

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

[2023] NZACC 99

ACR 116/21

UNDER THE ACCIDENT COMPENSATION ACT
2001

IN THE MATTER OF AN APPEAL UNDER SECTION 149 OF
THE ACT

BETWEEN DONNA LOTHIAN
Appellant

AND ACCIDENT COMPENSATION
CORPORATION
Respondent

AND DEPARTMENT OF CORRECTIONS
Interested Party

Hearing: 21 June 2023
Held at: Hamilton/Kirikiroa

Appearances: L Findlater for the Appellant
F Becroft for the Respondent

Judgment: 27 June 2023

**RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for work-related mental injury - s 21B,
Accident Compensation Act 2001 (“the Act”)]**

Introduction

[1] This is an appeal from the decision of a Reviewer dated 19 April 2021. The Reviewer dismissed an application for review of Gallagher Bassett’s decision of 13 August 2020, on behalf of the Department of Corrections (Ms Lothian’s accredited employer), declining her cover for a work-related mental injury.

Background

[2] Ms Lothian was born in 1962. She became an employee of the Department of Corrections.

[3] On 8 April 2019, Ms Lothian underwent certain experiences at her workplace, which are recorded in two emails to her employer dated 8 and 11 April 2019:

She had reported for her work as a prison guard and was expected to lead a team of four other staff, but she discovered written handover instructions which suggested she should have had a team of five. Ms Lothian contacted the next most senior officer about this and he instructed her to carry on with the staff she had.

She thought that the officer's instructions were inconsistent with her written instruction and tried to telephone someone else to query this, but was put back through to the same senior officer who was aggravated that Ms Lothian had not followed his previous instructions and confronted her in person where he yelled, swore and pointed his finger at Ms Lothian.

The staff members in Ms Lothian's team suggested that she should go home after this confrontation as she was upset and crying. However, when she went to exit the prison building she was again confronted by the senior officer who told her she was not to leave and ordered her to go to his office, again shouting and swearing when she insisted she was going home.

[4] On 9 April 2019, Ms Lothian's GP, Dr Dean MacKay, recorded Ms Lothian's report that she had been severely bullied by an officer the night before.

[5] On 13 May 2019, Dr MacKay recorded that Ms Lothian requested to be certified unfit for work due to bullying that she reported to have taken place at work.

[6] On 17 June 2019, Ms Lothian's employer investigated her complaints and conducted an interview with her. Ms Lothian advised that the event of 8 April 2019 was not the first instance of bullying as this had occurred "right the way through" and "started right at the beginning". She mentioned two particular previous incidents where she believed she had been assaulted both by a prisoner and by another prison guard. She reported that, on both occasions, she had not felt supported or listened to when she made complaints.

[7] On 25 June 2019, two colleagues who were working with Ms Lothian on the night of 8 April 2019 were also interviewed. They both confirmed that they had seen the senior officer yelling and that Ms Lothian had been crying and upset afterwards.

[8] On 4 July 2019, Dr MacKay recorded that Ms Lothian complained of a cough and noted that she had impending proceedings against “a couple of her bosses”.

[9] On 15 October 2019, Dr MacKay recorded that Ms Lothian complained of more bullying at work and that she had been spoken to harshly that day.

[10] On 18 October 2019, Dr MacKay lodged a claim on Ms Lothian’s behalf, for “acute reaction to stress” said to have been caused by “significant workplace bullying, ongoing”. The claim referred to an accident date of 8 April 2019.

[11] On 13 December 2019, Ms Lothian completed a work-related mental injury questionnaire, and described the events of the night of 8 April 2019.

[12] On 24 January 2020, Ms Lynette Dalglish, Psychologist, submitted a psychological services completion report, noting a diagnosis of Adjustment Disorder with mixed anxiety and depressed mood, but an improvement in symptoms due to time away from work.

[13] On 29 May 2020 and 19 June 2020, Dr Dipti Pereira, Psychiatrist, met with Ms Lothian. On 7 July 2020, Dr Pereira noted that Ms Lothian was reluctant to provide details about her personal and family history. After recording the key details from the available records, Dr Pereira summarised the relevant background reported to her by Ms Lothian, recording (*verbatim*):

3 years ago she joined the Department of Corrections. She indicated that she had experienced bullying in the workplace which started when she was training and continued throughout her work with the Department of Corrections. She reports that she was ostracised because of the colour of her skin and that she was physically abused during the training period on site by a peer. She reports that the PCO often referred to her as being delicate and weak in front of everybody else and that she retaliated because she had disclosed some information to him in a confidential manner so that he would look after her ...

