WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

MATTER NO:	**6143-2015**
APPLICANT:	**Margaret Baker**
RESPONDENT:	**TAFE NSW – Western Sydney Institute**
DATE OF DETERMINATION:	**15 March 2016**
CITATION:	**[2016] NSWWCC 63**

The Commission determines:

1. The Applicant suffered injury within the meaning of section 4(b)(i) of the *Workers Compensation Act* 1987, such injury being deemed by operation of section 15 to have been suffered on 21 January 2013,

2. The defence under section 11A(1) of the *Workers Compensation Act* 1987 has not been made out.

3. The Respondent is to make weekly payments to the Applicant as follows:

    (a) $1,043.67 per week pursuant to section 36(1) from 22 January 2013 to 23 April 2013;

    (b) $378.88 per week pursuant to section 37(3) from 24 April 2013 to 23 April 2014; and

    (c) $253.88 per week pursuant to section 37(3) from 24 April 2014 to 21 July 2015.

4. The Respondent is to pay the Applicant's section 60 expenses.

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 TIM WARDELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

Abu Sufian
Senior Dispute Services Officer
By Delegation of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Margaret Baker (the applicant) is now 63 years old. She commenced employment as a teacher with TAFE NSW (the respondent) in 1984, became a full time teacher in 1994 and was appointed the Head Teacher of the Environmental Studies Unit (ESU) in 1999 before having to relinquish that position due to having contracted Ross River fever in about 2001. She was replaced as Head Teacher by Mr Mann and thereafter returned to the role of full time teacher under his supervision, although she in fact worked only part time from about 2008 due to the complications of the Ross River fever. The applicant taught in the field of "natural resource management".

2. In circumstances which shall be discussed in some detail below, the applicant suffered a psychological decompensation at and immediately after leaving work on 21 January 2013 and she has not returned to any form of employment since. A claim for compensation in respect of a psychological injury was made.

3. On 11 April 2013 Allianz Australia Insurance Ltd on behalf of the Treasury Managed Fund (the insurer) issued a section 74 Notice declining liability on the grounds that the applicant had not suffered a "recognisable psychiatric/psychological injury", that such injury was not one which fell within section 4 of the *Workers Compensation Act* 1987 (the 1987 Act), that her employment was not a substantial contributing factor to any such injury within the meaning of section 9A of the 1987, that compensation was not payable in respect of any such injury by operation of section 11A(1) of the 1987 Act on the basis it was wholly or predominantly caused by reasonable action of the part of the employer with respect to "proposed retrenchment or transfer or the provision of employment benefits", that she was "not prevented from working full time pre-injury duties" by reason of any compensable injury and that she required no reasonably necessary medical treatment which resulted from such injury.

4. The insurer's denial of liability was confirmed in a subsequent Notice following review dated 19 June 2013.

5. The Application to Resolve a Dispute was lodged in the Commission on 27 October 2015 and in it the applicant alleges having suffered psychological injury between 2001 and 21 January 2013 as a result of "the nature and conditions of employment, including but not limited to an excessive workload and bullying and harassment by her head teacher". Claims are made for weekly benefits from 22 January 2013 to date and continuing and incurred section 60 expenses.

6. The Reply was lodged on 17 November 2015 but did not seek to raise any further issues.

7. The conciliation and arbitration hearing took place on 3 February 2016, although the conciliation phase was frustrated by the complete and unsatisfactory failure by the insurer and/or the respondent to engage in any serious attempt to resolve the matter.

8. Ms Wood of counsel appeared for the applicant and Mr Barnes of counsel appeared for the respondent at the arbitration hearing.

9. In relation to the claim for weekly payments, the applicant's counsel acknowledged that the claim for weekly payments would expire on 21 July 2015, that being the expiry of the second entitlement period and the Commission having no jurisdiction to award weekly

compensation during the third entitlement period: see *Lee v Bunnings Group Pty* Ltd [2013] NSWWCCPD 54 and *Sabanayagam v St George Bank* Ltd [2016] NSWWCCPD 3.

10. The applicant's Pre-Injury Average Weekly Earnings were agreed at $1,098.63.

ISSUES FOR DETERMINATION

11. In the absence of any medical or other evidence relied on by the insurer suggesting that the applicant does not suffer from a genuine recognisable psychological condition or that any factor extraneous to her employment had been causative of that condition, the respondent's counsel quite properly and formally declined to make any submission to the contrary, thereby effectively conceding that the applicant did suffer a psychological injury satisfying the requirements of section 4(b)(i) of the 1987 Act. In the absence of such concession, I would have had no hesitation in concluding that the applicant did contract a disease in the course of her employment and that her employment was the main contributing factor to the contraction of such disease, the lay and medical evidence being uncontradicted in this regard.

12. The parties agree that the following issues remain in dispute:

    (a) Whether the applicant is precluded from recovering compensation by operation of section 11A(1) of the 1987 Act on the basis that her psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to, here relevantly, retrenchment or the provision of employment benefits to workers;

    (b) As to the duration and extent of the worker's entitlement to weekly benefits, involving a consideration of her work capacity from time to time and, if applicable, her ability to earn in suitable employment as defined by section 32A of the 1987 Act, during the first and second entitlement periods.

Matters Previously Notified As Disputed

13. The matters previously notified as disputed are those set out in the section 74 Notice dated 11 April 2013.

Matters Previously Unnotified

14. No further matters are sought to be raised by the respondent.

PROCEDURE BEFORE THE COMMISSION

15. The parties attended a conciliation and arbitration hearing on 3 February 2013. 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

16. Objection was taken to the admission of various documents at the arbitration hearing. Those objections and my rulings on them are recorded in the transcript of the arbitration hearing. The surveillance report dated 14 December 2015 and the related DVD were not admitted into evidence.

17. 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) Reply and attached documents;
    (c) Application to Admit Late Documents lodged by the applicant on 25 January 2016 and attached documents, and
    (d) Application to Admit Late Documents lodged by the respondent on 27 January 2016 and attached documents (except for the excluded surveillance report and DVD).

Oral Evidence

18. There was no application by either party to take oral evidence from any person.

FINDINGS AND REASONS

The Evidence

19. In the absence of any issue as to "injury", it is unnecessary to consider the issues of whether the applicant contracted a disease in the course of her employment or whether her employment was the main contributing factor to that disease, being her psychological condition. Although nothing in particular turns on it, I prefer the evidence of Dr Dinnen that the relevant injury was an adjustment disorder with anxiety and depressed mood, which I note was in effect conceded by the respondent.

20. It will, however, be necessary to consider what aspects of or events in the applicant's employment were the whole or predominant cause of her injury for the purposes determining the section 11A issue. Broadly speaking, these fall into three categories, being the applicant's criticisms of Mr Mann's management style and attitude over a number of years, including her allegations of marginalisation and "passive bullying", the structural changes announced by the respondent in late 2012 which had the potential to impact upon the applicant's continued employment or, at least, the number of hours per week she would be able to work and the particular events of 21 January 2013, which concerned the applicant's position consequent upon the structural changes referred to but also included a heated exchange between her and Mr Mann regarding the loan of a printer to another department. There is, to varying degrees, potentially some degree of overlap and interplay between these matters so far as the causation of her injury is concerned.

21. It is in this context that the evidence, both lay and medical, will be reviewed and considered.

22. The applicant's evidence is set out in three lengthy and detailed statements dated 13 February 2013 (to the insurer's investigator), to which is attached an undated document headed "Background to Workplace Injury 2012-2013" adopted by the applicant on that date, 26 September 2013, to which is attached a letter (18 pages) to the insurer dated 25 May 2013, a document (4 pages) headed "Comments on 'Notice of Outcome of Optional Review Request" from Allianz . . ." and a document (30 pages) headed "Workplace Issues and Background to the Workers Compensation Claim of Margaret Baker" and finally, a statement dated 24 December 2015. I note that the statement dated 24 December 2015 was signed by the applicant at the arbitration hearing following objection by the respondent on the basis that it was unsigned and that no further objection was taken to that course.

23. I have carefully read all of the applicant's statements but do not propose to repeat their contents at length or in detail.

24. In her initial statement to the investigators, the applicant confirms that she was appointed a full time TAFE teacher in 1994, that she briefly held the position of Head Teacher until being obliged to resign in about 2000 due to having contracted Ross River fever, that Mr Mann replaced her as Head Teacher and that for a number of years she has worked varying reduced hours due to the effects of the Ross River fever. She says that, as at 2012, she was working 28 hours per week and taking the remaining seven hours a week as leave without pay, having exhausted her sick leave.

25. The applicant then refers to the attachment to her statement, which she describes as a "summary" of events "and the issues and uncertainties about my role and teaching position since September 2012 and my attempts to clarify these". The "issues and uncertainties" to which the applicant referred and to which I shall return relate to an announcement made by the respondent in about September 2012 that, due to a change in policy announced by the government, the structure and funding priorities of the respondent would change significantly, meaning that some courses would no longer be offered, that apparently including the Certificate II course taught by the applicant up to that time, and that there were to be some 800 redundancies across the whole of the respondents operations over four years. This left the applicant uncertain and concerned as to what teaching role or hours would be available to her in 2013 and led her to request voluntary redundancy, which request was refused on the basis that her department had not, at least as at that time, been identified as one in which positions were going to be redundant.

26. In her initial statement, the applicant goes on to state that she returned to work following vacation on 21 January 2013 "very concerned about my position and determined to find out that day what was going to happen". She acknowledged that there was "a problem with not knowing exactly before enrolments occur" (enrolments were to close four days later) but anticipated that even teaching a full Certificate III course, she would likely only get 50 hours of teaching per semester.

27. The applicant says she sought a meeting with Mr Mann on 21 January 2013 which took place at about 10.45 am in the corridor and the unoccupied canteen, which she considered inappropriate. She asked about whether a voluntary redundancy would be offered to her, she having requested this towards the end of 2012, but got a negative, or at least equivocal, response, which suggested to her that Mr Mann did not really know what was going on and had not discussed this issue with the relevant manager, Mr Samaha. She had the impression that Mr Mann was more concerned about the hours the applicant intended to work that year having regard to the restrictions necessitated by her Ross River fever, which she considered "really isn't the point when considering the viability of a full time position". I take this to mean that the applicant considered the question of how many hours she was capable of

working to be irrelevant in circumstances where she believed it probable that less teaching hours would be available due to the structural and funding changes. Indeed, she considered, and had considered since the changes were announced, that she didn't "have a viable position left". The applicant discussed alternative teaching roles with Mr Mann, but did not consider them to be practical. The applicant says that this meeting "was all conducted amicably, . . . the discussion was not heated (and) no signs of conflict were indicated" and further that it concluded with her saying she would seek advice from the union and Mr Mann saying he would discuss the issues, including voluntary redundancy, with "admin".

28. The applicant says that after returning from lunch that day she tried to carry on as usual, in spite of continuing uncertainty regarding what courses were to be offered that year, and then saw an email from Mr Mann sent after the meeting that morning setting out suggested teaching options for her, which she thought to be impractical and which would in any event provide her with only 190 hours of teaching that year. She resolved to discuss, directly or by email, her thoughts regarding these suggestions with Mr Mann later that day.

