Bulletin

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.

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Supreme Court of New South Wales – Judicial Review Decisions

Jurisdictional error – Error of law on the face of the record

AAI Limited v Fraser [2021] NSWSC 938 – Harrison AsJ – 30/07/2021

On 9/01/2017, the worker allegedly suffered injuries that included injuries to his right shoulder and left hip in a MVA and he claimed damages. On 24/07/2019, Dr Assem assessed 10% WPI, which did not entitle him to an award for non-economic loss under s 131 of the *Motor Accidents Compensation Act 1999 (NSW)* (the Act).

The worker applied for a review of that decision and the first Medical Review Panel (MRP) comprising Drs McGrath, Moloney and Crane assessed the dispute on 16/12/2019. It agreed with Dr Assem that he did not suffer any injuries to the right shoulder and left hip that were caused by the MVA, and assessed 7% WPI with respect to injuries to the right wrist, left patella & knee, left ankle and left hind foot.

On 17/03/2020, the worker applied to the Supreme Court for judicial review of that decision: *Fraser v AAI Limited t/as GIO as agent for the Nominal Defendant* [2020] NSWSC 1333. ***Campbell J*** quashed the decision and remitted the matter to SIRA for allocation to a different MRP.

On 12/12/2020, the second MRP (Drs Cameron, Kenna and Stubbs) issued a MAC and assessed 12% WPI. It found that the worker suffered injuries to the right shoulder and leg\ft hip that were caused by the MVA, based upon a history from the worker that he suffered pain in those body parts from the day after the accident. However, that history differed to that provided to Dr Assem.

The plaintiff applied for judicial review of this decision and alleged that the second MRP: (1) Erred in determining causation of the alleged right shoulder injury; (2) Failed to provide adequate reasons for its decision on causation of the alleged right shoulder injury; (3) Erred in determining causation of the alleged left hip injury; and (4) Failed to provide adequate reasons for its decision on causation of the alleged left hip injury.

Harrison AsJ noted that the first record of any right shoulder pain was made 2 months after the MVA and that the first report of left hip pain was 5 months after the MVA. While it questioned the worker's recollection in view of the absence of contemporaneous evidence, the second MRP accepted his recollection, although with some hesitancy. Her Honour also noted that grounds (1) and (2) relate to the right shoulder injury and that grounds (3) and (4) relate to the left hip injury.

Her Honour upheld ground (1). She noted that the second MRP found that the results on examination of the right shoulder were inconsistent and that there was no radiological evidence of any injury and that clinical information did not show any significant pathological changes. Therefore, it decided to assess permanent impairment by way of analogy and it assessed 2% WPI against mild crepitation of the AC joints. However, the MRP did not state how a soft tissue injury to the shoulder led to any impairment or identify any abnormality that was related to the accident or hot the injury was caused or materially contributed to by the MVA. She held that the MRP fell into jurisdictional error by failing to carry out its statutory duty.

Her Honour also upheld ground (2) and found that the actual path of reasoning was not identified and that this was an error of law on the face of the record.

Her Honour upheld ground (3) and noted that the second MRP examined the first defendant's hips and found some limitation of movement in each hip, but nothing of clinical significance. However, it did not identify an accident-related pathology in the left hip, although it diagnosed a soft tissue injury and assessed 2% WPI. It did not explain how it could do this when the range of movement in the right hip was the same or better than the left hip or articulate how the left hip injury was caused or materially contributed to by the MVA. In failing to do so, the second MRP fell into jurisdictional error by failing to complete its statutory task.

Her Honour also upheld ground (4) for similar reasons to ground (2).

Accordingly, her Honour quashed the decision of the second MRP and remitted the matter to the President of the PIC for referral to a differently constituted MRP.

PIC - Presidential Decisions

Sections 254 & 261 WIMA – "Special circumstances"

Maitland City Council v McInnes [2021] NSWPICPD 22 – Deputy President Snell – 23/07/2021

The worker was employed by the appellant full-time from March 2012, initially as a labourer with the construction team, but from and from January 2018 he worked on the maintenance team repairing potholes on roads. He alleged that he felt "pinching pain" in his lower back while at work on 1/07/2019.

On 2/07/2019, the worker had an interview "with HR" about unrelated matters. He took leave for largely unrelated reasons thereafter and resigned on 1/09/2019. On 1/10/2019 he moved to Queensland and he described a "progressive escalation" of back pain from 1/07/2019 to February 2020. He undertook some short-term employment. He was provided with a workers compensation certificate by Dr Zin (in Queensland) on 12/02/2020. However, he did not report the injury or claim compensation before that date.

