

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4233/20
Applicant: Mohamed Afifi
Respondent: Wee Services Pty Ltd t/as Priceline Pharmacy Rhodes
Date of Determination: 7 January 2021
Citation No: [2021] NSWCC 4

The Commission finds:

1. That the applicant suffered a psychiatric injury when he was unreasonably terminated from his employment on 6 November 2018.
2. That the applicant has become partially incapacitated thereby, and is able to earn \$300 per week in suitable employment.
3. The PIAWE applicable for the second entitlement period pursuant to s 37 of the *Workers Compensation Act 1987* is \$837.54.

The Commission orders

1. The respondent will pay to the applicant the sum of \$537.54 per week from 1 June 2019 to date and continuing.
2. The respondent will pay the applicant's s 60 expenses upon production of accounts, receipts and HIC documentation.

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

John Wynyard
Arbitrator

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

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Mohamed Afifi, the applicant, brings an action against Wee Services Pty Ltd t/as Priceline Pharmacy Rhodes, the respondent for weekly payments of compensation and payment of medical expenses.

ISSUES FOR DETERMINATION

2. The parties agree that the following issues remain in dispute:
 - (a) Is the respondent entitled to rely on the provisions of s 11A of the *Workers Compensation Act 1987* (the 1987 Act) to disentitle the applicant from compensation.
 - (b) If not, does the applicant have any residual earning capacity, and if so, the amount he is capable of earning.

PROCEDURE BEFORE THE COMMISSION

3. The matter was originally the subject of a Modron video conciliation and arbitration but had to be abandoned because of technical difficulties on 13 October 2020. The matter was accordingly set down for hearing by way of telephone conciliation and arbitration on 23 November 2020.
4. The applicant was represented by Mr William Carney of counsel instructed by Andra Youkhana from Messrs Fern Lawyers. The respondent was represented by Mr Campbell Robertson of counsel instructed by Mr Martin Thorne from Lee Legal Group. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary Evidence

5. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (ARD) and attached documents;
 - (b) Application to Admit Late Documents (ALD) dated 13 November 2020 and attached documents;
 - (c) Reply and attached documents, and
 - (d) ALD dated 6 October 2020 and attached documents.

Oral Evidence

6. No application was made in relation to oral evidence.

FINDINGS AND REASONS

Contemporaneous documentation

7. The applicant claims that he suffered a psychological injury as a result of the actions taken against him by the respondent. He commenced employment on 30 October 2018 and received an email dated 6 November 2018, terminating his employment. The email was from the General Manager, People (HR) Cheryl Williams, and it included the following:¹

“On Friday 2 November 2018, Mr Geoff Canning and Mr Trent Spackman met with you to discuss inappropriate sexual comments you made about Ms Melissa Cofre Abarca to Ms Jessie Kesby. Specifically, comments were made about Ms Cofre Abarca's physical appearance. During the meeting, you admitted to making these inappropriate comments about Ms Cofre Abarca to Mr Canning and Mr Spackman and failed to show any remorse

The comments you made about Ms Cofre Abarca are in breach of the Pharmacy's Anti-Discrimination-Sexual Harassment Policy. This Pharmacy considers harassment of any kind to be an unacceptable form of behaviour which will not be tolerated under any circumstances.

As was discussed, your comments are viewed seriously and are inconsistent with your continued employment with the Pharmacy. Given the severity of the misconduct, the Pharmacy maintains the view that it is appropriate that your employment be terminated effective immediately and without notice.”

8. Mr Spackman's account of the meeting was contained in an email dated 3 November 2018 to Ms Williams. He said:

“Hi Cheryl,

After myself and Geoff's conversation with **Mohamed**, please see some notes about the conversation below.

1 Two team members had approached me about inappropriate comments made by Mohamed of sexual nature.

2 During the conversation with Geoff and I, Mohamed initially denied that he had said anything inappropriate.

3 After I gave him more specifics in relation to the comments, he admitted that he had made the comments.

4 He also referenced an incident with another Pharmacist from Bankstown and asked whether accusations of this nature were common in the Priceline group. (Geoff will have more commentary around this as I am unaware of the incident he was referring to)

5 It was put to Mohamed that comments made of this nature were not professional nor acceptable in any work environment.

6 The comment that was made was in reference to the attractiveness of a Locum casual.

¹ Reply page 10

7 It was not an official complaint from the team members, but they approached me wanting me to have a conversation around his manner and comments.
..."