29. The applicant then says that someone from a different department then came in and took her department's printer, stating that Mr Mann had approved its loan. The applicant did not approve of the loan of the printer as she had a sore leg and did not wish to frequently have to walk to an alternate printer. She rang Mr Mann and objected, in her view in a "reasonable" manner, to the loan of the printer, whereupon she says that Mr Mann responded in a "hostile" manner and embarked upon a "tirade", at which point her "brain switched off completely". The telephone call ended with Mr Mann confirming that the loan of the printer was "not negotiable".

30. The applicant then says that about 15 minutes later she was walking along a corridor when Mr Mann "came charging at speed around the corner" and "started to shout" at her regarding the printer issue. The applicant says that due to Mr Mann's "shouting and verbal abuse, it was clear that I could not have had any reasonable discussion with him in the frame of mind he was in and by that stage (she) was fairly upset and was desperate not to cry". The applicant stated that she had "never been shouted at like that before in TAFE" and noted that "such harassment and hostility was not directed on that day to anyone else in the section". The applicant acknowledged that it seemed "ridiculous" for such an incident to occur in relation to a printer and said that she does not understand why she was "the brunt of (Mr Mann's) hostility that afternoon". The applicant left work that afternoon very distressed and angry, sought medical treatment and has not returned to work since.

31. In the document attached to her initial statement, the applicant confirms the likely impact of the announcements made by the respondent in relation to structural and funding changes upon her position, namely that the courses she had been teaching were no longer to be offered. She refers to meetings held by the respondent on 20 September 2012, 17 October 2012 and 22 October 2012 in which the changes were outlined in broad policy terms, although she complains that little discussion was directed towards the practical impact of these changes on staff and that promised consultations with staff never really took place. She confirms that it was during this period that she raised redundancy with Mr Mann and formed the view that he was not giving her request appropriate consideration or making appropriate enquiries, which caused her considerable frustration. Although promises were made to speak to her before the end of 2012 regarding redundancy and/or her teaching program for 2013, this did not occur and the applicant considered this to be typical of Mr Mann's tendency to prevaricate and avoid difficult issues. Just as the applicant was about to leave at the end of 2012 Mr Mann said he would send her an email, presumably about what was to happen the following year, to which she replied, perhaps out of frustration, that she would not read emails over the holidays. The applicant says that from September 2012 she became

increasingly despondent regarding her position and that, at the end of the teaching year, she "left the college . . . no wiser about my position in 2013" and feeling that she was watching her "professional career disappear before (her) eyes and faced leaving (her) passions and students behind".

32. In that document, the applicant also makes criticism of Mr Mann's management style, saying that he had poor communication, planning and organisational skills and was frequently unavailable. She says that as a consequence, she undertook much of the organisational work properly falling within the role of the head teacher, causing her to have an excessive workload. Perhaps more significantly, the applicant says that Mr Mann was biased against female staff and engaged in cronyism, in the sense that he favoured friends with a background in his own area of speciality. The applicant says further that from 2008 onwards, for reasons of which she is unaware, Mr Mann was cool towards her, that she was "singled out for . . . hostile responses" in meetings and that she felt "marginalised", in that she was often not advised of meetings and was left out of discussions relating to the operation of the Environmental Services Unit (ESU) generally, including discussions regarding her own area of speciality.

33. The various assertions made in these initial statements are repeated and expanded upon in the applicant's subsequent statements and the documents attached to them, in which she goes to considerable lengths to attack Mr Mann's management style, skills and ethics, together with the credibility of his evidence, and to assert that she had been "passively bullied" over a number of years by him, particularly by the "marginalisation" referred to above, although she also states that she "naively . . . did not realise (she) was being bullied". The applicant does say that she considered retiring in 2011 and asserts that Mr Mann had asked her to "cover up" the lack of hours available to her by taking leave without pay in 2012. The applicant further states that she felt "unsupported" and "consistently lied to" by Mr Mann in late 2012 after the structural and funding changes had been announced.

34. The applicant further states, referencing the evidence of her treating doctors, that her injury was caused by "a long term build up of anxiety . . caused by the management and communication practices" of Mr Mann and "five years of passive bullying by him", culminating in and being "triggered" by the "hostility and final verbal abuse" visited upon her on 21 January 2013. Indeed, notwithstanding that she acknowledges that following the announcement of the structural and funding changes and for the rest of 2012 she "considered that (her) time at TAFE had probably reached an end" and consequently felt "deflated", "distressed", "despondent", "weepy" and "aware that emotionally things were not okay for me as a result of the changes proposed", she asserts that her "severe reactive anxiety was not caused by not receiving a redundancy offer, or by inadequate consultation or communication by" the respondent and that she has "never expressed concern about how management . . have handled the difficult process of change". Rather, she goes on to say, such distress as she did experience in relation to the proposed changes could have been avoided by better communication on the part of Mr Mann, concluding that her "claim is about the inappropriate behaviour of, and means of communication by" Mr Mann, specifically on 21 January 2013.

35. The applicant further asserts that her symptoms were exacerbated, or at least perpetuated, by the investigation into her claim, the denial of liability, the attitude of the insurer generally, various attempts and mediation and unsuccessful attempts to return her to work in what she regarded as inappropriate circumstances.

36. In relation to the issue of incapacity, the applicant's evidence is somewhat diminished by her frequent references to the evidence of doctors and her assertions that any return to work is a matter for those doctors with little apparent input from herself. In her statement dated 25 May 2013 the applicant says that her symptoms were "severe at first" and that "many persist to this day", these including poor sleep, bad dreams, tiredness and exhaustion, panic attacks, an inability to sit still, headaches, gastrointestinal problems, moodiness, withdrawal, memory lapses, lack of motivation and difficulty with routine tasks such as shopping and meal preparation. This list is repeated verbatim in the applicant's statement dated 24 December 2015 but added to it is an assertion of an "eating disorder" which has caused weight gain. In relation to current symptoms, the applicant says:

> "I have high background anxiety most of the time; I'm prone to depressed moods (though not as often now) and sleep disturbance; I am hesitant about skills that were second nature; I avoid driving in medium to heavy traffic; I experience distraction, memory loss and problems with language. I am hyper-vigilant and sometimes I jump at shadows; I feel like I have become a fugitive in my own community".

37. The applicant's evidence is, in some respects, corroborated to a degree by statements from fellow teachers, namely Ms Smith dated 24 May 2014 and Ms Rattray dated 23 August 2015.

38. Ms Smith, who has been a casual teacher in the applicant's field employed by the respondent since 1997, states that after the applicant ceased to be the head teacher of the ESU in 2001 she continued to provide help and support to other teachers in relation to "administrative and educational issues" which "should have been dealt with by the head teacher". She notes that Mr Mann was frequently absent during teaching hours and then states:

> "In recent years I have found teaching at the Wentworth Falls campus to be increasingly difficult without the level of support to casual teachers that was provided by (the applicant) as head teacher. I believe that the very marked drop that has occurred in both student numbers and the number of courses that are now offered in the Environmental Studies unit is, in large part, due to the unit's loss of (the applicant) as head teacher".

39. Ms Rattray was a teacher in the ESU between 1998 and 2012 and thus observed both the applicant and Mr Mann carry out the duties of head teacher. While she considered the applicant to have been "strong, reliable and supportive", she considered that after taking up the role of head teacher Mr Mann "quickly proved to be unreliable, non-communicative, non-supportive and predominantly absent". At a staff meeting on 12 December 2001, which Ms Rattray arranged to address various concerns (the agenda is attached to her statement) and "the vacuum we seemed to be in due to (Mr Mann's) constant absence and lack of communication", she states that he acknowledged the validity of the concerns expressed but that thereafter and for the remainder of the time she was a teacher no change in attitude on Mr Mann's part occurred. Ms Rattray further states that she frequently observed Mr Mann to "ignore" the applicant, including by not telling her about formal and informal meetings, leading her to become "isolated in a boy's club atmosphere". Ms Rattray considered that the applicant had been exposed to a "subtle form of bullying" and concluded by stating that she:

> "witnessed the changes in (the applicant) between 1998 and 2012 from a strong and confident Head Teacher to an isolated person who experienced despondency, frustration and even self-doubt. Her physical health has also declined. I believe these changes were due to the non-supportive working environment she was in, especially down to (sic – due to?) the lack of support and worse from the Head Teacher".

40. The respondent relies upon a statement by Mr Mann dated 15 February 2013, in which he addresses the structural changes announced by the respondent in late 2012 and the events of 21 January 2013 but does not otherwise address the applicant's broader allegations regarding his management style generally or his attitude to and treatment of her in particular, notwithstanding that such allegation had been reported to the psychologist who undertook a Return to Work Assessment on 11 February 2013. Moreover, it was certainly open to the respondent and it's insurer to obtain further evidence from Mr Mann once it became more apparent that the applicant was relying on issues related more generally to the performance of his duties as a head teacher and the fact remains that the allegations made by the applicant in this regard are not challenged, refuted or contradicted.

41. Mr Mann does confirm the circumstances in which he took over from the applicant as head teacher in about 2001 and that she had worked reduced hours arranged by negotiation "supported by a medical certificate" for a number of years due to her health problems. Such negotiations would commence with the applicant advising of her availability in terms of hours and preferred arrangements for a coming year or semester. Mr Mann described the applicant as a "very competent and confident" teacher who is "self-critical if she is not performing at a high level which she sets for herself".

42. In relation to the proposed structural changes, Mr Mann confirms that in October 2012 the government announced significant changes in the "funding model" for TAFE at large, together with 800 redundancies over four years. Specific to the ESU, the changes would mean that Certificate II courses, being those taught by the applicant, would no longer be funded (presumably meaning offered), and that she would have to teach Certificate III courses, although the Unit "at this stage . . . has not been identified for voluntary redundancies". Mr Mann says that staff were briefed by management about the proposed changes and their "effect on everyone" in October and November 2012, although he conceded that such briefings "created a level of uncertainty" amongst the staff. Mr Mann says that he informed the applicant that Certificate II courses would no longer be funded in November 2012 and that thereafter on a number of occasions the applicant requested voluntary redundancy. Mr Mann says that he did discuss this with his superior, Mr Samaha, and then informed the applicant that her "situation falls outside the business rules for voluntary redundancy".

43. Mr Mann further states that in late 2012, indeed on the second last day of the year, he attempted to discuss the applicant's "program for 2013" with her but that she informed him that she would not be in on the following day and would not appreciate being contacted over the vacation period. It would appear from the context that such discussion related to the usual negotiation regarding the applicant's part time working arrangements, although it might readily be inferred that these arrangements could potentially be influenced and impacted upon by the proposed structural and funding changes.

44. Mr Mann then addresses the events of 21 January 2013, being the first day back from vacation. He says that the applicant approached him to discuss her "program" and that they met at about 10 am and talked in the corridor and the canteen (which was unoccupied) as he wished the meeting to be "informal". He says that the applicant responded to his question as to how many hours she wished to work by stating that she wanted a voluntary redundancy, whereupon he again advised her that this "was not an option for our section". He says that there followed a discussion regarding means by which the applicant's previous area of teaching, namely the Certificate II course, could be accommodated within the funding of the Certificate III course now available, this including the course being funded at least in part by the students. He says that the applicant "dismissed these options" and stated that she did not

agree with students funding the courses. At no stage did the applicant indicate the hours she wished to work. Mr Mann says that throughout this conversation the applicant "was tense" and "appeared on edge", while he attempted to remain "matter of fact".