The appellant disputed the claim and asserted that the worker failed to give notice of the injury and/or make a claim within the relevant time limits. It also disputed the allegations of 'injury' and 'main contributing factor'.

On 4/11/2020, ***Senior Arbitrator Capel*** conducted an arbitration during which the appellant applied for leave to cross-examine the worker. The Senior Arbitrator refused the application and reserved his decision. On 16/11/2020, the WCC issued a COD and SOR, which excused the worker's failures to give notice of the injury and claim compensation within required timeframes, found that the worker suffered injury to his back from 12/03/2012 to 1/07/2019, including a frank injury on 1/07/2019 to which employment was a substantial contributing factor. He awarded the worker continuing weekly payments and s 60 expenses.

The appellant appealed and alleged that the Senior Arbitrator erred: (1) in finding that the worker injured his lower back arising out of or in the course of his employment from 12/03/2012 to 1/07/2019, including a frank injury on 1/07/2019.; (2) in finding that employment was a substantial contributing factor to the injury; (3) in finding that the worker's failure to give notice of his injury was occasioned by the special circumstances identified in s 254 (3) (b) WIMA; (4) in finding that the worker's failure to make a claim was occasioned by the special circumstances identified in s 261 (4) (a) *WIMA*; and (5) in

that he gave insufficient weight to the attack made to the worker's credit and by doing so formed erroneous deliberations on the totality of the evidence.

Deputy President Snell determined the appeal. He noted that the appellant sought leave to admit fresh evidence under s 352 (6) *WIMA,* consisting of workers compensation claim files relating to injuries suffered by the worker with earlier employers on 22/10/2010, 3/02/2010 and 11/02/ 2004. It argued that the evidence was "not available" at the arbitration despite its best attempts to obtain it.

Snell DP noted that in *CHEP Australia Ltd v Strickland*, Barrett JA (Macfarlan JA agreeing) dealt with the application of s 352 (6) *WIMA* and stated at [27] and [30]–[31]:

> 27. In the s 352 (6) context, there are two threshold questions. They arise as alternatives and are set out in the second sentence of the provision. The first goes to the issue of availability in advance of the proceedings. The second entails an assessment of whether continued unavailability of the evidence 'would cause substantial injustice in the case'. The discretion to admit becomes available to be exercised only if the Commission is satisfied as to one of the threshold matters. …
>
> 30. Counsel for the appellant submitted that the Commission misdirected itself in law in construing the 'substantial injustice' criterion in s 352 (6). It was submitted that that criterion may be satisfied in circumstances where it is not possible to say that availability of new evidence would have produced a different result; and that the criterion will be satisfied if the evidence is compelling and might have influenced the outcome even though it cannot be said that it would certainly have done so.
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> 31. That construction cannot be accepted. The part of s 352 (6) concerning 'substantial injustice' does not direct attention to possibilities or potential outcomes. The task is to decide whether absence of the evidence 'would cause' substantial injustice in the case. There must therefore be a decision as to the result that 'would' emerge if the evidence were taken into account and the result that 'would' emerge if it were not. If the result would be the same on each hypothesis, the ends of justice cannot be said to have been defeated by exclusion.

Snell DP held that the power to admit fresh evidence is concerned with evidence that, if accepted, would have been likely to demonstrate that the decision appealed against was erroneous. He found that the first limb of the test was satisfied. With respect to the second limb of that test, Snell DP stated:

> 66. It appears from the above that the claims in respect of injuries on 29 October 2010 and 28 July 2014 were for the cost of limited medical treatment only. The claim in respect of injury on 11 February 2004 involved somewhere in the vicinity of three days absence from work. The claim in respect of injury on 3 February 2010 involved limited medical expenses with a nominal sum ($50.70) by way of incapacity payments. All of the claims were very minor.
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> 67. The available material does not include any claim forms lodged in respect of these claims. It is noteworthy that the claim in respect of injury on 28 July 2014 is referred to, in an email dated 29 July 2014 between the appellant and its insurer, as being recorded in an online notification system. A later email between the insurer and the appellant, on 29 July 2014, describes that notification being converted from an "Incident to a Claim" in the StateCover Online Notification System (see [62] above). There is no suggestion that this happened in the context of a claim form being lodged by the respondent. There is a formal written report of injury in respect of one of the claims, that for injury on 11 February 2004. It includes advice that the form should be completed as soon as possible after injury and given to the employer. This was about fifteen years prior to the incident on 1 July 2019. The material does not include other evidence going to knowledge on the respondent's part of the obligation to report an injury…

Snell DP held that the 'fresh evidence' on which the appellant sought leave to rely would not affect the result. There is no prejudice to the appellant if the 'fresh evidence' is not admitted and the interests of justice do not favour the admission of the material. He therefore refused the application to rely on fresh evidence.