In September 2017, she was physically abused by an officer on three different occasions ...

She was constantly criticised for the written reports that she provided, which lowered her confidence. Her buddy often left. She indicated that her colleagues often ridiculed her and called her too pretty, too white, too old to work in the prison.

In 2018 she was handcuffed to a prisoner who was in hospital. She completed a report about the incident but the PCO verbally abused her on the phone she was duty with the prisoner and used foul language.

Donna indicated that there were several such incidents of being verbally abused by senior and that made her feel very upset because she loves her job and was doing it sincerely and seriously.

[14] Dr Pereira also recorded Ms Lothian's report of what happened on 8 April 2019. This was report consistent with the description in Ms Lothian's emails to her employer. Dr Pereira discussed the relevant criteria and concluded:

It is my opinion based on the assessment carried out with Donna and review of the information provided to me that Donna has experienced symptoms of PTSD as well as an adjustment disorder with depressed mood which can be directly and significantly attributable to the multiple instances of being bullied in the workplace at The Department of Corrections.

She reports that the bullying started during her training and continued intermittently throughout her period of employment and that senior colleagues were intimidating in their behaviour towards her, spoke to her in a loud and aggressive tone at times and used abusive language...

Donna gave a very clear and detailed account of all the multiple instances of being bullied and also instances where she was required to work in unsafe environment which would have put her life at risk as well as the life of her colleagues and the prisoners at risk...

On inquiry, she reported that she worked almost throughout her life and had never been fired and has not previously experienced workplace bullying. It is understandable that she was very upset not only by the intimidating tone used by senior staff at the Department of Corrections who addressed her grievances and also failed to consistently follow through with her request to work on the nightshift.

With regard to the relationship between the traumatic events and the diagnosed mental conditions i.e. PTSD as well as adjustment disorder with depressed mood.

I have provided information about this in the body my report and I would like to state that in my opinion the experience of multiple episodes of bullying at the workplace has resulted in experience of symptoms of PTSD and depression and that there is no history to suggest previous experiencing these disorders.

It is my opinion that the experience of significant workplace bullying over a 3 year period can be directly and significantly attributed as being the causal factor for the mental injury.

I would also like to state that it is more than likely that experience of repeated instances of being bullied in the workplace, feeling not supported by senior colleagues, being required to work on a shift without sufficient team member support as per the written protocol of the prison and subsequently being invalidated by senior management and even being spoken to in an intimidating and threatening manner with the use of abusive language would provoke extreme distress in most people and one would hope that this is outside the normal range of workplace experiences for most persons.

[15] On 15 July 2020, Dr Bill Short, a Gallagher Basset internal advisor, noted that Dr Pereira had referred to both bullying over a three-year period as well the specific events which occurred on 8 April 2019. Dr Short recommended that clarification be sought as to whether Dr Pereira considered the 8 April 2019 events to have been a material cause of Ms Lothian's mental injuries or whether they were just one of the many events which had contributed to the injuries.

[16] On 17 July 2020, Gallagher Basset issued an interim decision declining cover on the basis that there was insufficient evidence to do so. However, Gallagher Basset sought further comment from Dr Pereira as to the sole cause of Ms Lothian's mental injuries.

[17] On 4 August 2020, Dr Pereira advised that Ms Lothian's mental injuries were more than likely caused by a combination of several separate unrelated events of bullying, understaffing issues and roster inflexibility, although "did not tend [sic] significant factors causally linked to the PTSD".

[18] On 13 August 2020, Gallagher Bassett advised Ms Lothian that it was making a final decision declining her claim on the basis that it did not meet the criteria for cover under the Act. Ms Lothian applied to review this decision.

[19] On 22 March 2021, a review hearing was held. Ms Lothian gave evidence disputing Dr Pereira's conclusion that the mental injuries were caused by a combination of events, and asserted that they were caused by the 8 April 2019 event only.

[20] On 19 April 2021, the Reviewer upheld Gallagher Bassett's decision. This was on the basis that, while Ms Lothian genuinely thought that the 8 April 2019

events had caused her mental injuries, the evidence from Dr Pereira suggested that it was the combination of separate events and bullying over a three-year period that caused Ms Lothian's mental injuries.

