GD News

Gillis Delaney Lawyers

Welcome to our latest edition of **GD NEWS** that brings to you information on new trends and issues that impact on employment and the insurance market in Australia. We can be contacted at any time for more information on any of our articles.

Pre-Litigation Requirements. A New Regime?

A defined pre litigation process that imposes requirements on parties to civil disputes to undertake specific steps before commencing proceedings has the potential to add unnecessarily to the costs of resolving a dispute and make it more difficult for litigants to access the courts. On the other hand if the parties have a real go at settlement and where they cannot settle narrow the issues in dispute there is the potential to save significant costs in any legal proceedings. The various jurisdictions in Australia are exploring ways to encourage litigants to resolve disputes, utilise cost effective dispute resolution processes and reduce the cost of litigation. The regulation of the pre-litigation process is seen as one way to address these concerns and NSW, Victoria and the Commonwealth are taking up the challenge and have passed legislation to deal with the pre-litigation stage of a civil dispute. Queensland already has its PIPA pre litigation process.

Interestingly at this stage each jurisdiction has shied away from prescribing mandatory requirements for parties in the pre-litigation stage of a civil dispute. NSW and the Commonwealth have approached the issue by requiring parties in a civil dispute to file a statement with the Court that sets out the steps taken to resolve or limit the dispute in the pre-litigation stage and permitting the Courts to take those steps into account when determining costs. Victoria on the other hand was initially prescriptive in its approach but has now repealed its legislation preferring to leave it to the Courts to set appropriate Rules.

So what is the lay of the land?

NSW Civil Procedure Act 2005

The *Courts and Crimes Legislation Further Amendment Act 2010* was passed in December last year and the Act amended the *Civil Procedure Act 2005* by incorporating Part 2A of the Act which sets out a regime that will permit the Courts or the Government to prescribe pre-litigation protocols and require persons involved in civil disputes to file statements that specify the steps that they have taken to resolve the dispute or limit the issues in dispute before proceedings were commenced. The legislation was due to commence on 1 April 2011 but the commencement date has not been proclaimed. When the Act commences it will only apply to proceedings commenced after a transitional period of 6 months after the commencement of the Act.

The legislation permits the Government to set pre-litigation protocols by passing a Regulation specifying protocols. The Courts are also empowered to make Rules that specify pre-litigation protocols.

A pre-litigation protocol is a set of provisions setting out steps that will constitute reasonable steps for the purposes of the pre-litigation requirements. Examples of the matters that the protocols may deal with are found in the Act and are:

- appropriate notification and communication steps,
- appropriate responses to notifications and communication steps,
- appropriate correspondence, information and documents for exchange between the persons involved in the dispute,
- appropriate negotiation and alternative dispute resolution options,

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- appropriate procedures to be followed in relation to the gathering of evidence (including expert evidence).

Currently there are no pre-litigation protocols however the Act will have an impact even without pre-litigation protocols.

Persons involved in a civil dispute in NSW will be required to take reasonable steps having regard to the person's situation, the nature of the dispute (including the value of any claim and complexity of the issues) and any applicable pre-litigation protocol:

- to resolve the dispute by agreement, or
- to clarify and narrow the issues in dispute in the event that civil proceedings are commenced.

The reasonable steps include:

- notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute,
- responding appropriately to any such notification by communicating about what issues are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute,
- exchanging appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute,
- considering, and where appropriate proposing, options for resolving the dispute without the need for civil proceedings in a court, including (but not limited to) resolution through genuine and reasonable negotiations and alternative dispute resolution processes,
- taking part in alternative dispute resolution processes.

A person involved in a civil dispute must not unreasonably refuse to participate in genuine and reasonable negotiations or alternative dispute resolution processes.

A dispute resolution statement must be filed by the plaintiff when proceedings are commenced. The statement must set out the steps that have been taken to try to resolve or narrow the issues in dispute between the plaintiff and the defendant.

A defendant must also file a statement indicating whether they disagree in whole or part with the dispute resolution statement filed by the plaintiff and specifying the respects in which, and reasons why, the defendant disagrees and specifying other reasonable steps that the defendant believes could usefully be undertaken to resolve the dispute.

The dispute resolution statement must comply with any Rules of the relevant Court.

A legal practitioner representing a person involved in a civil dispute has a duty under the Act to inform the person about the applicability of the pre-litigation requirements and to advise the person about the alternatives to the commencement of civil proceedings (including alternative dispute resolution processes) that are reasonably available to the person in the circumstances in order to resolve or narrow the issues in dispute.

Non-compliance with the pre-litigation requirements does not prevent or preclude a person from commencing civil proceedings in a court, or invalidate civil proceedings that have otherwise been duly commenced. A defendant's failure to file a dispute resolution statement will not invalidate the defence.

Each person involved in a civil dispute will bear that person's or party's own costs of compliance with the pre-litigation requirements, unless rules of court otherwise provide.

However a court may:

- order that a party to civil proceedings pay all or a specific part of another party's costs of compliance with the pre-litigation requirements if satisfied that it is reasonable to do so, having regard to the overriding purpose of this Act, and
- make a costs order against a legal practitioner to pay costs and, in determining whether such an order should be made, the court may take into account any conduct by the legal practitioner that causes a party to civil proceedings not to comply with the pre-litigation requirements.

If a party to civil proceedings has failed to comply with the pre-litigation requirements, the court may take into account that failure in:

- determining costs in the proceeding generally, and
- making any order about the procedural obligations of parties to proceedings, and

- making any other order it considers appropriate.

The proceedings that are exempt from these requirements are:

- any civil dispute where a person is in dispute with another person who is the subject of a vexatious proceedings order under the Vexatious Proceedings Act 2008,
- any civil proceedings in the Dust Diseases Tribunal,
- any civil proceedings in the Industrial Relations Commission, including the Commission in Court Session (the Industrial Court),
- any civil proceedings in relation to the payment of workers compensation,
- any civil proceedings in relation to the enforcement of a farm mortgage to which the Farm Debt Mediation Act 1994 applies,
- any civil proceedings in relation to a claim to which the Motor Accidents Act 1988 or the Motor Accidents Compensation Act 1999 applies,
- any civil proceedings in relation to a claim made under the Motor Accidents (Lifetime Care and Support) Act 2006,
- any civil proceedings in which a civil penalty under a civil penalty provision (however described) of or under an Act (including a Commonwealth Act) is sought,
- any ex parte civil proceedings,
- any appeal in civil proceedings.