Snell DP considered grounds (3), (4) and (5) together and she noted that much of the appellant's attack consisted of attempts to re-argue factual issues that were decided adversely by the Senior Arbitrator. He held that it is insufficient on appeal to simply argue that a different factual conclusion is preferable. It is necessary to establish error and that the appellant failed to establish error. He stated:

> 106. There were aspects of the respondent's evidence that the Senior Arbitrator found to be unreliable. He did not make a finding that the respondent was deliberately untruthful. The circumstances did not raise the principles in *Malco Engineering Pty Ltd v Ferreira*. It was open to the Senior Arbitrator, on the evidence as a whole, to determine which aspects of the respondent's evidence he accepted and which he did not. He carried out this task by reference to whether the respondent's evidence was corroborated, whether there was evidence inconsistent with it, whether it was challenged and its inherent credibility.

Snell DP rejected ground (1) and he stated:

> 157. The Senior Arbitrator's reasons clearly recognised that the weight of Dr Bodel's opinion was affected by limitations in the way in which the doctor's assessment was carried out, but he considered it was not deprived of all weight. This approach was open in the circumstances. There was no evidence to the effect that Dr Bodel's opinion was deprived of all weight by the circumstances in which the respondent was examined. The only medical evidence on that topic was from Dr Bodel and was to the contrary. The extent to which the weight afforded to an expert opinion is affected, if at all, by the way in which the assessment is carried out, depends on the facts and circumstances of the particular case. The way in which the Senior Arbitrator dealt with this aspect of the evidence did not involve error.

Snell DP also rejected ground (2) and he stated:

> 167. The reasons clearly enough exposed why the relevant findings of fact were made in dealing with s 9A. The reasons given by the Senior Arbitrator, dealing with the s 9A issue, complied with his obligation to provide adequate reasons.

Accordingly, Snell DP confirmed the COD.

PIC – Medical Appeal Panel Decisions

Schizophrenia is a biological condition and does not occur as a result of life events

O'Grady v Interactive Community Care Pty Ltd [2021] NSWPICMP 119 – Member Moore, Dr J Parmegiani & Dr M Hong – 12/07/2021

The appellant alleged that she suffered a work-related psychological injury and claimed compensation under s 66 WCA for 27% WPI based upon an opinion from Dr Oldtree Clark. The dispute was referred to a Medical Assessor and on 19/02/2021, Dr S Roberts issued a MAC, which assessed 0% WPI.

Dr Roberts stated that the appellant's history reflects her distress in the context of circumstances that arose in the workplace inclusive of assaults to which she was subjected and indicated the development of an Adjustment Disorder with Mixed Anxiety and Depressed Mood. She presented an account of the advent of psychotic symptoms when she returned to work after a holiday of several weeks' duration and described beliefs of a delusional nature about her colleagues, namely that they were harming a client. These beliefs persisted after she ceased work and came to include the belief that she and her friends were in danger and being targeted. She has experienced enduring delusional beliefs that her friends and family may come to harm and over the subsequent years she has taken steps to ensure her personal safety, including having the locks on her home changed and security cameras installed. She also experienced auditory hallucinations of voices telling her that undertaking basic household tasks would cause her to harm others, which persisted in speaking to her in a reprimanding tone. She also described visual hallucinations and somatic hallucinations. He diagnosed Schizophrenia and stated that the work-related diagnosis of Adjustment Disorder with mixed anxiety and depressed mood has remitted. The Schizophrenia is not a condition caused by work and it is accepted by the overwhelming body of psychiatric opinion and well documented in the psychiatric literature that this represents a neurodegenerative biological condition and cannot arise as an effect of circumstances in the workplace.

The appellant appealed against the MAC under ss327 (3) (c) and (d) *WCA*. argued that the diagnosis of Schizophrenia is not supported by the evidence and is inconsistent with opinions expressed by other clinicians. She argued that her psychosis is well-managed and that it is her work-related psychiatric condition (anxiety and/or PTSD and/or adjustment disorder with mixed anxiety and depressed mood) that she continues to suffer. She sought a re-examination by a Medical Assessor member of the MAP, but following a preliminary review, the MAP determined that it was not necessary to re-examine her.