(as written).

9. On 14 November 2018, Mr Geoff Canning sent an email to Ms Cheryl Williams, Mr John Loveridge, and copied in Ms Amanda Nancarrow. Mr Canning said that he attended the respondent's premises on 2 November 2018 saying that his purpose was to see how the applicant was settling in. He said²:

- "It was a discussion about Mohammed settling in (that was my interest when I visited). To be advised that verbal complaints had been presented to Trent by staff members was thoroughly disappointing because our focus was on trying to settle down the store.
- Mohamed was asked for comment and when asked to think, did recall making the reference.
- At no time (until today) I have seen any reference or did Mohammed offer an explanation as to any reason Mohammed might have chosen to make the comment, or indeed why he chose those words.(nothing about making light of a 'situation or tension". The only comment Mohammed made when I first spoke to him was that he was struggling to understand the layout and processes in the Dispensary.
- We were not holding a formal meeting Mohammed on the Friday 2nd and that is why he was not asked to have someone with him.
- It also explains why he was asked to consider if the comment he had made (I won't say allegedly because he freely admitted he said it) was appropriate in a business which strongly presents and advocates for woman and is about woman in modern Australia .He understood that it wasn't appropriate. He was asked to consider what he had said, he understood there was no formal complaint made and that was how we left it. What would have happened next.

..."

10. Mr Afifi immediately took action by instructing Messrs Eden King, lawyers who, on 14 November 2018 wrote to the respondent's management offices noting the following:

- Mr Afifi went through several interviews and significant testing prior to being employed
- Mr Afifi had been a pharmacist for approximately 10 years and in that time owned his own pharmacy
- Mr Afifi was an upstanding individual who prides himself on his character and has never received any complaint, formal or informal against him for his personal behaviour or conduct nor his professional service as a dentist."

² Reply page 11

11. The letter continued³:

“On Mr Afifi's first day of employment, Ms Jessica Kesby (Ms Kesby) took it upon herself to introduce Mr Afifi to pharmacy. During this introduction, Ms Kesby slandered several staff members of the pharmacy...”

12. As to the meeting on 2 November 2018, the letter alleged⁴:

“On 2 November 2018 Mr Geoff Canning attended Rhodes and asked to have a chat with Mr Afifi. Mr Trent Spackman was also present in the consulting room. Mr Spackman questioned Mr Afifi about sexual comments made. Mr Afifi confirmed his shock at the questions presented and advised he had never had a complaint about sexual harassment.”

13. The author of the letter, Ms Gazi, also alleged that the respondent had permitted several incorrect procedures as part of its business. It was that non-trained pharmacists had access to Schedule 8 medications, which was a reportable breach to the Pharmacy Council of NSW. It was alleged that this was a further reason why Mr Afifi had been terminated as he raised those breaches with the respondent.

14. Ms Gazi also alleged that Mr Afifi had suffered from a lack of due process and from discrimination. With regard to discrimination, Ms Gazi said:⁵

“...Given the unclear and prejudicial reason on Mr Afifi was terminated, it is our position that discrimination was one of the reasons behind his termination.”

15. This letter then advised the respondent that proceedings would commence in the Federal Court of Australia for damages. Mr Afifi's solicitors alleged that he had been the subject of a false allegation and that he had been defamed.

16. On 20 November 2018, the respondent's General Manager, Ms Cheryl Williams responded, denying that Mr Afifi had been terminated on the grounds of race or for making a complaint about the unauthorised handling of schedule 8 medications.

17. The respondent's solicitors also responded on 17 December 2018 when, for the first time, the respondent alleged the actual statement that caused Mr Afifi's employment to be terminated. This was “is she hot”.

18. The letter then said:⁶

“3. A decision to terminate Mr Afifi's employment had not been made prior to the meeting on 6 November 2018. However, a termination notice had been prepared in advance of the meeting to cater for the possibility which proved to be the reality that Mr Afifi admitted to the alleged misconduct, expressed no remorse or contribution and offered no mitigating factors which would cause our client not to terminate his employment.”