[21] On 24 May 2021, a Notice of Appeal was lodged. Ms Lothian and the Corporation agreed to make a joint referral for a second psychiatric opinion.

[22] On 30 March 2022 Ms Lothian attended an appointment with Dr Patrick Daniels, Psychiatrist. She was unwilling to answer his questions or provide information in relation to anything other than the events of 8 April 2019, despite Dr Daniel's warning that he could not proceed if she did not. Accordingly, Dr Daniels was unable to provide any useful report.

[23] Ms Lothian subsequently indicated that she would like to see a further psychiatrist and that she now understood that she would need to discuss and provide details relating to events prior to 8 April 2019. The Corporation agreed to arrange a further assessment on the express condition that Ms Lothian agreed to cooperate with and answer all the psychiatrist's questions, including those about her background.

[24] On 19 October 2022, Ms Lothian saw Dr Caroline Fraser, the Psychiatrist to whom Ms Lothian had asked to be referred. At the scheduled assessment, despite her previous agreement, Ms Lothian indicated that she was comfortable sharing only contemporaneous information and that she was concerned about the sharing/confidentiality of background information as she was concerned as to who would have access to this information. Dr Fraser offered a further appointment and there was discussion between all counsel, but Ms Lothian was unable to be persuaded to attend. Therefore, Dr Fraser was asked to provide her opinion as best as she could, with the information available to her.

[25] On 16 November 2022, Dr Fraser recorded Ms Lothian's account of the events of 8 April 2019, which was similar to that reported previously. However, Ms Lothian also made a new claim, that she had, at some subsequent point, received threats to her life from colleagues who were friends of the senior officer involved:

Ms Lothian said that the SPCO had subsequently left employment at the prison following disciplinary action in relation to this event and his actions towards another staff member. She said that following this her life had been threatened by his friends who were colleagues and still working at the prison, and that she had not laid a formal or police complaint about this “I don’t want to tell anyone – I feel like I would be more at risk”. She said that his friends had said that they “would make sure things happened” to her and she knew that they were capable of this. I note that these allegations were not documented in the information provided to me but Ms Lothian indicated this information had been shared in previous meetings.

[26] Dr Fraser advised that she agreed with Dr Pereira's opinion that Ms Lothian was suffering from adjustment disorder. In relation to Dr Pereira’s diagnosis of Post-Traumatic Stress Disorder, Dr Fraser agreed that Ms Lothian presented with some of the symptoms. However, Dr Fraser did not think Ms Lothian met the full criteria for that diagnosis, as the events of 8 April 2019 did not meet the criterion of exposure to actual or threatened death, serious injury, or sexual violence:

Criterion A requires that the individual is exposed to actual or threatened death, serious injury, or sexual violence ...

Ms Lothian reported two aspects of safety fears. On the one hand, she said that during this event she had feared the death of an inmate (due to the potential for the unit to become unsettled having witnessed the SPCO’s behaviour) and secondly, she had feared that she would be seriously assaulted.

I considered that fearing the death of an inmate after becoming unsettled did not meet threshold for criterion A “actual or threatened death, serious injury”. Ms Lothian did not report any threats directed at inmates or any changes in inmate behaviour arising from this incident ...

In this situation, Ms Lothian reported that she personally feared serious injury. She described threatening behaviour, being spoken to with a raised voice, invasion of personal space, and clenching of the fists by the perpetrator. She said that the perpetrator had attempted to prevent her from leaving her work premises, a locked correctional facility. There had been no verbal threats of harm. I considered that although there was clear evidence of bullying and intimidating behaviour, the question in this case, was whether the subjective experience of threat to life and of serious injury, was sufficient to meet threshold for Criterion A.

On the basis of the information provided to me, I considered that Ms Lothian was not exposed to actual or threatened death or serious injury. Accordingly, I considered that Criterion A for Post Traumatic Stress Disorder was not met in relation to this event, and that the diagnosis of an adjustment disorder was more appropriate.

At the time of my assessment, Ms Lothian presented with clinically significant symptoms meeting criteria for diagnosis with an Adjustment Disorder with anxiety and depressed mood. The history suggested that the symptoms had initially emerged following the event on 8 April 2019, and had been maintained

by alleged threats to her life as a consequence of the alleged perpetrator apparently losing his job. However this could not be confirmed as Ms Lothian did not attend the follow-up assessment and no other corroborative information was made available to me. It was likely that it was a combination of these two factors i.e. the initial intimidating behaviour and the subsequent alleged threats to Ms Lothian's life, that explained this diagnosis. As the consequences of the event were ongoing, the symptoms had not resolved. Should the consequences of the stressor (alleged threats on life) be resolved I would anticipate that the symptoms would not persist.

