

WORKERS COMPENSATION COMMISSION



CERTIFICATE OF DETERMINATION

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

MATTER NO: 014313/12
APPLICANT: CINDY REEDY
RESPONDENT: IBM AUSTRALIA LTD
DATE OF DETERMINATION: 29 AUGUST 2014
CITATION: [2014] NSWCC 303

The Commission determines:

1. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for whole person impairment.
2. The respondent is to pay the applicants costs as agreed or assessed. Such costs are certified as complex for both parties. It is determined that a 30 per cent uplift is appropriate in the circumstances.

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

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 ELIZABETH BEILBY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

Darren Moore
Senior Dispute Services Officer
By Delegation of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Reedy (the applicant) commenced employment with the respondent in 2000. She had predominantly worked in the sales area.
2. The applicant gave birth to her first child in 2002 and following that period has worked from home for lengthy periods (certainly following the birth of her subsequent children).
3. The dispute before the Commission relates primarily to the withdrawal of the employers "permission" to work from home and a request that she attend the office on at least four days a week.
4. I will now summarise the evidence before me.

APPLICANT'S EVIDENCE

5. The applicant had her first child in 2002. At that stage, she was employed by the respondent as a sales accounts manager. This involved liaising with clients on the telephone and selling IBM products and services to them. She worked on a full-time basis prior to the birth of her daughter in 2002. At that stage, the applicant's manager was Pia Wright. An agreement was reached for a flexible working arrangement so that she would be in the office three days a week and the other two days she would work from home.
6. In 2004, the applicant's second child was born. The applicant immediately took three to four months maternity leave. The applicant's manager at that stage was Richard Scott and after the end of her maternity leave, she returned to work on a full-time basis, however, was working three days from home and two days in the office.
7. The applicant continued in her duties and appears to have been wholly successful in her performance. Indeed, in 2005 and again in 2007, the applicant received two ANZ awards. These are awards which are received over all the sales people within Australia and New Zealand in the general business of the company. The applicant also won the "Telecoverage Representative of the Year" and the "IBM.com Rep of the Year" awards.
8. At the beginning of 2007, the applicant gave birth to twins. She took approximately five months maternity leave. She had intended to take a longer period of time, however, her manager at the time, Simon Pollard, requested that she return earlier in any capacity that could be agreed.
9. The applicant agreed she would return to work on a part-time basis working two days from home. Her duties would involve working over the telephone and, to work in sales and coaching and mentoring the sales team.
10. In 2009, the applicant's manager changed again and her new manager was Kate Tulp. Whilst being managed by Ms Tulp, it was agreed that the applicant would come into the office one day a week between 8.00 am until 2.45 pm, when she would undertake the coaching/mentoring role with new recruits.
11. In May 2010, the applicant was asked by her manager and the executive to come back into her old role on a full-time basis. It was agreed that the applicant would return to work on a compressed week, working a full-time week into four days. She says she was unable to come

into the office on any full-time basis. The compressed four day week would be performed with one to two days in the office from 8.00 am to 2.45 pm and the other days would be from home. The applicant agreed to this arrangement. She says that it would give her flexibility for extra appointments with her children, such as attending doctors and schools and it was also cost effective as there was a considerable expense to put all her children into child care for five days a week.

