

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4257/20
Applicant: Dale Sadler
Respondent: Secretary, Department of Education
Date of Determination: 18 December 2020
Citation No: [2020] NSWCC 416

The Commission determines:

1. The applicant suffered psychological/psychiatric injury in the course of the employment with the respondent on 16 May 2017 (deemed); the employment with the respondent was the main contributing factor to the injury.
2. The respondent's defence pursuant to s 11A(1) of the *Workers Compensation Act 1987* (the 1987 Act) is not made out.
3. The claim for s 66 of the 1987 Act lump sum compensation is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for assessment of whole person impairment as follows:

Injury: Psychological/psychiatric

Date of injury: 16 May 2017 (deemed)

4. The documents annexed to the Application to Resolve a Dispute and the Reply are before the AMS; plus, the documents annexed to all Application to Admit Late Documents (Form 2C) filed up to the date of the arbitration hearing:
 - (a) 7 October 2020;
 - (b) 12 October 2020;
 - (c) 28 October 2020;
 - (d) 4 November 2020, and
 - (e) 11 November 2020.

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

Ross Bell
Arbitrator

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

L Golic
Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. This Application to Resolve a Dispute (Application) was filed on 3 August 2020 and is in respect of a claim for injury on 16 May 2017 (deemed date) for s 66 of the *Workers Compensation Act 1987* (1987 Act) lump sum compensation. The insurer denied the claim in notices issued under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) dated 10 May 2019; and 5 December 2019.

ISSUES FOR DETERMINATION

2. The following issue remains in dispute:
 - (a) Whether Mr Sadler suffered psychological/psychiatric injury in the course of his employment with Secretary, Department of education (the respondent).
 - (b) If so, whether the employment was a substantial contributing factor/the main contributing factor to the injury.
 - (c) If so, is the defence under s 11A(1) of the 1987 Act made out by the respondent?
 - (d) If not, should the s 66 of the 1987 Act lump sum compensation claim be referred to an Approved Medical Specialist?

PROCEDURE BEFORE THE COMMISSION

3. The parties attended a conciliation conference and arbitration hearing on 14 October 2020 and 11 November 2020. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

SUBMISSIONS

4. The representatives made oral submissions which were recorded, and these have been considered.

EVIDENCE

Oral evidence

5. Sworn oral evidence was adduced from Mr Sadler on the record.

Documentary evidence

6. The following documents were in evidence before the Commission and I have taken them into account in making this determination:
 - (a) Application and annexed documents;
 - (b) Replies and annexed documents;

- (c) Applications to Admit Late Documents and annexed documents filed on,
7 October 2020;
12 October 2020;
28 October 2020;
4 November 2020 , and
11 November 2020.

Issue – Objection to admission of evidence relied on by Mr Sadler.

7. The respondent objected to some of the evidence relied on by Mr Sadler. The objection covered the following within the documents annexed to the Application.
- (a) Application annexures 24 – paragraphs 6,8,19,21 in Mr Sadler’s statement;
 - (b) Application 54-178;
 - (c) Application 224-226;
 - (d) Ms Dierdre Macedo’s statement;
 - (e) Certificate of Determination and Statement of Reasons in *Wilma Anota v Department of Education and Communities* [2013] NSWCC 140;
 - (f) Application 82-96, and
 - (g) Application 129; 130.
8. All the above materials were admitted in evidence at the arbitration hearing with reasons given on the record. Further to those reasons, the respondent relied on *Paul Segart Pty Limited trading as Lidco v Narayan* [2006] NSWCCPD 296 (*Narayan*), in which at [73] Roche DP observed,
- “73. Fourth, section 354(2) expressly permits the Commission to ‘inform itself on any matter in such manner’ it thinks fits. I do not believe this provision gives Arbitrators carte blanche to consider any material that he or she may consider of interest to an issue in dispute. The broad terms of section 354 are constrained by Rule 15.2 set out above. In addition to the requirements that the evidence be logical, probative and relevant to the facts in issue and the issues in dispute, I would add that Arbitrator’s, when seeking to inform themselves on matters, have a duty to comply with the rules of natural justice and procedural fairness as discussed above. That is, they must give all the parties in the case a reasonable opportunity to consider the material.”
9. Rule 15.2 of the Workers Compensation Commission Rules 2011 provides,
- “15.2 Principles of procedure
- When informing itself on any matter, the Commission is to bear in mind the following principles:
- (1) evidence should be logical and probative,
 - (2) evidence should be relevant to the facts in issue and the issues in dispute,
 - (3) evidence based on speculation or unsubstantiated assumptions is unacceptable,
 - (4) unqualified opinions are unacceptable.”

10. The evidence in dispute in *Narayan* was material introduced into the proceedings and provided to the parties by the Arbitrator, whereas the material in dispute here was filed and served in accordance with the Rules. Section 354 of the 1998 Act provides that the Commission is not bound by the Rules of Evidence, but the general principles remain relevant including procedural fairness and prejudice. In the Commission the key is the weight given to evidence according to its probative value. The evidence objected to has potential probative value for the determination of the issues in dispute given the claim covers a period of employment of some years and involves issues of Mr Sadler's workplace culture and atmosphere with the allegation that this had a negative impact on his psychological health.

Documentary evidence

Statement of Mr Sadler 7 May 2019

11. This statement is addressed to the respondent insurer as "a timeline of major incidents that have led to my current state". Mr Sadler says he had been reluctant to lodge a workers compensation claim due to the Health and Safety Directorate (HSD) being involved in the claims while also being the source of his problems. He says the injury was not only caused on 16 May 2017 but had been ongoing beforehand, being brought to a head on the day of the "termination";
12. The events that caused Mr Sadler distress as set out by him include the following:
- (a) the findings of investigations that the distressing events complained of were "unsubstantiated";
 - (b) bullying of the Incident Support Unit (ISU) team in a "dysfunctional and toxic workplace" and the need for him to comfort colleagues who had been bullied, which affected him more than he realised at the time;
 - (c) talk about the abolition of his and colleagues' positions, including by new manager Ms D Gordon;
 - (d) observing an interaction between the new Executive Director, Ms O'Brien, and then ISU Manager Mr Pat Hannan in his office during which Ms O'Brien could be heard screaming at him over some two hours;
 - (e) being told by Ms Gordon that if he wanted to continue doing presentations he would be required to attend a training session in the mandated holiday period or lose his presenting role. Despite a complaint to Mr Sarkis, no action was taken;
 - (f) being told by colleagues of managers spreading rumours about the team's standard of work as incompetent which was also complained of to Mr Sarkis;
 - (g) arriving at a school to make a presentation which was in the booking diary only to be told by the Deputy Principal to leave because another team had been arranged to make the presentation;
 - (h) the new manager failing to advise him until 45 minutes before another presentation that his co-presenter would not be attending because she had suffered a breakdown;
 - (i) observing Ms O'Brien screaming at his police inspector colleague Ms Karatas and pointing her finger in her face. He says this was the first time he became severely depressed;

