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. Oswell v Sublime Install Pty Ltd [2024] NSWSC 1586
2. Martsoukos v Secretary, Department of Education [2024] NSWPICPD 85
3. Massoudi v Rose Truck Pty Ltd [2025] NSWPICPD 2
4. Makdessi v Millennium Security Specialist Services Pty Ltd [2025] NSWPICPD 3

Supreme Court of NSW – Judicial Review Decisions

Judicial review – application for reconsideration – response to application not within MAP's functions – determination of s 323 deduction - error of law on face of record

Oswell v Sublime Install Pty Ltd [2024] NSWSC 1586 – Basten AJ – 11/12/2024

On 9/05/2023, the plaintiff filed an ARD commenced PIC proceedings and claimed compensation under s 66 WCA for an injury to his lumbar spine that caused him to cease working in 2020. Liability was not disputed.

It was common ground that degree of permanent impairment was 16% WPI and the dispute related to whether an additional 1% WPI should be allowed for scarring and whether there should be a deductible under s 323 WIMA. The dispute was referred to a MA, who issued a MAC on 27/06/2023, which assessed 14% WPI. This did not include an allowance for scarring, but it applied a 10% deduction under s 323 WIMA.

The plaintiff sought both a referral back to the MA (to assess scarring) and appealed the finding under s 323 WIMA. On 13/09/2023, the dispute was referred to a MAP and on 13/11/2023, the MAP dismissed the appeal.

The plaintiff sought judicial review of the MAP's decision on two grounds: (1) whether the MAP erred in determining the reconsideration application; and (2) whether the MAP erred in making a deduction under s 323 WIMA.

Basten AJ held that the MAP had no authority to determine the application for reconsideration of the scarring component. By so doing, the MAP exceeded its jurisdiction and its decision must be set aside.

His Honour noted that the plaintiff argued that the deterioration of his lumbar spine commenced when he started work as a sheet metal worker and the MAP erred in finding a pre-existing condition for the purposes of s 323 WIMA.

His Honour held that these dates were not determinative of the commencement of the gradual process involving deterioration of the lumbar spine. As the MAP failed to identify the time at which the pre-existing condition arose, it was not possible to know whether the finding of a pre-existing condition was supported by evidence and whether it was legally available. This was an error on the face of the record.

Accordingly, his Honour set aside the MAP's decision and directed the President or his delegate to determine whether to: (a) grant the application for reconsideration regarding scarring; (b) if not, give the plaintiff leave to amend his appeal to include a demonstrable error; and (c) refer the dispute to a differently constituted MAP for determination according to law.

PIC – Presidential Decisions

Psychological injury – COVID-19 vaccine mandate – whether email communications regarding the COVID-19 vaccine mandate constitute disciplinary action for the purposes of s 11A WCA - Secretary, Department of Education v Uzunovska [2024] NSWPICPD 19 considered and applied – Boyd v Secretary, Department of Education [2024] NSWPICPD 79 considered and applied

Martsoukos v Secretary, Department of Education [2024] NSWPICPD 85 – President Phillips DCJ – 17/12/2024

During the COVID-19 pandemic in 2021, the NSW Government required its school-based staff to receive two COVID-19 vaccinations in order to continue working. On 27/08/2021 and 2/09/2021, the respondent sent emails to all school staff notifying them of the vaccination mandates.

The appellant was employed by the respondent as a full-time teacher. She alleged that she suffered a psychological injury on 27/08/2021 as a result of receiving that email. The respondent relied on s 11A WCA and asserted that the injury was wholly or predominantly caused by its reasonable actions as its emails were of a disciplinary nature.

At first instance, ***Member Wynyard*** upheld the s 11A defence.

On appeal, the appellant alleged that the emails did not constitute '*discipline*' for the purposes of s 11A and that the respondent's actions were not reasonable.

At [41], his Honour referred to the decision of Neilson J in *Bottle v Wieland Consumables Pty Ltd* [1999] NSWCC 32; 19 NSWCCR 135, which held that the giving of a lawful instruction was not "*discipline*". While that finding was fact-sensitive, it is illustrative of a direction given by the employer lacking the necessary "*coercive corrective*" element so as to imbue the direction with a disciplinary colour. A lawful direction given to an employee may simply be a direction to perform a particular task, or work at a particular location, or any one of a myriad of directions given in the course of an employment relationship. Unless the direction has the necessary element or intention of being "*coercive correction*" or a measure consistent with that purpose, it will lack the necessary disciplinary colour.