45. Mr Mann then states that during his lunch hour he received a phone call from the applicant objecting to the loan of their unit's printer, that he explained that he had given permission for this to occur, that it was only for a few days, that it would assist with the enrolment process later that week, that there was an alternate printer relatively close by and that he confirmed his decision regarding the loan of the printer. Mr Mann says that during this phone call he was "perhaps exasperated" but did not "recall being angry or aggressive" and considered that he spoke in a "calm voice", although the applicant was "short and sharp".

46. Mr Mann then states that he returned to the campus and sought out the applicant to "allay her fears" regarding the printer and spoke to her in a "placating voice". He says that the applicant spoke to him in an "aggressive tone" and stormed out of the room, whereupon he followed her into the corridor and "demanded" of her "what is the point?" (meaning the point of her objection to the loan of the printer). He says that he was "firm" with the applicant, who then asked him to leave her alone. He walked away, but while doing so said that he was "over it". Mr Mann says that "in terms of tone and timbre of voice I was reacting in like terms to how (the applicant) was speaking".

47. Mr Mann did not see the applicant again on that day and subsequently became aware that she had ceased work and was claiming a psychological injury. For reasons unexplained, the printer was returned to its usual place during the afternoon of 21 January 2013.

48. The respondent also relies upon a statement by a Technical Officer and casual teacher, Mr Bourke, dated 15 February 2013. Mr Bourke was present in the ESU office on 21 January 2013. He confirms the applicant's displeasure at Mr Mann having authorised the loan of the printer and that he heard her on the phone to "someone" about that issue, although he says that the conversation as he recalled it was short and innocuous. Mr Bourke was present when Mr Mann instigated a conversation with the applicant in the office after lunch regarding the printer. He says that Mr Mann "did not raise his voice" and spoke in a "normal tone" and further that the applicant left the office at the conclusion of the conversation. Mr Bourke then says that about 10 minutes later he observed the applicant and Mr Mann conversing in the corridor, at which time Mr Mann said "what's wrong Margaret, what's wrong?" in a "raised voice which sounded to be in an exacerbated (sic – exasperated?) tone". He says that the applicant said words to the effect "don't speak to me" and that she "sounded emotive". Mr Bourke confirms that the printer was returned that afternoon, the borrower stating that it was "not required".

49. Finally, the respondent relies on a statement of its Injury Management Advisor, Ms Guntley, dated 19 January 2016 in relation to two attempts made to return the applicant to work. The first, in July 2013, came to nothing because after a meeting to discuss the return to work the applicant was again certified as having no current work capacity due to a recurrence or exacerbation of symptoms. Ms Guntley says that the applicant declined a proposed return to work at Strathfield when she discovered, while being shown her intended work station, that she would be sharing that work station with one of Mr Mann's "associates", albeit not at the same time (i.e. one would use the work station when the other was not working). Ms Guntley says that the applicant was "taken aback" by this discovery and further when she was informed that another of Mr Mann's "associates" also worked in that office. Despite Ms Guntley's assurances that direct contact could be avoided, the applicant was again subsequently certified as having no current work capacity and the return to work came to nothing.

50. I turn now to the medical evidence.

51. The clinical notes of the general practitioner, Dr Woo, record that at the initial attendance on 22 January 2013 the applicant reported "got verbally abused and bullied at work yesterday by her supervisor" with no other "precipitating events" or "predisposing psychiatric illnesses". Dr Woo's notes for 29 January 2013, however, record a more detailed history of ongoing issues with her supervisor over 12 years, including "significant communication issues and workplace bullying", feeling "marginalized" as the supervisor had shown "favouritism" to his "close friends" for the past four years and a feeling that "her supervisor is making things difficult for her to change jobs or settle for redundancy" (it is not entirely clear whether this meant he is making it difficult so that she would change jobs or take a redundancy or that he was making it difficult for her to do those things).

52. On 4 February 2013 a different general practitioner from the same practice, Dr Krzyszton, recorded "has had trouble with head teacher at TAFE after discussions regarding possible redundancy".

53. By March 2013 the clinical notes record events relating to a proposed mediation and on 11 March 2013 the applicant reported that she was "feeling less teary and emotional now", was sleeping better and experiencing less anxiety after seeing a psychologist. The notes, however, indicate that the applicant's symptoms became more florid during periods when events related to her claim, such as mediations with the respondent, were occurring.

54. Dr Krzyszton provided two reports to the insurer dated 7 February 2013 and 9 May 2013 and a further report to the applicant's solicitors dated 22 May 2014.

55. In the first of those reports, Dr Krzyszton diagnosed a post-traumatic stress disorder (PTSD) "related to an episode at work where she was shouted at by her Head Teacher". It was further stated that the applicant's "acute anxiety has been made worse by the aura of uncertainty regarding job continuity (due to proposed changes to the respondent's structure and funding) . . . and her inability to determine what will happen to her job in the near future".

56. In his second report, which was in response to the section 74 Notice, Dr Krzyszton confirmed the diagnosis of PTSD which "occurred after exposure to a traumatic event (head teacher getting angry/shouting at her . . .)" and pointed out that whether the actions of Mr Mann on 21 January 2013 were reasonable depended upon whose account one accepted, noting that "it may be fair to assume that the head teacher's and (the applicant's) perception of this event remain different". Dr Krzyszton opined that the applicant "is prevented from going back to work", although it is not entirely clear whether this was qualified to mean "with Mr Mann".

57. In his medico-legal report, Dr Krzyszton confirmed his diagnosis of PTSD, which he also described as "reactive anxiety", arising out of Mr Mann's "verbal abuse" of the applicant on 21 January 2013 and noted that, although the applicant had been exposed to a number of stressors since he had begun treating her in 1988 relating to her own health, her son's health, personal matters and "a degree of work/professional stress, she has managed to carry out her work . . . and function as an intelligent independent adult throughout that time". On this basis, Dr Krzyszton concluded that "the incident at work was the predominant cause or the major tipping point to her developing chronic anxiety and PTSD". In relation to capacity for employment, Dr Krzyszton stated that:

> "(The applicant) has stressed all along that she was capable of continuing to work as a teacher, provided she was in a position separated from Mr Mann or any of his associates, who may react adversely to her as a result of the incident. I understand that only in the last two months or so have alternative positions been offered. Today I have certified her fit to return to work in a unit of TAFE at Strathfield with the proviso that she have a graded increase in hours (as she has not worked full time in over a year). I have certified she can work 6 ½ hours on site 2 days a week, with another 4 ½ hours from home".

58. On 6 July 2013 Dr Krzyszton responded to questions posed by the respondent's rehabilitation officer. In essence, it was Dr Krzyszton's opinion at that time that the applicant "will be fit to return (to work) if she does not work with, report to or answer to Mr Mann".

59. In evidence are WorkCover certificates of Capacity issued by Dr Krzyszton between 14 October 2013 and 10 June 2015 all of which, with one exception, certify the applicant as having no current work capacity due to psychological injury suffered on 21 January 2013, although those certificates also make reference to the applicant having an "inability to work with previous head teacher", there being a "need to discuss alternative employment" and, after June 2014, the applicant being "unable to do job for which she was employed" and a return to work having failed due to the applicant having come into contact with associates of Mr Mann. The exception is the certificate dated 22 May 2013, in which the applicant was certified as having a current work capacity which was "to be determined" in anticipation of her undertaking suitable duties at reduced hours at Strathfield. In the certificate dated 30 June 2013 following the failed attempt at a return to work, which again certified the applicant as having no current work capacity, Dr Krzyszton made reference to the applicant's condition being "exacerbated by contact with" Mr Mann's associates at Strathfield.

60. In April 2013 Dr Woo referred the applicant to a psychologist (the applicant not having developed a rapport with the first psychologist to whom she was referred), Ms Sharp, who first reported to him on 1 May 2013, confirming that the applicant was undergoing counselling sessions for symptoms which were "indicative of post-traumatic stress", the stressor reported by the applicant being "bullying she feels she has received from her employers at TAFE over the last five years, culminating in an incident with her head teacher on the first day back this year, after which she felt that she could not return to work". No history was recorded of the applicant's difficulties with Ross River fever, the proposed structural and funding changes announced in late 2012 or the applicant having requested and been refused voluntary redundancy. It was noted that symptoms had begun to wane after a period off work but had returned when the applicant read documents relating to her claim or contemplated a return to her former position. Ms Sharp concluded that the applicant "should be fit to return to work after treatment" but expressed concern that contact with Mr Mann would give rise to an "extreme risk of re-traumatisation".

61. Ms Sharp next reported to Dr Woo on 10 July 2013, confirming that treatment was ongoing and noting that the applicant's symptoms had improved "since her prolonged absence from work" but continued to be exacerbated by "ongoing communication with the insurance company . . . and the lack of resolution of the situation". Ms Sharp recommended a further four counselling sessions "until the situation develops some clarity".

62. Ms Sharp next reported to Dr Krzyszton on 13 August 2013, confirming that treatment was continuing and essentially repeating the opinions previously expressed as to diagnosis and the limitations upon a return to work. Particular reference was made to "a dramatic increase in all symptoms after a particularly disturbing meeting held with TAFE management at the request of her rehabilitation officer".

63. In a typed response to questions apparently posed by the respondent dated 17 August 2015, Ms Sharp stated the diagnosis to be adjustment disorder and confirmed that the applicant was still being treated by her. In relation to a return to work, Ms Sharp offered the following opinions:

> "I consider that (the applicant) is unfit to return to any work situation which involves contact with her former colleague Mr Mann and/or his associate colleagues, as his actions appear to be the sole cause of her current condition. I consider that (the applicant) would be able to adjust to a gradual return to pre-illness duties, as long as she was not at any time in contact with her former colleague Mr Mann and/or his associate colleagues".

64. A psychiatrist, Dr Dinnen, examined the applicant at the request of her solicitors on 1 July 2014 and provided a report dated 7 July 2014.

65. Dr Dinnen recorded a history of the applicant having been replaced by Mr Mann as head teacher in about 2001 as a result of her having contracted Ross River fever, although the applicant did not tell him she had worked reduced hours thereafter due to that condition. The applicant gave a history critical of Mr Mann's management style, essentially to the effect that he was inefficient and unsupportive, but also of him having excluded female staff generally, shifted the emphasis of the ESU from conservation and land management to horticulture (in the process engaging in "cronyism" by appointing a friend to a position in that field), this leading to a reduction in the "courses and hours of teaching" available to her in her field, and of him having marginalised and resented her, perhaps because he perceived her as having made comments critical of him to others.