We will have to wait and see whether pre litigation protocols become a way of life in NSW or whether the impact will be limited to a requirement to file a dispute resolution statement with possible cost consequences if a party has not taken reasonable pre-litigations steps before commencing proceedings.

Victorian – It's Over To The Courts

In a somewhat stop start approach to the regulation of the pre litigation stage of disputes the Victorian Government passed legislation in 2010 which prescribed requirements on persons involved in a civil dispute to take reasonable steps to resolve the dispute and clarify and narrow issues before proceedings were commenced but in March 2011 repealed that legislation before it had any impact.

The *Civil Procedure Act 2010* pre litigation requirements were due to apply to proceedings commenced on or after 1 July 2011. The Act was prescriptive and identified specific steps that were to be undertaken. The reasonable steps were defined to include the exchange of correspondence, information and documents relating to the dispute and the consideration of options for resolving the dispute without the need for proceedings. Legal practitioners were required to certify whether the pre-litigation requirements were complied with, and if not, the reasons for the non-compliance. With the repeal of the Civil Procedure Act 2010 the mandatory requirements go out the door.

However the baby has not been thrown out with the bathwater. The *Civil Procedure and Legal Profession Amendment Act 2011 (Vic)* which repealed the Civil Procedure Act 2010 has enhanced the Courts power to make Rules that deal with the pre-litigation stage of a civil dispute as the Courts may now make Rules that address the pre-litigation stage as the Courts now have the power to make Rules on:

> *"specific protocols for civil proceedings or classes of civil proceeding including, but not limited to, mandatory or voluntary pre-litigation processes for specified civil proceedings or specified classes of civil proceeding;".*

We will have to wait and see how the various Courts in Victoria embark on the challenge of managing the pre-litigation process.

Commonwealth Legislation - The Civil Dispute Resolution Act 2011

On 24 March 2011, the Commonwealth Parliament enacted the *Civil Dispute Resolution Act 2011*.

The Commonwealth's approach is similar to that recently taken in NSW, where under the new Part 2A of the Civil Procedure Act 2005 litigants will be required to file a statement when they commence proceedings that sets out the pre-litigation steps taken however the legislation does not contemplate the making of pre-litigation protocols.

The Act requires litigants in the Federal Magistrates Court and the Federal Court to lodge a statement with the court detailing

what 'genuine steps' they have taken to resolve a dispute, or the reasons why no such steps were taken. A failure to comply with the requirements will not invalidate the proceedings however a Court when determining costs will be entitled to take into account the steps taken by a party in the pre litigation process.

The date of the commencement of the provisions has not been proclaimed.

A “genuine steps statement” must specify the steps that have been taken to try to resolve the issues in dispute between the litigants in the proceedings; or the reasons why no such steps were taken, for example urgency of the proceedings.

Whilst the applicant goes first as its statement must be filed when proceedings are commenced, the respondent must also file a genuine steps statement before the hearing date. The respondent’s statement must identify any disagreement with the applicant’s statement and provide reasons. No doubt some respondents will view their attempts at settlement in a different light to the one that an applicant advocates.

There is no prescribed form for the “genuine steps statement” although the Act contemplates that the Rules of the Courts will specify the content to be included and the format of the statement. We will have to wait and see what the Rules prescribe. However it is unlikely that the Rules will mandate the steps that must be taken in the pre-litigation process as the Act has not done so.

The Act merely provides examples of the steps that can be taken and the examples do not limit the steps that may constitute taking genuine steps to resolve a dispute. The examples provided by the Act are:

- notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute;
- responding appropriately to any such notification;
- providing relevant information and documents to the other person to enable the other person to understand the issues involved and how the dispute might be resolved;
- considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process;
- if such a process is agreed to, agreeing on a particular person to facilitate the process; and attending the process;
- if such a process is conducted but does not result in resolution of the dispute--considering a different process;
- attempting to negotiate with the other person, with a view to resolving some or all the issues in dispute, or authorising a representative to do so.

A lawyer acting for a person who is required to file a genuine steps statement has a duty under the Act to advise the person of the requirement and assist the person to comply with the requirement.

The driver for a party in litigation to take genuine steps to resolve a dispute will be costs. In exercising a discretion to award costs the Court may take account whether a genuine steps statement was filed and whether such a person took genuine steps to resolve the dispute. The Court may also take account of any failure by a lawyer to comply with their duty.

If a party fails to take genuine steps to resolve a dispute in the pre litigation phase they may find themselves on the end of an adverse cost order. Applicants will be motivated to take genuine steps to resolve a dispute in the pre litigation phase in the hope of attracting a cost order that will cover the work undertaken before the litigation was commenced.

The genuine steps statement requirements do not apply to all proceedings in the Federal Magistrates Court and the Federal Court The proceedings that are exempt from these requirements are:

- proceedings for an order imposing a pecuniary penalty for a contravention of a civil penalty provision;
- proceedings brought by or on behalf of the Commonwealth or a Commonwealth authority for an order connected with:
  - (i) a criminal offence or the possible commission of a criminal offence; or
  - (ii) a contravention or possible contravention of a civil penalty provision;
- proceedings that relate to a decision of, or a decision that has been subject to review by:
  - (i) the Administrative Appeals Tribunal;
  - (ii) the Australian Competition Tribunal;
  - (iii) the Copyright Tribunal of Australia;
  - (iv) the Migration Review Tribunal;
  - (v) the Refugee Review Tribunal;
  - (vi) the Social Security Appeals Tribunal;

(vii) the Veterans' Review Board;
(viii) a body prescribed by the regulations;

- proceedings in the appellate jurisdiction of the Federal Magistrates Court or the Federal Court;
- proceedings arising from the exercise of a power to compel a person to answer questions, produce documents or appear before a person or body under a law of the Commonwealth;
- proceedings in relation to the exercise of a power to issue a warrant, or the exercise of a power under a warrant;
- proceedings that are, or relate to, proceedings in which the applicant or the respondent has been declared a vexatious litigant under a law relating to vexatious litigants (however described);
- ex parte proceedings;
- proceedings to enforce an enforceable undertaking.
- proceedings to the extent that they are proceedings under, or under regulations made under, any of the following Acts:
  (i) the Australian Citizenship Act 2007;
  (ii) the Child Support (Registration and Collection) Act 1988;
  (iii) the Fair Work Act 2009;
  (iv) the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009;
  (v) the Family Law Act 1975;
  (vi) the Migration Act 1958;
  (vii) the National Security Information (Criminal and Civil Proceedings) Act 2004;
  (viii) the Native Title Act 1993;
  (ix) the Proceeds of Crime Act 1987;
  (x) the Proceeds of Crime Act 2002.