The MAP held that the appellant's submissions regarding the consideration to be given to competing diagnoses are misconceived. The MAP stated, relevantly:

> 34. The "difference of opinion" between the MA and Dr Clark is clearly explained by the MA. The appellant's presentation and the weight of all the medical evidence summarised in considerable detail by the MA clearly supports the diagnosis he made.
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> 35. A MA is required to make an assessment on the day of the examination.
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> 36. In our view, the appellant presented with a clear history of schizophrenia which is a biological condition which does not occur as a result of life events.
>
> 37. The MA does not deny that the appellant had a psychological condition, whether it be Adjustment Disorder with mixed anxiety and depressed mood or as Dr Clark opined, Post-traumatic Stress Disorder. Whatever the nature of that condition, the MA concluded that any symptoms from that condition had abated.
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> 38. The appellant's presentation and the totality of the evidence supported that conclusion.
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> 39. In our view, it was open to the MA to reach the conclusions he did. He prepared a thorough and comprehensive MAC clearly explaining his reasons for his assessment.

Accordingly, the MAP confirmed the MAC.

Fresh evidence from appellant's daughter rejected as lacking in probative value – Further medico-legal report rejected as offending public policy – Medical Assessor not required to follow an opinion from a medico-legal expert – Failure to discuss a particular diagnosis does not lead to an inference that the medical assessor failed to consider it

Velevski v Glad Cleaning Services Pty Ltd [2021] NSWPICMP 136 – Member Wynyard, Dr M Gibson & Dr J Ashwell – 27/07/2021

On 26/11/2020, following a defended hearing, the dispute under s 66 *WCA* was referred to a Medical Assessor for assessment of permanent impairment of the right lower extremity (ankle/foot/Achilles tendon), the left lower extremity (ankle/foot/Achilles tendon) and the lumbar spine with respect to injuries deemed to have occurred on 30/06/2016.

On 17/02/2021, Dr Pillemer issued a MAC, which assessed 7% WPI (7% WPI for lumbar spine & 0% WPI for either lower extremity).

The appellant appealed against the MAC under ss 327 (3) (b), (c) and (d) *WIMA*. He sought to be re-examined by a Medical Assessor member of the MAP and the President's delegate referred the appeal to a Medical Panel (MAP).

Following a preliminary review, the MAP determined that it was not necessary to re-examine the appellant because no error was found in the MAC.

The appellant sought to rely upon fresh evidence, being a statutory declaration from his daughter dated 17/03/2021 and a medico-legal report from Dr Dixon dated 17/03/2021. The respondent objected to the admission of the fresh evidence in the appeal.

The MAP refused to admit the evidence from the appellant's daughter on the basis that it did not assist them.. The impression gained from her evidence is that the appellant was more seriously injured than the Medical Assessor found and that if the Medical Assessor had asked the right questions, a higher assessment would have been made. The MAP stated, relevantly:

26. Such an approach overlooks the presumption of regularity that accompanies the actions of administrative decision makers, of which an MA is one. It may be presumed that the MA asked all appropriate questions of Mr Velevski that were relevant to his task. Presumptions are rebuttable, but Ms Nestorovski's evidence does not have the prima facie probative value to do so. It is flimsy, it has no independent support, and it comes from a witness translating another witness' impressions of a conversation that had taken place some weeks earlier with a qualified medical expert. The appropriateness of the various steps involved in the assessment, including taking of the history and the complaints, is not one that either witness was qualified to comment upon. Further, Mr Velevski has an interest in the outcome of his appeal, which could carry an unconscious bias as to his recall.

27. In *Lukacevic v Coates Hire Operations Pty Ltd* [2011] NSW CA 112, the Court of Appeal was concerned with fresh evidence that took the form of a statement by the appellant calling into question the conduct and enquiry of the AMS. The majority (Handley AJA and Hodgson JA), upheld the Appeal Panel's decision to reject the statement upon a consideration of the policy of the legislation, and its relation to the particular matters raised in a fresh statement. Hodgson JA at [78] said:

> A dispute by the worker as to the history set out in the Certificate, or the observations made by the AMS, can readily be raised; and it could be raised honestly or dishonestly, on strong of flimsy grounds. Having regard to the matters I have set out, in my opinion, it would be reasonable for an AP not to admit evidence raising such a dispute unless that evidence had substantial prima facie probative value, in terms of its particularity, plausibility and/or independent support. Otherwise, simply by raising such a dispute going to a matter relevant to the correctness of the Certificate, a worker could put the AP in a position where it had to have a further medical examination conducted by one of its members. I do not think this would be in accord with the policy of the WIM Act.