- (j) a colleague being threatened with having leave days withdrawn if he did not follow a direction given by his manager;
- (k) Manager Mr Dring failing to acknowledge bookings by schools for presentations, leading to Principals calling in because the bookings had not been confirmed;
- (l) being denied access to the booking diary;
- (m) drop in staff numbers leading to increased workload with no support from management;
- (n) hearing Ms O'Brien screaming down the phone to Mr Sadler's colleague which was loud enough for Mr Sadler and the team to hear;
- (o) Ms Gordon angrily yelling at Mr Sadler's colleagues such that it could be heard by all on "Level 8";
- (p) the seconded police inspector, Ms Karatas, and Ms Moore being taken into Ms O'Brien's office during which she yelled at the police inspector;
- (q) being told of manager Ms Green harassing Ms Karatas after the disciplinary meeting with Ms O'Brien, after which Ms Karatas suffered a breakdown;
- (r) attending managerial meetings as support for the police inspector, at which Ms O'Brien belittled the team and their suggestions;
- (s) an occasion when Ms O'Brien was intimidating and invading the personal space of Ms Moore despite requests to cease;
- (t) a directive to "Option 3" staff not to go to the toilet after a certain time of the day on the justification that the call centre was too busy;
- (u) being informed that another manager, Ms Van Tussnbroek, was spreading rumours about him and the team that they were not an asset to the Directorate, and were responsible for Ms Gordon's departure;
- (v) Ms Gordon, having first ascertained which days Mr Sadler worked in the Directorate, then scheduling "IMEX" training mostly on days when Mr Sadler was not working;
- (w) being told about the dismissal of a contractor in a callous fashion as she sat at her desk;
- (x) Manager Ms Green approaching Ms Karatas and harassing her about a sexual assault matter, to the point Ms Karatas had a breakdown in the office;
- (y) Ms O'Brien summoning Mr Sadler to her office on 16 May 2017, the day he asked a question of Ms Gordon at a meeting, and without the opportunity for a support person to be present for a 45 minute session in which allegations as to his conduct were made and his contract terminated;
- (z) on 17 May 2017 being informed of staff being advised by managers that the ISU was dysfunctional, but that management had been able to get rid of the troublemakers which he understood to include himself and others who had left;

- (aa) no support being offered to him by the respondent;
- (bb) contact with the department after his formal complaints, including determinations that complaints were “unsubstantiated” and “unacceptable if true”;
- (cc) a witness for another colleague complainant (Ms Lynne Kennedy) with other colleagues, discovering that the investigator had worked with Ms O’Brien;
- (dd) the excessive time taken by the second investigator into his complaint;
- (ee) being informed of the intimidation of a witness in the investigation of his complaint until she withdrew from the process;
- (ff) the outcomes of his complaint being that it was “unsubstantiated” and that he had acted unprofessionally in asking the question of Ms Gordon;
- (gg) Ms O’Brien, on 17 May 2017 having told the ISU staff in answer to a question as to why Mr Sadler had been terminated that, “It was my decision!” then changing the story to state that he voluntarily relinquished his position;
- (hh) learning that there have been many more victims of Ms O’Brien’s behaviour;
- (ii) being told by the Department that there have been very few complaints against Ms O’Brien when he knows there have been a least five, one with 20 complainants, and
- (jj) learning that the group complaint had been dismissed.

Mr Sadler’s statement 27 May 2020

13. This statement begins with a detailed account of events on 16 May 2017. He goes through the day from the time of arriving at work where he was told by colleagues that a consultant, Mr York, who had been brought in to work with the Unit on the ISU’s processes, had been told by Ms Gordon that the ISU staff were “difficult” and would not share information. This comment was overheard by colleague, Mr Lauric. Mr Sadler says the team was concerned that the manager portrayed the team as problematic to the consultant who was there to structure their work.
14. Ms Gordon, with the consultant, commenced an informal “chat” with the ISU staff about the consultant’s role. Mr Sadler states that when Ms Gordon invited questions with the staff still seated at their workstations, he asked a question about what had been overheard by Mr Lauric. He states that he asked the question in a “normal professional tone”. He states that Ms Gordon was at first lost for words, and admitted making a comment to the consultant, but that perhaps only part of what was said had been overheard. Mr Sadler says he accepted Ms Gordon’s reply and thought that was the end of it.
15. He then went to attend a training day, but in the afternoon Ms O’Brien appeared at the training room asking for him. He states that she appeared red-faced and angry, and he went to her office with her where she gave him a piece of paper she told him to read and left the office. It was a complaint from the consultant about the earlier meeting, which he says he had difficulty reading as he did not have his reading glasses with him. Ms O’Brien returned to the office with Ms Gerardis and asked Mr Sadler what he had to say for himself. He attempted to explain the situation in the morning regarding what Mr Gordon had been overheard saying. He says Ms O’Brien kept repeating “She didn’t say it!” although he told her Ms Gordon had admitted saying it when asked, and the consultant had confirmed that Ms Gordon had said it.

16. Mr Sadler states that he realised Ms O'Brien did not want a discussion about the matter but had already made up her mind about it. He says she was intimidating and he had difficulty composing his thoughts. Ms O'Brien referred to Ms Gordon going through an emotional time in her life and Mr Sadler said he was sorry for her, but he did not apologise for his actions as he had acted courteously and professionally. He says he was not capable of responding due to his stress levels in the meeting.
17. The consultant was brought into the meeting and was asked about the comment, and all he would say was that he had not made a derogatory comment. When Mr Sadler suggested Ms O'Brien speak to his colleagues to establish that Ms Gordon had confirmed the comment had been made, Ms O'Brien said she did not have to speak to anyone. He realised Ms O'Brien had not spoken to anyone other than the complainant.
18. Ms O'Brien told Mr Sadler that she was terminating his contract. He asked when he had to leave and she said he had to leave immediately and his contract would be paid out in full. As he left Ms O'Brien made a light-hearted comment that "we all lose a good job sometime". He responded that he had never been accused of acting unprofessionally, been disciplined, or lost a job. He left Ms O'Brien's office and contacted Ms McGeown and asked to meet her outside the lifts. She asked if he was OK and said he looked pale and unwell, and she helped him to his desk to pack his belongings. His colleagues refused to let him leave alone. Three of his colleagues left work early and took him to a café to sit and talk for which he was "incredibly grateful for their support". His colleagues said he was pale and somewhat incoherent and distressed. A police colleague told him he was in shock.
19. Mr Sadler stated that his condition became far worse over the following months.
20. Mr Sadler also provided a sketch of the office layout. There is also attached a page of Mr Sadler's handwritten notes of the events 16 May 2017 of that date.

Statement of Mr Sadler, undated [ARD 23]

21. In this statement Mr Sadler outlines his extreme reaction when his workers compensation claim was denied, involving his disappearance, contemplation of self-harm, and subsequent brief admission to a mental health unit.
22. He also makes further comments about the complaint he and 19 colleagues lodged against the management of his Unit, and the dismissal of the complaint. In 2019 the Department advised him that it would delete his email account, and this had a significant impact on his well-being.
23. Mr Sadler recounts making a call to the Department's injury hotline on 9 July 2019 when he gave an account of Ms O'Brien being the "root cause" of his condition. He was shocked to find that the report of his call had been copied to Ms O'Brien.

Vicki Moore's handwritten meeting notes 17 May 2017

24. This note appears to record a meeting with the ISU team with Ms O'Brien on 17 May 2017. This records "Marnie – asked any questions. I said yes 'there was no mediation' No-one asked us what happened. He was sticking up for me. She Screamed: Said 'It's my decision'."

Email from Ms O'Brien to Mr Sadler 16 June 2017

25. This email is in regard to Mr Sadler's pay. It includes,

“... as per our discussion on 16 May 2017, you were advised of the cessation of your temporary appointment with the Health and Safety Directorate effective immediately, and that your entitlements would be paid in accordance with the relevant notice period.

...

As outlined in your letter of offer, dated 25 January 2017 (attached), temporary appointments can be terminated earlier if extenuating circumstance arise.”