Conclusion

At this stage NSW, Victoria and the Commonwealth do not impose specific requirements on litigants to civil disputes to undertake specific actions before legal proceedings are commenced.

However an obligation to file a "statement" identifying steps taken in the pre-litigation process to resolve a dispute will shortly become part of the process in NSW and Commonwealth Court.

There is the possibility that NSW will be confronted by mandatory obligations in the pre-litigation process if the Courts make Rules that prescribe pre-litigation protocols or if a Regulation is passed specifying a protocol so we will have to wait and see what develops.

As for Victoria it's over to the Courts and any new Rules of Court that are published in the future.

For now we are waiting for the commencement date of the Commonwealth and NSW legislation to be proclaimed.

No Duty Of Care Owed To Persons Involved In Joint Illegal Enterprises

The High Court has recently determined that a 16 year old girl involved in the theft of a motor vehicle was owed a duty of care by the driver of the vehicle despite the concept that a person does not necessarily owe a duty of care to a participant involved in a joint illegal enterprise being undertaken at the time of an injury.

On 17 May 1998 Danelle Miller had been out in Northbridge, a suburb of Perth and wanted to get home to Maddington. Danelle had been drinking and with her sister and cousins had tried unsuccessfully to enter a night club. The last train had left and Danelle did not have enough money to pay for a taxi so decided to steal a car. Danelle started a car in the car park near the night club and then asked her older sister, Narelle to drive her and her younger cousin Hayley home. Danelle knew that Narelle had been drinking and did not have a driver's licence. Maurin Miller, a cousin of Danelle's mother, was at a cab rank when he saw the car leaving the car park. At the time of the incident Maurin Miller was 27 years of age. Miller said to Narelle: "I'm your uncle, let me drive" and Narelle then moved out of the driver's seat and Maurin took the wheel. Some of Maurin's friends who were waiting at the cab rank also got into the car. There were nine passengers in the car with Maurin driving.

Initially Maurin drove sensibly but then began to speed and drive through red lights. Danelle asked him to slow down and then to stop and let her and Narelle out. Maurin however drove on saying they were "all right" and should come with him to his house. Near Maddington, Maurin slowed the car and Danelle again asked to be let out but Maurin laughed. Shortly afterwards Maurin lost control of the car and the car struck a pole. One of the passengers was killed and Danelle was

seriously injured and is now a tetraplegic.

Miller sued Maurin in the District Court of Western Australia. At trial the parties agreed the only live issue was whether or not Maurin owed Danelle a duty of care. If this was the case then there should be a 50% reduction for contributory negligence.

The Trial Judge found that Maurin did owe Danelle a duty of care. On appeal, the Court of Appeal held that Maurin did not owe Danelle a duty of care as Maurin and Danelle had engaged in a joint illegal enterprise, that is, illegally using a motor car without the consent of the owner. Danelle appealed to the High Court and special leave was granted.

The High Court found that Maurin owed Danelle a duty of care as by the time the accident happened, Maurin and Danelle were no longer engaged in a joint illegal enterprise. Danelle had initially stolen the car and she and Maurin and some, perhaps all, of the other passengers became parties to a joint illegal enterprise when they agreed to Maurin driving them in the stolen car. However, Danelle withdrew from that joint enterprise when she asked to get out of the vehicle.

The majority of the High Court stated:

> *"Because Danelle had withdrawn from, and was no longer participating in, the crime of illegality using the car when the accident happened, it could no longer be said that Maurin owed her no duty of care. That he owed her no duty early in the journey is not to the point. When he ran off the road, he owed a passenger who was not being complicit in the crime which he was then committing a duty to take reasonable care."*

Justice Heydon in dissent, stated:

> "*The decision of the majority on the withdrawal point is certainly a decision of some importance in tort cases of which this appeal is an illustration. But is of very great importance in criminal law.*
>
> *The withdrawal point turns on the Criminal Code (WA) Section 8(2). There are provisions similar to, though not identical with, Section 8(2) in other jurisdictions in this country. The problem with which the legislation, and the corresponding common law, deals is difficult. It is complex. Various solutions have been proposed, but they have been controversial.*
>
> *The decision of the majority that Section 8(2) applies in the present circumstances is the ratio decidendi of this case – the fulcrum on which the appellant's success turns. It will bind every Court in this country in the law of tort and the criminal law."*

An interesting decision of the High Court. The fact that it was initially Danelle's idea to steal the vehicle was not enough to save Maurin in this case. When Danelle asked to be let out of the vehicle the joint illegal enterprise ended and at that point Maurin owed Danelle a duty of care. It will also be interesting to see, if, as Justice Heydon refers to, this decision will impact on criminal cases and may provide an escape for some criminals.

How easy will it be for an injured person involved in an illegal enterprise to argue they had decided to cease their involvement just before an accident. Will they be believed? The wriggle room is there to defeat a joint illegal enterprise defence.

Warning – You May Need An Expert On Liability To Prove That An Employer Was Negligent In A Cross Claim Or That An Injured Person Was Negligent

Accidents on construction sites often involve a multiple parties who are responsible for the accident. A contractor's employee who is injured on site might look to sue his employer and/or another contractor or the head contractor. In some situations in New South Wales the injured employee will not be able to sue his employer for work injury damages as his injuries do not satisfy the necessary threshold or he may simply choose not to do so. However, if that injured employee sues someone other than his employer, any damages recovered will be reduced to take into account the employer's contribution to the accident. The damages will also be reduced for the contributory negligence of the injured person.

However a defendant who is found liable for damages needs to do more than assert negligence on the part of the employer or contributory negligence on the part of the injured person to succeed in a claim for a reduction in the damages claimed as was seen in the recent Court of Appeal decision in *Varga v Galea*.

Varga was a bricklayer working at a building site. The Trial Judge accepted that his injuries were caused by the negligence of an employee or agent of Joseph Galea and Pauline Galea. The Trial Judge concluded that Varga had been guilty of

contributory negligence and assessed his contribution at 25%. Varga did not bring proceedings against his employer, Greystanes Bricklaying Pty Limited, a company of which he was the director and sole shareholder. The Trial Judge assessed that the employer was 25% liable for the accident.