His Honour stated that the issue for determination is whether the Member's finding that the emails were disciplinary in nature was an error was either a finding of fact or a legal conclusion drawn from the emails and the surrounding circumstances. He accepted the respondent's submission that the Member's finding was an evaluative exercise whose resolution involved balancing matters of fact and degree. In *Australian Air Express Pty Ltd v Langford* [2005] NSWCA 96, the Court of Appeal said that in respect of such evaluative decisions, it was insufficient for an appellate court to have a different view. Rather, the decision maker must be shown to have been wrong. This authority is consistent with the terms of s 352(5) WIMA.

His Honour did not accept the Member's conclusion was not an available construction of the evidence. Therefore, the finding was infected by error. He stated, relevantly:

> 59. The fact that the direction in the emails is couched in mandatory terms does not ipso facto render the direction to be action with respect to discipline. Every employer has the power to issue reasonable and lawful commands. The respondent's powers are set out in the 1980 Act and Regulation. Nowhere is Part 3 of the Regulation, which deals with discipline, referred to in the email. The respondent relied upon the evidence of Dr Paul Wood, Executive Director Educational Standards.[46]In his statement dated 31 May 2022, Dr Wood makes it clear that the 27 August 2021 email was sent to keep all school based staff " *... up to date on the progress of the PHO[47] ...*" Nowhere in his statement does Dr Wood ascribe either the 27 August or 2 September 2021 emails as being disciplinary in nature, either actual or proposed. Given that these emails went to all school-based staff in NSW, it is fanciful to assert that every recipient was at that stage under disciplinary action, either actual or proposed.

60. I also reject the Member's finding that the appellant, being a qualified teacher, may be presumed to understand the meaning of the words used in the email and the disciplinary ramifications. I reject the finding that the disciplinary character of the two emails depends upon the appellant's subjective interpretation of the emails. Dr Wood for the respondent did not ascribe the emails as possessing this quality.

61. I dealt with a similar submission made by the respondent in *Secretary, Department of Education v Uzunovska*, which is referred to by the appellant at paragraphs [4]–[5] of its response to the Direction I issued on 27 November 2024. Nothing has been put in this matter which would alter the approach I took in *Uzunovska* and which has subsequently been followed in *Boyd v Secretary, Department of Education*. Indeed, in this case, in light of the answers to the 27 November 2024 Direction, this interpretation of the two emails not being disciplinary is even stronger…

63. In this case, it is apparent that the two emails are not initiating an investigation or are disciplinary in content or nature. The emails do not expressly say that they are. There is no element of '*coercive correction*' as described in the caselaw appearing in the emails which would give them the necessary disciplinary colour. Dr Wood for the respondent does not ascribe that quality to them and they are not issued in accordance with the Regulation and its provisions about disciplinary action. All the respondent and Member rely upon is the appellant drawing an inference that the emails are in fact the start of a disciplinary or investigatory process. I reject this submission and conclusion. It is plainly apparent that neither email initiated an investigation of any alleged breach of discipline. This does not stop the emails from being evidence in a later investigation, however it is a long way from the emails being part of the process of an investigation with respect to discipline.

His Honour decided to revoke the COD and to remit the matter to a different Member for redetermination, but he held that the issue of reasonableness of the action was irrelevant because the emails were not of a disciplinary nature.

Death of a working director of an uninsured company – Dependants claimed lump sum death benefits under ss 25 and 26 WCA - consideration of ss 3(1A) and 4A WCA and s 4(2) WIMA - dependants' rights are not separate and distinct rights under Part 3, Division 1 WCA having regard to s 3(1A) WCA and s 4(2) WIMA – Dependants not entitled to statutory benefits

Massoudi v Rose Truck Pty Ltd [2025] NSWPICPD 2 – acting Deputy President Nomchong SC – 17/01/2025

The deceased was the owner/operator of the respondent trucking business, which did not have compulsory workers compensation insurance as at 15/04/2004, when the deceased died as a result of injuries that he suffered at work.

The deceased's wife and three children claimed lump sum death benefits under s 25(1)(a) WCA, plus ongoing weekly payments under s 25(1)(b) and reimbursement of funeral expenses under s 26 WCA.

Member Whiffen determined that the dependants' claims were not maintainable due to the operation of ss 3(1A) and 4A WCA and s 4(2) WIMA, because the deceased was a director of the respondent at the time of his death and the company was uninsured.