28. For the above reasons there is no substantial prima facie probative value in Ms Nestorovski's statutory declaration, and it is rejected.

The MAP held that it is contrary to public policy to permit further medical reports to be tendered for the purpose of cavilling with the finding of the Medical Assessor. It stated, relevantly:

31. The opinion of an MA is conclusively presumed to be correct pursuant to s 326 (1) of the 1998 Act. To allow another medical expert to modify, explain or cavil with the opinion of an MA would be to negate the intent of the scheme. To admit such a report would entail giving an opportunity to the opponent to put on evidence in response. A hearing might then have to be called before the Medical Appeal Panel to decide which of the competing views should be admitted. Such litigation relating to medical disputes would be protracted and their overall resolution delayed, thereby defeating the purpose of the Act.

32. As a matter of policy therefore it would negate the legislative intent if either or both sides were permitted to lodge expert opinion cavilling with the opinion of the MA.

The MAP noted that the appellant challenged the findings made by the Medical Assessor by reference to an opinion from Dr Dixon that was made almost 12 months earlier. It found that the Medical Assessor was aware of that opinion and explained why he did not agree with Dr Dixon's conclusions. It stated, relevantly:

60. The task of an MA is to assess an injured worker's condition as he/she presents on the date of consultation. The date of consultation was 15 February 2021. As Mr Velevski presented on that date, examination of Mr Velevski's ankle/foot/Achilles tendon did not demonstrate any nerve involvement. There was no swelling or thickening of the tendo – Achilles on either side, he had a full range of ankle and subtalar movements bilaterally, and did not display any particular discomfort. The MA found that sensation was intact.

61. An MA is not obliged to comment on every opinion that comes before him. An MA's task is not to choose between competing medical opinions, but is to use his clinical judgement, experience and expertise to give an opinion within the applicable guidelines.

62. We noted with interest the appellant's submission that the assessment ought to have included a "modification" because it was alleged that symptoms (and presumably pathological changes such as swelling and thickening of the tendo-Achilles area) did not occur until certain actions were performed – in this case excessive walking. We would observe that, whilst such a method might in some circumstances be appropriate, it was not suggested by the MA that this case was one. That decision was a matter of clinical judgement for the MA. It has not been alleged that the MA was unaware of Mr Velevski's complaint, as he spelt it out clearly when giving his findings on examination.

63. Similarly, an MA is not required to discuss all the diagnoses that are expressed in the material referred to him/her. The failure by the MA to discuss Dr Dixon's diagnosis regarding nerve deficit does not lead to a finding of fact that he therefore did not consider it. In view of his findings on examination and view of the imaging, together with his assessment of Mr Velevski, we find no error in his failure to engage with Dr Dixon's diagnosis regarding nerve deficit. We note also that Dr Dixon's finding of dysthesia on the dorsum of both feet on the distribution of the superficial perineal nerve and the medial and lateral plantar nerves of both feet was not supported by any other practitioner over the long history of this injury.

Accordingly, the MAP confirmed the MAC.

PIC – Member Decisions

Work capacity dispute – suitable employment under s 32A WCA – Held: Worker had no capacity for suitable employment – Continuing weekly benefits awarded under s 38 WCA

Hanna v Sargents Pty Ltd [2021] NSWPIC 243 – Delegate McAdam – 14/07/2021

The worker was employed by the respondent as a process worker. She suffered injuries to both shoulders, both arms, both wrists and both thumbs and ceased work on 11/07/2021. She has not worked since then.

In 2017, the worker claimed compensation under s 66 *WCA* and on 8/09/2018, Dr Wong (AMS) issued a MAC that assessed 29% WPI, which classified her as a worker with high needs.

On 18/06/2020, the respondent made a WCD that the worker had capacity for suitable employment as a sales assistant for 24 hours per week and that she is able to earn $599.76 per week. It reduced weekly payments to $0.

The worker sought reviews of the WCD on 17/09/2020 and 20/05/2021, respectively, but the respondent confirmed its WCD. The worker then applied to the PIC to set aside the WCD.

President's Delegate McAdam identified the issue as being whether, and if so to what extent, does the worker have capacity for suitable employment. The parties agreed that PIAWE is $530.

The respondent relied upon vocational assessment reports dated 25/08/2016, 29/11/2018 and 12/02/2020, which identified that the worker has limited lifting and sustained manipulation with both hands and has pai when lifting items over 1 kg with either hand or over 2kg with both hands. The latter report identified roles as an information officer, greeting officer and sales assistant as suitable employment.