The description of the event on 08 April 2019 was consistent with an episode of intimidation which had resulted in subjective fears for safety. This met criterion B "marked distress that is out of proportion to the severity or the intensity of the stressor, taking into account the external context and the cultural factors that might influence symptom severity and presentation" as well as being associated with a change in social and occupational functioning. The external context was important as these events had taken place within a locked corrections facility, where a heightened sensitivity to potential risk would be adaptive, enabling risk management procedures to be put in place proactively to protect prisoners and staff. As a locked facility, this environment was inherently more difficult to leave. Both of these factors were likely to influence symptom severity and presentation at the time of the initial incident but on their own did not fully explain the presentation. The subsequent events, when Ms Lothian alleged that her life had been threatened, constituted more significant or severe stressors. Ms Lothian indicated that she feared serious injury during the first incident, and that the later incidents had caused her to fear for her life.

The focus of psychiatric assessment is on diagnosable illness which is typically an interplay between vulnerability and stress factors. Accordingly, it is not the remit of psychiatric assessment to determine what a 'normal reaction' is to a specific stressor. Rather, it is to provide an explanation for why an individual might have experienced the psychopathology that they did. Ms Lothian was self-described as "OCD" with perfectionistic tendencies somewhat increasing the risk of developing mental health concerns. However Ms Lothian described herself as a resilient person prior to this event notwithstanding three years of prior bullying, and as such it seemed less likely that a single instance of intimidation as described would have resulted in the protracted stress response which she had experienced, had other contextual factors not been present. Adjustment difficulties relating to the event on 08 April 2019 would be expected to have resolved after the alleged perpetrator had been disciplined and had left the Department of Corrections employment. Hence it seemed that other contextual factors, possibly the previous history of bullying or the alleged threats on her life, had been important in this case. As Ms Lothian was reluctant to participate in a full assessment, the relative contributions of these could not be determined.

Relevant law

[27] Section 27 of the Act defines mental injury as a clinically significant behavioural, cognitive or psychological dysfunction.

[28] Section 21B provides:

- (1) A person has cover for a personal injury that is a work-related mental injury if—
 - (a) he or she suffers the mental injury inside or outside New Zealand on or after 1 October 2008; and
 - (b) the mental injury is caused by a single event of a kind described in subsection (2).
- (2) Subsection (1)(b) applies to an event that—
 - (a) the person experiences, sees, or hears directly in the circumstances described in section 28(1); and
 - (b) is an event that could reasonably be expected to cause mental injury to people generally; and
 - (c) occurs—
 - (i) in New Zealand; or
 - (ii) outside New Zealand to a person who is ordinarily resident in New Zealand when the event occurs.

...
- (5) In subsection (2)(a), a person experiences, sees, or hears an event directly if that person—
 - (a) is involved in or witnesses the event himself or herself; and
 - (b) is in close physical proximity to the event at the time it occurs.
- (6) To avoid doubt, a person does not experience, see, or hear an event directly if that person experiences, sees, or hears it through a secondary source, for example, by—
 - (a) seeing it on television (including closed circuit television):
 - (b) seeing pictures of, or reading about, it in news media:
 - (c) hearing it on radio or by telephone:
 - (d) hearing about it from radio, telephone, or another person.
- (7) In this section, event—
 - (a) means—
 - (i) an event that is sudden; or
 - (ii) a direct outcome of a sudden event; and
 - (b) includes a series of events that—
 - (i) arise from the same cause or circumstance; and

- (ii) together comprise a single incident or occasion; but
- (c) does not include a gradual process.

[29] Section 28(1) of the Act provides that:

- (1) A work-related personal injury is a personal injury that a person suffers—
 - (a) while he or she is at any place for the purposes of his or her employment, including, for example, a place that itself moves or a place to or through which the claimant moves.