Letter/statement of Ms L M Kennedy (undated)

26. Ms Kennedy outlines her difficulties with Ms O'Brien and the uncertainty in the ISU staff as to the security of their positions. Ms Kennedy states that she contacted the union for clarification, and Ms O'Brien's very angry response when she discovered this fact. She states that, "The work environment was very nasty and toxic." She recounts an occasion on which she answered the phone in the office and there was a tirade of abuse from Ms O'Brien so loud she had to pull her headset away from her ear. She says,

"This bullying behaviour went on the entire time while I was at this Unit, I witnessed Managers screaming at my colleagues, and one day needing the assistance of the Police Inspector went to Ms O'Brien's office to locate her. I witnessed Ms O'Brien screaming at the Inspector, pointing her finger in her face and said, 'you better watch your frenemies'".

27. Ms Kennedy goes on to relate what she experienced in relation to Mr Sadler on 16 May 2017. She states that one of her colleagues contacted her on the way home from work. Her colleague was "crying and extremely distressed" and told her "Dale had been dismissed on the spot". She says that she has noticed Mr Sadler change from a happy, bright and positive person to being sad and withdrawn.
28. Ms Kennedy states that she drove to meet Mr Sadler and other team members and says, "Dale was clearly a man in shock". She states the the other team members present were also shocked and in disbelief.

Letter of Ms L M Kennedy – undated

29. This correspondence was clearly prepared at a later time and in it Ms Kennedy describes what she has observed of the impact of events on Mr Sadler's demeanor.

Statement – Daniel Lauric 26 July 2020

30. Mr Lauric comments on the meeting on the morning of 16 May 2017 when Mr Sadler asked a question about the conversation Mr Lauric had overheard between Ms Gordon and the consultant who was to assess the work of the ISU. Mr Lauric states that everyone in the unit was concerned about the overheard comments made by Ms Gordon, their new manager.
31. Mr Lauric says that Mr Sadler was calm and polite in manner when asking the question, which he described as "speaking in the same way that all things were discussed during a meeting." He says that Ms Gordon "floundered" at first, eventually saying that only part of the conversation had been heard, which Mr Lauric says was not true.
32. Mr Lauric says he understood the executive Director, Ms O'Brien, who was not present at the meeting, to have told Mr Sadler that he asked the question of Ms Gordon in an unprofessional and aggressive manner, which was grounds for termination. Mr Lauric states, "I categorically refute this." He says the meeting was witnessed by the entire team and Mr Sadler was at no time aggressive, rude or in any way unprofessional.
33. Mr Lauric states that he spoke with Mr Sadler after the meeting with Ms O'Brien and says he was "highly distressed and upset", and told him he had been denied a support person.

34. Mr Lauric goes on to describe “a culture of bullying that the Executive Director created” and “countless incidents of her screaming at and verbally abusing staff as well as physically intimidating them”. Mr Lauric recounts his decision, after the experience of Mr Sadler, to leave the unit in June 2017 and seek employment elsewhere for his own mental health due to “that toxic environment”.

Statement Lisa McGeown 26 July 2020

35. Ms McGeown recalled the external consultant being called in to “develop a Manual outlining the work of the” ISU, and Mr Lauric overhearing a conversation between Ms Gordon and the consultant. Ms McGeown recounts the meeting on the morning of 16 May 2017 and Mr Sadler’s question to Ms Gordon about the overheard conversation. She says, “I remember thinking that Mr Sadler had asked a difficult question in a calm and considered manner.” She also remembers Ms Gordon appearing to be shocked at first before denying she had said the team was difficult.
36. Ms McGeown recounts being at the training with Mr Sadler afterwards, and his leaving the session with a senior officer (Ms O’Brien). She also outlines the call from Mr Sadler afterwards and meeting him at the lifts where “he appeared shocked and pale”, and informing her that his contract had been terminated. She describes Mr Sadler as becoming “very despondent and confused” when she checked with him and becoming “a shell of himself”.

Text from Lisa McGeown to Mr Sadler

37. This text message was to confirm to Mr Sadler that Ms McGoewn had told investigator Ms Van Berlo the circumstances of Mr Sadler being summoned by Ms O’Brien to her office on 16 May 2017, and that Ms O’Brien appeared red-faced.

Statement of Ms Karatas 25 October 2020

38. Ms Karatas outlines her role in the Unit and her opinion of Mr Sadler before she walked out of the job in April 2017. She says the reason for her leaving was the behaviour of Ms O’Brien and other managers. She says she kept in contact with the ISU team and on 16 May 2017 she was told Mr Sadler had been “fired” by Ms O’Brien, and drove to meet with him and his colleagues at a café. She recalls him saying he was “numb” and she said he was in shock.

Statement of Vicki Moore 26 July 2020

39. Ms Moore outlines an incident when the Unit was still based at Blacktown in which Ms O’Brien who was upset and “yelling very loudly” at the then manager, Mr Pat Hannan, when attempting to discover who had called the union. She states Ms O’Brien was “extremely intimidating and forceful”. She recounts being scared for Mr Hannan’s well-being.
40. She recounts staff being denied access to the Unit calendar containing bookings, leave, and meetings, and being denied items of stationery. She says that a police Inspector, Brendan, walked out, telling colleagues that he was unable to work under that management.
41. Ms Moore states that she witnessed Ms Gordon yelling at Ms McGeown and Ms Karatas while Ms McGeown was on the phone to a Principal.
42. Ms Moore outlines what happened at the meeting with Ms Gordon and the consultant on 16 May 2017 when Mr Sadler asked his question on behalf of the group. She says that Ms Gordon looked shocked and “did not say anything”. She then “made an excuse that they must [have] miss overheard [sic]”.

43. Ms Moore reports that Mr Sadler returned after the meeting with Ms O'Brien and said "that he was terminated, asked to leave by Marnie". She says that "We were all devastated", and she recalled how pale and shocked he was when they went for coffee. She states that the team was in shock that Mr Sadler could be asked to leave when the team was never questioned over what happened in the earlier meeting.
44. Ms Moore recounts the meeting on 17 May 2017 with Ms O'Brien at which she took the handwritten notes above. She relates that a colleague was crying in the meeting and questioned Ms O'Brien as to why Mr Sadler was not given a warning. Ms O'Brien became agitated "and yelled towards us that it was her decision. I still remember how scared and terrified we were and we all put our heads down. I also mentioned that Dale only asked a question. I told her that Dale was my mentor and was only trying to stick up for us."
45. Ms Moore also outlines another incident involving Ms Karatas (Relieving Police Inspector) and herself in Ms O'Brien's office at which Ms O'Brien was,

"... screaming and holding her fist towards us. Marnie placed her other hand over her fist and continually slammed her hands while shaking her fist at us. Marnie told us we had one brain and she continued to yell one brain."
46. Ms Moore says she left Ms O'Brien's office but she followed and "pinned" her to her desk area as she tried to leave, and it was not until Ms Karatas intervened that Ms Moore was able to leave.
47. Ms Moore goes on to outline her work experiences after Mr Sadler left the Unit.

Ms Vicki Moore's statement 22 October 2020

48. In this statement Ms Moore refers to incidents involving Mr Sadler, the effect of which she observed. She refers to when Mr Sadler was dismissed and observing that he was shocked and in disbelief immediately afterwards. She observed he was shaking, anxious, and extremely upset. She recounts conversations with Mr Sadler in which he explained his symptoms to her.
49. Ms Moore describes the effect she observed on Mr Sadler during the subsequent processes of complaint undertaken by Mr Sadler and colleagues.