12. The applicant says she had no difficulty in performing her duties at that time, however, she found that the role working as a coach/mentor was difficult in that she felt she was being used to “get ammunition” on staff that were not performing. Part of her role was to sit in and listen on telephone conversations of staff in the team, assess their performance, then give feedback, which was then used to performance manage those staff.
13. At that time the applicant was offered two territories to choose from. It was by mutual agreement that after initially accepting the computer science territory that the aged care territory would be the territory that the applicant would work in. She managed both those territories between May and June 2010 when another worker was away. The applicant said she did not have any problems in working this territory or, indeed, in juggling both territories because this was just “part of the expectation” with IBM, that is, “if you’re loaded up with lots of work, you just have to live with it or move”.
14. In September 2010, the applicant’s manager changed once more, Stephen Galloway, became the manager of the applicant’s team of 10 staff.
15. The applicant says that in November 2010, Mr Galloway made a comment to her in a meeting that he could “get two graduates for the salary she was receiving”. The applicant felt that this was condescending. The applicant also says that Mr Galloway made a number of comments in relation to her being able to work with four young children full-time. The applicant found the comments offensive. Mr Galloway denies such comments.
16. Mr Galloway had expressed to the applicant that he would like her to be in the office more often. Which was different to the previous agreement which was the applicant would work a four day compressed week which would enable her to juggle both her family life and her work life.
17. By December 2010, the applicant says she had met and overachieved the target set for her territory.
18. The applicant says that she did not feel comfortable with Stephen Galloway’s communication with her. She perceived that he would not look her in the eyes, would always be focused on the book or papers in front of him and very much just focused on “the numbers”. She felt that unless you were “one of the boys” he was biased against her.
19. By December 2010, Mr Galloway made it clear to the applicant that he wanted her to work more days and more hours in the office. The applicant thought that the idea could work and said she would look over it into the holiday period. The applicant says that she found it very difficult to find available child care spots at such short notice over the Christmas period. At that stage, the applicant’s son was in a different child care centre to her twins and she could not find an additional spots in both of those centres and the financial costs with putting them into extra hours was also too great for the family.

20. At that stage, the applicant felt that she had no choice in the matter and if she did not accept his proposal to come in and work from the office, then this would jeopardise her employment.
21. The applicant says she was concerned with the pressure she perceived Mr Galloway was putting on her for two reasons. Firstly she was aware that IBM were putting pressure on other employers to move them out of work and secondly, she couldn't understand why, despite her good performance over the many years, that she would now be subjected to this amount of pressure to change her working conditions.

I will now outline relevant email correspondence between the parties relating to the period December 2010 to February 2011, before returning to the applicant's evidence.

22. The applicant sent an email to Mr Galloway on 2 December 2010. In that email she proposed that she take long service leave or annual leave for the time the children resume school to help them transition into their new school. In relation to the working week generally she proposed that she was happy working Monday to Thursday, but was open to discussion for three days and two half days (say two days in the office 8.30 am to 2.30 pm, then work from home doing admin).
23. Some 10 days later on 12 December 2012 the applicant received an email from Mr Galloway in reply. Essentially he communicated that he was happy for the applicant to work from home on Fridays though expected her to be in the office for the other four days a week.
24. He said that Enablement and Training sessions would be held on Mondays for all sellers. Tuesday, Wednesday and Thursdays would be core selling days. Fridays were to be SSL days and general administration days and she could work from home on that day. He explained that as there were relatively new and junior team with several new members joining, he really needed the senior sellers to act as role models and mentors to the rest of the team.
25. The applicant replied by email that same day. She wrote that a previous idea of Monday, Wednesday, Thursday 8.30 am to 2.30 pm in the office, then work from home after pick-up and work from home Tuesday morning and Friday morning would work.
26. The applicant said that she was looking into child care options to be able to meet this proposal though she was waiting to hear back from one centre.
27. The applicant says that she wanted to try and clarify her situation with Mr Galloway but by the end of 2010, she was leaving him telephone messages and sending him emails but he wasn't responding.
28. An email was sent by Mr Galloway to the applicant on 11 January 2011. Mr Galloway said that there was an expectation that the applicant would be in the office Mondays to Thursdays and could work from home on Fridays. He said he would allow the applicant to leave after 3 pm each day however there were still expectation of at least 2.5 hours of talk time and a contact usage. He said "if it is not going to be possible we need to decide that now". He also said he'd rather discuss this with the applicant face-to-face to avoid any confusion
29. In reply to the email that same day the applicant said that she was feeling confused after a meeting at the end of last year. Miss Reedy outlines discussions at the previous meeting and on what terms you committed to return to IBM which were to attend the office on Mondays

and Wednesdays from 8.30 am to 2:30 pm with her working at home after pickup and working Tuesday and Thursdays from home. She commented that finding childcare on Tuesdays and Thursdays at that stage of the year would be a challenge.