³ Reply page 13

⁴ Reply page 14

⁵ Reply page 14

⁶ Reply page 17

19. On 2 April 2019, a further email from Ms Kesby advised Ms Williams and others, that Mr Afifi had complained about her husband, Mr Brendan Kesby to the Royal Australian Navy, where he was serving as an officer. She said⁷:

“I believe it may have been in retaliation for me putting a complaint in about his sexual harrasment of another staff member in November.

He put the complaint in a few days after the bombing in Christchurch.

He said that I had a conversation with him and he said he wanted the join the Navy and according to the complaint I said that's funny my husband joined the Navy so he could kill Muslims.

Please be aware I did not say this and no conversation like it ever took place.

The RAN is now investigating and I've been advised not to leave my house by myself.

...”

Statements

Mr Afifi – 29 September 2019

20. Mr Afifi made two statements dated 29 September 2019 and 9 June 2020.⁸ His first statement was made to the Insurer’s investigator, Elizabeth Cross. Mr Afifi said that he had been working at another pharmacy when he applied for the position with the respondent, as he lived in Rhodes with his wife and young son.
21. He attended an interview, meeting Ms Williams and another manager, Geoff Canning, together with the Pharmacist Amanda Nancarrow, who managed the dispensaries. Mr Afifi was offered the position, and accordingly gave his then employer a week’s notice. He signed a six month probationary contract, and commenced with the respondent.
22. Mr Afifi said that on his first day Ms Nancarrow introduced him to staff, and said he would be mainly liasing with the Dispensing Technician, Ms Jessie Kesby. The locum pharmacist was named Ibrahim, and Mr Afifi spoke with him in Arabic. Mr Afifi said:⁹
- “...Jessie made a comment about the fact that I must he Egyptian as well as we, were speaking to each other in Arabic, and added, *"but you're a Muslim"*. I do not know whether Ibrahim heard this. I thought that this was an odd comment, but did not think too much of it at the time.”
23. Mr Afifi said that he and Ms Kesby worked together that day dispensing and dealing with customers. Mr Afifi noted that Ms Kesby was handling drugs of addiction that had arrived from the supplier, counting and storing them in the safe. He mentioned to Ms Nancarrow that normal procedure was that such drugs had to be handled by a Pharmacist, or at least an intern. Ms Nancarrow asked if there was anything else she should know, and Mr Afifi noted that a glass rod was missing which was needed for the dispensary to be compliant, which was acknowledged by Ms Nancarrow.

⁷ Reply page 22

⁸ Reply page 23 and ARD page 110 respectively

⁹ Reply 24

24. The following day, 31 October 2018, Mr Afifi commenced work at 9am, and said that the locum was due to start at 3pm. He said:¹⁰

“...Jessie was friendly and chatty as she had been the previous day. She asked me where I was going for lunch and I told her that I would be going home as I lived so close by, Jessie mentioned that she did not like Rhodes or the atmosphere at the shopping centre. We talked about where she lived and she mentioned that she lived at the Ermington army barracks, as her husband is in the Navy. I told Jessie that I was interested in the Navy and had applied for a role as a Pharmaceutical Officer with the Navy. Jessie commented, *“That’s ironic”*. I asked her why, and she said that her husband had always wanted to serve in a Muslim country so that he could kill as many Muslims as he could. No-one overheard Jessie’s comment. I felt offended when I heard this, but since I was new to the business I did not want to “rock the boat” by raising a complaint.

10. Jessie appeared to be joking and was still friendly when she made this comment. I subsequently submitted an email of complaint about this matter via the Navy’s complaint channels. I have been advised that the matter is being investigated.”

25. Mr Afifi said that another Pharmacist called Melissa was due to start later in the day. Her initials were the same as Mr Afifi, M.A. Mr Afifi said:¹¹

“..Jessie told me that I should not use my initials M.A. as I would not want my name associated with Melissa’s work. She described Melissa as lazy and went on trashing her for about five minutes. In the context of this conversation, I asked Jessie, *“Is she good looking at least”*? Jessie replied, *“Not even that”*, laughed, and walked away.”