Statement of Cathryn Sadler 17 October 2020

50. Mr Sadler's spouse outlines what she observed of his distress over incidents at the Unit, in particular the termination. She describes his bewilderment over the events on 16 May 2017 and the manifestations of his distress. She says that she insisted Mr Sadler go to the doctor, and describes what she saw of the decline in his condition including behavioural changes.

Statement of Mr P Hannan

51. Mr Hannan recounts that he spoke to Mr Sadler in January 2018 and on that occasion and in earlier conversations it was evident that Mr Sadler was "despondent and dispirited" due to his dismissal and he followed up with an email urging Mr Sadler to seek support.

Letter from the Hon. Mark Banasiak 28 July 2020 to Mr Sadler (and annexed documents)

52. The letter refers to contact being made by constituents to Mr Banasiak about "allegations of long-standing historical bullying within the Health and Safety Directorate". The annexed documents cover then period from 2007 to 2019.

53. Some of the documents cover Mr Sadler's own complaints [from ARD 128]. Attachment 10 "Complaint to Minister" essentially reiterates Mr Sadler's main statement noted above.

Complaint Determination from Mr Riordan 5 February 2018

54. The letter of 5 February 2018 from Mr Riordan, Deputy Secretary, Corporate Services, to Mr Sadler in response to his complaint includes under the heading "1. Termination of temporary engagement", the comment that, "I agree that your early termination could have been handled more sensitively ...".
55. Under the heading "Bullying and Dysfunctional Workplace Allegation", Mr Riordan responds,
- "The behaviours you have referenced are not acceptable if true and I will be raising these matters with the Executive Director and her management team. All staff are required to abide by the Code of Conduct and to demonstrate dignity and respect in the workplace."

Complaint to Minister – Lynne Kennedy 5 January 2018

56. Ms Kennedy's complaint reiterates the points in her statement noted above. Ms Kennedy says the situation in the Unit "was the most disrespectful work environment I have ever worked in."

Complaint Determination from Mr Dizdar 12 March 2018 and letter 15 May 2015

57. This correspondence addresses the formal complaints of Ms Kennedy and Mr Sadler.
58. The remaining documents in the bundle relate to complaints made to the Minister for Education and the Secretary of the Department. Attachment 22 is a complaint from 20 current and former employees of Health and Safety dated 28 February 2019, including Mr Sadler, followed by a letter from Mr Riordan dated 12 June 2019 indicating the correspondence was closed. There is also a letter from Mr Sadler to the Minister dated 11 February 2018 complaining about the outcome from Mr Riordan; a further letter from the group complainants dated 28 February 2019; and a letter from Mr Cornish dated 24 April 2019 indicating the concerns were finalised in 2018.

Statement Rosemary Gerardis 21 August 2020

59. Ms Gerardis outlines the commencement of the new ISU in February/March 2016, and the engagement of a consultant, Mr York, to help the unit to develop procedures. She says about the meeting in Ms O'Brien's office on 16 May 2017,
- (a) she did not have time to discuss in detail the issue involving Mr Sadler that Ms O'Brien had called her about. She remembers complaints about an incident involving Ms Gordon and Mr Sadler, and members of the ISU being upset about something overheard. She says that Ms O'Brien said she wanted to understand from Mr Sadler what had happened;
 - (b) Mr Sadler acknowledged that his behaviour had been inappropriate "and he could have possibly handled it in a better way." She says it was then agreed that Mr Sadler would finish up that same day;
 - (c) she does not recall that Ms O'Brien was "red faced or angry at the meeting" or "that she was aggressive, intimidating, bullying, harassing, accusatory". She says she doesn't recall Ms O'Brien saying repeatedly to Mr Sadler "She didn't say it" in relation to Ms Gordon's overheard comment to Mr York;

- (d) she did not know if Mr Sadler was aware she would be present but she presumed he was advised. She says that, "Therefore to my knowledge there was not a power imbalance in the room as I believe Dale suggests." She says that it was not obvious to her that Mr Sadler was intimidated or upset by the meeting as he engaged in conversation with Ms O'Brien and then also with Mr York. She does not recall Mr Sadler saying he was uncomfortable or wanted to stop the meeting;
- (e) she does not recall Mr Sadler apologising for anything in Ms Gordon's personal life. She also does not remember if Ms O'Brien leaned forward to Mr Sadler, or that she said she "didn't have to speak to anyone";
- (f) she does not recall that Ms O'Brien terminated Mr Sadler's contract. She says, "Dale raised whether Marnie wanted him to finish up that day and this was then discussed and agreed." She says she does not remember Ms O'Brien saying "everyone loses a job sometimes" or making light of Mr Sadler leaving. She says she clearly recalls Mr Sadler offering to finish up that day. She believes there was an offer of the Employee Assistance Program to Mr Sadler "given what had happened";
- (g) she understands that Mr Sadler made "7 allegations" about the meeting. She says that "to the best of her recollection" Ms O'Brien offered a support person to Mr Sadler at the beginning of the meeting;
- (h) she "thinks" Mr Sadler indicated he didn't require a support person;
- (i) in relation to Mr Sadler's statement that he did not have a reasonable opportunity to respond she was not involved in discussion before the meeting, but was aware that Ms O'Brien "wanted to deal with the matter promptly on that day";
- (j) to her "recollection", Mr Sadler did not seem surprised that Ms O'Brien wanted to meet with him about the incident with Ms Gordon and assumed Mr Sadler had been given "a heads up" as to what the meeting was about;
- (k) there was no specific discussion in the meeting about Mr Sadler leaving the meeting and composing a response to the allegations about the incident, "The conversation came naturally to a point where Dale asked if Marnie wanted him to finish up that day.";
- (l) she was essentially unaware of what investigations Ms O'Brien had made prior to the meeting;
- (m) she does not recall what Mr York said in the meeting;
- (n) there was nothing about the meeting that struck her as unfair on Mr Sadler. Ms O'Brien "raised the concerns/feedback provided by others, she asked Dale what happened, and he responded.";
- (o) she says it was a natural conclusion to the meeting once Mr Sadler raised the idea of finishing up that day there was no further discussion in terms of his response or review of the meeting. "It was not a unilateral termination of his employment; Dale was in complete agreement.", and
- (p) "There is no culture of bullying and harassment in Health and Safety, from Marnie or otherwise. I did not witness Marnie bullying anyone, including Dale. I wouldn't call the culture toxic."

Statement of Marnie O'Brien 20 August 2020

60. Ms O'Brien gives her account of the leadup to her meeting with Mr Sadler on 16 May 2017, although she was not present at the "chat" involving Mr Sadler and Ms Gordon. She,
- (a) received a call from Mr York about the morning meeting in the ISU;
 - (b) spoke to staff as to what happened;
 - (c) "had lots of staff upset";
 - (d) "needed to take immediate steps to addresss the issue as it could not wait given the distress in the office.";
 - (e) "set up the meeting with Director Rose Gerardis so there was a second person in the meeting";
 - (f) asked Mr Sadler if the reports she had heard were true and "He acknowledged his comments but played it down." He said maybe he shouldn't have been inappropriate with his language but did not think it was that bad;
 - (g) says Mr Sadler agreed he had acted inappropriately and unacceptably, and it was apparent to her that Mr Sadler was admitting to verbally abusing Ms Gordon and physically intimidating her;
 - (h) told Mr Sadler that she "couldn't have him behaving in this way" and she "could not see how I could extend his position further." Mr Sadler said "so when do you want me to leave" or words to that effect. After further discussion about when he would leave "He said he was comfortable about finishing that day and I agreed.";
 - (i) says Mr Sadler thanked her and shook her hand at the end of the meeting and said he was grateful she had been respectful and appreciated how she had handled the meeting;
 - (j) spoke with the ISU staff the next day. They were unhappy and thought Mr Sadler had been sacked. She "was firm with the staff and said there was no excuse for inappropriate behaviour.";
 - (k) told the staff that if they were unhappy and wanted to leave she would help them to find other positions. She told them "that the toxic behaviour was to stop and staff were to start addressing issues through the appropriate channels in a professional manner.";
 - (l) states "In terms of the reasonableness of my actions", "I made sufficient enquiries to substantate that what [Mr York] said had happened, happened. I did not just speak to my friends or relatives";
 - (m) notes that she spoke to Mr Rik Hoole and that she attended school with him for one year some 28 years before, and they were not personal friends and she did not employ him. She also notes that Ms Devoy is her cousin and she had no involvement in her employment and they are not close;
 - (n) spoke to the 4 people directly adjacent to where the incident happened. The feedback I got was that Dale had been aggressive and he had been in Di's personal space.";