30. Miss Reedy explained that a 3.00 pm finish would cause difficulty because pickup for school was at 3.00 pm and that if she left at 3.00 pm from work could compromise the safety of the children as it would put extra stress on her drive in a school zone to pick them up. She explained that due to the late changing nature of the requests she would find it difficult to commit.
31. On 13 January Mr Galloway wrote an email to the applicant saying he was sorry for the confusion. He said he'd like to arrange a time next week to sit down and walk through the requirements of the role this year. He said he would much rather do this face-to-face to avoid any confusion.
32. On 14 January 2011, the applicant sent an email to Mr Galloway asking him to clarify the situation at work and again outlining to him her personal circumstances. She commented that she was concerned that the management were construing grounds for dismissal against her. Additionally she felt that management was trying to change the terms so that she would not be able to continue in her role as it would put the kids at risk and push her into taking another role (if she could find one).
33. The applicant received a calendar invite to attend a meeting on 19 January 2011 with Stephen Galloway and Nadya Corne, who was in Human Resources.
34. The applicant says she attempted to contact Mr Galloway to ask him about the meeting but once again, he was uncontactable. The applicant was able to speak to Ms Corne who told her that the purpose of the meeting was to discuss what her role would be for 2011.
35. At the meeting on 19 January 2011, the applicant said that she felt she was being "railroaded" by Mr Galloway and Ms Corne. The applicant says she was basically told she had no choice but to come into the office four days a week or to find another role. She said it was clear they were not questioning her performance but they could not properly measure her performance as she was not in the office.
36. The applicant says that she can't understand why there was a problem when she was meeting her performance targets. She said she had arranged her life so that she could properly balance work, family and kids by working under a flexible arrangement which she agreed to with her employer. She says that because they could not measure her performance through other means.

Email correspondence continued after the 19 January 2011 meeting.

37. On 22 January 2011, the applicant received an email from Human Resources saying that she could continue in her role until another role was found within IBM.
38. On 25 January the applicant received an email from Ms Corne asking her to respond to the proposed arrangements by 26 January "so that we can work to the next steps".
39. On 27 January the applicant sent an email to Ms Corne outlining the costs of child care. She also indicated that she could not commit to a definite timeframe as child care had not been yet secured.

40. On 31 January the applicant received an email from Ms Corne asking her to confirm what work arrangements she was able to commit to and if she would consider various part-time options and if so what days and hours.
41. The applicant was on leave from 31 January 2011 to 11 February 2011 while she was settling her children into a new school.
42. On 14 February the applicant wrote to Ms Corne saying that she'd been trying to contact her manager from 30 January to 11 February to discuss the matter further and that she'd had no phone call back which had caused considerable further strain.
43. On 14 February 2011, the applicant returned to work, she again tried to contact Stephen Galloway but received no response.
44. The applicant says she found herself constantly ruminating about work and felt as if her job was being threatened through no fault of her own. She could not stop thinking about the way in which work was expecting her to change all her arrangements with utter disregard for her previous good performance.
45. On 18 February 2011 the applicant received an email from Mr Galloway asking her what her movements were over the next few weeks. At that stage the applicant had sustained a back injury which is not related to this present claim.
46. On 22 February the applicant again wrote to Mr Galloway and Ms Corne by email. She updated her current position in relation to leave for her back injury. She indicated that she would have preferred a telephone call whilst on sick leave rather than email regarding how she was feeling.
47. On 18 March 2011, Stephen Galloway sent the applicant an email saying that as she was not in a position to meet the full-time requirements of the sales role that he proposed for the next three months she come off the sales role and work on projects instead. He said the role was part-time, four days per week, which would change into a full-time role in the office as of 1 July 2011.
48. The applicant lodged a workers' compensation claim on or about 28 September 2011.