[30] The Commentary from the Transport and Industrial Relations Committee which considered the insertion, on 1 October 2008, of section 21B, stated:

The intent behind the requirement that the event be one that could ‘reasonably be expected to cause mental injury’ is to ensure that cover for work-related mental injury does not extend to injuries caused by minor events or by gradual process. Costs for the introduction of cover for work-related mental injury will be borne directly by employers through the Work Account. Consequently, it is also necessary to ensure that only work-related injuries are gaining cover under this provision. This means that the cause of the injury must be clearly identifiable, and that it must not be the result of work-related stress, or an event that is the ‘final straw’ in a series of events (work or non-work-related) that would not, in itself, usually cause a mental injury. The intent is that the event must be one that could reasonably be expected to cause mental injury in the general population.

The majority of us recommend amendments to reflect the bill’s intention regarding work-related mental injuries: that the triggering event must be one that could reasonably be expected to cause mental injury in the general population.

[31] In *W*,¹ Collins J held:

[76] In summary, the answer to the first question posed in [5] is that the ambit and meaning of the words “because of” in s. 26(1)(c) of the Act depends on the context in which the claim for cover is made. In most cases, s.26(1)(c) of the Act will require that the claimant’s physical injuries are both a factual and legal cause of his or her mental injuries. These requirements will usually be satisfied where two tests are met. First, subject to the possible exceptions outlined in [63], the “but for” test must be satisfied. Second, the physical injury must “materially contribute” to the claimant’s mental injury.

[32] In *OCS Ltd v TW*,² Judge Joyce reinstated the employer’s decision declining cover for a work-place mental injury. The appellant noted that she had regularly

¹ *W v Accident Compensation Corporation* [2018] NZHC 937.

² *OCS Limited v TW* [2013] NZACC 177.

been the victim of harassment and bullying by two co-workers, leading up an incident at work where a co-worker threatened, verbally abused and “squashed” her face (pressed fingers hard against her skin). Judge Joyce stated:

[80] ... whatever happened on the night of 25 October, such amounted to no more than an event forming an integral element of a reasonably long-running pattern of bullying and harassment; it was a “last” or “final” straw event at most.

[81] Whatever happened that night was obviously reprehensible, and could never be condoned, but my just expressed placement of it takes TW’s case quite outside the bounds of s 21B – that because it cannot be said that, even if she did indeed suffer a mental injury, it was one that was caused by a single event of the kind described in subs (2) of that section.

[82] A “squashing” of the face is far removed from the league of seriously traumatic events the mischief of which s 21B is designed to address.

[33] In *KB*,³ Judge Beattie dismissed the appeal as to a work-place mental injury. The claimant was a funeral embalmer, who was diagnosed with PTSD nearly two years after attending the suicide of a young man. During that period, KB had also been subjected to other distressing circumstances and events in her work. Judge Beattie stated:

[25] I consider that the statutory requirements of Section 21B make it clear that the single event of a nature which might cause mental injury to people generally must be one that is in effect a one-off event, and which results in the more or less immediate onset of the factors involved in the medical condition of Post Traumatic Stress Disorder, which was the mental injury in this appellant’s case.

[26] On the basis that the appellant did experience significant events on a number of occasions, I find that it cannot be identified that only one event, in this case the event of September 2007, caused the onset of the appellant’s mental injury some two years after the event itself, particularly when there were a number of subsequent events which the appellant had indicated had caused her significant mental problems.

[34] In *KB*,⁴ in dismissing the application for leave to appeal to the High Court, Judge Powell stated:

[8] First, it is difficult to see on what basis the applicant can possibly argue that the requirements of s 21B of the Act can be satisfied by reference to a claimant’s subjective view of the cause. In particular the questions contained in s 21B(1)(b) and (2) involve questions of fact, not only of medical causation but also require consideration of whether an event could “reasonably be expected to

³ *KB v Accident Compensation Corporation* [2013] NZACC 41.

⁴ *KB v Accident Compensation Corporation* [2014] NZACC 336.

cause mental injury to people generally”. It is impossible to see how these issues could be limited to simply reflect the subjective opinion of the applicant...

[10] ... The ACC guidelines identified serve to flesh out the question of what “could reasonably be expected to cause mental injury in people generally” set out in s 21B(2)(b) because it:

- Is outside the range of normal experience.
- Is capable of provoking extreme distress in most people.
- Involves a real threat of significant harm to self or others.
- Would induce feelings of horror, alarm and shock in most people.