Varga had gained access to the top of a 4.6 metre Bessa block wall using a scissor lift. Whilst Varga was standing with his right foot on the scissor lift railing and his left foot on the top of the Bessa block wall the boom was operated and extended, projecting Varga upwards onto the top of starter bars on the. The Trial Judge noted Varga did not wear a harness, did not do the work from inside the scissor lift and failed to work from the scissor lift platform or scaffolding. The Trial Judge essentially found that Greystanes contribution and the negligence of Varga arose from the failure to wear a harness.

Varga appealed arguing that Greystanes' liability and his own liability should not be coterminous.

The Court of Appeal noted there was no expert evidence concerning a safety harness and the entirety of the evidence concerning the use of a harness came from cross examination of Varga and another witness who was also working in the scissor lift at the time of the accident.

The leading judgment of the Court of Appeal was delivered by McColl J. The Court of Appeal noted the issue was whether the Galeas had established that Greystanes breached its duty of care.

The Court of Appeal noted that the Galea's bore the legal and evidentiary burden of establishing that Greystanes had breached its duty of care owed to Varga. It was noted they had to demonstrate first that there was a reasonably foreseeable risk of injury to Varga in the manner of performing the task he was undertaking and secondly that Greystanes failed to take reasonable care to avoid that risk because it failed to devise a method of operation for the performance of the task that eliminated the risk, or failed to provide adequate safeguards.

The Court of Appeal noted that to establish that proposition the Galea's had to establish that a safety harness was a reasonably practical precaution or alternative course of conduct, the use of which would have avoided or reduced the consequences of the injury. The Court of Appeal noted a practical alternative will not be shown if it exposes the plaintiff to risks of a different, but equally dangerous kind.

McColl J noted:

> *"Evidence of the practicality of a proposed alternative course of safeguard "is essential except to the extent that (it is) within the common knowledge of the ordinary man." ... A mere allegation that a precaution is practical is insufficient where the evaluation of whether or not the precaution is practical involves issues of technical knowledge and experience. ...The primary judge appears to have approached the question of causation by deducing Varga could have been provided with a safety harness with a safety line, that such a harness could have been secured to the scissor lift railing and that by wearing it Varga would not have been injured in the circumstances of this accident, in particular, that he would not have been impaled on the starter bars protruding from the Bessa blocks into which the concrete was being poured…. In my view this approach was not open to Her Honour. First the evidence about whether a safety harness could have been attached to the scissor lift railing was confusing. Varga said on several occasions that there was nowhere to put a safety harness, evidence which contradicted his evidence that a safety harness could be attached. Moreover he gave evidence that it was dangerous to use a safety harness in a scissor lift. Secondly even assuming that a safety harness could have been attached in some manner to the scissor lift, whether such a device might have prevented Varga being injured, or even reduced the risk of injury was a matter of speculation. It might in some cases be a matter of common sense to infer that a safety harness will prevent injury to a person at risk of falling from a height. However ... even in what appears to be such a case, evidence will be required of the reasonable practicality of the safety measures proposed."*

The Court of Appeal noted the circumstances of the accident were unusual with Varga being catapulted into the air and how a safety harness might operate in those circumstances was not a matter of common sense. The Court of Appeal noted that technical explanation of the nature of the safety harness was required to establish that a safety harness was a reasonable response to the risk.

Accordingly the Court of Appeal concluded that in the absence of expert evidence the case against Greystanes should fail. The Court of Appeal also concluded that the finding in relation to contributory negligence should also be set aside ipso facto as it was also based on the finding that a safety harness ought to have been worn.
At the end of the day the Trial Judge's findings on contributory negligence and the contribution of the employer to the accident

were overturned due to the lack of expert evidence. The Galeas were solely liable for the totality of damages assessed.

The absence of expert evidence in this case was devastating for the Galeas. The damages payable were effectively doubled by reason of the defeat of the contributory negligence finding and the disallowance of the reduction in damages for the employer's apparent negligence.

When running cross claims defendants need to carefully consider the evidence required to demonstrate negligence on the part of either an employer or the injured person. Often an expert report will be needed to comment on the technical aspects of the alleged negligent acts. Without appropriate expert evidence you may fail to prove your case and may fail to establish contributory negligence and/or the negligence of another party.

Watch out experts your work may well increase in the near future as defendants will be concerned that need technical evidence rather than have their arguments rely solely on evidence based on common experiences or perceived concepts of safety.

Are The Findings In A Medical Assessment Certificate Binding When It Comes To The Question Of Causation?

In New South Wales the *Workplace Injury Management and Workers Compensation Act* ("WIM Act") provides a regime for the medical assessment of impairments for various purposes including the determination of the extent of a person's impairment to ascertain whether the person has satisfied the relevant impairment threshold that gives rise to an entitlement to bring a work injury damages claim. A worker assessed under a Medical Assessment Certificate (MAC) as having at least 15% permanent impairment is entitled to bring a work injury damages claim.

In addition the *Civil Liability Act 2002* provides a regime for the medical assessment of impairments suffered by offenders in custody who seek to bring damages claims against defendants who have responsibility for the supervision of the offenders. The *Civil Liability Act* provides that the assessment regime found in the *WIM Act* is used when determining the impairment of an offender. Pursuant to section 26C of the Civil Liability Act an offender in custody assessed under a Medical Assessment Certificate (MAC) as having at least 15% permanent impairment is entitled to an award of damages however if the degree of permanent impairment is less than 15% no damages may be awarded.

Sometimes issues of causation of injury arise despite findings in a MAC that that a person has a permanent impairment that exceeds the threshold.

Section 326 of the *WIM Act* provides that an assessment certified in a Medical Assessment Certificate pursuant to a medical assessment conducted under Part 7 of the WIM Act is conclusively presumed to be correct as to the following matters:

- The degree of permanent impairment of the worker as a result of an injury;
- Whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality;
- The nature and extent of loss of hearing suffered by the worker;
- Whether impairment is permanent;
- Whether the degree of permanent impairment is fully ascertainable.

The section goes on to note that as to any other matter, the assessment certified is evidence (but not conclusive evidence) in any proceedings.