Kate Tulp

49. Kate Tulp, has provided a statement dated 4 January 2013. Ms Tulp in 2009 was the mid-market sales manager for the south and she managed a sales team of 12 staff. She says she, at that stage, was having communication issues with the applicant as she was unable to contact her whilst she was working from home. Ms Tulp says that the applicant's phone was often off or would cut out during conversations and that she had received feedback and complaints from the staff and the sales team that they were also unable to contact Cindy or that she would simply not show up for allocated phone meeting times. In addition, she says the applicant also failed to attend the office to attend meetings with the staff when requested.
50. After discussing these communications issues with the applicant, it was agreed that the applicant would work from the office one day a week so she would listen to sales calls with the sales team and provide effective coaching to them. This meant that she was to work from 8.00 am till 2.45 pm one day in the office.

51. Ms Tulp says on many occasions the applicant would call in sick or be unable to attend the office due to last minute child care challenges. Ms Tulp did agree that the applicant could work a compressed week when she returned to a full-time sales role, working her full-time hours within four days if she needed to. This was an agreement that was approved by human resources.
52. Ms Tulp says it was very hard to assess whether the applicant was meeting her key KPIs as she was rarely working in the office and as such they could not measure her performance.
53. Ms Tulp disputes the applicant was being used effectively to spy on staff in her coaching/mentoring role. Indeed, she says the applicant never advised her she was uncomfortable in this role. Further, Ms Tulp says that the applicant never complained about her work load.

Mr Galloway

54. Mr Galloway has provided evidence that when he took over from Ms Tulp as the manager, he understood that the applicant's working arrangement was that she worked a compressed four day working week, working predominantly from home for three days a week but with a requirement that she attend the office on certain occasions and at least one day a week.
55. He makes a general comment that the applicant didn't seem to be working her full-time hours across four days, she was often non-contactable when he tried to call her or sometimes when he did speak to her, she was picking up or dropping off the kids or her children could be heard in the background making noise.
56. Mr Galloway said he made it clear to the applicant that she was a valued sales rep and he wanted her in the team which was why he was working with her to find a suitable arrangement that accommodated her need for work flexibility.
57. Mr Galloway denied he made a comment to the applicant that "he could get two graduates for the salary she was receiving". He agrees that he did have conversations with the applicant regarding her work life balance and how she was handling the balance between work and looking after her children. He denies that he made any condescending or threatening remarks about her ability to balance both work and personal life.
58. Mr Galloway agrees that he did have conversations with the applicant about spending more time in the office. He says there were several reasons why he wanted this to occur. He said there was a genuine concern about her safety and whether she was able to properly balance her personal life and her work and the applicant herself had expressed some concern over this, that it was clear that the applicant was struggling to manage her work and looking after her children. In addition, the sales rep team were all based in the office, it is an office role, not intended to be a work from home role. Further, the team needed to be able to communicate and meet with each other and the applicant was unable to effectively do this as she was not in the office. Further, they were unable to properly measure the applicant's performance as some of their metrics were based on data retrieved from the office.
59. Mr Galloway explained that there was going to be impending structural change taking place in the office from the start of 2011. Mr Galloway said he needed to have discussions with the applicant and every other employee about their plans for the new year in terms of what territory they might like to cover and what territory was best suited to the applicant for her flexible work arrangement.

60. By December 2010, Mr Galloway says he was still trying to work with the applicant regarding working more days in the office. The applicant advised that it was dependent on whether she could arrange child care for her children and that she would look into this over the holiday period and get back to the office. Mr Galloway says that he had no real issues with her performance except that it was hard to measure her performance as she was not in the office.
61. Mr Galloway denies that he failed to return the applicant's phone calls but does say that he was playing telephone tag with her and he was becoming concerned about the lack of communication and Ms Reedy misconstruing conversations. Mr Galloway says that there was never any suggestion or intention to get the applicant into the office five days a week. He said that they did propose that she work in the office four days per week based on her communication that she only wanted to work a four day week but with flexible hours and leaving some days early. He says that these were only suggestions and they wanted her feedback on this and what she could and could not do. He says there was no ultimatum that she return to work full-time in the office or that she would lose her role. He says that the proposal put forward to the applicant regarding the 'project work' was an attempt to find something that suited the applicant's needs, particularly given she indicated she could not find suitable child care. His intention was not to push the applicant out of the workforce.