On appeal, the appellants asserted that the member erred by misdirecting himself and in applying an incorrect application of ss 3(1A) and 4A WIMA, and by determining that upon the deceased's death, the dependants' separate and distinct rights became subject to s 4A and were extinguished.

Acting Deputy President Nomchong SC dismissed the appeal. Her reasons are summarised below.

- The Member identified the principles of statutory construction as enunciated in the authorities in *Alcan (NT) Alumina Pty Limited v Commissioner of Territory Revenue*; *Project Blue Sky Inc v Australian Broadcasting Authority*; and *Newcastle City Council v GIO General Limited*.

- The Member also noted the summary of the relevant principles identified by Roche DP in *Hesami v Hong Australia Corporation Pty Limited* which, in turn, relied on the decision of the NSW Court of Appeal in *Wilson v State Rail Authority of New South Wales*. In so doing, he Member correctly recognised that the first consideration is of the ordinary, grammatical sense of the text itself. However, the text is to be considered in light of its context and the legislative purpose of the scheme.
- These are the correct principles. The High Court confirmed them in *SAS Trustee Corporation v Miles*. They have been consistently applied across all jurisdictions in Australia for many years. This approach has been recently applied by the New South Wales Supreme Court of Appeal in *Tsolis v Health Care Complaints Commission*.
- Recently, the Victorian Supreme Court of Appeal in *Moorabool and Central Highlands Power Alliance Inc v Minister for Energy and Resources* helpfully summarised those principles in the following manner:

  > 82. The starting point in any exercise of statutory construction is the text of the provision. However, the text is to be considered in light of its context and purpose. Context includes the legislative context, because the meaning of a provision must be determined by reference to the entire Act. Consideration of purpose is further reinforced by s 35(a) of the *Interpretation of Legislation Act 1984*, which in summary provides that a construction that would promote the purpose of the Act (whether or not that purpose is expressly stated) shall be preferred to a construction that would not promote that purpose or object.
  >
  > 83. Identification of the statutory purpose may appear from an express statement in the statute or by reference to, or inference from, its language. Discernment of purpose may be aided by reference to any relevant extrinsic materials, in particular those that identify the mischief to which it is directed. It is also permissible to have regard to extrinsic materials in resolving the meaning of the text, particularly in cases of ambiguity. However, legislative history and extrinsic materials cannot displace the meaning of the statutory text. Finally, it is permissible, in determining which of two competing interpretations of a statute ought to be adopted, to have regard to the consequences of each interpretation.

- Section 35(a) of the Victorian Act is in very similar terms to s 33 of the Interpretation Act 1987 (NSW), which states:

  > In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object.

- Section 3(1A) WCA was considered briefly in *Kimberly-Clark Australia Pty Ltd v Thompson* in the context of a claim by a spouse for nervous shock in relation to the death of her husband during the course of his employment. Basten JA held at [22]:

  > This language is now found in s 4(2) of the [1998 Act] and in s 3(1A) of the [1987 Act]. The same purpose is apparent as under the earlier legislation. Further, because the extended definition only applies in the case of death of the worker, it makes no sense to treat the categories so identified as potential recipients of common law damages for injuries they themselves have suffered. There was no evident purpose, either in 1910, in 1926 or in 1998, in treating those who suffered nervous shock as the result of an industrial accident as being subject to constraints imposed on their general law rights by workers compensation legislation in the event that they were dependants of a worker who died, but not if the worker lived.