- (o) says Mr York made it clear that he had to tell Mr Sadler to stop. "This was extremely serious to me ... Therefore I had to act immediately.";
- (p) was not "angry, red faced or aggressive in the meeting ...";
- (q) says that once Mr Sadler raised his leaving she had no intention of talking him out of it, but she "did not terminate him";
- (r) says "The purpose of the meeting was not to sack Dale. It was to understand his feedback on what happened";
- (s) says when Mr York came into the meeting Mr Sadler acknowledged things occurred as Mr York had said and suggested he finish up;
- (t) does not recall making any comment at the end of the meeting about everyone losing a job sometime or making light of Mr Sadler leaving;
- (u) says Mr Sadler refused an offer to have a support person present;
- (v) was unable to give notice of the meeting to Mr Sadler because it was a serious issue that had to be addressed immediately;
- (w) says Mr Sadler should have known she would want to speak to him about what happened in the morning;
- (x) says Mr Sadler was given ample opportunity to respond;
- (y) says because Mr Sadler offered to finish that day meant that they "did not proceed to a disciplinary or investigation process". In her view Mr Sadler's offer to leave was a way for him to avoid "a full blown disciplinary investigation";
- (z) denies creating "a toxic work culture", or that she was a bully and bullied staff including Mr Sadler. The staff were resistant to change, so there have been "issues", and
- (aa) says it was not a toxic work culture but there was a toxic culture in the ISU.

Meeting report Ms O'Brien - unsigned and undated

61. This report is similar to the contents of Mr O'Brien's statement

Email Ms O'Brien to Mr Sadler 16 June 2017

62. This message contains the following,

"With regards to your pay, as per our discussion on 16 May 2017, you were advised of the cessation of your temporary appointment with the Health and Safety Directorate effective immediately, and that your entitlements would be paid in accordance with the relevant notice period.

As outlined in your letter of offer, dated 25 January 2017 (attached), temporary appointments can be terminated earlier if extenuating circumstance arise. The notice period for ceasing temporary assignment is two weeks, and as such, you have been paid until 30 May 2017."

Email Ms O'Brien to Ms Van Berlo 5 December 2017

63. Ms O'Brien said to Ms Van Berlo,

"Dale was employed on a temporary contract above establishment to help out the ISU as they were very unhappy at coming across to Bankstown. His contract was due to end within weeks of the incident and I brought that forward given the issues in the team and his involvement."

Statement of Mr York 4 November 2020

64. Mr York states that on the morning of 16 May 2017 he was in the ISU hub talking with Ms Gordon with the whole team present. He says Mr Sadler "out of the blue" stood up and spoke in a loud voice posing a question about the alleged conversation overheard in which Ms Gordon criticised the team. He says that Ms Gordon tried to respond but was cut off by Mr Sadler who said, "You were heard saying this."

65. Mr York states that he responded himself, as the allegation also involved him, and denied that the alleged conversation had occurred, and "encouraged people to get back to work. Ms Gordon responded and also stated that it [the allegedly overheard conversation] did not occur."

66. Mr York expresses his view that Mr Sadler was condescending in demeanour and described it as "inappropriate and highly unprofessional".

67. He states that he sent an email to Ms O'Brien, and had nothing more to do with the matter.

Mr York's email to Ms O'Brien 16 May 2016

68. This email appears to be the basis for Mr York's statement, but there is a difference in terminology, and no mention of Mr Sadler standing up [bold in original],

"To my surprise and also my disgust ISU team member Dale '**Grandstanded**' Di Gordon in front of the ISU team and to be honest I am confident that the entire floor heard the accusations."

Complaints to Minister and Secretary and associated correspondence 13 November 2017 to 12 June 2019

69. These complaints and responses are referred to by Mr Sadler in his statements.

Ms Van Berlo Inquiry Report 29 January 2018

70. This includes reports of contacts with staff, many of whom have provided statements in these proceedings. Ms Van Berlo's "Key Findings" included acknowledgement of "staff dissatisfaction with the culture and management of the HSD teams." She also finds there were "instances of bullying and inappropriate behaviour by various staff within the unit."

Email from Ms J Thorpe to Mr P Riordan 22 November 2017

71. Ms Thorpe says to Mr Riordan in this message following a discussion with Ms Gerardis,

"I have had the opportunity to review the Sadler complaint and have spoken to Rose Gerardis to obtain some context. Douglas Sadler the complainant is known as Dale Sadler and his contract was terminated. Rose believes he was a DP and he came across with the old SSRU in a part-time position but she is not sure of his current status."

Medical Evidence

Clinical notes Dr Adusu-Milli

72. The note with the hand written date of 22 May 2017 includes, “terminated on 16/5/17 due to inappropriate behaviour patient didn’t elaborate - feeling restless, insomnia”.
73. The note with hand written date 6 June 2017 includes, “to see psychologist – needs mental health care plan”.

Clinical notes Dr Davey & Dr Lodewijks

74. These notes record the continuing symptoms from the beginning of 2018, including the the concerns about the complaint processes of the respondent.
75. The entry for 18 March 2019 records, “going on hols to Italy. [Department] wants ‘special sick cert.’ (although he was prepared to take leave through usual channels) [Strange] [machinations] at work-they [seem] not to know what to do!!”
76. A “GP Mental Health Treatment Plan” dated 16 February 2018 has the diagnosis of “Anxiety/Depression (Adjustment Disorder) Secondary to workplace bullying”.
77. There is a series of non-WorkCover medical certificates certifying unfitness for work to 12 April 2019.

The medical certificates of Dr Sarika Tiwari of 2 May and 6 May 2019

78. Dr Tiwari diagnosed “Depression, Anxiety and Panic attacks ... directly due to harassment and bullying at work as per patient.”

Dr Dinnen report 17 October 2019

79. Dr Dinnen noted that Mr Sadler,

“... gave a full but self-absorbed and rather intense account of workplace events but during the course of that history showed difficulty with memory and concentration from time to time. He was uncertain of some dates and had to correct himself, for example when he misattributed the source of his university degrees.”

80. Dr Dinnen takes a summary of the period before and after the ISU coming under the direction of Ms O’Brien and the arrival of Ms Gordon as Manager, and takes detail about the incidents on 16 May 2017, consistent with Mr Sadler’s statements.
81. Dr Dinnen rates the elements of the symptoms in terms of the Psychiatric Impairment Rating Scale (PIRS), including Travel, under which he records,

“The patient's wife told me that he can drive a short distance to a fish and chips shop by himself and she tries to go with him to his appointments and to his psychologist, if she can get time off work. He prefers to have someone with him when he leaves the house. Class 2.”

