Ahmed, psychiatrist, at his solicitors' request and on 27/06/2019 and 10/09/2020, he diagnosed "Post-Traumatic Stress Disorder and an Alcohol Dependence". He said "[t]he key contributor is the stabbing event".

On 25/02/2021, the appellant's solicitors claimed lump sum compensation for 21% WPI based on Dr Ahmed's assessment.

On 21/02/2021, the respondent issued a further dispute notice which disputed that the appellant suffered a psychological injury and it formally raised a defence of serious and wilful misconduct' and the issue of 'credit'.

The current proceedings were listed for hearing on 18 February 2022. Mr Barter appeared for the appellant and Mr Saul for the respondent. The matter was conducted by way of a video hearing. The appellant was cross-examined by leave. Counsel addressed and the Member reserved his decision. The Commission issued a Certificate of Determination dated 22 March 2022, accompanied by the Member's reasons (the reasons). There was an award in favour of the respondent.

Member Wynyard conducted an arbitration and on 22/03/2022 he issued a COD which entered an award for the respondent.

The Member summarised the police material, which indicated that the assault occurred at a location where the appellant was out of CCTV view and that he was vague about the incident when interviewed by police in hospital. It referred to the appellant having knowledge of growing "one large [cannabis] plant, which he had cut up and on-sold to various persons in and around the Burwood area", and that he thought "he may have pissed another dealer off for selling on his turf". In an interview with police following his release from hospital, the appellant said that he may have been targeted because "for about 6 months I have been selling cannabis to people that I have known and have attended Burwood Park to collect the cannabis. The dealing times were infrequent."

The Member referred to the appellant's interview with the respondent's officers on 16/06/2017, in which the appellant described selling cannabis, "basically almost gave it away to a homeless man" on 3 occasions in May, June and September 2016. He denied selling it to others, although said "the homeless man might have … [he] could do what he liked with the cannabis" and that "these exchanges of cannabis occurred at about 5.15am before he started work". When it was specifically put to him, the appellant denied "that he was in the process of participating and undertaking an illicit drug activity" when he was assaulted. He denied any dealings with the assailant

The Member referred to a statement by the appellant dated 24/10/2021 in which he said:

> In or around December 2016, the Police were investigating an allegation on me in relation to selling illicit drugs at Burwood Park. However, I was not arrested, charged or convicted of any criminal offence.

The Member also referred to a statement by the appellant dated 31/01/2022, in which he said that he liked the homeless man ("Barnsy") and was happy to give him cannabis from his plant. The Member quoted a passage in which the appellant said, "I suppose I knew he would sell some and he did give me a small amount of money but I hardly made anything out of it".

The Member summarised the respondent's cross-examination of the appellant. The appellant said he was "pretty sure" he had sold or given cannabis to the homeless man on 4 occasions and that a man that Barnsy played chess with "started to go on and on about it" until he "gave him some". He later agreed he had charged Barnsy "$200 for a zip lock sandwich bag he had filled with marijuana from his plant". He conceded he would advance money to Barnsy from time to time and that "he would be getting the money back because [Barnsy] would on-sell the cannabis." The Member described the appellant as prevaricating when giving evidence.

The respondent argued that if the appellant could not establish that he was not dealing drugs on 1/01/2017, then he was not acting in the course of his employment. If he was not dealing drugs on that day but knew his attacker due to involvement with drug activity, then he was not in the course of his employment. If the attack was unrelated to drugs, he would still fail as he could not satisfy s 9A (there was specific reference to s 9A(3)). The appellant was not a witness of truth, he could not show that he was in the course of his employment at the time of the attack. If the attack was simply random, s 9A would apply, but the opinion of Dr Lee should be preferred to that of Dr Ahmed as Dr Lee had an accurate history.