26. Mr Afifi said that it was his birthday that day, and his wife and child visited him whilst he was at work. He introduced them to Ms Kesby, who did not even acknowledge his three year old son. Mr Afifi thought that was strange.
27. When Melissa took over the shift from Mr Afifi, she spoke “poorly” of Ms Kesby, saying that Ms Kesby disappeared from the dispensary for long periods. Mr Afifi said he did not engage in that conversation.
28. The following day Mr Afifi said it was business as usual, and the same issues regarding the handling of drugs of addiction occurred. Mr Afifi said that Ms Kesby made another comment in the first three days, although he did not recall which. He said:¹²

“..She said that she hated the previous Retail Manager prior to Trent Spackman and was proud and boasted about being the reason that he was terminated within ten days of being hired.”

29. On 2 November 2018, Mr Spackman and Mr Loveridge asked to have a chat with Mr Afifi:¹³

“They said that two staff members had heard me make comments that were deemed to be sexual harassment. I was shocked as I have never been accused of anything like that or even close to that in my life. I asked what the comment was, and was told that I had referred to another female staff member comment as “hot”.

¹⁰ Reply page 25

¹¹ Ibid

¹² Reply page 26

¹³ Ibid

I tried to recall what they might be referring to and asked if related to the question that I asked of Jessie about whether Melissa was good looking at least. They agreed that it might have been that comment. They would not tell me who the witness was who was alleged to have heard me say this. They suggested that it was not a big issue, however, the work environment was predominantly female and that I needed to be mindful of any comments.”

30. The following day, 3 November 2018, Mr Afifi worked again with Ms Kesby, but neither made any mention of the allegation. Mr Afifi said he became cautious around her. He asked her not to yell back at the Asian customers, of whom there were a high number, when they raised their voices because their limited English frustrated them. The proper handling of addictive drugs was still not being done, he said.
31. Mr Affifi was not required to attend work the following Monday 5 November 2018, and when he attended on 6 November 2018 he was spoken to at a meeting held at about 4pm in a consulting room. He had no advance notification, and was not invited to bring a support person as, he said, was later alleged by Ms Williams. He was given a letter of termination and, after protesting that the complaint described was not what happened, left the business.
32. Mr Afifi said he had found other pharmacy work, but has developed a psychiatric condition which has impacted on his earning ability.

Ms Jessie Kesby – 30 September 2019

33. Ms Kesby made a statement to Ms Cross the following day, 30 September 2019. She said that she commenced employment with the respondent in late July 2017.
34. She alleged that she did not remember Mr Afifi’s first day, but said:¹⁴

“...it would have been likely that Mohamed was speaking to Locum, Ibram [sic] Hanna, in Arabic. I believe that I asked him if he was Muslim as his name was not known to me to be Coptic, and we had two other Coptic staff members at the pharmacy. I was not asking him in an offensive manner, only as I found it interesting. I have been known to be a total foot in mouth person.”
35. Ms Kesby could not recall that Mr Afifi told her that she should not handle drugs of addiction. She said:

“I do not recall Mohamed telling me that I should not dispense and handle [drugs of addiction] as I would have asked someone else for their opinion.”
36. Ms Kesby agreed that she would have told Mr Afifi that her husband was in the Navy, however she denied telling him that her husband had joined the Navy in order to kill Muslims. Ms Kesby said that she would never make such a comment about her husband, as he was not that sort of person. She said that there was “no way” that she would say it to someone who was of the Muslim/Islamic faith. She spent some time praising her husband’s character and describing his mental problems.
37. Ms Kesby said that she could not remember the exact conversation word for word, but she would not have said that it was ironic that Mr Afifi had wished to join the Navy.

¹⁴ Reply page 33

38. Ms Kesby said:¹⁵

"I did say something to Mohamed about the Pharmacist, Melissa A, as I had worked alone with Melissa the week prior and she did not know where anything was and made mistakes that required me to stay back at work for an hour or so. I was four months pregnant at the time, and we were experiencing issues with the air-conditioning and I was over it. I told Mohamed not to use her initials she made mistakes from what I observed as a Tech and I did not like her work. I mentioned something about her getting stuck in the car park. The conversation ended with Mohamed asking, "*Is she hot though*"? I replied, "*she doesn't look like your wife so I don't think you'd think so*". I uncomfortably laughed it off at the time."