So can the MAC be challenged on the question of causation.

This issue was recently determined by the Supreme Court in *Michael v State of New South Wales.*

Michael was an offender in custody when he was injured. An assessment of impairment was conducted pursuant to Part 7 of the WIM Act and a MAC was issued. The MAC was subsequently challenged on appeal and an Appeal Panel issued a fresh MAC. The State of New South Wales claimed that despite the finding of impairment in the MAC causation was very much an issue and needed to be determined by the principles found in the *Civil Liability Act*.

Michael's case was referred to Justice Fullerton on a preliminary issue to determine whether the State of New South Wales was entitled to run the question of causation where there had been a MAC.

Justice Fullerton concluded that it was.

Fullerton J concluded that the conclusionary effect of a MAC is limited to the specific matter set out in section 326(1) of the WIM Act.

Fullerton J concluded:

> *"Because causation is in dispute in the proceedings, the MAC is not conclusive as to whether the harm allegedly suffered by the plaintiff as an offender in custody was caused by the tortuous conduct of the Crown as the protected defendant. The defendant's liability in negligence must be established in accordance with … the Civil Liability Act … An assessment of permanent impairment in essence of 15% certified under section 326 of the WIM Act is only conclusive upon a finding of liability by a court, or as agreed between the parties. In this case, and notwithstanding the defendant's admitted breach of duty, whether the assault on 16 August 2001 caused the extent of harm claimed by the plaintiff remains in issue and is to be determined by the court."*

Fullerton J went on to conclude:

> *"A MAC issued by an Appeal Panel pursuant to the WIM Act will extend to the causation of the relevant impairment in a medical sense but only if a court is satisfied that the injuries the subject of assessment in the MAC were caused by the breach of duty. If a court does not find the necessary causation, or finds that the facts presumed by the assessor are inconsistent with the court's factual findings, then the conclusiveness of the MAC will not extend to the causation of the relevant impairment in a medical sense … If a court finds a set of circumstances different from those upon which the Appeal Panel relied in preparing the MAC the court is not bound by the MAC."*

Whilst Michael's case dealt with a claim by an offender under the Civil Liability Act it has equal application to work injury damages claim. Whilst a MAC may be binding on the issues including the degree of permanent impairment, causation remains a very real issue and defendants will be entitled to resist claims on the basis that the facts relied on by the medical assessor are inconsistent with the actual facts and/or that the negligent acts were not the cause of an injury. Whilst a MAC is conclusive on some issues it is not conclusive on the question of causation.

Recreational Services-Gym & Personal Trainer Negligent

The NSW Court of Appeal has recently found a gym and one of its trainers liable to one of its members who was injured whilst undertaking a personal training session.

Barrister David Wilson, who was 40 years old at the time of the accident (March 2008) decided to lose weight and get fit. Wilson joined the Vision Gym at Crows Nest and engaged personal trainer Alec Draffin, 20 years of age, who had recently completed qualifications as a fitness instructor and fitness trainer.

In early March 2008 Wilson underwent a pre-exercise screening and assessment conducted by Jenny Webb, a staff member of the Vision Gym, which took about two hours. A nutrition strategy and training plan were formulated. The program was based on four sessions with a personal trainer each week, extending over 12 weeks and three cardio sessions and one weight session per week. Draffin, the personal trainer allocated to Wilson, was inexperienced and Wilson was one of his first 10 clients.

On 5 April 2008 Wilson sustained a right sided prolapse of his L4/5 intervertebral disc with associated nerve compression. Wilson alleged this was caused when he undertook two particular exercises including a "horizontal leg press" and "medicine ball exercise", which was an exercise which required Wilson to catch a heavy medicine ball whilst sitting up from prostate position and then rotating or twisting from side to side with a medicine ball held at arm's length.

As a consequence of his injuries Wilson commenced proceedings against Vision Training in its own right and also as the employer of Draffin. Vision Training accepted it was vicariously liable for Draffin's negligence.

There was an issue at trial as to whether or not Wilson had in fact been performing the exercise alleged but the Trial Judge did not accept the evidence of Draffin in this regard and accepted that Wilson had been undertaking the abdominal exercise with a medicine ball on the day in question.

However the Trial Judge found that there had been no breach of any contract or duty of care. Wilson appealed.
The Court of Appeal found in favour of Wilson.

An expert, Mr Tzarimas had provided a report and gave evidence at trial that performing sit ups caused spine loading conditions that greatly elevated the risk of injury as each sit up produced low back compression. Dr Hopcroft, who had provided medical evidence on behalf of Wilson, found that Wilson's injury was caused as a consequence of the pressure on the lumbar spine where the medicine ball was caught, combined with a flexion of the spine caused by the twisting part of the exercise. The Court of Appeal noted that the critical issue was whether Draffin, the personal trainer, had been negligent in requiring Wilson to do the crunch exercise with the medicine ball and twist. Wilson argued that there was a breach of duty of care as he was not fit or well conditioned enough to undertake this exercise.

Justice Tobias, in his judgment stated:

> *"In my view the appellant's case did not require Mr Draffin to have known of the expert opinions expressed by the appellant's (Wilson's) witnesses but the standard of care of a reasonably competent professional personal trainer would surely require him or her to be aware of the risks of injury associated with different exercises and of the physical condition of the persons for whom they are appropriate, and have some knowledge of the physiological consequence of requiring a client whose abs had not advanced to the point where such an exercise could be undertaken without risk of injury, to undertake that exercise.*
>
> *Mr Draffin must have had some appreciation of the risks associated with the medicine ball exercise given that his evidence was that he would only pass or throw the ball to his really advanced clients and that to do so to someone who did not have "strong abs" would be dangerous ... the fact that Mr Draffin took it upon himself to exercise a discretion to deviate from appellant training program devised by Ms Webb especially for the appellant, a discretion Mr Draffin knew he did not have, in my view, is indicative of a departure from the standard of care expected of a professional fitness trainer."*

Wilson was therefore successful in establishing negligence on the part of the gym. The matter will now be remitted to the Supreme Court for assessment of damages. The skill set of professionals involved in the health industry requires more than simple knowledge of potential exercise regimes, a trainer requires some knowledge of the physiological consequences of requiring a client to undertake exercises. If a trainer pushes to hard they may well find themselves on the end of a law suit from an injured participant.