The appellant argued that the nature of his duties exposed him to a random attack. He appeared unreliable, and he probably was as it was 5 years after the event and he had suffered the effects of the assault and the aggravating effects of alcohol and a loss of esteem. The assault was of such a nature that it was likely to lead to the sort of problems described by Dr Ahmed. He had worked for the respondent for 30 years and he was in charge of Burwood Park. It was only speculation that the assault was connected with his dealing with drugs and the respondent carried the onus under s 14 *WCA*. If Dr Ahmed's opinion was accepted, compensation would be payable in any event because of s 14(2), even if the respondent's argument was accepted.

The Member held that he was prima facie satisfied that the worker was in the course of his employment at the time he was stabbed, as he had permission to start early, he was observed on CCTV arriving at Burwood Park dressed in his uniform, he was assaulted in Burwood Park and beat off his assailant using his garbage collecting stick.

The Member stated that the outcome depended on whether he could infer the attack was connected to the drug dealing during the year before and this involved an analysis of the different statements.

The Member was not persuaded that the appellant's denial of supplying cannabis to people in the Burwood area had any substance and he was not convinced by his answers about whether he was present when other drug deals with Barnsy occurred. He noted that the appellant was a police suspect in the weeks prior to the attack and that if the police considered that he should be investigated, "other interested parties such as rival drug dealers might also have suspected him of continuing his dealing, whether he was or not, hence the attempt on his life on New Years' Day".

The Member quoted the following passage from *Nunan v Cockatoo Docks & Engineering Co Ltd*:

> ... If, for example, a private enemy of a worker assaults and injures him when he happens to be at work on his employer's premises, the assault arising out of something unconnected with the employment and there being no other relevant factors, it is clear that the injury does not arise out of the employment ...

The Member held that the appellant was not in the course of his employment when he was assaulted.

The argument based on s 14 WCA remained and the Member quoted from the reasons of Basten JA in *Scharrer v The Redrock Co Pty Ltd*:

> ... However, that appears to give s 14(2) a form similar to s 14(1) as an independent source of entitlement. Historically the provisions served different functions; s 14(2) started life as a limitation on the primary entitlement in the case of relevant misconduct. When a qualifying exception was made to it, in the case of death or serious and permanent disablement, the appropriate reading required that the primary entitlement to compensation was restored, by disregarding the disqualifying misconduct: it did not create a new form of entitlement. Thus the injury must, at that time, otherwise have arisen out of and in the course of the employment.

The Member held that s 14(2) WCA did not assist the appellant, given the finding against him on the issue of 'injury' and, in the event that he was wrong regarding the application of that provision, he found that the injury had "caused serious and permanent disablement".

The appellant appealed on 3 grounds and alleged that the Member erred as follows: (1) in law in finding that he was not in the course of his employment when he suffered injury on 1/01/2017; (2) in law and fact in making that finding as it was against the weight of the evidence; and (3) he failed to consider whether or not he suffered injury to which his employment was a substantial contributing factor.

Acting President Snell allowed the appeal, revoked the COD and remitted the matter for redetermination by another member consistent with his reasons, which are summarised below.

Snell AP noted that the appellant argued that the Member's reference to whether the attack was "connected to the drug dealing which he admitted to in the park during the year before" (see reasons at [166]) may be relevant to an issue going to 'arising out of employment' but was not relevant to injury 'in the course of employment'. Effectively, he argued that the Member applied an incorrect test to the 'course of employment' case.

Snell Ap stated, relevantly (citations removed):

> **The potential inferences**
>
> 83. There was no direct evidence of matters occurring on 1 January 2017, in the period prior to and including the assault, which would lead to a conclusion that the appellant was not in the course of his employment when he was assaulted. The Member raised the topic of whether an inference should be drawn in the reasons at [166] (see [72] above). He said the result "depends on whether I can legitimately draw an inference that the attack suffered by the [appellant] was connected to the drug dealing which he admitted to in the park during the year before" (emphasis added). The Member here asked himself the wrong question. Whether there was such a causal connection could be relevant to whether the assault arose out of the employment. It was not of assistance in considering the allegation brought, being whether the assault occurred

in the course of the appellant's employment. This was consistent with the conclusion implicit in the reasons at [175], in which it was found that the assault did not occur in the course of employment, supported by a passage from Nunan that dealt with whether an assault arose out of employment.