39. Ms Kesby told the Retail Manager, Mr Spackman, about Mr Afifi's comment which had made her feel uncomfortable. Ms Kesby believed that she also advised Mr Spackman that Mr Afifi was "not nice to work with" as he expected Ms Kesby to do the work, including the dispensing. She said that Mr Afifi was not helpful. She said that either Mr Spackman told Mr Williams, or that Mr Spackman encouraged her to tell Ms Williams. In any event Ms Williams rang on the Monday when she was not working and told Ms Kesby to leave the matter with her.

40. Ms Kesby said that there was "an awkward vibe" between she and Mr Afifi on the Friday and Saturday as he "continued to expect me to do all the work." Ms Kesby denied boasting about getting the previous Retail Manager fired. Whilst she conceded that she found that person annoying, she said that it was more annoying when the previous Retail Manager left because there was no one doing that work.¹⁶

41. Ms Kesby acknowledged that Mr Afifi had submitted a complaint to the Navy regarding her comment that her husband wanted to kill Muslims. She said:¹⁷

"... I do not understand why he waited for months to make a complaint if he was actually concerned."

42. Ms Kesby said that she and her husband had been caused considerable emotional distress by the accusation. She was advised not to leave the house with her newborn daughter by herself, as it was unknown how much of a threat Mr Afifi might be. Ms Kesby said that the time she spent in writing and reviewing her statement had also cause her significant stress.

Further statement by Mr Afifi - 9 June 2020

43. Mr Afifi made a further statement on 9 June 2020. He stated that he was 42 years old the time of the statement, and that he was married with one dependent child.

44. Mr Afifi set out his academic record as follows:¹⁸

- a) Bachelor of Science at New Castle University, completed in 1999;
- b) Bachelor of Medical Science at Western Sydney University, completed in 2003;
- c) Master of Science Management at the University of Technology Sydney, completed in 2004;
- d) Doctor of Philosophy in Medicine by thesis between 2004 and 2005;
- e) Bachelor of Pharmacy at the Charles Sturt University and Master of Pharmacy at the University of Canberra, between 2006 and 2009."

¹⁵ Reply page 34

¹⁶ Reply page 35

¹⁷ Reply page 36

¹⁸ ARD page 110

45. Mr Afifi became a registered Pharmacist in 2010 and purchased three pharmacies between 2011 and 2017. He encountered financial difficulties in 2018, which resulted in his business going into liquidation. He then obtained employment as a full-time Pharmacist in Rockdale before moving to the respondent in Rhodes.
46. Mr Afifi then repeated the events here already described in his earlier statement. He expanded on his impressions of Ms Kesby, saying that she appeared to be friendly, not only with him, but with all staff members. Whilst being introduced to the staff Ms Kesby “slandered several staff members.” He said:¹⁹
- “... She was making comments like “I hate everybody here” and “I don’t like this place”, yet she would joke around with everyone employed by the pharmacy. I thought that this might be her personality and I just carried on with my job.”
47. With regard to Ms Kesby’s comments about her husband, Mr Afifi said:²⁰
- “... I told her that I considered being in the Navy too. She then said, ‘my husband is in the Navy and serving in Muslim countries to kill as many Muslims as he can.’ I was completely shocked by her comment and I was left with no words to reply. I decided to ignore her and not pay attention to anything she would say.
- I thought this was Jessie’s personality, making comments about all staff members and being rude to customers and not being taken seriously. Her actions disarmed me to believe that there was a lax culture in the workplace and that everyone around including her would be making comments of the like and not become offended.”
48. Mr Afifi repeated that he had been told by Ms Kesby that a previous Retail Manager had been fired after she had put in a complaint. He said that Ms Kesby “bragged” about her ability to get people fired if she didn’t like them.
49. Mr Afifi repeated the circumstances under which he said to Ms Kesby that he hoped that his fellow Pharmacist, whom he again said he had not met at that point, was “good-looking at least.” He said that when he worked with the Pharmacist, Melissa, she seemed pleasant and that she had a negative view of Ms Kesby’s work ethic. Mr Afifi sensed that there were clear issues between the two and made no comment in that regard.
50. When he was confronted at the meeting with Mr Canning and Mr Spackman, Mr Afifi said he was shocked when he was told that “several people” had complained about him making sexual remarks towards them. He responded that he had never in his life had that accusation either as an owner or an employee.
51. Mr Afifi explained to the two gentlemen that his comments were based on Ms Kesby’s behaviour which had led him to believe there was a lax culture in the workplace whereby the comment that he did make would be taken comically or light-hearted. He said that he never intended his remark to be turned into a “sexual remark.” He asked if he was expected to apologise and Mr Spackman said there was no need, as there was no formal complaint.
52. When he attended the meeting on 6 November 2018 with Mr Spackman and Mr Williams he was told there was a formal complaint, that he was terminated, that he was to hand over his lab coat and nametag, and that he was to leave. Mr Afifi said:²¹