The worker's solicitors qualified Dr Ryan and on 12/07/2021, he assessed 38% WPI and stated that the worker can no longer work. However, Dr Barich (NTD) certified that the worker has capacity for some type of work from 7/04/2021 to 6/05/2021, for 24 hours per week, with significant lifting/carrying/pulling restrictions and a driving restriction of 30 minutes. On 2/03/2020, he approved the role of sales assistant as being suitable employment.

The Delegate noted that the NTD was contacted as part of the work capacity assessment, but that the duties and functional demands of the position were not provided to him at that time.

The worker argued that the WCD was made in a bubble in that it has some superficial or theoretical approval, but the reality of the situation is that she has no experience as a sales assistant. The theory and the reality are poles apart and she is simply not going to obtain work in that area.

The Delegate accepted that argument and noted that the respondent's case finds little strong support in the available medical evidence and the support that has been provided has been contradicted or reconsidered in the light of further evidence. He stated:

> 86. It is understandable that Dr Barich would approve the role of sales assistant when provided with the duties description from Kairros. The description fits within the restrictions placed on Ms Hanna by Dr Barich, but are specific to an individual job, and not necessarily consistent with the role of sales assistant on the open labour market. The definition of suitable employment is not necessarily satisfied by identifying one specific job that might fit within a worker's medical restrictions. Consideration of the factors in section 32A is not a theoretical exercise. This was discussed in *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCCPD 55, where DP Roche stated:
>
> > Therefore, the determination of whether a worker is 'able to return to work in suitable employment' is not a totally theoretical or academic exercise and Mason P's reference to the 'eye of the needle' test may still be relevant in many cases. To use his Honour's example, a labourer who is rendered a quadriplegic may well be able to perform tasks using only his voice. However, whether, under the new provisions, he or she would be found to have no current work capacity will depend on a realistic assessment of the matters listed at (a) and (b) of the definition of suitable employment. Depending on the evidence, it is difficult to see that work tasks that are totally artificial, because they have been made up in order to comply with an employer's obligations to provide suitable work under s 49 of the 1998 Act, and do not exist in any labour market in Australia, will be suitable employment. (at [60])
>
> 87. Although neither party referred to that decision, I think the above is on all fours with the case before me. The applicant referred to the "theory and the reality" of the case being poles apart, which aligns with DP Roche's assessment of section 32A as not being a "totally theoretical or academic exercise".
>
> 88. Whilst two industry contacts suggested that Ms Hanna would be considered a suitable applicant for that role, I am mindful of, and largely agree with the criticism of that report from Mr Martin. He states:
>
> > The labour market research conducted by Kairros Rehab to determine suitable employment options and earnings for each suitable employment option surveyed is questionable, and most probably inadequate and unreliable, for the purposes of producing a report to be relied upon for a Work Capacity Decision for the following reasons:
> >
> > a) Only two employers were contacted for each employment option which is an insufficient sample size to produce valid or reliable conclusions regarding each employment option surveyed.
> >
> > b) The names of the employee representatives surveyed were not given and cannot be verified.
> >
> > c) Information on who contacted the employer representatives and when they were contacted is not given.
> >
> > d) Information of how the employer representatives were selected is not given. Were they randomly selected?
> >
> > e) It is not known if each employer representative surveyed was suitably qualified to answer questions on the functional demands of employment options occupations.
> >
> > f) It is not known how many employer representatives were surveyed. Were two employer representatives surveyed or more than two?
> >
> > g) Information is not provided on the standard questions asked of employer representative.

89. I share the same reservations concerning what is now a common practice by insurers in work capacity cases. Were the rules of evidence to apply, that evidence would not be admissible. In the Commission, where the rules of evidence do not apply (section 43 of the Personal Injury Commission Act 2020), one must be cautious of the weight given to such evidence.

The Delegate found that the vocational capacity evidence was not worthless, as it indicates that work as a sales assistant can involve lifting of up to 9.1kgs. However, the worker's lifting restriction of 1-2 kg is so low as to be functionally zero and she also has other functional capacity issues that are numerous and would genuinely impact or her capacity to perform a role, including the fact that she was educated in Egypt and came to Australia as a mature age person; she has no formal qualifications and has only ever worked in unskilled, process-based work; she has no relevant experience as a sales assistant, or even in the transferrable skills required of such a role, such as dealing with people or experience with point of sale systems.