- This passage supports the approach taken by the Member, in which he found that the proper construction of ss 3(1A) and 4A WCA depended on the context and legislative purpose of the provisions. Further, as is clear from the above extract, the spouse of the deceased worker in *Kimberly-Clarke* was not making a claim for compensation under the WCA or the WIMA, but rather a claim at common law, which was not constrained by anything in the workers compensation scheme. This case was not drawn to the attention of the Member in the hearing.
- The appellant relied on the *Hadfields* decisions. The Member considered those submissions but found that the decisions did not assist in the correct statutory interpretation of s 4A in the context of s 3(1A) WCA. He noted that the High Court held that s 63(2) of the *Workers' Compensation Act 1926* (now repealed) (1926 Act) was directed to preventing double recovery by a worker in relation to his compensable injuries by preventing a worker from obtaining further compensation payments under the Act if the worker had obtained judgment in a common law claim in respect of the same injuries. The High Court held that this did not preclude the dependants from running a claim, after the death of the worker, either under the Act nor under the *Compensation to Relatives Act 1897 (NSW)*. The High Court described this as a "*distributive operation*".
- At paragraph [56] of the Statement of Reasons, the Member found that this distributive operation, if applied in this matter, would still be subject to the provisions of s 4A WCA. This provision had no analogue in the 1926 Act and had no part of the decision-making of either the Court of Appeal nor the High Court in *Hadfields*.
- ADP Nomchong SC accepted the second respondent's submissions on this point, which refer back to the Member's finding that the rights of an injured worker, who is also a director of the uninsured employing company are extinguished ab initio. By reason of the fact that the deceased, being the sole director of the Company, had not obtained or maintained Compulsory Insurance, he never had any rights to claim under the WCA or WIMA.
- The second respondent referred to the decision of Sugarman J in *Hadfields* in which his Honour found that the purpose of s 6(2) of the 1926 Act was to avoid the circumlocution in the legislation, which would otherwise be necessary if the worker was dead.
- The In my opinion, the Member was correct to hold that this means that s 3(1A) operates only where the injured worker is dead but otherwise had rights to compensation, not where those rights were non-existent because of the failure of the injured worker, in his role as director, to have Compulsory Insurance. Therefore, there was no error in the Member's finding.
- The Member correctly identified that the task to be addressed was to apply the definitional provision of the term injured "*worker*" in s 3(1A) WCA (replicated in s 4(2) WIMA) into the disentitling provision in s 4A WCA.
- The appellant argued that whilst s 4A WCA would have applied to exclude compensation claims made by the deceased (had he lived), it did not apply to the dependants' claims unless they were also directors of the uninsured Company at the time of the injury.
- However, the Member correctly rejected that submission because s 3(1A) states that the term "*worker*" includes the "*worker's dependants*" and therefore the term "*worker*" includes the deceased and any other classes of persons listed in the extended definition in s 3(1A).
- As to the context and legislative purpose of the provisions, it is apparent that there is a balance to be struck between the provision of benefits to workers and/or their dependants, with the need to ensure a fair system and one that is financially viable. To ensure the fairness and financial viability of the system, an inherent component of the system is that employers are required to comply with their obligation to obtain and maintain Compulsory Insurance.

- Section 155 WCA requires all employers in New South Wales to obtain and maintain "*a policy of insurance that complies with this Division* ***for the full amount of the employer's liability under this Act*** *in respect of all workers employed by the employer ...*" (emphasis added). Failure to do so creates an offence under the Act with the concomitant imposition of civil penalties. The Member noted this emphasis and there was no error in his finding that this includes the liability for death benefits to dependants and funeral expenses.
- The Member found that s 3(1A) – in its application to s 4A – means that the dependants of a deceased worker are to be treated the same as a deceased worker, following the death. There was no error in that finding.

Section 11A WCA - reasonableness of the employer's action following instruction from a third party shopping centre – Decision to suspend the worker in response to receiving a demand by the third party – Jeffery v Lintipal Pty Ltd [2008] NSWCA 138 considered and applied

Makdessi v Millennium Security Specialist Services Pty Ltd [2025] NSWPICPD 3 – Acting Deputy President Parker SC – 20/01/2025

The appellant was employed by the respondent as a security guard at a Shopping Centre. There was a robbery at the shopping centre and at the direction the shopping centre, the respondent suspended the appellant and a fellow employee pending investigation of the events.

The investigation exonerated the appellant, but the shopping centre gave a further direction that the appellant was not to be re-employed at those premises. The appellant alleged that he suffered a psychological injury on 18/02/2023 and the respondent conceded the issue of injury.

The dispute related to whether a defence under s 11A WCA was made out and the period in which the appellant was incapacitated for work.

Member McDonald entered an award for the respondent.

The appellant appealed on 18 grounds.

Acting Deputy President Parker SC allowed the appeal and revoked the COD. In doing so, he determined that the s 11A defence was not made out and that the injury was not wholly or predominantly caused by reasonable action taken or proposed by the employer with respect to transfer or discipline of a worker.

The appellant essentially complained that the Member did not have any proper basis for determining the reasonableness of the respondent's action in suspending the appellant in response to the third party's demand and that she did not correctly apply the decision of *Jeffery*. The Acting Deputy President upheld these challenges.

The respondent did not introduce the facility service contract or any part of it and there was no explanation for this. There was no evidence to support the Member's conclusion that contractually the third party was authorised to give directions to the respondent, which the respondent was obliged to comply with. While the Member recognised the absence of the contract, she relied on what she said was "*common experience*" to conclude that "*there would have been a commercial as well as likely contractual imperative*" for the respondent to comply with the requests of the third party. That conclusion was not based on evidence and should not have been reached.