In NSW the *Civil Liability Act, 2002(the "Act")* imposes restrictions on the duty of care owed to those involved in dangerous recreational activities. A person is not liable in negligence for harm caused as a result of the materialisation of an obvious risk of a dangerous recreational activity.

In NSW the *Civil Liability Act p*rovides that a person ("the defendant") does not owe a duty of care to another person who engages in a recreational activity ("the plaintiff") to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff. Clearly engaging in training is a recreational activity and if an adequate risk warning was provided an argument about the duty of care owed may have arisen. This issue did not arise so it appears there may not have been a risk warning or the defendant may have accepted any warning was not adequate. A risk warning for a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity.

Further in NSW a recreational service provider may contract out of liability as a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which the Civil Liability Act applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill not apply if it is established (on the balance of probabilities) except where the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety. A term of a contract for the supply of recreation services that is to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at his or her own risk operates to exclude any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill. This issue also did not arise in the case so one must question whether there was a contract that sought to limit liability.

The supply of recreational services can result in injuries however there are ways to manage legal risks and damages claims by way of risk warnings and contractual exclusions. If you go to a gym, has your gym provided an adequate risk warning or excluded liability if so you may have problems proceeding with a damages claim if you are injured. If you insure a gym or operate a gym the issues to explore are the processes for providing and recording risk warnings and contractual exclusions as

limiting liability will be your ultimate goal and the question will be have you done enough to exclude liability.

Finally with recent changes to Australian Consumer Laws that commenced on 1 January 2011 recreational service providers can contract out of liability under the Competition and Consumer Act (formerly the Trade Practices Act) and recreational providers should review their contracts to ensure that they have taken advantage of the right to limit their liability for breaches of the Competition and Consumer Act 2010 as well as for any civil liability.

Termination of Injured Worker Following Restructure Not Discriminatory

A common problem for employers is managing ill or injured workers when their illness or injury impacts on the employee's ability to carry out their assigned duties. Employers must be careful when considering the termination of an ill or injured employee as to whether such a termination will expose the employer to a claim for discrimination in that the employee's employment was terminated on the grounds of their disability.

Where an employer is considering making an ill or injured worker redundant, a termination by way of redundancy does not prevent an employee from bringing a claim for discrimination against the employer but not all claims will succeed as was seen in the recent decision of the Administrative Decisions Tribunal of New South Wales ("the Tribunal") in a matter of Kuruppa v Director General, Department of Justice and Attorney General.

Ms Kuruppa began working at the Glebe's Coroners Court as a clerical officer on 21 March 1988. She suffered from Trigeminal Neuralgia which is disorder characterised by episodes of intense pain in her face. Despite the fact her position statement included sound recording court proceedings which required her to use a headset or ear piece, her medical condition resulted in advice to Ms Kuruppa that she should not use such devices.

As a result, her employer did not require her to undertake court monitoring activities. She was directed to focus on other clerical tasks.

In 2009 the employer restructured the clerical positions at Glebe Coroners Court. Whilst there was no change to the position descriptions of those officers, the number of clerical officers was reduced to three. Each of those remaining officers including Ms Kuruppa was required to undertake court monitoring activities.

The employer acknowledged that Ms Kuruppa was not able to do the court monitoring activities. She was medically assessed and offered either medical retirement or a transfer to another position at the same grade.

Ms Kuruppa accepted the transfer to a position at Parramatta Children's Court which did not involve court monitoring. She commenced working there on 31 May 2010. Ms Kuruppa alleges she experienced a high degree of stress and difficulties in her new role and went on sick leave. Ms Kuruppa lodged a complaint of disability discrimination citing the restructure at Glebe's Coroners Court forced her to use the monitoring equipment which she claimed was an act of discrimination.

Magistrate Hennessy stated it was unlawful for an employer to discriminate against an employee on the ground of the employee's disability in relation to the terms or conditions of employment. The Magistrate noted it was also unlawful for an employer to discriminate by subjecting an employee to any other detriment. However , unlike the Disability Discrimination Act 1992 (Cth)("DDA") it is not unlawful under the New South Wales Anti-Discrimination Act 1997 ("ADA") for an employer to fail to make "reasonable adjustments" for an existing employee with a disability. This is a requirement under section 5(2)(a) of the DDA.

There was no dispute that Ms Kuruppa had a disability within the meaning of the ADA. It was noted the terms and conditions of Ms Kuruppa's employment required her to undertake the court monitoring duties. The employer claimed she was not required to perform those duties rather she was given an option of accepting medical retirement or transferring to an equivalent position where those duties did not have to be performed.

Discrimination can be "direct" or "indirect". In order for Ms Kuruppa to substantiate a complaint of direct disability discrimination, she would have to prove that:

- she has a disability as defined by section 49A and section 4 of the ADA;
- the employer changed her terms and conditions of her employment or subjected her to a detriment;
- by doing so, that her employer treated her less favourably than it treated or would have treated a person without her disability in the same or similar circumstances (differential treatment); and

- at least one of the reasons for that treatment was Ms Kuruppa's disability (causation).

To substantiate a claim of indirect discrimination, Ms Kuruppa would have to prove the matters listed in (a) and (b) above and in addition, that:

- in changing the terms and conditions of employment or subjecting her to a detriment, her employer required her to comply with a requirement or condition;
- a substantial high proportion of people who do not have Ms Kuruppa's disability can comply with that requirement or condition;
- Ms Kuruppa cannot comply with the requirement and condition; and
- the requirement or condition is not reasonable to have regard to the circumstances of the case.

Direct Discrimination

The first component of the test for direct discrimination is the differential treatment test. The treatment afforded to Kuruppa must be compared with the treatment that would have been afforded to persons who do not have an illness or injury in the same or similar circumstances. In the absence of an actual person whose treatment could be validly compared with the treatment given to Ms Kuruppa, a decision maker would have to rely on a hypothetical person in a comparable situation. Where there is no actual comparator, the differential treatment and causation enquiries merge because the Tribunal can only reach the conclusion that the employer treated Ms Kuruppa less favourably than a hypothetical person by deciding that a disability was a reason for that treatment.

The second part of the test for direct discrimination is causation. At least one of the reasons for being treated in the way Ms Kuruppa was treated must have been her disability.