Accordingly, the Delegate found that the role of sales assistant is not suitable employment for the worker and he awarded continuing her weekly payments under s 38 *WCA*.

Section 11A WCA – Complaint that the worker used racist and offensive language at morning tea – Employer prohibited the worker from communicating with other employees who were present while it investigated the complaint – Held: While its actions were exemplary in many respects, the employer's actions were not reasonable as they deprived the worker of the opportunity to put his case at the highest

Malouf v Pandora Jewellery Pty Ltd [2021] NSWPIC 265 - Member Sweeney – 28/07/2021

On 24/05/2017, the worker engaged in a discussion about the Manchester bombing with several work colleagues during an ordinary recess at work. One of the participants was offended by the language used in the conversation and reported it to the respondent's HR department.

On 29/05/2017, employees of the respondent were summoned to a meeting conducted by the HR partner and Warehouse Manager, to discuss that conversation in the context of the respondent's corporate values. After the meeting, the worker was told by his immediate supervisor to return to the meeting room, where he was questioned about his recollection of the conversation. When he returned to his workstation, he received an email from the HR partner, which was headed "Performance Discussion". It advised him that the respondent had received an email complaint regarding alleged racial comments and conversations that occurred amongst staff in the break room. It required him to attend a meeting with the Warehouse Manager on 31/05/2017, during which he would have the opportunity to provide information concerning the conversation on 24/05/2017 and that the HR partner would submit her findings to management, that a decision about whether the complaints were substantiated would be communicated to him and that the investigation would be completed no later than 5/06/2017. It also stated that the investigation was confidential.

After the meeting on 31/05/2017, the worker received a further letter from the HR partner, which stated, relevantly:

> Having regard to all evidence presented, the finding of the investigation is that the aforementioned allegations are substantiated and a formal counselling meeting is the appropriate outcome. Accordingly, I would like you to attend a meeting with Ali Hoile at 8am on Thursday 8th June. I will also be attending this meeting. You may bring a support person with you to this meeting which will take place at Pandora Central Office in Belrose. At the meeting you will have the opportunity to formally respond to the allegations and make any further comments that you would like to be taken into consideration.
>
> I encourage you to familiarise yourself with the Bullying & Harassment Policy and Behavioural Expectations Policy found on Infora. Please be aware that the outcome of the meeting might result in disciplinary action such as a formal warning.

On 8/06/2017, the worker attended a meeting with the Warehouse Operations Manager and the HR partner. At the conclusion of the meeting, the worker was provided with a first written warning, which he refused to sign.

The worker has not worked since 22/06/2017 and alleges that he suffered a psychological condition. He claimed continuing weekly payments from 30/05/2017, compensation under s 66 *WCA* and s 60 expenses. However, the respondent disputed the claim and it relied upon s 11A *WCA*. It also asserted that the worker had current work capacity during the period claimed.

Member Sweeney conducted an arbitration on 28/06/2021. He accept that each of the actions of the respondent with respect to discipline from the convening of the meeting of warehouse employees and the subsequent recall of the worker to the meeting on 29/05/2017 until he finally ceased work on 22/06/2017 materially contributed to his psychological injury. Those actions must be considered in determining whether the defence under section 11A defeats the claim.

The Member held that the worker's psychological injury was probably either wholly or predominantly caused by disciplinary actions taken by the respondent arising from the discussion in the break room on 24/05/2017 up to the cessation of his employment. This conclusion is consistent with the opinion of both the qualified psychiatrists, Dr Bisht and Dr Dinnen. That left the issue of reasonableness.

The Member found that it was appropriate for the employer to respond to the complaint and that a disciplinary response was necessary and the plan of action agreed upon by the respondent was quite sensible. It was proposed to interview witnesses, including the worker, within a week of the event to establish the facts and to reach a conclusion on culpability and penalty in a period of roughly two weeks. Assuming that the evidence obtained supported a conclusion of culpability, it is not suggested that the penalty of a written warning was unreasonable. A finding that the employer's general approach to the disciplinary process and the penalty imposed was reasonable is a useful starting point for a finding that its actions with respect to discipline were reasonable because it is necessary to consider the process as a whole in reaching a conclusion as to reasonableness. In the oft quoted passage from *Department of Education & Training v Sinclair* [2005] NSWCA 465 (20 December 2005) (*Sinclair*), Spigelman CJ at [97] said this:

> His Honour's analysis, as that of the Arbitrator, appears to assume that any specific blemish in the disciplinary process, however material in a causative sense or not, was such as to deprive the whole course of conduct of the characterisation "reasonable action with respect to discipline". In my opinion, a course of conduct may still be "reasonable action", even if particular steps are not. If the "whole or predominant cause" was the entirety of the disciplinary process, as much of the evidence suggested and his Honour appeared to assume, his Honour did not determine whether the whole process was, notwithstanding the blemishes, "reasonable action". For this alternative reason the appeal should be allowed.