There was also no evidence from the third party as to why it adopted this approach after the appellant was exonerated.

In the absence of the contract, or any evidence as to the third party's investigation, the Member's conclusion as to the reasonableness of the employer's action was not based on the evidence and must be set aside. She relied on her reading of *Jeffery* and, in particular, the passages from Basten JA quoted in her Statement of Reasons. She appears to have taken from the decision of *Jeffery* as determinative the statement that in the "*absence of improper motive*" on the part of the respondent, there was no need to make further enquiry as to the third party's actions.

In *Jeffery*, the worker was a school cleaner, who was transferred at the direction of the principal of the school. The Deputy President treated the direction by the principal as being effectively determinative. Hodgson JA, who agreed with Basten JA, "*subject to what he said below*" and substantially agreed with the reasons of Rein J, said:

> The question whether or not the school's direction itself was reasonable is a factor relevant to the question whether or not the transfer was 'reasonable action taken ... by or on behalf of the employer'; but in my opinion, it would not be essential in this case [my emphasis] for the respondent to prove that the direction given by the school was reasonable action taken by the school. The issue is the reasonableness of action taken by or on behalf of the employer [emphasis in original]; and even if the Deputy President was not affirmatively satisfied that the school's direction was objectively reasonable action taken by the school, he still could be satisfied that the respondent's action in transferring Mr Jeffery was reasonable action taken by or on behalf of the employer.

His Honour gave an example of what he had in mind in the following paragraph:

> Such a finding could for example, in my opinion, conceivably be open on the basis that the respondent reasonably saw the direction as based on reasonable concerns of the school which either were adequately investigated [my emphasis] or were such that it was unlikely they could be allayed by further investigation, and reasonably considered transfer as an option carrying little detriment to the worker while resolving a situation of concern and conflict. I am not asserting that it would be sufficient that the transfer appeared reasonable to the employer [emphasis in original]. The assessment of reasonableness is an objective one for the Commission; but in my opinion it is the reasonableness of action taken by or on behalf of the employer that is in issue, not the reasonableness of action taken by any other person.

ADP Parker SC stated, relevantly:

> 94. Nor does the judgment of Basten JA, properly understood, support the Member's conclusion. His Honour said:
>
> > ... Section 11A is a provision which removes a right to compensation otherwise available in respect of a psychological injury arising out of or in the course of employment. It is concerned with reasonable action on the part of an employer which may have such a consequence. The reasonableness of the action should properly be assessed by reference to the facts giving rise to the transfer, rather than the contractual relationship between the employer and a third party. The contractual relationship is not, of course, irrelevant: it may mean that the conduct of the third party becomes a relevant factor in assessing the reasonableness of the transfer.
>
> 95. After the paragraph quoted by the Member, Basten JA said this at [48]:
>
> > Against this approach it may be argued that a reasonable contractual arrangement, which devolves part of the responsibility on to a third party, may leave the employer in an invidious position where, in the case of an unreasonable direction, it will either incur liability to its employee, or will incur liability to the third party for breach of contract. However, that concern cannot override the clear statutory purpose requiring that the reasonableness of the transfer be judged in accordance with the circumstances involved. The practical answer is that an employer which accepts a contractual obligation to deal with its employees at the behest of a third party might be expected to negotiate an indemnity if, acting in accordance with its contract, it may incur a statutory liability to an employee.

Whatever tension there may be between the decisions of the various members of the Court of Appeal in *Jeffery*, the judgments do not support Member's approach.

The Acting Deputy President did not uphold grounds 3, 4, 5, 6, 7, 9, 10, 11, 12, 14 and 18. He upheld grounds (8), 15, 16 and 17, which was fully canvassed in relation to grounds (1) and (2).

The Acting Deputy President upheld ground 13, which alleged that the Member erred by finding that the injury was caused by reasonable action in relation to discipline alone and not transfer. He noted that the respondent decided that its actions were reasonable with respect to discipline and transfer. Therefore. By finding as she did, the Member was not required to make findings regarding the respondent's actions after 18/02/2023 and she departed from the basis on which the case was conducted. This resulted in two errors: (1) She constrained the enquiry as to reasonableness; and (2) She denied the parties procedural fairness.

The Acting Deputy President remitted the matter to a different Member for determination in accordance with his reasons.