¹⁹ ARD page 111

²⁰ ARD page 111

²¹ ARD page 112

"I was not provided with an opportunity to talk..... I found this to be extremely unreasonable in the circumstances.

The sudden termination left me shocked. I was panicking. I was becoming increasingly anxious because I suspected that Jesse had made a complaint and had lied when she indicated in a complaint that I had used the word "hot" to describe a woman.

I have never used this term, nor did I ever intend to be harassing when I made the above comment.

This behaviour and the sudden termination made me feel like the victim of a vicious lie.

I felt that the employer was not acting reasonably. They did not provide me with a real opportunity to explain myself. It was almost as if they had made up their mind before speaking to me. The only evidence was Jessie's word against mine.

My employer did not give consideration to the workplace culture, particularly the relaxed attitude and comments that Jesse displayed throughout the day. I was disarmed into believing that Jesse was a joker with an easy-going personality.

I was humiliated and ridiculed. I was fooled into thinking that the store had an accepted culture and norm especially when Jesse would make offensive comments about Muslims knowing that I was Muslim.

I have never intended to offend Jesse or the subject person of the complaint."

53. As to Mr Afifi's subsequent work history, he obtained a further position as a Pharmacist at Wentworth point, working for "a couple of days fper week, but that he had become "paranoid" and became mistrustful of his fellow employees and began writing everything down. He said that his paranoia and hypervigilance were increasing rapidly, that he would have waves of anxiety before the start of each shift which developed into panic attacks until in May 2019 he had to cease work, on the advice of his psychologist, Mr Attai.
54. Mr Afifi said that he now avoids large crowds and socialising with friends, does not attend Friday prayers anymore, and has become hesitant in making his own decisions, even in simple day-to-day matters. He said:²²

"Before the incident, I was studying Law on a full-time basis, however, as a result of my injury, I had to switch to part-time. I have been unable to concentrate on my studies and I am barely passing my units. At this stage, I am considering dropping more units as I am unable to focus on studying. My current psychological condition is preventing me from giving this course genuine efforts."

²² ARD page 114

Medical Evidence

Dr John Baker

55. Dr Baker was a Consultant Psychiatrist retained by the applicant. In his report dated 10 February 2020 he took a history that was consistent with Mr Afifi's statement.²³
56. He recorded that Mr Afifi was born in Heliopolis, Egypt, the son of a diplomat for the Egyptian Government, who settled in Australia in 1990. During his childhood Mr Afifi's father was posted to Uganda, Kenya, Burma and Thailand, Mr Afifi completing most of his childhood in Burma and Thailand. Mr Afifi completed his high school education in Sydney. He married an Egyptian woman in 2012, and the relationship had encountered difficulties. They had travelled to Egypt in 2019 to seek advice and to inform his wife's family of what had happened since the marriage.
57. Dr Baker diagnosed a Major Depressive Disorder. He noted that Mr Afifi spent about 20 hours or more each week studying. Dr Baker thought that Mr Afifi could work as a gate security guard, which would be less stressful than working as a pharmacist. He noted the history that Mr Afifi had attempted to work as a pharmacist at Wentworth point, but that his condition worsened and he ceased work in May 2019.
58. Dr Baker noted that Mr Afifi had been declared bankrupt in November 2018 after the collapse of his Pharmacies. Dr Baker did not note any prior psychiatric condition. Mr Afifi was then in receipt of income protection insurance.
59. In a supplementary report of the same date, Dr Baker assessed the various categories Psychiatric Impairment Rating Scale by which applications for lump sum payment are assessed. Dr Baker attributed a class 2, or mild, impairment, saying:²⁴

"Mr Afifi was studying part-time at the time of this assessment. He stated that he usually spent about 20 hours or more each week studying. He has not sought employment. He would be able to work part-time in his prior role as a 'gate security guard' which would be a lessor role and less stressful than working as a pharmacist. He holds his pharmacist credentials."