Ms Corne

62. Ms Corne, human resources partner at the respondent, has provided a statement dated 1 November 2011. In that statement it becomes clear that she is of the opinion that the applicant's performance generally has been good. In relation to her relationship with Mr Galloway, she understands has been strained since November 2011 when Mr Galloway commenced talks with the applicant about coming into the office.
63. In terms of Mr Galloway's leadership style, Ms Corne comments that "He is a strong sales leader/manager and is well liked across the floor".

ISSUES FOR DETERMINATION

64. The parties agree that the following issues remain in dispute:
 - (a) Did the respondents conduct relate to the provision of an "employment benefit"?, and
 - (b) Has the respondent a valid defence pursuant to s 11A of the *Workers Compensation Act 1987* (the 1987 Act).

Matters Previously Unnotified

65. No new matters were raised.

PROCEDURE BEFORE THE COMMISSION

66. The parties attended an Arbitration on 23 May 2014. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary Evidence

67. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) Application to Resolve a Dispute and attached documents;
 - (b) Late documents received from the applicant dated 26 November 2013, 8 May 2014;
 - (c) Reply to an Application to Resolve a Dispute;
 - (d) Late documents received from the respondent – report from Associate Professor Robertson dated 13 January 2014, and
 - (e) Submissions following the arbitration received from both parties.

Oral Evidence

68. No application was made to adduce oral evidence or cross-examine any witness.

FINDINGS AND REASONS

69. Section 11A(1) of the 1987 Act provides there is no compensation for psychological injury caused by reasonable actions of employer. The provision is as follows:

“11A No compensation for psychological injury caused by reasonable actions of employer

(1) 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.

70. The s11A defence is only invoked if it falls within the specific categories within subsection (1), and is not available if it falls outside the list: See *Smith v Roads and Traffic Authority of NSW* [2008] NSWCCPD 130; *Breckinridge v Atlas Copco Australia Pty Ltd* [2011] NSWCCPD 151. In this case the relevant categories are “employment benefit” and “transfer”.
71. In deciding cases such as this one, a notion of fairness must be borne in mind. That is weighing the rights and entitlements of both parties.

Whole or Predominant cause

72. It is trite to say that when 11A is pleaded as defence, it is crucial to determine firstly the whole and predominant cause of the psychological injury. In addressing that issue, the following points should be observed:

- (1) The onus of proof in establishing a defence under section 11A is on the employer (*Sinclair*);
 - (2) The meaning of “predominantly caused” is “mainly or principally caused” (*Ponnan v George Weston Foods Limited* [2007] NSWWCPPD 92);
 - (3) The test of causation workers compensation matters is the common sense test (*Kooragang Cement Proprietary Limited v Bates* (1994) 35 NSWLR 452);
 - (4) A decision-maker must feel actual persuasion of the occurrence or existence of the fact in issue before it can be found (*Nom v DPP* [2012] VSCA 198 at (124)).
73. The parties did not put in issue that the psychological injury was wholly or predominantly caused by action taken by the respondent. This was consistent with the medical evidence in the dispute. Which I will now briefly outline.
74. Dr Kenneth Henson was the applicant’s treating psychiatrist. He initially saw the applicant after being referred to him by her general practitioner on 30 September 2011.
75. Dr Henson took a history that the applicant’s psychological state deteriorated with her interactions with Stephen Galloway when he told her that she had to return to work full-time in the office and that he involved the Human Resources department. The applicant felt worried, fearful and had difficulty thinking clearly and her memory was poor. Dr Henson diagnosed the applicant as suffering from a major depressive episode, anxiety disorder and adjustment disorder. He was of the opinion that the adjustment disorder had progressed to post-traumatic stress disorder. Dr Henson was of the opinion that the adverse experience of work was the cause of her illness and the difficulties at work were a substantial contributing factor.
76. The applicant was examined by Dr Leonard Lee, psychiatrist, at the request of her solicitors on 5 June 2012. Dr Lee diagnosed the applicant as suffering from a major depressive disorder with comorbid anxiety that was not responding to treatment. Dr Lee said that if it was accepted the applicant was meeting her performance targets as a longstanding agreement that she was allowed to work from home, it would appear to him that the employer’s behaviour was not reasonable. To this extent, I understand that Dr Lee is saying that the applicant’s injury arises from the change in the longstanding agreement that she be allowed to work from home.
77. The applicant was examined by Dr Teoh, psychiatrist in August 2011. Dr Teoh took a history from the applicant that she had experienced a difficult relationship with Mr Galloway and felt that he was “always changing the benchmark”. She left messages for Mr Galloway but there was no reply and she felt that her position was threatened. The applicant said that she started to experience psychological distress when dealing with Mr Galloway, regarding her position at work. She felt discriminated against because she had children and felt threatened that her position was changed.
78. Dr Teoh opined that the applicant’s psychological stress was as a result of several factors, including personality style that made it difficult for to deal with anger and conflict. In addition, she was unwilling to change the structure of employment to working full-time in the office. She also had a personality conflict with her manager, Mr Galloway, and a sense of entitlement to her employment conditions.
79. Associate Professor Michael Robertson examined the applicant on 13 January 2014. He opined that the applicant was suffering from a persisting depressive disorder with cross-cutting anxiety symptoms. In a subsequent report dated 13 January 2014 he expressed

an opinion that he could not identify any factors external to the claimed work injury which were impacting on her capacity to work.

80. A report obtained from Ms Laurena Moore, consultant psychologist, from the Centre for Corporate Health concludes that when the applicant was informed in December 2010 of the changing business requirements for her role in 2011 and new work arrangements being suggested along with her being asked to clarify what she should commit to were to be considered as major causative factors to the onset of Ms Reedy's current distress in February 2011.
81. Further, it is Ms Moore's opinion that a letter dated 22 September 2011 directing Ms Reedy to return to full-time work five days per week in the office was a precipitant to her lodging her worker's compensation claim on 28 September 2011 but was not considered a major causative factor, as she reported her symptoms increasing in severity and frequency in February 2011, resulting in her going off work at this time.
82. It is therefore clear that the medical evidence supports a finding that the whole or predominant cause of the applicant's psychological injury was the proposed change in her working arrangement.

Employment benefit or transfer?

83. When the arbitration was listed for hearing, no issue was raised between the parties that the ability to work from home constituted an employment benefit falling within the provisions of s 11A(1).
84. Following the listing of the arbitration, counsel for the applicant sought leave to raise the issue as to whether working from home was indeed an employment benefit. Submissions were filed on behalf of both parties. It was an issue that was relevant to the dispute before me. I granted the applicant leave on the condition the respondent would also be granted the opportunity to file and serve submissions which they did.
85. The applicant has provided submissions that the respondent's actions were not in the context of employment benefits as working from home was as much of a benefit to IBM as it was for the applicant.
86. In support of the applicants submissions I was referred to the following matters which could mean that the working from home was a benefit to IBM:
 - (a) lower costs by saving on office space, electricity at computers, etc.
 - (b) flexibility promoted productivity as the applicant could have worked around otherwise rigid office hours, meal breaks and overtime.
 - (c) as Ms Tulp and Mr Galloway complained at not being able to micromanage the applicant from home, the clear inference is that IBM did not go to the expense and inconvenience of setting up the necessary IT software and hardware at the applicant's home office.
 - (d) staff loyalty and avoiding expensive recruitment and training costs of attracting new staff.
 - (e) retaining years of corporate knowledge.
 - (f) being an employer of choice by accommodating the needs of working parents.
 - (g) working from home did not increase the applicant's remuneration package or income.