66. Dr Dinnen then recorded the following history:

> "The situation became very difficult for her. It came to a head in December 2012. That was to a large extent due to external factors. The government had made decisions about TAFE and TAFE had to respond. Accordingly, there were meetings about the proposed changes in September 2012. The staff were informed that TAFE was no longer going to give Certificate II courses or statements of attainment. This directly affected the patient's role in TAFE and she recalled feeling sick during the meeting. She believed that the removal of high level courses was a way of . . . trying to get rid of her. . . . She recalls thinking that there was no point to (undertaking retraining courses) because she would have no job. There was talk of redundancies. She told (Mr Mann) she would be interested in having a discussion with the appropriate officer about redundancies, commenting that 'my life in TAFE is practically over'. However, he avoided the issue afterwards and did not get back to her. . . . It seemed to her that (in 2013) she would be teaching only 200 hours instead of 760 hours. She saw no point in speaking to management about this because of their previous response. Instead she spoke to (Mr Mann's) manager. She told the manager she needed to know her position next year. (Mr Mann) had not been at the TAFE for some 10 days at that time so she was justified in speaking to his manager. She was told there was no decision that positions were going, but that the manager would discuss the matter further with her. That didn't happen. Instead, the patient predicted that she would only be informed of

her role for the following year at the end of the last day of the year at TAFE. That is in fact what happened, after (Mr Mann) had sat next to her all day . . . as she got up to leave he told her he would send her an email. She told him not to bother as she wouldn't read it during her holidays. He said instead he would call but he didn't. When she encountered him in the local supermarket he seemed to be avoiding her".

67. Dr Dinnen then recorded a history of the events of 21 January 2013, being the first day back from the Christmas vacation. The applicant reported that the other teachers "seemed edgy", presumably due to continuing uncertainty about the effect of the structural and funding changes announced in late 2012, and that she asked Mr Mann for a meeting following which she advised him that she was going to consult the union. He apparently supported that idea. She then described the printer incident, stating that Mr Mann shouted at her on the phone and then "charged" at her in the corridor. The applicant felt that she was "going under" following this encounter and was distressed on her drive home. That night she developed more florid symptoms and sought medical treatment the following day. She said that she "fell apart" and believes that she suffered a "nervous breakdown".

68. Dr Dinnen diagnosed an adjustment disorder with anxiety and depressed mood which he considered to have resulted from "workplace conflicts as described" (Dr Dinnen also had access to the applicant's statement of 26 September 2013). He gave slightly conflicting opinions in relation to capacity for employment in that he variously stated that the applicant was not fit for any form of employment and should be medically retired but also that "the prognosis is favourable so long as she does not return to work", which may or may not mean with Mr Mann or the respondent generally, and that "she should find other areas of activity and/or employment in due course". In assessing a nine per cent permanent impairment, Dr Dinnen assessed "employability" as Class 5 on the basis that "she is unable to work as a teacher and . . . should be medically retired".

69. Finally, and more for the purposes of history, I note an "Initial Return To Work Assessment Report – Amended" dated 11 February 2013 in which the applicant was reported as stating that she had "started to feel distressed" in September 2012 when "changes to funding were announced which meant that . . . courses she had taught would no longer be funded (and) as these made up the majority of (her) teaching hours she became concerned as to her future with the college". The applicant advised that she requested voluntary redundancy on a number of occasions but obtained no satisfactory answer, rather being told by Mr Mann that if she left she would not be replaced but that if she stayed she would have to be satisfied with teaching some eight hours per week. The applicant confirmed that Mr Mann's anger during the printer incident was the final straw precipitating the onset of significant symptoms. The applicant further confirmed that, as a result of her Ross River fever, she had been working reduced but gradually increasing hours and taking the balance as leave without pay.

70. Significantly, this report also includes a reported discussion with a Ms Kumar of the respondent, who advised that the applicant had requested voluntary redundancy but that this was not being offered to her , that the applicant "does not want to teach the courses that are being offered to her" and that "she feels that during the last five years she has been subjected to marginalisation and passive bullying by her Head Teacher, although there is no evidence of this and she has never raised this in the past".

71. The respondent has attacked the applicant's credit and submitted that her evidence ought not be accepted, at least in its entirety, on the basis that she has "gilded the lily" by using "colourful and florid language", particularly in relation to the printer incident on 21 January 2013. By way of example, the respondent points to the application's allegation of Mr Mann "charging down the corridor and shouting at me", suggesting that the applicant was asserting

that Mr Mann intended to physically assault her. I do not read her evidence that way and consider that she was merely trying to convey Mr Mann as having an agitated demeanour.

72. Nevertheless, I consider there to be some force in the respondent's general submission that the applicant has gone out of her way to paint a negative impression of Mr Mann and to emphasise her perceptions of his conduct over a number of years and on 21 January 2013 as being the cause of her psychological injury. This may well arise from the fact that much of her "evidence" is in fact contained in submissions made to the insurer by her and, in those circumstances, it is hardly surprising that she has adopted the role of an advocate and sought to put her case in its most favourable light. One obvious example of this tendency or be overly descriptive or to over dramatize events is the applicant's repeated statements that Mr Mann "passively bullied" by making her feel marginalised when she has acknowledged that she did not realise that she was being bullied at the time. I do not, therefore, accept the applicant's evidence unreservedly.

73. That said, I do not find the applicant to be an untruthful witness and note that, in the main and subject to some discrepancies which might arise from differing emphasis, nuance and perception, her evidence and that of Mr Mann in relation to events from September 2012 onwards is not markedly at odds. The role of perception in relation to the experience of actual events in the work place in the development of psychological injury is well recognised: see, for example, *State Transit Authority of NSW v Chemler* [2006] NSWCA 249.

74. On balance, I find the applicant to be a credible witness, at least to the extent that she has a genuinely held perception of the various events to which she has deposed, and in general I accept it, subject to certain matters to which I shall refer to the extent that they are relevant.

75. In particular, I have no hesitation in accepting that the proposed changes announced by the respondent in September 2012 in relation to the funding for and structure of the respondent's operations, raising the prospect of a large number of redundancies to take place gradually over four years and the applicant not being likely to teach the courses she had taught previously, leading to a reduction in the hours available to her, did justifiably cause her considerable concern and uncertainty regarding the viability of her future employment with the respondent.

76. For reasons I shall discuss more fully in dealing with the issue of what was the predominant cause of the applicant's psychological injury, I do not accept that applicant's assertions that such injury was caused by Mr Mann's management style and conduct over a number of years, culminating in the printer incident on 21 January 2013, and that the proposed changes announced in September 2012 had little or nothing to do with the receipt of that injury.

77. I note that Mr Mann's evidence has not traversed the issues raised in relation to his management style and practices and that the applicant's evidence in this regard is to some extent corroborated by Ms Smith and Ms Rattray. Rather than make any specific findings in relation to Mr Mann's conduct generally as head teacher, suffice it to say that I accept that the applicant formed an opinion, based on her interpretation or perception of real events, that Mr Mann was inefficient, avoided difficult situations and engaged in "cronyism" and favouritism towards friends, males and his particular area of specialty and interest (horticulture as distinct from the management of natural bush). I accept that the applicant felt marginalised and unsupported by Mr Mann and lacked confidence in him, which feelings I consider influenced and undermined her faith in him so far as the proposed changed announced in 2012 and their direct impact upon her were concerned. I will return to some of these issues when dealing with the section 11A(1) defence.

78. Finally, it is appropriate that I make some specific findings in relation to the printer incident. Both the applicant and Mr Mann seem to be surprised that this relatively minor issue took on the proportions it did. I consider it probable that this occurred because both of them were tense and frustrated regarding the issues which had arisen as a consequence of the proposed changes, namely the applicant's redundancy and/or the hours and duties she would undertake in 2013. I consider that the applicant has failed to acknowledge or accept that her own attitude to Mr Mann in relation to the printer issue was unnecessarily forceful, if not hostile, and that he reacted in kind. I do accept, noting Mr Mann's concession that he spoke to the applicant in reactive terms similar to the tone she was taking with him and the evidence of Mr Bourke that Mr Mann did speak with a raised voice and an exasperated tone, that Mr Mann did raise his voice to the applicant and that she found that upsetting. I would further accept that her reaction to being spoken to in that way was influenced by the feeling of vulnerability she was experiencing due to the stress of the issues relating to redundancy and the hours and duties which she might undertake in 2013. That said, although the applicant has alleged that Mr Mann was "abusive" she has not deposed to him having sworn at her or made any inappropriately personal remarks. In short, I accept that Mr Mann spoke to the applicant in a raised and angry voice out of a sense of exasperation and that this was sufficient to make her feel distressed and upset but, beyond that, I do not accept that there was anything more sinister or inappropriate in Mr Mann's conduct.

79. I also note that the applicant gave evidence that she had never been spoken to in that way prior to 21 January 2013 during the whole of her employment with the respondent. From that I infer that she had never been previously spoken to in that way by Mr Mann, notwithstanding her assertions made elsewhere in her evidence of others having been subjected to abuse by him.

Issue 1 – The Section 11A(1) Defence

80. Although the respondent has, at least implicitly and in my view properly given the absence of any medical evidence to the contrary, conceded (at Transcript 50.7 – 26 (T)) that the applicant contracted a psychological or psychiatric disease in the course of her employment and that her employment was the main contributing factor to the contraction of such disease, meaning that she has suffered injury within the meaning of section 4(b)(i) of the 1987 Act, it nevertheless contends that she is precluded from recovering compensation in respect of that injury by operation of section 11A(1) of the 1987 Act. That section provides that no compensation is recoverable for a psychological injury wholly or predominantly caused by reasonable action taken or proposed to be taken by the employer with respect to prescribed matters, namely here relevantly "retrenchment" or the "provision of employment benefits to workers". "Transfer" was referred to in the section 74 Notice but no submissions were put to me in relation to that matter.

81. The applicant disputes that section 11A(1) is engaged in the circumstances of the present case and specifically asserts that an "employment benefit" for the purposes of the section is something "over and above the ordinary employment relationship" and would not extend to a reduction in hours of work offered to the applicant in those circumstances. The applicant further asserts that the respondent has not discharged the onus of establishing that her injury was wholly or predominantly caused by any relevant "action" under section 11A(1) or that, in any event, the respondent's actions were reasonable.

82. It is now well established that the respondent carries the onus of proof in relation to all issues arising under section 11A(1): see, for example, *Department of Education and Training v Sinclair* [2005] NSWCA 465 (*Sinclair*). Thus, in order for the respondent to successfully prosecute the defence, I must be satisfied on the balance of probabilities and to a sense of

actual persuasion that the respondent took or proposed to take action with respect to retrenchment or the provision of employment benefits to workers, that such action wholly or predominantly caused the applicant's psychological injury and that the relevant "action" was "reasonable".

83. Ultimately, I am not satisfied that any of these matters have been proved to the requisite standard by the respondent for the reasons I shall now provide.

84. It is first necessary to consider which aspects of the applicant's employment were causative of her psychological injury and to weigh up the relative contributions made by those events or incidents in order to determine which of them "wholly or predominantly" caused her injury: see *Sinclair* and *Jetstar Airways Pty Ltd v Cantebury* [2011] NSWWCCPD 54. For this purpose "predominantly" means "mainly or principally caused": *Ponnan v George Weston Foods Ltd* [2007] NSWWCCPD 92. The enquiry, being one in relation to causation, is essentially a question of fact which, applying *Kooragang Cement Pty Ltd v Bates* [1994] 35 NSWLR 452 **(***Bates*) requires a "commonsense evaluation of the causal chain" and is "determined on the basis of evidence, including where applicable, expert opinions".