Dr Nicholas Ingram

60. Dr Ingram was a Consultant Psychiatrist retained by MLC Life Insurance with whom Mr Afifi's income protection was held. Dr Ingram reported on 9 August 2019, taking a history that was consistent with Mr Afifi's statement.²⁵
61. At the time of the assessment, Mr Afifi said that he wanted to return to work in a pharmacy, but that he had ceased some months before and wanted to get a bit stronger in himself before he could manage. Since Mr Afifi had ceased work he increased his study load from two to three subjects in his part-time law degree. At that time also, Mr Afifi was working about 30 hours per week of contact work together with 10 hours of reading and assignments, although Dr Ingram noted that motivation had become a problem. Mr Afifi told Dr Ingram that there had been no history of psychiatric problems.

²³ ARD page 93

²⁴ ALD page 2

²⁵ ARD page 40

Associate Professor (A/Prof) Robert Kaplan

62. Dr Kaplan was a Forensic Psychiatrist retained by the respondent. Dr Kaplan reported on 8 October 2019.²⁶

63. Dr Kaplan took a somewhat truncated history of the interchange between Mr Afifi and Ms Kesby. He said:²⁷

“[Mr Afifi] insists that the only comment he made about Melissa was a question whether she was good-looking before he walked away.”

64. Dr Kaplan noted that Mr Afifi accused Ms Williams of lying in her statement, that he was “subjected to unfair treatment that had sinister connotations” and that “he was set up to fail and a victim of false allegations.” The sinister connotations Dr Kaplan thought to be a reference to racial discrimination.

65. Dr Kaplan diagnosed Adjustment Disorder with depression and anxiety. The condition arose from “the performance management process” with the respondent. Dr Kaplan noted that Mr Afifi “strongly denies the allegations, believes he was submitted to unfair due process and is a victim of racial discrimination.”

66. Dr Kaplan noted that there were no previous difficulties (presumably, psychiatric difficulties) and recommended that Mr Afifi should be “approved to work 20 hours a week while continuing with his treatment for three months.”

Dr Deepinder Miller

67. On 4 September 2015, Dr Miller, Consultant Physician in Psychiatry, reported to Dr Etienne Cawood, GP. Mr Afifi had been referred on that occasion for “a review of his anxiety.”²⁸

68. Dr Miller took a history that Mr Afifi had always been a worrier and had some insight into his anxiety. His wife was then in Egypt and was expecting their child. Mr Afifi was about to travel to Egypt to accompany her back to Australia, and was stressed at both having to travel and to leave work.

69. Mr Afifi had reported “night terrors” since high school and they had currently been triggered by financial concerns and conflict with his mother. These symptoms affected his sleep about once per week. Mr Afifi was also recorded as saying that he associated number eight as a bad omen as his maternal uncle passed away on 8/8/1998. He could not then send an email containing the number eight, he did not like it on his phone would say a prayer after seeing the number eight. Mr Afifi was at the time of his assessment in conflict with his mother whom he described as very controlling. Dr Miller noted that Mr Afifi had not previously had any contact with a psychiatrist.

70. A diagnosis of Major Depressive Disorder with melancholia and Obstructive sleep apnoea linked to obesity was made. Dr Miller noted that Mr Afifi did not return for review.

²⁶ Reply page 1

²⁷ Reply page 2

²⁸ ALD page 59

Dr Etienne Cawood

71. Dr Cawood's notes were lodged in the same ALD.²⁹ Mr Afifi had consulted her practice since 2014 and reported the same symptoms described to Dr Miller as "night terrors". On 25 August 2014, Dr Cawood noted that Mr Afifi had been completely paralysed when he awoke but after 15 minutes was totally recovered. On questioning, Mr Afifi said that he was undergoing a particularly stressful period as he had two new business sites and conflict with an employee that he had let go. Further, his wife was not present being away on holidays.
72. On 15 April 2015, Dr Cawood noted similar symptoms including stress and anxiety. On 18 May 2015, she recorded further symptoms and it was then that the referral was made to Dr Miller.