87. Whilst it is quite true that there could be benefits to the employer so far as the applicant working from home, I do not think that this is the true test and I agree with the respondent's submissions which were to the effect that the concept of benefit ought to be considered in the everyday sense. I agree that the applicant derives some benefit from both working from home and working flexible hours, particularly in terms of her children.
88. A further issue arose as to whether the respondent's action fell within the context of a transfer as (a) the move to four days in the office and one day at home involved the same role in the same office, the same team under the same manager; and (b) the proposed temporary three month part-time projects role as a demotional suspension probably at the same office within the same team.
89. Once again, I agree with the respondent's submissions that the respondent's actions do not properly fall within the concept of transfer. The working arrangements discussion that was ongoing between the applicant and the respondent does not indicate that the applicant would be on a lesser salary package or a position of less importance. Indeed, the negotiations appeared to be in relation to the same position but with the location differing substantially. Whilst it is true that at the end of the discussions, particularly in March 2011 the role proposed was substantially different. I believe that the damage to the applicant had already been done and is not relevant in my decision at this point.
90. I therefore find it easy to find that the applicant's injury and the respondent's conduct falls within the provisions of s 11A(1), that is, the provision of employment benefits.

Reasonable action

91. The next question that must be asked is to whether that action was reasonable. To this extent, the decision-maker must focus on whether the action that caused the psychological injury was reasonable. The Commission determines reasonableness objectively by reference to the circumstances known to the employer at the time the relevant action is taken, taking into account relevant information the employer could have obtained had it made reasonable inquiries or exercised care.
92. The NSW Court of Appeal recently looked at the concept of reasonableness in a s 11A context in the decision of *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255.
93. The following guidance can be taken from that decision:
- (a) the employer bears the burden of proving that the action was reasonable;
 - (b) the test of reasonableness and objective, it is not enough that the employer believed in good faith that the action was reasonable;
 - (c) It is the reasonability of the action that must be assessed, that is in this case the requirement the applicant in the office and not work in the manner that she requested and had worked, and
 - (d) the assessment should take into account the rights of the employee, but the extent to which his rights are given weight in a particular case depends on the circumstances.

94. The test is not whether the employer's relevant actions were unreasonable. Only that compensation will not be payable if the action was a "reasonable" (*Jeffrey v Lintipal Pty Ltd* [2008] NSWCA 138).
95. Applying the law to this dispute it is clear the respondent company wanted the applicant to cease working from home and perform her duties from the office. I have no doubt that the respondent holds the view that their actions were reasonable. This however is not the test that I need to apply, it is whether the respondent has proven to be that they were reasonable.
96. In examining whether the respondents conduct was reasonable, I will now discuss the reasons that the respondent has proffered as to why the direction to work in the office was made. I was helpfully referred to four matters that the respondent points to as to the reasons they wanted the applicant back in the office.

Performance management

97. The respondent say that they say they say that they cannot measure the applicant's performance effectively at home because there is now a measurement which is based on data retrieval from their office phone and not the applicant's phone that she uses when she works from home. It was further submitted that this would then have been of some concern to an employer of this size to make sure that the applicant was meeting her key performance indicators.
98. I am left with little evidence from the respondent on what performance would be measured. The respondent has repetitively said that the applicant was a valued employee. I am unsure and have no assistance to what the telephone system in the office measured, and as to why this was important and could not be achieved remotely.
99. I know that the applicant was in a sales position and it is obvious that sales data would have been available to the applicants manager.
100. Further I am not told what the key performance indicators were. I am not told what was measured and would not be measured. It maybe that the respondent does have evidence in this regard, however I do not have the benefit of that material.
101. It is therefore difficult for me to find that asking the applicant to work from the office on this basis was reasonable.

Contactability

102. The second reason that the respondent provides is that they had difficulty in contacting the applicant. This is a general complaint that has been levelled at the applicant through the evidence of Mr Galloway and Ms Tulp.
103. Ms Tulp said that the applicant's phone was often off or would cut out during conversations and that she had received feedback and complaints from the staff and the sales team that they were also unable to contact the applicant.
104. Mr Galloway said that the applicant was often non-contactable when he tried to call her or sometimes when he did speak to her, she was picking up or dropping off the kids or her children could be heard in the background making noise.