82. Dr Dinnen’s assessment is 22% while person impairment (WPI).

Dr Graham George report 25 November 2019

83. Dr George takes a history consistent with the other histories, apart from some confusion on the York/Gordon conversation as to who overheard whom, upon which nothing turns.

84. Dr George also assesses Mr Sadler in terms of the PIRS and arrives at the overall assessment of 23% WPI, effectively the same as that of Dr Dinnen. He notes,
- “Dr Dinnen’s opinion and my own are in accordance with each other’s opinion. Dr Dinnen diagnosed major depressive disorder as I have and also, indicated similar impairment.”
85. Dr George records in relation to travel,
- “He said that, since leaving work, he has been on a short break to Wagga to visit his sister-in-law and he said both him and his wife went on a short cruise to the Pacific Islands subsequent to leaving work. He found that he spent most of his time in his cabin.”
86. As to causation Dr George says,
- “This is one case on which I cannot arbitrate. However, his psychiatric injury has emanated from what he believes is unfair dismissal by his Director and unprofessional conduct not only, at the time of his alleged dismissal but also, over an extended period of time within his department.”
87. Under the PIRS Category of Travel, Dr George finds,
- “He indicated that he could drive locally but could not drive a distance. He is dependent on his wife for driving a distance. He finds it hard to concentrate on driving. Class 2.”

Discussion

88. Following submissions on the substantive issues, on review of the materials objected to by the respondent but admitted, I did not find the historical material relating to events and behaviours in times earlier than Mr Sadler’s period in the ISU to be of any real assistance on the issues to be determined. The same goes for the Certificate of Determination and Statement of Reasons in another matter involving a former employee of the respondent and Ms O’Brien. These events are in my view too removed from the circumstances and context of what happened to Mr Sadler to affect the outcome. The evidence from the relevant period is sufficiently clear for the issues to be determined without any need to take inferences from earlier times.

Issue – Mr Sadler’s Credit

89. The respondent submits that Mr Sadler cannot be accepted as a witness of truth on the issues in dispute because he has been untruthful about the issue of his ability to travel. This was a large part of the cross-examination.
90. Under cross-examination Mr Sadler was pressed about his travel to Melbourne, Wagga Wagga, Culburra and Europe. Mr Sadler explained that his daughter had moved to Melbourne, that relatives lived in Wagga, and that it was a family Christmas to a friend’s property at Culburra.
91. It was put to Mr Sadler that he withheld from Dr Dinnen the trips away, including Europe. Mr Sadler said that he told Dr George about the travel because he asked specifically, whereas Dr Dinnen did not. Mr Sadler said he told Dr George about the European cruise, but he only reported the history of the Pacific cruise. He also said that he told the Department about the European trip, which is confirmed in the clinical notes of Dr Davey regarding the Department requiring a “special sick certificate” for the trip.

92. What became apparent from Mr Sadler's evidence was that none of the travel was enjoyable for him. His evidence about going to Europe to save his marriage is consistent with the history of strain in the relationship with his wife due to his symptoms. Not seeing the cruises as a holiday and spending most of the time in the cabin is also consistent with the diagnosis and symptoms that he experienced at home. Because he went with his wife on trips and to Melbourne to see his daughter; to Wagga to see relatives and Culburra for Christmas with the family does not mean he was not suffering from the diagnosed condition throughout. His evidence was essentially that he was experiencing the symptoms wherever he was taken. The respondent's submission that the evidence is that Mr Sadler was not psychologically injured was not supported by his oral evidence or by the documents.
93. It was put to Mr Sadler that he told a lie in his oral evidence about not travelling anywhere else after being asked about the Melbourne, Wagga and Culburra trips, but he said that he thought he was being asked about travel in Australia, and I accept this given the context of the question, which was not specific.
94. The respondent submits that it took an effort to pry the information from Mr Sadler about the trip to Italy and the cruise. I do not accept this submission. It is not clear why Mr Sadler would attempt to hide a trip to Europe when the respondent knew all about it. As noted above, Mr Sadler did not experience the trip as a holiday but as an exercise he was obliged to agree to for the sake of his marriage; a trip he did not enjoy and during which he suffered from the same symptoms as at home, spending most of the cruise in the cabin. This is all consistent with the medical opinions and the history.
95. In these circumstances there is little significance in Mr Sadler's travel on the issue of injury. Dr George was aware of the cruises. He did not report being told about the European cruise, but I accept Mr Sadler told him about it. Dr George does report the Pacific cruise, and still comes up with the same impairment assessment as Dr Dinnen.
96. There is nothing about the travel within or outside Australia that contradicts Mr Sadler telling Dr Dinnen that "... he does not go out anywhere". This seems to me to refer to going out to social outings from home. He does not say he is housebound and offers that he can drive to get fish and chips on his own.
97. It seems to me that Mr Sadler was not trying to conceal anything, either from Dr Dinnen, or when giving his oral evidence. The evidence was given via audio-visual link, and the sound and vision were of high quality and I was able to observe and hear Mr Sadler clearly. Mr Sadler's overseas travel was undertaken not in the absence of symptoms but despite them, at the instigation of his wife, and the symptoms continued to affect him such that on the cruise he stayed in the cabin "eighty percent of the time".
98. I found Mr Sadler direct and open in his answers. He had some difficulty with memory such as when his daughter moved to Melbourne, and when he travelled, but this is consistent with the memory issues due to the condition noted in the medical evidence. Mr Sadler's oral evidence in this regard must be given some latitude given the severity of the symptoms of his condition.
99. The respondent also tested Mr Sadler on other issues including what occurred on 16 May 2017. Mr Sadler was firm regarding his version of events. He rejected the suggestion that he had been distressed by the complaint process and not by the meeting on 16 May 2017 or earlier events. This will be discussed further below.
100. Mr Sadler was also challenged on what occurred at the impromptu meeting with Ms Gordon, and he rejected suggestions that he stood up from his chair or spoke aggressively to her.

101. Mr Sadler answered the respondent's questions as to the "Desktop Investigation" and his credit was unaffected because nothing emerged that contradicted the evidence of the symptoms of injury. That he took part in a Rotary public speaking exercise was plausibly explained as attempting to regain confidence and get back to normal, but without success.
102. The book he wrote was before the events of May 2017 and involved an on-line exercise not requiring him to leave home.

The morning meeting of ISU staff with Ms Gordon and Mr York on 16 May 2017

103. There are conflicts in the evidence as to what occurred in the morning meeting with Ms Gordon. Mr York said in his email to Ms O'Brien that Mr Sadler was "condescending" and "Grandstanded". In his statement Mr York adds the new point that Mr Sadler stood up when he asked the question.
104. Mr Hoole was interviewed by Ms Van Berlo and his comments reported by her were that he was in another part of the office to the meeting area and could not hear the detail of the discussion but did hear Mr Sadler being "abrupt" with Ms Gordon.
105. Ms O'Brien says that Mr Sadler verbally abused and physically intimidated Ms Gordon and invaded her personal space. Ms O'Brien says she spoke to Mr York about this but there is nothing to support Ms O'Brien on it given she was not present at that meeting and there is nothing from Mr York supporting Ms O'Brien's version. Ms O'Brien's comment that Mr Sadler admitted in her office to verbally abusing and physically intimidating Ms Gordon is not supported by any of the other evidence apart from Ms Gerardis. There is no evidence from four people "adjacent" to the question that Ms O'Brien asserts she spoke with.
106. There are statements from ISU members who were part of the morning meeting with Ms Gordon who say that Mr Sadler's question was asked reasonably. I do not accept Ms O'Brien's assertion that Mr Sadler was verbally abusive and physically intimidating towards Ms Gordon. Mr York did not say this in his email to Ms O'Brien, adding only in his much later statement that Mr Sadler stood up before he spoke. In my view Mr York had a personal involvement in the question, having been involved in the conversation overheard by Mr Lauric. It is a matter of individual interpretation whether Mr Sadler's tone was either "condescending" or "Grandstanding", or measured and reasonable. Others thought the question was made in a normal or reasonable manner. I do not accept that Mr Sadler stood up to ask the question. I note that even if he had, standing up is of itself not aggressive or intimidating.