[35] In *Jeffrey*,⁵ Judge Mathers dismissed the appeal as to a work-place mental injury. The appellant suffered a major depressive episode (initially diagnosed as PTSD) after a three-week period of stress at work during the rebranding and converting of the Greymouth store into a Countdown store. During that period, Ms Jeffrey worked three weeks without a day off. Judge Mathers stated:

[65] There was no single event or series of events which caused the mental injury, and that (contrary to the views of medical expert Dr Dean) there was no event that could reasonably be expected to cause mental injury to people generally.

[36] In *MC*,⁶ Judge Maclean allowed an appeal on a claim for work-related mental injury. The appellant had been a reserve force soldier on tours of duty in Afghanistan in 2005 and 2009, and reported rocket attacks, being metres away from the point of impact during these attacks where soldiers were killed, witnessing a military helicopter explode in the air containing 16 passengers with a devastating loss of life, whilst with Police discovering a suicide victim, and attending to a victim who had been disembowelled. Judge Maclean stated, in support of his decision granting cover:

[83] The question then is, does the psychiatric evidence coupled with the appellant’s own statement meet the required standard of identifying that the most serious events in 2009 were a material cause of the post traumatic stress disorder and can in effect be isolated out from the other stressors so that it is not an accumulation or constellation of stressors as a whole, that can be said to be causative, but a smaller number that can be encompassed within the various

⁵ *Jeffrey v Progressive Enterprises & Accident Compensation Corporation* [2015] NZACC 4.

⁶ *MC v Accident Compensation Corporation* [2016] NZACC 264.

identified stressors, as arising from the same cause or circumstance and together comprising an “event”.

[37] In *Taylor v Roper and Attorney-General*,⁷ Justice Brown (for the Court of Appeal) concluded that section 21B did not provide cover for the PTSD suffered by the appellant. The appellant had suffered sexual abuse in the course of her employment and this abuse involved a number of incidents of false imprisonment either in a tyre cage or in a motor vehicle when she was summoned to drive him home. Justice Brown stated:

[34] We accept that individual incidents of false imprisonment would have a sudden component in the sense that each instance, while anticipated, would necessarily involve a point of commencement. However the substantial effect of the detention on a victim would lie not in the mere fact of its commencement but also its prolonged nature, combined with the fear of what else might occur during the period of confinement. For these reasons we consider it unrealistic to characterise the incidents of false imprisonment to which Ms Taylor was subjected as being sudden events in the sense that expression is employed in s 21B.

...

[47] ... we consider it is quite unrealistic to view the incidents of false imprisonment during 1986 and 1987 as comprising a single incident or occasion. The tyre cage incidents and the driving incidents occurred at different places and in different circumstances. They involved different conduct, albeit all comprising detention or confinement of some kind. The nature of Ms Taylor’s case is in our view similar to that in KB where the appellant had experienced multiple significant traumatic incidents.

Discussion

[38] The issue in this case is whether Gallagher Bassett’s decision of 13 August 2020, declining Ms Lothian cover for a work-related mental injury, is correct. Mental injury is a clinically significant behavioural, cognitive or psychological dysfunction.⁸ Ms Lothian is entitled to cover for a work-related mental injury which is caused by a single event, experienced, seen or heard by her directly, and which could reasonably be expected to cause mental injury to people generally.⁹ “Event”, means an event that is sudden or a direct outcome of a sudden event, and includes a series of events that arise from the same cause or circumstances and together

⁷ *Taylor v Roper and Attorney-General* [2021] NZCA 691.

⁸ Section 27.

⁹ Section 21B(1)-(2).

comprise a single incident or occasion.¹⁰ The words “because of”, have been interpreted to mean “materially contributed to”.¹¹

[39] Ms Findlater, for Ms Lothian, submits that the question of whether she sustained a mental injury under section 21B has not been properly or completely answered by Gallagher Bassett, and that this failure means that the decision should be set aside. At the time Gallagher Bassett made the decision to decline cover, it had asked Dr Pereira to identify the sole cause of Ms Lothian’s PTSD. That being the case, Gallagher Bassett was not in a position to rely upon the response in declining the claim. The appropriate legal test is whether the event in question was a contributing causative factor, in some material measure. Ms Lothian’s GP confirmed that Ms Lothian had not suffered from mental health symptoms in the five years prior to April 2019. Dr Fraser probably had sufficient information about Ms Lothian’s pre-morbid functioning, and her behaviour and functioning since that date, to decide whether she had sustained a mental injury because of the events on 8 April 2019. However, Dr Fraser shied away from making any comments about the general population test. She confined herself to the question of Ms Lothian’s subjectively reported experience, objectively understood symptoms and an opinion about why she might have suffered the way she did. However, there is enough evidence to sustain Ms Lothian’s claim for cover for a work-related mental injury.