84. In *Bradshaw v McEwans Pty Ltd* the High Court said:

> In questions of this sort where direct proof is not available it is enough if the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture (see per Lord Robson, *Richard Evans & Co Ltd v Astley* [1911] UKLawRpAC 47; [1911] AC 674 at 687). But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise: cf per Lord Loreburn, above, at 678.

85. In *Luxton v Vines* the plurality described the above passage from *Bradshaw* as "the test to be applied". In *Flounders v Miller* Ipp JA said: "The circumstances must do more than give rise to conflicting inferences of an equal degree of probability or plausibility. The choice between conflicting inferences must be more than a matter of conjecture." In *Fuller-Lyons v New South Wales*, the High Court spoke of the need for an inference of fact to involve "a definite conclusion of which the trier of fact is affirmatively satisfied as distinct from merely a possible explanation for the known facts".

86. The respondent, on appeal, refers to the following inferences which it submits should be drawn:

> (a) The appellant was dealing with drugs at the time when he was at the park or certainly at the time of the attack. He was not engaged in any purely employment activities.
>
> (b) Alternatively, the appellant was fraternising with people and involved in criminal activity outside employment.
>
> (c) On the probabilities cannabis was being supplied to the homeless man, issues arose, further "another drug dealer's territory was being violated hence the attack".
>
> (d) Issues arose in the park that were unconnected to employment but were connected to the dealing of drugs.

87. The reasons do not indicate what factual inferences the Member drew. He did make an ultimate finding of fact. The basis of this is opaque. There is discussion in the reasons at [173] going to whether "interested parties such as rival drug dealers" might have been responsible for the attempt on the appellant's life on 1 January 2017. This discussion does not contain any factual finding based on an inference. It expresses itself in terms of "might also have suspected him", it does not involve a positive finding on the probabilities, contrary to the decisions discussed at [84] to [85] above. It is unhelpful to consider whether the inferences nominated on appeal by the respondent were properly available. These were not findings made by the Member, on the basis they were matters that could be properly inferred. Of the potential inferences referred to at [86] above, those at (a), (c) and (d) were conjectural. That at (b) had support in the evidence, however there was little basis for a conclusion on the probabilities that there was any causal relationship between those matters and the assault. In any event, the various suggested inferences went to whether there was a causal relationship between the employment and the injury. The correct question was whether the injury occurred in the course of the appellant's employment.

88. In my view the Member misapplied the test of 'injury' in s 4 of the 1987 Act, in that he conflated the tests governing injury arising out of the course of employment and injury in the course of employment. In considering whether the appellant suffered injury in the course of employment, the Member had regard to irrelevant matters, going to whether the appellant had established a causal connection between the employment and the injury.

PIC – Member Decisions

Workers Compensation

PIAWE dispute determined by reference to the definition in the Vehicle Manufacturing, Repair, Services and Retail Award 2010 (2010 Award

Evans v Shaw t/as Sparkles Kar Shower [2022] NSWPIC 740 – Member Sweeney – 22/12/2022

The worker was previously employed by the respondent as a car-wash attendant and was concurrently employed by the Heart Research Institute. On 8/12/2016, she severely injured her back at work and was unable to resume PIDs. She retrained as a Child Care worker and was employed on a full-time basis.

A dispute arose as to whether the worker's PIAWE should be determined by reference to either Level 1 or 2 of the Vehicle Manufacturing Repair, Services and Retail Award.

Based upon the evidence before him, ***Member Sweeney*** held that PIAWE should be calculated by reference to a Level 2 employee under the award and that the duties at the automated car wash were well beyond the scope of a Level 1 employee.