Meeting in Ms O'Brien's office 16 May 2017

107. There are problems with Ms O'Brien's statement and that of Ms Gerardis about the meeting to which Mr Sadler was summoned by Ms O'Brien because everything is consistent with Mr Sadler's position being terminated by Ms O'Brien, except her statement and that of Ms Gerardis.
108. Mr Sadler states emphatically that his position was terminated. The aftermath of the meeting as reflected in the statements of Mr Sadler's colleagues was of a shocked and disoriented Mr Sadler saying that his position was terminated. His disarray was evident to all who saw him immediately afterwards. At the meeting on 17 May 2017 with the unit staff Ms O'Brien was noted by those present to have responded to vocal concerns of staff about Mr Sadler's treatment and lack of prior investigation with the assertive comment to the effect, "It was my decision".
109. It is apparent that Ms O'Brien had not spoken to Mr Sadler's ISU colleagues present at the meeting with Ms Gordon, who have made statements for the proceedings, as to what had happened before summoning Mr Sadler to her office.

110. Further, the email correspondence from Ms O'Brien to Mr Sadler of 17 June 2017 is inconsistent with resignation, and includes, "you were advised of the cessation of your temporary appointment with the Health and Safety Directorate effective immediately".
111. The correspondence from Mr Riordan in response to Mr Sadler's complaint also refers to the termination of Mr Sadler's appointment. This refers to the issue of the "termination", and also includes, "I agree that your early termination could have been handled more sensitively ...".
112. Ms Thorpe's email to Mr Riordan about a discussion she had with Ms Gerardis to gather information includes as part of the report of that conversation that Mr Sadler's "contract was terminated".
113. Ms O'Brien's statement of events in the meeting with Mr Sadler cannot be accepted, and nor can the statement of Ms Gerardis. The other evidence contradicts the assertion that Mr Sadler resigned. Had he voluntarily relinquished his position it would have been reported from the beginning by Ms O'Brien and others, but it was not, either at the discussion with the unit staff the following day or in the respondent employer's correspondence. The outward effects of the meeting on Mr Sadler seen by numerous colleagues immediately afterwards, which I accept, is also not consistent with Ms O'Brien's and Ms Gerardis' account of a calm and unperturbed Mr Sadler offering his resignation after agreeing he had verbally abused and physically intimidated Ms Gordon. This account is implausible.
114. I find Ms O'Brien's evidence to be self-serving and lacking credit. I also find Ms Gerardis' statement to be unreliable and lacking credit on what occurred in the meeting of 16 May 2020.
115. Ms O'Brien's evidence must be treated with care, as must that of Ms Gerardis, whose statement is very much in concert with that of Ms O'Brien, although heavily qualified as to her diminished memory of events of May 2017. I note there is no statement from Ms Gordon.
116. Where Ms O'Brien and Ms Gerardis differ from Mr Sadler, I prefer Mr Sadler's account. I find that Mr Sadler's contract was terminated by Ms O'Brien in the meeting in her office on 16 May 2017. Mr Sadler did not accept that he had been verbally abusive and physically intimidating when asking a question of Ms Gordon, and nor did he resign from his contract.

Issue – Did Mr Sadler suffer psychological injury in the course of his employment with the respondent (s 4 (b)(i) 1987 Act)

117. There is abundant evidence of the symptoms of the injury suffered by Mr Sadler, as reported by him and as observed by others, including his work colleagues and his wife.
118. The above discussion as to credit issues is relevant to the issue of injury. The respondent submits that Dr Dinnen cannot be given weight because he does not have the history of Mr Sadler's travel.
119. I do not accept the respondent's submissions on Dr Dinnen's opinion. There is a "fair climate" for acceptance of Dr Dinnen.¹ Because Dr Dinnen did not ask Mr Sadler about overseas travel does not negate his opinion as to injury. As discussed above, Mr Sadler's evidence, which I accept, is that he took his symptoms with him on the trips with his wife. He did not see the European trip as a "holiday". Travel of itself does not negate psychological injury, and in this case, it tends to support the claim of injury because the symptoms continued to have a significant impact on Mr Sadler when in Europe at the behest of his wife.

¹ *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA 58.

120. As noted above, Dr George had asked Mr Sadler about travel and was aware of the trip to Europe and a Pacific cruise, yet assessed the impairment at the same degree as Dr Dinnen. Dr George says, “The cause of Mr Sadler’s mental health disorder directly relates to work circumstances.”
121. Dr George also says when asked, “Do you consider the worker to have sustained a psychiatric injury as a result of his dismissal from the department? Please provide detailed reasons for your opinion.”,
- “This is one case on which I cannot arbitrate. However, his psychiatric injury has emanated from what he believes is unfair dismissal by his Director and unprofessional conduct not only, at the time of his alleged dismissal but also, over an extended period of time within his department.”
122. I am satisfied on the evidence that the workplace was for Mr Sadler and others a toxic environment, with an atmosphere of fear and intimidation. I note that Ms O’Brien does not deny specific instances outlined by Mr Sadler and his colleagues involving her before 16 May 2017.
123. The psychological condition was already present by 16 May 2016 but was significantly worsened by the termination of the contract on that day, and further by the subsequent formal complaint processes and what Mr Sadler viewed as unsatisfactory outcomes.
124. The evidence establishes that Mr Sadler suffered psychological injury with the respondent. The evidence is consistent with Dr Dinnen’s opinion that the period before the meeting of 16 May 2017 is part of the cause of injury as is the period following through the complaint processes and outcomes. As diagnosed by Dr Dinnen the condition which was adjustment disorder with anxiety and depressed mood is now Major Depressive Disorder.
125. The psychological injury falls under s 4(b)(i) of the 1987 Act as a disease contracted in the workplace. This means that the issue of whether the employment is the main contributing factor to the injury must be considered.

Main Contributing Factor

126. There are no other factors that compete with the workplace events as the main contributing factor to the injury. The evidence is that Mr Sadler had been a happy individual before February 2017 when the unit was relocated. I find that the employment was the main contributing factor to the injury.

Issue – Is the defence pursuant to s 11A(1) of the 1987 Act applicable for the respondent?

127. In *Chisholm v Thakral Finance Pty Ltd trading as Novotel Brighton Beach* [2011] NSWCCPD 39 (*Chisholm*) Roche DP set out a useful guide to the legislation and authorities equally relevant to the s 11A (1) issues in this case:

“Section 11A(1) of the *Workers Compensation Act 1987* provides:

‘No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.’

In a claim for compensation for psychological injury, the Commission has to decide whether the whole or predominant cause of the psychological injury was the employer's action or proposed action with respect to one or more of the actions listed in s 11A(1), and, if so, whether the action or proposed action was reasonable (*Manly Pacific International Hotel Pty Ltd v Doyle* [1999] NSWCA 465; 19 NSWCCR 181 at [4]).”