Discrimination may not be conscious. There was no need to prove the employer intended to discriminate. The restructure was necessary to meet the expectations of the community, staff and the Judiciary. It was said the government and budgetary constraints meant that work practices needed to be reviewed and enhanced and new procedures implemented. Following the restructure, it was not possible to accommodate Ms Kuruppa's needs and the Magistrate noted there was no legal obligation to do so under the ADA. The employer identified an alternative position for Ms Kuruppa with the same employment conditions as she had been enjoying in the past. Consequently, the Magistrate concluded there was no direct evidence, nor evidence from which an inference could be drawn, that Ms Kuruppa's disability was a reason for the restructure.

Indirect Discrimination

The Tribunal noted Ms Kuruppa was given the option of accepting medical retirement or transferring to a different position where court monitoring was not required. Given that she accepted the transfer and commenced working in the new position, she could comply with at least one of the options that she was offered. On that analysis Ms Kuruppa would not be able to prove the element of indirect discrimination.

The Magistrate concluded Ms Kuruppa had not discharged her onus of persuading the Tribunal that the complaint had sufficient merit to make it fair and just for it to proceed.

In dealing with injured or ill employees, employers should:

- obtain a proper assessment from an independent health professional to assess the employee's current medical status and the ability of the employee to perform the duties of his or her position;
- where the medical assessment requires an alteration or cessation of duties, an assessment must be made by an employer as to:
  - where the impairment to perform the employee's normal duties will continue indefinitely; or
  - whether there is the likelihood of improvement in the employee's ability to undertake any meaningful duties.

If there are no prospects of an employee being redeployed to an alternative position because either such positions are not available or modifications to an employee's duties would provide an unjustifiable hardship to the employer, the employer should meet with the employee to discuss options. This occurred in the above case.

During any meeting the employee's view should be considered. If suitable duties or modified duties are available to be provided by the employer, such duties should be documented as being duties or modifications provided to the injured or ill

employee by the employer solely for the purposes of that employee's rehabilitation. However if there is, as in the above case, an alternative permanent position, it should be offered to the employee and accepted by the employee in writing.

Ultimately, there will be circumstances where modifications to duties or alternative duties are not available. In those circumstances, employers should follow the above processes which may lead to an employer deciding to terminate the employment.

OH&S Roundup

Roofer Fined $70,000

Bodel's Plumbing Service Pty Limited was recently prosecuted for a contravention of Section 8 of the Occupational Health and Safety Act 2000 after an employee fell from a roof. Bodel's employed approximately 27 staff including Mr Hush who was a roof plumber. Hush who was not wearing a harness fell through scaffolding which was erected around the perimeter walls. The roofer fell from the roof onto scaffolding and onto the ground floor concrete slab below. The scaffold platform was lower than the roof edge with no handrails. There was an exposed and open access between the roof and the concrete floor. There were no roof guard rails erected.

The Court noted there was in effect no safe system of work maintained. The employee fell from a slippery roof, hit the scaffolding and then fell down through the chasm. Two other employees were exposed to the same risk.

The Court determined the breach was a serious one and simple and straightforward alternatives to remedy the defects were available.

Both the head contractor and the plumbing contractor were found to have contributed equally to the incident. The Court noted that planned safety procedures that were prepared and adopted by Bodel's were not implemented on the site.

The Court noted:

> *"Once more the Court must reiterate to the tradespersons operating in the construction industry that carefully prepared safe work methods must be implemented. Any variation made on site to the existing systems must be again risk assessed and tested against the objective of ensuring the safety of employees at worksites."*

The head contractor on the project had been prosecuted and fined $110,000 and although the Court found the Bodels equal liabile for the objective seriousness of the offence, because of mitigating elements of the offence including Bodel's financial care of its employee and its industrial record, a lesser penalty was imposed. Bodel's were fined $70,000.

Workers Compensation Roundup

Overtime Claims Under Section 40

A common issue for determination in the NSW Workers Compensation Commission is the appropriate amount of weekly compensation to be paid to an injured worker pursuant to Section 40 of the Workers Compensation Act 1987. Section 40 specifically provides for the payment of weekly compensation for the difference between the worker's post-injury earnings and those that could be expected to be earned in either pre-injury or comparable employment. It has long been held that pursuant to Section 40 and decisions such as Mitchell v Central West Area Health Service, in the absence of evidence demonstrating a failure to exercise a residual capacity by deliberately minimising earnings, the simple mathematical difference between pre and post-injury earnings will be the appropriate amount to be paid to the worker.

When a component of the worker's pre injury earnings were the result of overtime, arguments are often advanced by employers that a refusal by the worker to avail themselves of additional overtime or that overtime was not available for operational reasons post-injury, should result in no top up Section 40 payments for the worker.

These issues were recently examined by President Judge Keating in *DHL Exel Supply Chain (Australia) Pty Limited v Hyde (2011).* The worker was employed as a storeman with DHL and his constitutional left sided plantar fasciitis condition had been aggravated by his employment. The worker initially received an award of $135.79 per week pursuant to Section 40 on the basis that his probable earnings but for the injury were $1,092.50 per week and actual earnings following the injury were $952.26 per week.

The employer had argued that the worker had unreasonably refused overtime and, on this basis, should not be entitled to the

simple mathematical difference between pre and post-injury earnings. The Commission had accepted that the worker had refused overtime but only on two occasions when the offer had been made too late in the shift for him to rearrange his after work commitments. It was concluded in these circumstances that the worker had not failed to exercise his residual capacity by deliberately minimising his earnings.

The employer had also contended that the worker had rejected suitable employment by failing to take up the offers of overtime post-injury. Although this argument was not ultimately allowed as it was only contested at the appeal, President Keating commented that a rejection of overtime on several occasions only would not constitute a rejection of suitable employment. The President also commented that once a worker had established that comparable earnings exceed his ability to earn, the evidentiary burden shifted to the employer. It was up to the employer to lead evidence as to why in the exercise of the Arbitrator's discretion, the simple mathematical difference between pre and post injury earnings should be reduced. President Keating upheld the original Arbitrator's decision to award the worker $135.79 per week.

So is the situation in all cases where a worker could be seen to have refused overtime post-injury that there would be no variance in the simple mathematical difference between and pre and post injury earnings? We would suggest in order for an employer to reduce the entitlement, they must provide evidence that the overtime was offered to the worker in a timely manner, was offered on a regular and consistent basis and the worker consistently refused to accept offers of overtime. Of course, it should be remembered that any offers of overtime must be within the worker's medically certified restrictions both as to hours and duties allowed.