85. As noted and subject to the findings made above, the aspects of the applicant's employment alleged to have contributed to her psychological injury fall into three broad categories: first, her perception formed over the years prior to September 2012 of Mr Mann as an inefficient and unsupportive manager who had engaged in favouritism and cronyism leaving her feeling marginalised; second, the consequences of the policy, structural and funding changes announced by the respondent in September 2012 which left the applicant uncertain and pessimistic regarding her future in the organisation and caused her to contemplate taking voluntary redundancy in preference for working reduced hours and, third, what might broadly be described as the printer incident involving Mr Mann speaking to her in a raised voice and, to her perception, in an aggressive manner.

86. It might be observed at the outset that the first and third of these potentially causative matters could not possibly engage any of the specified "actions" under section 11A(1), while the second may potentially do so.

87. Notwithstanding the applicant's assertions to the contrary, which are to some extent supported by medical opinion based on the history she has provided to the doctors, and the fact that I have accepted that the applicant did have an honestly held perception that Mr Mann was an inefficient and unsupportive manager who had engaged in favouritism leaving her feeling marginalised, I am not satisfied that these issues, while they may have evoked the ordinary human emotions of upset, distress and anger, played any significant causative role in causing her psychological injury. This is primarily because the applicant has given no evidence of having experienced any adverse psychological reaction to her working conditions, requiring any time off work or requiring resort to medical treatment in the period prior to September 2012. There is no evidence to suggest that the applicant was unable to cope with her working environment prior to that time.

88. At the highest, I would consider the applicant's perceptions of Mr Mann as a manager to have been a predisposing factor in the sense that they undermined her confidence that he would act in a supportive and proactive way when addressing the effects of the policy, structural and funding changes announced in September 2012 on her, in particular in relation to her desire to obtain a voluntary redundancy.

89. I do accept that the ramifications of the changes announced in September 2012 did play a significant role in the causation of the applicant's psychological injury and further that this was cumulative in the sense that the stress upon the applicant increased as the uncertainty regarding her future with the respondent remained unresolved and her level of pessimism in this regard increased. The applicant has described herself as feeing "sick" when the changes were announced and thereafter as feeling "despondent", "deflated", "distressed", "weepy" and "aware that emotionally things were not okay for me as a result of the changes proposed". This evidence, which I accept without reservation, clearly indicates that the proposed changes and their consequences were having an adverse psychological effect on the applicant and that such adverse effects remained present when she attended work on 21 January 2013 and had a conversation with Mr Mann that morning; she describes herself as "very concerned" at the time of that meeting while Mr Mann described her demeanour at that meeting as "tense" and "on edge".

90. That the effects of the proposed changes played a causative role in the applicant's psychological injury is supported by the unchallenged evidence of Dr Krzyszton, who considered that her "acute anxiety has been made worse by the aura of uncertainty regarding job continuity . . . and her inability to determine what will happen to her job in the near future", and Dr Dinnen, who recorded a detailed history of the impact of the proposed changes on the applicant and her reaction to them, notwithstanding that he placed considerable emphasis on the applicant's perceptions of Mr Mann's conduct in relation to these issues in concluding that her injury resulted from "workplace conflicts as described". The psychologist, Ms Sharp, recorded no history of the changes announced in September 2012 or their impact upon the applicant and, for that reason, I do not place particular weight upon her evidence in relation to this issue.

91. In view of the discussion and findings below regarding the relevant "actions" alleged by the respondent to engage section 11A(1), it is necessary to consider the causative aspects of the effects on the applicant of the proposed changes announced in September 2012 with more precision. It is clear that the applicant perceived, probably correctly, that she would not have a viable future with the respondent as a result of those changes, most immediately manifested by a significant reduction in the teaching hours and duties available to her in 2013 by reason of the Certificate II course and Certificate of Attainment courses previously taught by her no longer being funded and therefore offered.

92. Significantly, it is clear that the applicant quickly concluded in these circumstances that her preferred option was to obtain a voluntary redundancy. She conveyed this preference, whether as a request or an enquiry seems immaterial, to the respondent, and in particular Mr Mann, on a number of occasions prior to the end of 2012 and again on the morning of 21 January 2013. On each occasion it was indicated to her that this was not possible as her department had not, at least at that time, been identified as one to which any of the announced 800 proposed redundancies over four years were to be applied. The applicant alleges that Mr Mann was unsupportive of her attempts to obtain voluntary redundancy and "consistently lied" to her in that regard, including in relation to whether he had even discussed the matter with the manager, Mr Samaha, as requested by the applicant. It seems to be common ground that the applicant was dismissive of and disinterested in all options raised by Mr Mann in relation the duties she might undertake in 2013, possibly with good reason and possibly because her only desire was to obtain voluntary redundancy.

93. In these circumstances, I have concluded that the applicant wished to bring her employment with the respondent to an end by obtaining a voluntary redundancy and that it was the frustration of her efforts in this regard which significantly contributed to the development of her psychological injury. Having formed the desire to cease employment on these terms and

focussed her efforts on achieving that outcome, I infer that the applicant was not particularly distressed at the prospect of no longer undertaking the vocation of teaching in the employ of the respondent.

94. It follows that, to the extent that the applicant's psychological injury was caused by the impact on her of the proposed changed announced in September 2012, it was the frustration of not being able to obtain the voluntary redundancy she was seeking, rather than the prospect of teaching different courses at reduced hours, which materially contributed to the development of her condition.

95. The relative causative role played by the printer incident, and in particular the applicant's reaction to Mr Mann speaking to her with a raised voice and an angry tone in the corridor concerning his decision to lend the printer is difficult to determine. In part, this is because I consider that the attitudes, reactions and perceptions of both parties were influenced by the fact that the applicant already felt, to use Mr Mann's expression, "edgy" as a result of their earlier discussion regarding her desire for a voluntary redundancy, while he felt frustrated by the applicant's lack of engagement in relation to the teaching options which might be available to her in 2013. Moreover, as I have previously said, the applicant had been developing symptoms since September 2012, or at least experiencing emotions, suggestive of an emerging psychological condition. Whether this would have become the recognisable psychiatric condition which caused her to cease work but for the incident concerning the printer on the afternoon of 21 January 2013 is a difficult question. Nevertheless, the applicant's perception of Mr Mann's behaviour during this incident clearly had a profound and shocking effect upon her which immediately manifested itself in a dramatic way.

96. While, as was held in *Bates*, notions of immediate or proximate cause should be avoided in applying the appropriate test of causation, it nevertheless remains the case that the temporal nexus between an event and the onset of an "injury" (using that word in a pathological sense) can be, and often is, a relevant, and sometimes determinative, factor when considering the causal connection between the two. This may be so, but is perhaps not necessarily so, where, as here, the issue is not merely whether a particular factor was one material contributing factor (a condition can, of course, have more than one relevant cause), but rather requires consideration of which of a number of such causative factors is predominant.

97. Certainly it is the applicant's evidence that the incident relating to the printer was the "trigger" which precipitated her injury and this is corroborated by Dr Woo's note on the following day that she "got verbally abused and bullied at work yesterday by her supervisor" with no other "precipitating events" or "predisposing psychiatric illnesses". In all three of his reports, Dr Krzyszton attributed the applicant's psychiatric condition to the shouting incident regarding the printer, expressly stating in that dated 22 May 2014 that "the incident at work was the predominant cause or the major tipping point to her developing chronic anxiety and PTSD". Similarly, the psychologist, Ms Sharp, considered that the applicant's condition was caused by "bullying she feels she has received from her employers at TAFE over the last five years, culminating in an incident with her head teacher on the first day back this year, after which she felt she could not return to work". Although I have not accepted Ms Sharp's opinion in relation to the causative contribution of the perceived bullying over a five year period, I do accept her opinion, and the history on which it is based, to the effect that the printer incident was significant and immediately led to a level of decompensation which precluded the applicant from returning to work. Although Dr Dinnen was somewhat vague in terms of identifying the relative causal role played by the various stressors relied upon by the applicant, he did record a history that after the encounter in the corridor regarding the printer in which Mr Mann shouted at her, the applicant felt that she was "going under", felt distressed on her drive home and developed more florid symptoms that night which

necessitated seeking medical treatment and ceasing work, she believing that she had suffered a "nervous breakdown".

98. Based on the dramatic escalation of the applicant's symptoms immediately following and a result of the incident regarding the printer, I am satisfied that this incident was also a significant contributing factor causative of her injury.

99. Noting that the onus of proof rests upon the respondent in relation to establishing what "wholly or predominantly caused" the applicant's injury, I am not satisfied that the consequences of the changes announced by the respondent in September 2012, these including the applicant forming the desire to obtain voluntary redundancy and being concerned regarding the hours and duties which might be available to her in 2013, were the predominant cause of her psychological injury. I so conclude on the basis that I am not persuaded that the printer incident was not at least equally causative.

100. Moreover, to the extent that the consequences of the proposed changes were causative, I would consider that the applicant's failure to obtain an offer of voluntary redundancy or, in her perception, a satisfactory response from the respondent in relation to that issue, was more contributory to her injury than was the prospect of undertaking different duties at lesser hours. I so conclude on the basis that the focus of the applicant's concerns from late 2012 up to and including the meeting on the morning of 21 January 2013 was clearly voluntary redundancy. By her own evidence and that of Mr Mann, her attitude to the various alternative duties suggested by him was negative and disinterested, from which I infer that she had no intention of, or interest in, engaging with the question of what duties she would undertake in 2013 until such time as the question of voluntary redundancy had been finally resolved.

101. If I be wrong in my findings regarding the predominant cause of the applicant's injury and it were the case that such injury was wholly or predominantly caused by the respondent's actions consequent upon the changes announced in September 2012, such actions being failing or refusing to offer the applicant voluntary redundancy or deciding not to fund (i.e. offer) the courses previously taught by her, this having the consequence that she would be required to undertake different duties at reduced hours (while nevertheless remaining a permanent full time employee), it becomes necessary to consider whether such actions were "actions" of a character or type identified in section 11A(1) as engaging that section.

102. It is well established that, notwithstanding that the words "with respect to' are of a wide application" (per Davies A-JA in *Manly Pacific International Hotel Pty Ltd v Doyle* [1999] NSWCA 465 at paragraph 27) in terms of considering matters connected with or ancillary to the relevant action in question in the sense of including the whole of the process surrounding such action, section 11A(1) "does not operate as a defence in respect of all reasonable action taken by an employer" but rather "operates where reasonable action is taken, or proposed to be taken in respect of the matters specified": per Snell ADP in *Smith v Roads and Traffic Authority of NSW* [2008] NSWWCCPD 130 at paragraph 63. The section does not extend to everything a worker does or is exposed to in the course of their employment or which arises out of or in connection with their contract of employment. Thus, section 11A(1) will only be engaged and warrant consideration if the relevant action may be characterised as falling within one of the specified matters. Those specified matters are identified with some precision and, as noted, the onus of establishing that the action sought to be relied upon is "with respect to" one or more of the specified matters rests upon the respondent.