128. The onus of establishing a s 11A(1) defence is on the employer (*Ritchie v Department of Community Services* [1998] NSWCC 40; (1998) 16 NSWCCR 727; *Department of Education and Training v Sinclair* [2005] NSWCA 465; 4 DDCR 206; (*Sinclair*)).
129. There is a difficulty for the respondent because the insurer relied on s 11A(1) in its Notice pursuant to s 78 of the 1998 Act in the category of dismissal, yet in its submissions argued that there was no dismissal, but rather that Mr Sadler voluntarily resigned.
130. This change would appear to necessarily require the abandonment of the s 11A(1) defence. It cannot be simultaneously argued that the worker resigned, and that he has no claim because the injury was wholly or predominantly caused by the reasonable action of the employer with respect to dismissal.
131. However, as I have found that Mr Sadler's contract was terminated by the employer, I intend to address the s 11A(1) defence raised in the s 78 of the 1998 Act Notice.

Wholly or predominantly

132. For the purposes of the exercise the s 11A(1) category of action relied on by the respondent is dismissal.
133. The concepts “wholly” and “predominantly” need to be considered separately.² The expression “wholly or predominantly” has been held to mean “mainly or principally” caused.³
134. In *Manly Pacific International Hotel Pty Ltd v Doyle* [1999] NSWCA 465; (1999) 19 NSWCCR 181 Fitzgerald JA said whether actions, in respect of one of the specified matters, were the whole or predominant cause of psychological injury was “a question of fact and degree, which involves consideration of all the factors which produced (the worker's) condition”.
135. What is established by the evidence is that the injury was not “wholly” caused by the action of the employer in terminating Mr Sadler's contract.
136. The evidence also does not establish the dismissal as “predominantly” the cause of the injury. I have already found that Mr Sadler had developed a psychological condition prior to the events of 16 May 2017 resulting in the termination. The termination was one element but the period of employment in the ISU from February 2017 is another significant element in the development of the condition. The termination did make him worse, but he had symptoms before that.
137. The evidence is also of significant worsening of the condition over the period of the formal complaints and negative outcomes as perceived by Mr Sadler resulting in the development of the condition into Major Depressive Disorder. It is not possible to conclude that the termination by Ms O'Brien is predominantly the cause of the condition.

² *Smith v Roads and Traffic Authority of NSW* [2008] NSWCCPD 130.

³ *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; *Ponnan v George Weston Foods Ltd* [2007] NSWCCPD 92; *Temelkov v Kemblawarra Portuguese Sports and Social Club* [2008] NSWCCPD 96.

138. For these reasons I find the respondent has failed to show the employer's action regarding dismissal was wholly or predominantly the cause of Mr Sadler's psychological injury.
139. Given this finding it is not necessary to address the other elements of s 11A(1), however, in case I am wrong about this I will address whether the action of dismissal was reasonable.

Reasonable action

140. The Court of Appeal considered the meaning of the words "reasonable action" in *Commissioner of Police v Minahan* [2003] NSWCA 239; 1 DDCR 57, in which the Court cited with approval the following passage from *Irwin v Director-General of School Education* (Unreported, NSW Compensation Court, Matter No. 14068/97) where Judge Geraghty said:
- "The question of reasonableness is one of fact, weighing all the relevant factors. The test is less demanding than the test of necessity, but more demanding than a test of convenience. The test of 'reasonableness' is objective, and must weigh the rights of employees against the objective of the employer. Whether an action is reasonable should be attended, in all the circumstances, by a question of fairness."
141. The assessment of whether an employer has acted reasonably requires an objective assessment of the conduct involved (*Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138 at [50] (*Jeffery*), and not the subjective opinions of the employer or worker.
142. In *Ivanisevic v Laudet Pty Ltd* (unreported, 24 November 1998), Truss CCJ said:
- "In my view when considering the concept of reasonable action the Court is required to have regard not only to the end result but to the manner in which it was effected."
143. Reasonableness is judged having regard to fairness appropriate in the circumstances, including what went before or after a particular action (Burke J in *Melder v Ausbowl Pty Ltd* [1997] 15 NSWCCR 454). Armitage J in *Jackson v Work Directions Australia Pty Ltd* [1998] NSWCC 45 stated "only if the employer's action in all the circumstances was fair could it be said to be reasonable."
144. In *Sinclair Spigelman* CJ observed that one must look at the entire process to see if it was reasonable action within s 11A. That includes looking at the circumstances surrounding the action, both before and after the action.
145. In *Balranald Shire Council v Walsh* [2013] NSWCCPD 47 at [50] an employer's failure to follow its own procedures in relation matters of discipline led to a finding that the employer's actions were not proven to be reasonable.
146. The respondent's guidelines for the processes and formal steps to be observed before dismissal are not in evidence, which does not assist it in discharging the onus. However, it is very plain to see that there was no procedural fairness in the action taken by Ms O'Brien on 16 May 2017.
147. What I consider having occurred from the evidence is that there was a complaint by Mr York to Ms O'Brien on 16 May 2017 about a question asked by Mr Sadler in an informal meeting with Ms Gordon that morning. As the applicant submits, it took a matter of minutes for Ms O'Brien to summon Mr Sadler from his training session and take him to her office where she gave him a copy of the complaint from Mr York and asked for an explanation. Ms O'Brien says she offered Mr Sadler a support person after he was in her office. Mr Sadler denies this. Mr Sadler says he was intimidated and when unable to explain what happened, he "shut down". Ms O'Brien then announced that his contract was being terminated.

148. There was no proper investigation possible in the short and turbulent time between the complaint being received by Ms O'Brien and the termination, and none occurred in my view. It seemed Mr Sadler that Ms O'Brien had made up her mind.
149. There was no agenda notified to Mr Sadler before the termination, and he was necessarily taken by surprise. I prefer Mr Sadler's account that he was not offered a support person. Even if he had been offered a support person after the meeting commenced this would not have fixed the extreme haste of the whole process. There was no "procedure" at all in what was essentially a summary dismissal. This is well beyond a blemish in an overall reasonable process (*Sinclair*).
150. As discussed above, on the preferred view of the evidence, there was no urgent need for Ms O'Brien to act without proper investigation and without a proper opportunity for Mr Sadler to respond. The urgent action in what Mr Sadler found to be a confrontational setting with a complaint thrust at him without context was not justified. The subjective view of the employer is not the test.⁴
151. Mr Sadler had asked a question in a meeting which the complainant thought was "Grandstanding" and "condescending". There is no direct evidence that Ms Gordon was upset by Mr Sadler's tone, by discovering she had been overheard in the conversation with Mr York, or any other reason. There is no evidence, apart from Ms O'Brien herself, of "many" staff being upset, let alone evidence of his colleagues being unable to work with Mr Sadler as asserted by Ms O'Brien. If there were, it could be expected that statements to this effect would have been relied upon. This did not on any objective view create a situation so urgent that procedural fairness considerations could reasonably be pushed aside. In these circumstances the respondent is unable to discharge the onus regarding reasonable action.
152. For these reasons I find that the respondent's defence under s 11A(1) of the 1987 Act fails.

SUMMARY

153. Mr Sadler suffered psychological/ psychiatric injury in the course of his employment with the respondent; the employment was the main contributing factor to the injury (s 4(b)(i) 1987 Act).
154. The respondent's defence under s 11A (1) of the 1987 Act is not made out.
155. Mr Sadler's claim for s 66 of the 1987 Act lump sum compensation for psychological/ psychiatric injury is to be remitted to the Registrar for referral to an Approved Medical Specialist for assessment of WPI.

⁴ *Jeffery*