105. The evidence in relation to this accusation has limited weight. No particulars have been given as to when and how often the phone was not answered. If the respondent wanted me to make a finding that the applicant was not answering her phone regularly then the appropriate evidence ought to have been provided so that I could evaluate it in the circumstances.
106. Certainly little weight is to be given to hearsay comments contained in the evidence as to complaints by third parties who were unable to contact the applicant.
107. True it is that the applicant has not given any substantive evidence in reply to the general allegations of non contactability whilst at home. Even then, I am not satisfied that the respondent has provided me with enough evidence on this point for me to make a finding of fact on this issue.
108. The problem essentially is that if the respondent wanted me to make findings of fact to support these vague allegations then the evidence provided needs to be of a level that I would have felt a actual persuasion of the occurrence or existence of a fact in issue (Redlich JA, Harper JA and Curtain AJA in *NOM v DPP* [2012] VSCA 198 at [124]).
109. In any event, if the applicant was somewhat deleterious in relation to answering her phone, then this should have been the subject of performance appraisal matter and/or written warning. There are other ways the respondent could have approached this issue rather than requiring the applicant to attend the office.

Occupational Health and Safety

110. The third reason was that they perceived an occupational health as safety issue and were concerned for the applicant's safety. I understand that this submission is to the effect that the applicant's children could sometimes be heard in the background and this constituted a risk.
111. No evidence has been proffered by any of the respondent's witnesses as to how often this occurred or to identify the risk. The respondent has failed to persuade me that this was a valid reason to ask the applicant to return to the office.

Ongoing Training

112. The fourth reason was that there was training organised Monday's and the employer has an obligation to train their staff. I am not sure where this submission really goes. The applicant had agreed that she would return to the office on Mondays for a period of time. In any event no evidence is before me in relation to the importance or subject of such training. The respondent has failed to persuade me that this is a valid reason to ask the applicant to return to the office

Other matters

113. Further it seems to me that the handling of the negotiations seems rather haphazard. Clearly there has been miscommunication between the parties. Clearly both Ms Reedy and Mr Galloway had different understanding as to the outcome in their 2010 meetings. Nevertheless, once some understanding is reached that is at the end of 2010 as to what the respondent was asking the applicant to do that is to work from the office for days per week, there appears to be a small timeframe to allow the applicant to attempt to find childcare (ie December 2010 to February 2011). Given the well-known shortage of childcare positions, I am not satisfied that this timeframe was reasonable- given the length of time that the applicant had worked from home for the respondent (some eight years).

114. To be clear I am well aware that discussions were embarked upon before the end of 2010 as to the applicant working in the office, however it was not until the end of 2010 that their expectations were clearly understood by the applicant.
115. It seems to me completely understandable that the applicant would have felt like she was being 'pushed out' by the respondent. Whilst the respondent says that there was no ultimatum to return to the office, I think that there was one in reality. The ultimatum was either return to work as we ask you take a short four month contract for a job in a different area until the end of the financial year, and then return full time.
116. I have not focused on the other areas of complaint made by the applicant such as overwork. This is because the evidence before me does not support any finding the applicant was "overworked" There is no significant history of complaint to any medical practitioner or to her employer.

General observation

117. I am not willing to find that the respondent has been totally unreasonable in the circumstances of this case. The respondent carries with it the onus of proof to show that its conduct was "reasonable". If the onus of proof in this case was reversed, that is the applicant had to show the respondent's conduct was unreasonable, then I may have made different orders.
118. This has not been a decision that was easy and obvious. At the end of the day, the respondent has been unsuccessful the onus of proof has not been discharged by the respondent.

ORDERS

119. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for whole person impairment.
120. The respondent is to pay the applicants costs as agreed or assessed. Such costs are certified as complex for both parties. It is determined that a 30 per cent uplift is appropriate in the circumstances.