103. In relation to whether the respondent took or proposed to take action "with respect to ... retrenchment", the first thing to be observed is that the respondent's counsel appeared to

expressly abandon any reliance on action or proposed action in this regard at the arbitration hearing (T.76.4-32, 77.26-78.8 and 81.6-18), notwithstanding that some oblique references were made to "redundancy".

104. The evidence establishes that the respondent had announced a proposal that 800 "redundancies" would take place over a four year period and that the applicant, being concerned about the number of teaching hours which might be available to her in light of structural and funding changes proposed and announced at the same time (which will be discussed in more detail in relation to the "provision of employment benefits to workers"), requested a "voluntary redundancy", which request was refused because her department had not, at least as yet, been a department identified as one in which the proposed redundancies would occur. At no stage was there any announcement that anyone, including the applicant, would be "retrenched".

105. Strictly speaking, a position or job, rather that the person occupying it, becomes redundant when an employer determines that it no longer requires it to be filled. Often, as may well be the situation in the present case, an employer may determine that it no longer requires as many positions of the same type to be occupied; for example, due to a downturn in demand or sales an employer may determine that it only needs twenty salespersons instead of the forty currently employed. At that point, the employer will determine whether some or all of the people in positions which are now redundant can be accommodated in different positions within the organisation (in which case "transfer" under section 11A(1) may become relevant) or it may, possibly as an alternative, invite employees to apply for "voluntary redundancy", being an agreement that a worker voluntarily leave the employment in return for an agreed "pay out". Voluntary redundancy may have beneficial attraction to both employers and employees, one such benefit for the employer being that it may not need to "retrench" anyone. It is only when the worker or workers whose positions have become redundant cannot be accommodated by either of the means to which I have just referred that an employer will need to "retrench" anyone, "retrenchment" being the involuntarily and unilateral termination of an employment contract by the employer by reason of the position held by the worker in question no longer being required to be filled by the employer.

106. Applying this logic to the present case, there is nothing in the evidence to suggest, particularly having regard to the lengthy period over which the process was to take place, that the respondent proposed or desired, during the period relevant to the applicant's claim, to retrench anyone. It may well be that the respondent hoped to accommodate the proposed redundancies by either moving employees to different positions, not replacing employees who resigned or retired or offering voluntary redundancy to those who wished to accept it.

107. Thus, while I accept that the applicant was disappointed that voluntary redundancy was not to be offered to her, at least at the time in question, and that she was concerned about the viability of her position consequent upon the proposed structural and funding changes which would mean that the course she was accustomed to teaching would no longer be offered, I am not satisfied that the respondent has discharged the onus of establishing that any action taken or proposed to be taken by it was "with respect to . . . retrenchment".

108. The respondent did not argue that the refusal of the applicant's request for voluntary redundancy constituted "action . . . with respect to . . . the provision of employment benefits to workers" (T.81.6-29).

109. The respondent's primary position is that it's proposed action in no longer offering the courses previously taught be the applicant due to changes in funding priorities, thereby making less hours of work available to her and/or in offering, requesting or requiring her to

teach a similar but different course was action "with respect to . . . provision of employment benefits to workers".

110. It is appropriate to make one thing clear at this point, being a matter which has caused me some confusion in relation to the degree of upset experienced by the applicant. Her evidence seems to suggest, at least implicitly, that a reduction in the hours offered to her would mean a commensurate loss in pay. Statements to that effect were made by the applicant's counsel. It is, however, common ground that the applicant was employed on a full time permanent basis, notwithstanding that she worked reduced hours and took either sick leave or leave without pay due to the continuing effects of Ross River fever. It would, therefore, follow that regardless of how many hours were actually given to the applicant, the respondent would have been bound by the contract of employment to pay her agreed weekly salary, at least until such time as it did indeed identify her as a person to whom a voluntary redundancy should be offered. I am unable to find anything in the evidence to the contrary.

111. The relevant action relied upon by the respondent does not, therefore, appear to have any financial aspect or component so far as the applicant is concerned. The question then becomes whether a reduction in hours with no commensurate reduction in pay and/or teaching a different course in the circumstances of this case are "employment benefits".

112. The expression "provision of employment benefits to workers" is not defined by the legislation. The Second Reading Speech delivered on 6 December 1995 in respect of the amending legislation which introduced section 11A and the concept of "provision of employment benefits" is singularly unhelpful, the minister referring to the removal of liability for "specific staffing matters" including "promotion, performance appraisal transfer, discipline and dismissal". The "provision of employment benefits", and indeed "retrenchment", were not even mentioned, let alone explained.

113. Moreover, the "provision of employment benefits" has been the subject of surprisingly little consideration at appellate level regarding what is and is not encompassed by the phrase. No doubt because section 11A(1) constitutes a significant exception to, or exclusion from, the general entitlement to compensation established by the receipt of an "injury" under section 9 of the 1987 Act and also because it is clear from the section itself and was established by early case law that not all matters arising in the course of a worker's employment or all actions taken by an employer fall within the ambit of the section, the specified matters in the section have tended to be construed strictly; see for example the cases, not here relevant, considering and limiting what does and does not constitute "performance appraisal" and "discipline".

114. No submissions were put to me regarding the scope of the expression and my attention was not drawn to any relevant authority. My own researches have identified five Presidential decisions in which the issue has been touched upon, although all but one of them have not considered the question in any detail and none of them has provided a definitive statement as to the meaning of the expression or its scope.

115. In *Delta Electricity v Healey* [2006] NSWWCCPD 143 Candy ADP concluded, contrary to the arbitrator's finding, that the actions of the employer "in relation to the workers application to retire on account of ill health", which arose in the context of proceedings between the parties in the Industrial relations Commission, a possible compensation claim by the worker and the granting of such application apparently having ramifications for the determination of the worker's superannuation entitlements, were actions "with respect to . . . the provision of employment benefits". In so concluding, Candy ADP referred to several

decisions relating to the Commonwealth compensation scheme and made the following observations (at paragraph 37):

> "On behalf of the worker it was submitted that superannuation benefits were a statutory entitlement like holiday pay, sick leave and minimum wages. It was further suggested that an employment entitlement [sic – benefit?] would be something provided by the employer to benefit a particular employee such as a car, flexible working hours or anything that accrues to him from this particular employer as a separate employment benefit. I cannot agree. The payment of sums when a worker is retired from work because of ill health is undoubtedly a benefit. Such a benefit is, it seems to me, an incident of employment. It is not inappropriate to describe the entitlement to retirement ill health benefits as an employment benefit".

116. In making these observations, Candy ADP did not explain precisely why retirement on grounds of ill health having ramifications for the calculation of superannuation entitlements was a relevant "benefit", although it might be inferred that he considered it significant that the issue had financial ramifications for the worker and that accrual of such financial benefit depended upon the approval of the employer in the exercise of some discretion.

117. In *ISS Property Services Pty Ltd v Milovanovic* [2009] NSWWCCPD 27 Candy ADP found (at paragraph 82) that "while it is difficult to see the reduction of the worker's working hours as being the 'provision of employment benefits' to the worker, I am of the opinion that the preceding phrase, namely 'with respect to', is sufficiently wide to encompass such reduction". It is significant to note, however, that the relevant reduction of hours related to "extra' work done by the worker in addition to that required of her under the terms of her employment contract. Moreover, I would respectfully suggest that Candy ADP may have fallen into error of law in concluding that the expression "with respect to" in section 11A(1) informed the question of whether an employer's action fell within one of the matters specified, as distinct from enabling or requiring consideration of the whole of the process culminating in a specified action; see, for example, *Sinclair* per Spigelman CJ at paragraph 35.

118. In *Temelkov v Kemblawarra Portuguese Sports & Social Club Ltd* [2008] NSWWCCPD 96, the employer handed the worker a letter informing him that, due to the employer's "financial circumstances", his employment was to be terminated and that he would be re-employed "on a much lower wage". Roche DP concluded, at paragraph 112, that the terms of the letter "and the manner in which Club's decision or proposal was communicated" to the worker "directly related to the action taken or proposed to be taken by the Club with respect to 'retrenchment or dismissal' or the 'provision of employment benefits'". Having identified three separate "actions" contemplated by section 11A(1), Roche DP clearly did not consider it necessary to identify precisely which category the "action" fell into or why or to critically consider what might be encompassed by the expression "provision of employment benefits". In any event, I consider this decision to be factually distinguishable from the present case, in that it involved the termination of the existing employment contract and had a direct financial consequence for the worker.

119. In *Rail Corporation New South Wales v Crilly* [2010] NSWWCCPD 84 Candy ADP found (at para.132) that a letter from the employer to the employee, who had previously suffered a work-related injury, noting his absence without a medical certificate and difficulties in contacting him by telephone and pointing out that he "may" be regarded as having abandoned his employment, did not constitute "the provision of employment benefits", rejecting the employer's submission the letter enjoyed that character because "employment

benefits" were "the benefits and rights of the worker remaining in employment, such as superannuation benefits and the right to challenge the termination of that employment".

120. In *Baptist Community Services NSW & ACT v Smith* [2012] NSWCCPD 5 Roche DP considered a situation where the worker considered herself "unfairly treated" by the "unfair allocation of work" and "mistakes in her roster" which left her feeling "upset" and "unsupported" because "nothing ever got fixed up" and concluded (at paragraph 113), without further explanation, that "this distress did not relate to matters relating to performance appraisal, discipline or the provision of employment benefits".

121. As noted, and with no disrespect intended in acknowledgement that each of these cases were considered in the context of their own facts and circumstances, I am unable to discern any unifying logic or approach which assists in determining the nature and scope of an "employment benefit" within the meaning of section 11A(1). Indeed, there may be a degree of inconsistency among them, although this cannot be stated with any certainty in the absence of any detailed explanation for the conclusions reached.

122. The issue was considered by Arbitrator McManamey (as he then was) in *Hosoglu v Australian Concert and Entertainment Security Pty Ltd* (WCC 9517-2009 – Determination: 12 March 2010). The worker was chastised at a meeting for having sought and arranged to swap her shift on short notice in order to undertake alternative casual employment as a film extra, the employer having refused permission to do so. The employer alleged that the meeting was in respect of either performance appraisal, which the arbitrator did not accept, or the "provision of employment benefits". After referring to several of the cases to which I have referred above and also noting the lack of authority which "has considered its meaning", the arbitrator made the following statements (at paragraphs 23 and 24):

> "The Oxford Dictionary defines 'benefit' as 'advantage' whereas the Macquarie Dictionary defines benefit as 'anything that is for the good of a person or thing, or to gain advantage; make improvement'. It seems to me that an employment benefit is some advantage gained from employment. On the other hand there is a distinction to be drawn between a benefit and an entitlement. Matters such as agreed wages under a contract of employment would not be an advantage but represent the basic entitlements under the agreement with which the worker provides their services. In my view an employment benefit would involve additional matters which are not part of the contract of employment and are not routinely available to all employees. Matters such as the use of an employer's corporate box at the football would fall within that category whereas provision of a company car as a term of the contract of employment would not. In this matter the respondent was not able to describe the employment benefit to which the employer's actions related. The only possible matter that could be described as an employment benefit is the action of swapping a shift with another person. I do not think that would constitute an employment benefit. The worker does not obtain any advantage by swapping a shift. She would have given up the salary for the shift she vacated and would still be required to work another shift. In these circumstances it is difficult to see how there is a benefit or advantage over and above her usual terms of employment".