The worker argued that the manner in which the response was undertaken was at times awkward, impinged on his rights and undermined the ability of the investigation to reveal the truth. Member Sweeney found that the Warehouse Manager's approach to obtaining an account of what was said by staff on 24/05/2017 was probably not best practice as putting statements to witnesses may have influenced their answers. However, the Member doubted that it could lead to a conclusion that the respondent had not established that its actions were reasonable as 3 witnesses signed a typed copy of the face-to-face notes and agreed on 4 statements/comments made by the worker.

The worker asaid that he harboured some distrust or lack of rapport with the Warehouse Manager because of his previous conduct and this impinged on the fairness of the investigation or caused him to believe that it was unfair. The Member found that it was clear that the worker has an intense dislike for the Warehouse Manager, but it is not evident that this was ever directly brought to the respondent's attention or that the respondent ought to have known of it. In any event, the Warehouse Manager's involvement in the matter was largely confined to the investigation of the facts. The decision to issue a warning was made by the HR partner in conjunction with the Warehouse Operations Manager at their meeting with the worker on 8/06/2017 and the Warehouse Manager was not at that meeting.

The Member also noted that the worker regarded all of the respondent's senior management and HR department as "*corrupt bullies who are above reproach and above the law*". In those circumstances, it seems likely that any senior employee appointed to carry out the investigation would not have had his confidence, but he was not persuaded that this distrust or lack of rapport undermined the fairness of the investigation. He stated, relevantly:

> 88. With the one exception, I regard the other criticisms of the investigation raised by the applicant as blemishes which do not detract from the reasonableness of the investigation or the disciplinary process. The exception relates to the respondent's instruction to the applicant to keep the investigation confidential and not to speak to fellow employees. This is reminiscent, of course, of one of the specific matters held by the arbitrator to be unreasonable in Sinclair. I have also previously found a blanket prohibition on speaking with employees to be unreasonable in other circumstances.
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> 89. In this case the applicant argues that the prohibition on him speaking with other employees restricted his ability to refresh his memory and obtain their recollection of the events of the morning of 24 May 2017. I doubt whether there was any real need for the applicant to refresh his memory of what he said in the breakroom as he says in that he had a "clear memory" of what he said. The other aspect of the applicant's submission, however, cannot easily be cast aside. The respondent's command that the applicant refrain from speaking to other employees effectively prevented him from obtaining factual information that may have assisted him in deflecting or mitigating the allegations of racist language or offensive language.
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> 90. I appreciate that the respondent may have a legitimate interest in confidentiality. This was not articulated at the arbitration hearing. However, it is self-evident that the respondent would wish to protect the author of the complaint and possibly other workers who were interviewed in respect of it. Ms Porter says in her statement that there was some interest in who made the allegation among the staff at the warehouse and that many of the older staff were supportive of the applicant…
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> 92. The troubling aspect of this state of affairs is that the prohibition on speaking with other employees has deprived the applicant of obtaining information from at least two other employees whose evidence may have assisted him. Whether or not their evidence would have assisted the applicant and, if so, whether Ms Clarke and Ms Hoile would have preferred their evidence to the evidence already obtained is unknown. However, it is in necessary to consider whether it was fair for the respondent to prohibit the applicant from talking to witnesses who were present in the breakroom at morning tea on 24 May 2017, when it either did not interview them or, alternatively, did not put their statements into evidence.
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> 93. While I have discounted many of the criticisms of the process as mere blemishes, this aspect of the investigation and decision-making process of the respondent is more than a blemish. It goes to the heart of the question of fairness. It is for the respondent to prove that its processes were fair. In many respects, the process adopted by the respondent was exemplary. It acted on the complaint expeditiously; interviewed witnesses; retained a signed copy of the notes made at interview; provided the applicant with two opportunities to put his case; and came to a decision which on the available evidence is difficult to criticise.

Accordingly, Member Sweeney held that the respondent has not established that the procedure adopted was fair. He directed the parties to file short minutes of order indicating that the worker had no current work capacity from 29/05/2017 until the end of the second entitlement period. He proposed awarding weekly payments and s 60 expenses to the worker and he remitted the s 66 dispute to the President for referral to a Medical Assessor.