Disease Type Injuries – Compensable Under A Journey Claim?

The New South Wales *Workers Compensation Act 1987* contains a number of discreet injury provisions that allow for the payment of compensation. Sections 15 and 16 of the Act provide for the deeming of injuries where a worker has contracted a condition either by way of disease of gradual onset or where the disease has been aggravated, accelerated etc in the course of their employment. Section 10 of the Workers Compensation Act 1987 provides for the payment of injuries sustained on a journey between the worker's residence, place of employment and upon return. So can a worker succeed in a claim where it is alleged a disease has been aggravated whilst on a journey? President of the Workers Compensation Commission, Judge Keating recently examined this question in *Abou-Sleiman v P & V Masonry Pty Limited*.

Section 10(1D) of the *Workers Compensation Act 1987(NSW)* specifies that compensation is not payable if the personal injury resulted from a medical or other condition of the worker and the journey did not cause or contribute to the injury. There was no question that the worker was on a journey to which section 10 applied when he was involved in a motor vehicle accident. Nevertheless it needed to be determined whether he suffered a personal injury within the meaning of section 10. The Arbitrator initially determined that the injury that the worker suffered was most likely an aggravation of degenerative changes in the lumbar spine and thereby failed to satisfy the provisions of section 10(1D). Most notably there was not a sudden identifiable pathological change that resulted in the event being classified as a personal injury.

Judge Keating reinforced that for the worker to succeed on the claim under the journey provisions he must have suffered a sudden identifiable pathological change. Simply establishing an aggravation of a disease whilst on the journey may be an injury but it is not a "personal injury" as required by Section 10. It should be remembered Section 10 is an entitling provision to compensation for an injury that would not normally be found to be in the course of employment and employment would not be a substantial contributing factor to the injury.

Another component of the appeal was the attempt by the worker to admit late evidence in the appeal process. This included a statement from the worker addressing the deficiencies of the claim. The Commission soundly rejected the Application to Admit the Documents as it was clearly an attempt to rectify the shortcomings of the evidence in the initial hearing. The admission of new evidence in the appeal would have resulted in substantial prejudice to the employer.

The decision clearly identifies the need to carefully consider the medical evidence in a matter where the claim is the result of an incident on a journey. Whilst a clearly identifiable frank injury resulting from some trauma would bring the matter within the journey provisions of the Act, unless there is sudden pathological change caused by the incident compensation will not be payable. Mere aggravations of a pre existing disease are insufficient.

Reasonable Actions By Employers In Psychological Injury Claims

The recent decision of *Baldwin v Greater Building Society Limited [2011] NSW WCC PD 18* provides a timely reminder as to requirements for Section 74 Notices and the difficulties in defending claims under the reasonable action provisions contained within Section 11A of the Workers Compensation Act 1987. Section 11A provides a defence to employers and insurers for

psychological injury claims in performance appraisal and other specified criteria.

The worker was employed by the Greater Building Society as branch supervisor from September 2007. In March 2009, she failed to follow the employer's procedures on three occasions. Because of these failures, the employer removed her as a branch supervisor and informed her that she would be transferred to the position as a teller at another branch. Ms Baldwin ceased work immediately and submitted a claim based on psychological injury caused by "harassment and victimisation" at work.

The employer disputed liability in a Section 74 Notice on a number of grounds, most notably the workers injury had been caused by reasonable actions taken by the employer with respect to all of the seven grounds specified in Section 11A. Deputy President Roche commented that the Section 74 Notice was unacceptable. Any declinature based on Section 11A must properly particularise the grounds upon which the employer relies. Given there are seven different parts to Section 11A(1), a worker is entitled to know precisely which element of Section 11A was relied upon. Given the "front end loaded" premise of the NSW system, in most circumstances any subsequent attempt by the employer to cure the notice will fail. In this matter, the inadequacy of the Section 74 notice was eventually cured by the employers filing its reasons for disputing liability. The worker did not dispute this late filed document and it was allowed into the proceedings.

Although the employer was successful at first instance, the Deputy President ultimately disagreed with the Arbitrator's determination. The worker's terms of employment were set out in the 2008 Greater Federal Enterprise Agreement which included a section dealing with performance counselling procedures. Performance counselling was to commence with informal discussions to ensure both parties had a mutual understanding of the objects to be achieved. If there was insufficient improvement within an acceptable timeframe, formal documented proceedings were to be commenced. This formal procedure would include a second formal meeting. If there was no improvement within a further specified period after this formal meeting, the employee's service could be terminated. Of note, the Enterprise Agreement also provided a Code of Conduct which contained relevant provisions to ensure compliance with legal, regulatory and policy requirements of the employer. The workers' failure to comply with some of the policy requirements had brought about the disciplinary procedure.

After a detailed examination of the worker's errors, the Deputy President accepted that they were matters of concern for a financial institution and the employer was entitled to take action with respect to her performance. When considering whether the action taken was reasonable in all the circumstances, the Deputy President did not accept that the employer's actions were consistent with the Enterprise Agreement. In particular the formal documented proceedings outlined in the Enterprise Agreement had not been complied with. The Deputy President considered that by immediately demoting the worker after the second meeting, the employer did not provide an opportunity for her to improve her performance within required specified period as detailed in the Enterprise Agreement.

The informal coaching session that was initially provided to the worker was not a performance appraisal, as it did not contain an assessment or evaluation of a worker's performance. He also had regard to email documentation demonstrating that management had "made up its mind" before any performance management counselling took place. In these circumstances the employer had not viewed the worker's case objectively or fairly.

The Deputy President confirmed that the test of reasonableness under Section 11A is objective. Mere compliance with a set procedure that the employer believes is reasonable will not necessarily mean that an employer's conduct is in fact reasonable in all the circumstances. The employer compounded the problem in this matter as it failed to have proper regard to its own Enterprise Agreement and the worker was not given a reasonable opportunity to address her perceived shortcomings.

The decision reinforces the difficulties for employers in defending psychological injury claims under Section 11A. Whilst strict compliance with an agreed documented appraisal procedure (such as that contained under an Enterprise Agreement) would appear to be the accepted minimum, even then an employer must give the worker a reasonable opportunity to address any perceived shortcomings before taking disciplinary action. Coupled with the specific Section 74 notice requirements to set out exactly what part of Section 11A is relied upon, we recommend careful consideration be given to declining any claim under this section.

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