123. The concept of a "benefit" has also been considered in the context of the *Safety, Rehabilitation and Compensation Act* 1988 *(C'wealth)*, although I acknowledge that care must be taken when considering the interpretation of legislation framed in different terms to that under consideration. Section 5A(2) of that Act does echo section 11A(1) in that it provides that no compensation is payable to a Commonwealth employee whose psychological injury is caused by "reasonable administrative action taken in a reasonable

manner . . . in connection with the employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in connection with his or her employment".

124. The first thing to be observed is that, unlike section 11A(1), section 5A(2) introduces the concept of "administrative action", which in *Commonwealth Bank of Australia v Reeve* [2012] 199 FCR 463 was distinguished by the majority of the Full Court from "operational actions" on the basis that the former was "action directed specifically to the employee as opposed to it affecting him or her because it was an ordinary feature of his or her work, workplace or environment or otherwise connected to his or her employment" while the later involved "matters of general administration, management and the implementation of policy . . . even if they affect the employment of employees". In *Lombardo v Comcare* [2013] AATA 470 (*Lombardo*) the senior Member considered the case of an employee who had not been offered a voluntary redundancy which would have allowed him to obtain favourable superannuation benefits, concluding that the decision "about the need for redundancies" in the organisation was operational, but that the decision not to offer a redundancy to that particular worker was administrative because it was "specific to him".

125. *Lombardo* also considered the meaning of a "benefit" for the purposes of section 5A(2), following the decision in *Trewin v Comcare* [1998] 84 FCR 171 (*Trewin*) to conclude that a "benefit" was "something desirable, good or beneficial from the applicant's point of view". It was concluded that a voluntary redundancy which entailed a financial benefit in relation to the worker's superannuation entitlements which he desired satisfied this test.

126. *Meaney v Comcare* [2012] AATA 352 was a decision by the same Senior Member dealing with the provision of carer's leave to the worker, a senior public servant, which leave was both incorporated in her employment agreement and involved a degree of flexibility and informality in its implementation. After again considering the distinction between "administrative" and "operational" actions, the Senior Member rejected the employer's contention that such leave was not a "benefit" because the worker was entitled to it under her employment agreement, citing the following passage from the judgement of Heery J in *Trewin*:

> "In my opinion the term 'benefit' . . . is not restricted to something which is given as a matter of charity or gratuity. The Macquarie Dictionary gives two relevant meanings for the noun 'benefit': '1 An act of kindness 2 anything that is for the good of a person or thing.' To some extent the meanings overlap with the latter being broader. I think that the word is used . . . in the latter sense, which does not necessarily exclude something obtained as a matter of right. . . . Sometimes employees might have career-related legal rights, at other times no more than understandings or expectations. I think the intention to be deduced from the exception to the definition of 'injury' in (the Commonwealth legislation) is that Parliament recognised that injury, and particularly stress, might arise out of (sometimes no doubt quite justified) disappointment in Commonwealth careers but concluded that such injuries so arising were, for policy reasons, not compensable. In the passage already quoted the Tribunal held that the exception applied because the obtaining of a permanent position was not 'not a right'. But the question whether permanency, in the circumstances . . . , could be characterised as a right was not relevant. For the reasons mentioned, a benefit (or promotion or transfer) to which an employee is entitled as a matter of right – in the sense of something being legally or administratively enforceable – is nonetheless within the exception".

127. Notwithstanding the foregoing review and discussion, the scope and limitations of the expression "provision of employment benefits to workers" remains elusive.

128. While I would accept that the concept of a "benefit" is broad and encompasses "anything that is for the good of a person", it does not necessarily follow that any positive aspect of employment from the point of view of a worker constitutes the "provision of employment benefits". Assuming that the notion of "provision" includes the failure or refusal to provide, it has never been suggested, for example, that a psychological injury caused by a worker being overwhelmed by their workload engages the issue of whether the employer has failed to provide a benefit, namely a more manageable workload, notwithstanding that a less demanding workload might be "for the good of" that worker. That said, I would accept that an "employment benefit" need not necessarily have a financial aspect and that it may be something to which a worker has a right or entitlement to under an employment contract. An option, incorporated in an employment contract or not, to work flexible hours or to work from home might be considered to be "employment benefits".

129. The presence of the words "provision of" in section 11A(1) must, however, applying the principle of interpretation that it must be assumed that all words in a statutory provision must be given some work to do, have some role in determining the scope of the phrase. The word "provision" is defined in the Macquarie Australia Encyclopedic Dictionary as, here relevantly, "the providing or supplying of something". In the present context the "something" is "employment benefits" and, in my view, the phrase "provision of employment benefits", taken as a whole, connotes some active step taken by the employer specifically related to and for the purpose of the supply (or withholding the supply) of something that is for the good of, or advantageous to, its employees or a particular employee, but does not extend to steps or actions taken by an employer for some other purpose relating to the operations and objectives of its business. I would not, for example, consider the decision of an employer not to offer overtime because its business needs did not require overtime to be worked to be a decision or action "with respect to . . . the provision of employment benefits to workers", notwithstanding that the opportunity to earn extra money by working overtime might be regarded as a "benefit" connected with employment. On the other hand, a decision not to offer a particular worker overtime because a manger did not like that worker may involve "the provision of employment benefits".

130. I do not, therefore, consider that the respondent's decision, dictated by a change of government policy requiring the implementation of structural and funding changes, not to offer the Certificate II course or the Certificates of Attainment previously taught by the applicant, could be regarded as an action "with respect to . . . the provision of employment benefits". By analogy to the Commonwealth cases to which I have referred, that decision was operational in nature, in the sense that it related to the allocation of funding within the business as a whole and to the services offered by the business to its clients (i.e. students), and was not taken with the intention or purpose of affecting the employment benefits of workers generally or the applicant in particular. That this decision had the incidental or collateral consequence of causing the applicant, and other staff, uncertainty and concern about their future role in the organisation does not invest the action with the necessary character of being one "taken or proposed to be taken . . . with respect to . . . the provision of employment benefits to workers". In my view, section 11A(1) requires that the object or purpose of the relevant action must directly relate to one of the matters specified by the section.

131. I am confident in my conclusion that the circumstances of the present case do not engage "retrenchment" under section 11A(1) and in any event again note that the respondent did not argue to the contrary or that the voluntary redundancy issue fell within the scope of the "provision of employment benefits to workers".

132. If I be wrong in my conclusion that the respondents action in ceasing to fund and therefore offer the courses previously taught by the applicant, having the consequence that she may have been required to teach less hours and undertake different duties (but still the duties of a teacher), due to changes in policy and structure, did not constitute "action or proposed action . . . with respect to . . . the provision of employment benefits to workers", it then becomes necessary to consider whether such action was "reasonable".

133. Given that the "action" was apparently necessitated by a change in government policy which was imposed upon the respondent and that there is no evidence to suggest that, in those circumstances, it was unreasonable not to continue to fund or offer the courses previously taught be the applicant, I would accept that such "action" was reasonable. Indeed, the applicant's own evidence did not suggest otherwise.

134. It is well established, however, that in order to be "reasonable action" within the meaning of section 11A(1) the action itself must not only have been reasonable but it must have been carried out in a reasonable way: see *Irwin v Director-General of School Education* (unreported WCCNSW, Geraghty CCJ, 18 June 1998) (*Irwin*), *Ivanisevic v Laudet Pty Ltd* (unreported, WCCNSW, Truss CCJ, 24 November 1998) and *Commissioner of Police v Minahan* [2003] NSWCA 239. These cases, and numerous others which have considered and followed them, further establish that the test of "reasonableness" is an objective one requiring a weighing of "the rights of employees against the objective of the employer" with the issue being "attended, in all the circumstances, by questions of fairness" (per Geraghty CCJ in *Irwin*. This involves a consideration of the whole of the process involved in and the circumstances surrounding the relevant action as such circumstances were known to the employer at the time: see *Sinclair* and *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255.

135. Applying these principles, I am not satisfied that the respondent has established that its relevant "actions" were reasonable in all of the circumstances and in terms of the manner in which they were carried out. The respondent must have known that the changes announced in September 2012 were far reaching and were likely to have a significant impact upon a large number of staff. That the changes would cause uncertainty and concern amongst its employees, particularly those immediately and directly affected by them, was obvious and was acknowledged by Mr Mann. That the applicant was one of the staff directly and immediately affected by the changes was also obvious and is not in dispute. That the applicant was indeed concerned was clearly apparent to Mr Mann.

136. Nevertheless, it appears that, having announced the changes and the reasons for them, the respondent did nothing to address and allay the uncertainties and concerns by promptly providing advice as to how the changes would affect particular employees or indeed providing any form of counselling to assist the employees in dealing with, or coping with, their concerns.

137. So far as the applicant is concerned, she was left in limbo until the end of 2012 and indeed returned to work on the first day of the 2013 year knowing that the courses she had previously taught were no longer to be offered but having no idea what duties or hours, if any, were required of, or would be offered to her by the respondent. Concurrently, she had been told that voluntary redundancy, which would at least have removed the uncertainty,

would not be offered to her because her department had not yet been identified as one in which such redundancies would be offered, notwithstanding that it was apparent that her position was no longer "viable", which evidence I accept.

138. Whether the position the applicant found herself in at the beginning of 2013 was the fault (without intending to use that word in a pejorative sense) of the respondent throughout the whole chain of management or of Mr Mann in particular, or a combination of both, is not really material. In the circumstances, the applicant should have been considered for redundancy regardless of the general policy in that regard, for the simple reason that her position does appear to have become redundant to all intents and purposes; on my reading of the evidence there were already teachers employed to teach the courses that would continue to be offered. If some valid reason for not offering redundancy existed (none is apparent on the evidence), then steps should have been taken to determine and clarify the applicant's position prior to the end of 2012. Instead, the applicant was left to ruminate regarding her situation over the Christmas vacation period and then to attend work on the first day of the new teaching year, to use her words, "none the wiser".

139. In short, I do not consider that the respondent's treatment of the applicant in leaving her in limbo was fair or reasonable.

140. Further, although I have not accepted the applicant's perception of Mr Mann's management skills, style or conduct to have been quite as egregious as she has portrayed it, I do nevertheless accept that his dealing with her regarding the impact of the announced changes, both prior to the end of 2012 and on 21 January 2013, was less than entirely empathetic and that he should have been far more proactive in addressing the applicant's obvious and understandable concerns. Rather than asking her what she wanted to do, which was a somewhat meaningless question in the circumstances, he should have considered to question more carefully in advance and told her how she was to be accommodated within the new teaching landscape and, if he was unable to provide reassurance in that regard, he should have been more proactive in pressing her claim for voluntary redundancy to higher management.