[40] This Court finds that it has been established that Ms Lothian has suffered a mental injury.¹² Dr Pereira, Psychiatrist, diagnosed adjustment disorder as well as post-traumatic stress disorder. Dr Fraser, Psychiatrist, agreed that the full criteria were met for adjustment disorder.

[41] However, in relation to other criteria for cover under section 21B, this Court notes the following considerations.

[42] First, on 17 June 2019, Ms Lothian told her employer that the event of 8 April 2019 was not the first instance of bullying, as this had occurred “right the way through” and “started right at the beginning”. She mentioned two particular previous

¹⁰ Section 21B(7).

¹¹ W, above note 1, at [76].

¹² In terms of section 21B(1).

incidents where she believed she had been assaulted both by a prisoner and by another prison guard and was not supported by her employer.

[43] Second, on 18 October 2019, Dr MacKay, GP, lodged a claim on Ms Lothian's behalf, for "acute reaction to stress" said to have been caused by "significant workplace bullying, ongoing".

[44] Third, on 7 July 2020, Dr Pereira, Psychiatrist, having attended on Ms Lothian, recorded her experience of bullying in the workplace which started when she was training, and that bullying, intimidation, criticism, ridicule and verbal abuse continued throughout her work with the Department of Corrections. Dr Pereira noted that Ms Lothian gave a clear and detailed account of all the multiple instances of being bullied, and also instances where she was required to work in an unsafe environment which would have put her life at risk. Dr Pereira concluded that the direct and significant causal factor of Ms Lothian's mental injury was her experience of significant workplace bullying over a three-year period. On 4 August 2020, Dr Pereira further advised that Ms Lothian's mental injuries were more than likely caused by a combination of several separate, unrelated events of bullying, understaffing issues and roster inflexibility.

[45] Fourth, on 19 October 2022, Dr Fraser, Psychiatrist, who attended on Ms Lothian, noted, *inter alia*, her three years of prior bullying, and that Ms Lothian was not exposed to actual or threatened death or serious injury in the April 2019 incident. Dr Fraser assessed that it seemed less likely that a single instance of intimidation as described would have resulted in the protracted stress response which Ms Lothian had experienced, had other contextual factors not been present. Dr Fraser also noted subsequent events, when Ms Lothian alleged that her life had been threatened, which constituted more significant or severe stressors.

[46] In light of the above considerations, the Court finds as follows:

- (a) Ms Lothian has not proved, on a balance of probabilities, that she suffered a mental injury that was caused by a single event, in terms of section 21B(1)(b) and (7): the above evidence does not establish that

Ms Lothian's mental injury was the direct outcome or result of a sudden event, or of a series of events that together comprised a single incident or occasion. Ms Lothian's own evidence, together with the medical evidence of two psychiatrists, points to her mental injury being contextual, in that it was the result of an accumulation or constellation of stressors, both preceding and following the incident of 8 April 2019.

- (b) Ms Lothian has not proved, on a balance of probabilities, that the event of 8 April 2019 was one that could reasonably be expected to cause mental injury to people generally, in terms section 21B(2)(b): the event was described by Ms Lothian as involving her senior officer yelling, swearing and pointing his finger at her, and then, when she went to leave the prison building, the senior officer telling her not to leave and ordering her to go to his office, again shouting and swearing when she insisted she was going home. While this Court accepts that this event was clearly deplorable and upsetting, it does not appear, in itself, to qualify for the kind of seriously traumatic event that could reasonably be expected to give rise to a clinically significant behavioural, cognitive or psychological dysfunction. As noted above, Dr Fraser, Psychiatrist, assessed that it seemed less likely that a single instance of intimidation as described by Ms Lothian would have resulted in the protracted stress response which she had experienced, had other contextual factors not been present.

Conclusion

[47] This Court finds that Ms Lothian has not established that she meets the statutory criteria for cover for a work-related mental injury. The decision of the Reviewer dated 19 April 2021 is therefore upheld. This appeal is dismissed.

[48] I make no order as to costs.

P R Spiller
District Court Judge

Solicitors for the Respondent: Medico Law.