141. Certainly, and in the end result, I consider that by the end of 2012 the respondent should have given the applicant a clear understanding of the role envisaged for her in 2013 or, alternatively, if no viable and meaningful role existed, should have offered her voluntary redundancy, and further that by 21 January 2013 her position had become untenable and intolerable. The respondent took no meaningful steps to address that situation and, accordingly, I am not satisfied that the process adopted in light of the changes announced in September 2012 took little or no account of fairness so far as she was concerned. I am, therefore, not satisfied that the respondent's actions were "reasonable" within the meaning of section 11A(1).

142. I am not satisfied that the defence under section 11A(1) is made out.

Issue 2 – Weekly Payments

143. The applicant seeks weekly payments from 22 January 2013 to 21 July 2015, on which date the applicant concedes that the Commission's jurisdiction to award weekly payments expired by reason of the second entitlement period having ended. Such claim is made on the basis that the applicant has had "no current work capacity" throughout the entire period.

144. Having regard to the dramatic nature of the applicant's decompensation on 21 January 2013, the florid nature of her symptoms immediately thereafter and the medical evidence as a whole, I would accept that she had no current work capacity for the whole of the first entitlement period and accordingly award compensation pursuant to section 36(1) of the 1987 Act from 22 January 2013 to 23 April 2013.

145. The position thereafter becomes rather more complex. In her statement dated 25 May 2013 the applicant says that her symptoms were "severe at first" and that "many persist to this day", this suggesting that some symptoms had ceased by that time and that others had reduced in intensity. This impression of gradual improvement from a relatively early stage, subject to exacerbations from time to time when matters relating to her injury and her claim were prominent, is supported by the clinical note of the general practitioner on 11 March 2013 recording that the applicant was "feeling less teary and emotional now", was sleeping better and was experiencing less anxiety and the report of Ms Sharp, the treating psychologist, dated 1 May 2013 in which it was noted that symptoms had begun to wane.

146. It is, therefore, necessary to consider whether the applicant had a "current work capacity" by reason of becoming fit for "suitable employment" as defined by section 32A of the 1987 Act and, if so, to identify her ability to earn in such employment from time to time.

147. These are issues on which the applicant carries the onus of proof.

148. The definition of "suitable employment" directs attention to matters to which regard is to be had and other matters to which regard is not to be had, the latter including whether work otherwise identified as suitable is available, whether such work is of a type generally available in the employment market, the nature of the worker's pre-injury employment and the worker's place of residence. It is clear from the nature of these excluded matters that the enquiry is more objective and hypothetical than the approach under the former section 40, whether the emphasis now being on what work is suitable rather than the worker's realistic prospects of obtaining such employment on the open labour market geographically available to him or her. Nevertheless, "suitable employment" must be a "real job": see *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCCPD 55.

149. The first matter to which regard is to be had is "the nature of the worker's incapacity and the details provided in medical information including, but not limited to and certificate of capacity".

150. Noting that an injured worker, in particular one suffering from a psychological injury, may not be in the best position to objectively assess their capacity for employment, the applicant's own evidence may be of limited assistance. Nevertheless, she is in the best position to understand her symptoms and the way in which they might affect her ability to work. The applicant has not, however, given much in the way of evidence regarding her capacity to work, deferring to the opinions expressed by the doctors, although she has described her symptoms. That she has done so in identical terms in her statements of 25 May 2013 and 24 December 2015 without any further explanation of the nature of the symptoms and the ways in which they had changed over time is a matter of some concern.

151. Nevertheless, I would accept that during the period in question the applicant has continued to suffer some degree of anxiety, loss of confidence, sleep disturbance and interference with her memory and ability to concentrate. This does not, however, necessarily mean that the applicant has been incapable of undertaking some form of employment.

152. One piece of evidence which I regard as highly significant is that reported by Dr Krzyszton in his medico-legal report dated 22 May 2014, namely that the applicant has "stressed all along that she was capable of continuing work as a teacher ", provided that she was not required to be in contact with Mr Mann or his "associates".

153. I place considerable weight on this evidence for a number of reasons. First, it is an assessment of capacity provided by the applicant herself, apparently on numerous occasions. Second, Dr Krzyszton appears to have agreed with the applicant's assessment, or at least did not demur from it. Third, the statement was expressed retrospectively, meaning that this situation had existed for some time at the time of writing.

154. Although Dr Krzyszton has, with the exception of the certificate dated 22 May 2014 issued in anticipation of the applicant being provided with suitable duties at Strathfield, consistently certified her as having no current work capacity, it is abundantly clear from his evidence as a whole over a long period of time that he has not considered her fitness for employment other than in the context of work for the respondent in circumstances where she is not required to be in contact with Mr Mann or those she associates with him. As early as 6 July 2013, for example, he responded to questions posed by the respondent's rehabilitation officer that the applicant "will be fit to return (to work) if she does not work with, report to or answer to Mr Mann". Having regard to his evidence as a whole, it is my impression that Dr Krzyzszton has elected to withhold any certification for suitable employment until such time as the respondent offers such employment to the applicant which involves no interaction with Mr Mann or his associates.

155. Accordingly, I do not accept Dr Krzyszton's certifications of "no current work capacity" on the basis that he has not considered the issue in the terms of the legislation, in that he has not considered the applicant's capacity for "suitable employment" in the broader sense as defined.

156. The overall inference that I would draw from Dr Krzyszton's evidence is that he would consider the applicant to be fit for a wide range of work, possibly including work as a teacher, notwithstanding such residual symptoms as she may be experiencing, with the proviso that she undertake a gradual return to work initially on a part time basis.

157. The treating psychologist, Ms Sharp, said in her initial report of 1 May 2013 that the applicant "should be fit to return to work after treatment", again provided that contact with Mr Mann be avoided, and by the time of her report dated 17 August 2015 she considered that the applicant "would be able to adjust to a gradual return to pre-illness duties", again with the same proviso regarding avoiding Mr Mann.

158. Dr Dinnen provided a medico-legal report dated 7 July 2014 following an examination on 1 July 2014. It is perhaps significant that he examined the applicant on only one occasion and that this was approximately one month after she had experienced an exacerbation of symptoms following the abortive attempt to return to work at Strathfield. I therefore approach his opinions in relation to capacity for employment with some caution. Those opinions were, in any event, to some degree inconsistent and difficult to understand with precision. Certainly, he stated that the applicant was not fit for any form of employment and should be medically retired by the respondent. Elsewhere, however, he appeared to qualify this by stating that the applicant was "unable to work as a teacher" and "should find other areas of activity and/or employment in due course".

159. Apart from the continuing certificates of Dr Krzyszton, the probative value of which I have discussed above, there is no medical evidence in relation to the applicant's capacity for employment since the report of Dr Dinnen following examination on 1 July 2014, save for the report of Ms Sharp dated 17 August 2015 in which she says that she should "be able to adjust to a gradual return to pre-illness duties".

160. On the whole, I do not find the medical evidence relating to capacity for employment to be particularly helpful, primarily because the focus of such evidence has been on the applicant's inability to return to work as a teacher in contact with Mr Mann (I readily accept that this is something she cannot do), with little or no attention being addressed to the wider issue of whether she is able, notwithstanding that she experiences some continuing symptoms, to undertake employment, including in a capacity other than as a teacher employed by the respondent. The inference I ultimately draw from the medical evidence and her own evidence is that the applicant has since 23 April 2013 been able to undertake some form of work, initially on a part time basis gradually upgrading over time as confidence increases.

161. The next matter to which regard is to be had for the purposes of identifying "suitable employment" is the "worker's age, education, skills and work experience".

162. The applicant is 63 years old. Given that she has no physical impairment, that manual labour is not in contemplation and that the focus is on identifying what employment is suitable rather than whether the applicant has prospects of obtaining such employment as might be suitable on the open labour market, I do not consider this to be a matter of particular weight in the present case. Put simply, I do not consider her age to be a significant factor having regard to the type of work which I have otherwise concluded is suitable to her.

163. The applicant has been educated to tertiary level and is clearly intelligent and literate to an advanced degree. Although her skills and work experience have been in teaching, and that in a particular field, it is also significant that the evidence discloses that she has skills and experience as a manager and has been a capable and respected administrator and organiser, both as Head Teacher and subsequently when undertaking such tasks to make up for Mr Mann's deficiencies.

164. The final matters to which regard is to be had are documents, including any Injury Management Plan, prepared as part of the return to work process and any occupational rehabilitation services that are, or have been, provided to the worker. No such documents or information are before me, save for that connected with the two somewhat ad hoc and abortive attempts made by the respondent to return the applicant to suitable employment. I therefore glean little or no guidance from the information before me in relation to these matters, although I do have an impression that a more proactive and empathetic approach by the respondent and its insurer may indeed have facilitated a return to suitable employment by the applicant.

165. I further note that the medical evidence concerning rehabilitation and a return to work has consistently suggested that such should be undertaken gradually with the applicant upgrading her hours as she becomes more confident and her condition continues to improve.

166. On the whole of the evidence as I have considered it, and noting that such evidence is less than satisfactory in that it does not directly address the matters required to be considered under the definition in section 23A, I have concluded that since 23 April 2013 the applicant has had a "current work capacity" to undertake "suitable employment" in a sedentary capacity performing clerical and administrative work, probably for a small to medium

business or possibly, indeed, as a teacher at a campus where contact with Mr Mann or his associates could be avoided.

167. I have further concluded that the applicant would have been able to undertake such work for between 15 and 25 hours per week for the first year, being an average of 20 hours per week, and for between 20 and 30 hours per week, being an average of 25 hours per week, thereafter.

168. Having determined what is "suitable employment" within the meaning of section 32A, the next step is to determine the applicant's ability to earn in suitable employment for the purposes of calculating her entitlement to weekly benefits in accordance with the formula prescribed by section 37 of the 1987 Act. Although I would accept that this is a separate step to be undertaken after appropriate "suitable employment" has been identified, I do not consider it to be one which invites consideration of the matters to which regard is expressly not to be had under section 32A, these including whether the employment is available or whether some adjustment is warranted to take account of the worker's realistic prospects of obtaining the employment identified on the open and competitive labour market. Rather, the step requires identifying, primarily in a mathematical sense, what earnings might be expected in such employment.

169. There is no evidence before me as to the earnings which the suitable employment I have identified might attract. Using my commonsense knowledge and experience of earnings in the labour market, informed to some degree by my position as a member of a specialist tribunal, I consider it probable that work in a part time clerical or administrative role in, for example, a doctor's office or a small business, would attract something in the vicinity of $25 per hour.

170. Accordingly, I propose to enter an award on the basis that the applicant was able to work on average 20 hours per week at $25 per hour and earn $500 per week from 24 April 2013 to 23 April 2014 and was able to work on average 25 hours per week at $25 per hour and earn $625 per week from 24 April 2014 to 21 July 2015.

171. This produces an entitlement under section 37(3) of the 1987 Act (the applicant not having returned to work) of $378.88 per week from 24 April 2013 to 23 April 2014 and $253.88 per week from 24 April 2014 to 21 July 2015.

172. It follows from the above findings that the applicant is entitled to a general order for section 60 expenses.