Dr Omar Marwat

73. The clinical notes of Mr Afifi's treating psychiatrist Dr Marwat were lodged, together with those of his treating psychologist Mr Hamid Attai and Mr Afifi's current GP, Dr Hany Adballa.
74. Dr Marwat's note of the consultation on 10 September 2019 stated:³⁰

"- Over last 2-3yrs lost + 3 businesses – felt he was pushed out by sigma pharmaceuticals

- Oct/Nov 2018 – lost job due to allegations of sexual harassment – he denies and reported feeling he was accused by racist [woman] who was supported by employer

- From that the hypervigilant/anxious ... about any opportunities for perceived sexual harassment ...

Past psychiatric history

Deepi Miller – 2014 – x1 assessment of psychological ...?OCD"

SUBMISSIONS

Mr Robertson

75. Mr Robertson said that there was no dispute that Mr Afifi suffered from a psychiatric condition and that therefore the s 78 notice that raised the issue of injury, was not pressed. Put simply, Mr Robertson said that the issue was that the applicant was disentitled to compensation by virtue of the provisions of s 11A the 1987 Act. He submitted that the essence of the case revolved around the conversation which led to Mr Afifi's dismissal.
76. Mr Robertson referred to the various versions of the exchange in different documents, including the statements and emails. He submitted, as did Mr Carney, that this was a case that was appropriate to this day and age as to the protection of young women in the workplace from sexual harassment, and indeed that there was also an element of racial discrimination contained in the allegations.

²⁹ ALD page 4

³⁰ ARD page 33

77. Mr Robertson submitted that the actual language used by the protagonists was not important, as no matter what version was preferred, it implied that if a young woman was good looking then her level of competence was not as important. It was, Mr Robertson submitted, a sexist remark and clearly inappropriate. He said that the respondent's business was dominated by young women and the respondent took this sort of comment very seriously indeed, as was shown by its actions. I would accept, he submitted, that Ms Kesby was made to feel very uncomfortable by Mr Afifi's remark, and that the action taken by the respondent was appropriate.
78. It was not correct to say that Mr Afifi had no opportunity to respond at the meeting on 2 November 2019, as Mr Afifi had admitted his offence. It was not suggested by Mr Afifi that his comments had been light-hearted and the import of the words used was sufficiently reprehensible that it justified termination.
79. Mr Robertson relied on the allegation made in the letter of 17 December 2018 by the respondent's then solicitors that the words used were "is she hot", which confirmed Ms Kesby's account. Mr Robertson also relied upon the explanation in that letter that Mr Afifi had admitted his misconduct and expressed no remorse or contrition, nor had he offered any mitigating factors that would have caused the respondent not to behave in the way that it did.
80. Thus, Mr Robertson submitted, the respondent had satisfied its onus of proof to show that the applicant's psychiatric injury was predominantly caused by the reasonable action taken by the employer with respect to discipline and dismissal.
81. Mr Robertson submitted that if I was against that proposition that I would find that Mr Afifi had a residual earning capacity in the region of \$500 - \$600 per week.
82. Mr Robertson's submitted also that I would not accept the applicant as a witness of credit. The applicant's failure to tell most of the doctors of his pre-existing psychiatric treatment could only be seen as a deliberate attempt to conceal relevant facts from the experts within the case. Mr Afifi had been diagnosed by Dr Miller, a Consultant Physician in Psychiatry at St Vincent's Hospital, to be suffering a Major Depressive Disorder with melancholia and obstructive sleep apnoea linked to obesity, and his failure to reveal that fact rendered his evidence to be of questionable weight.
83. Mr Robertson submitted that the calculated repetition of false evidence to the various medical practitioners was "disconcerting". Mr Robertson referred to the stressors that were noted by Dr Cawood, and submitted that Mr Afifi's failure to disclose them put the expert witnesses under a considerable disadvantage in assessing his condition.
84. Mr Robertson referred to Mr Afifi's impressive academic career and noted that although he had been left with a psychiatric condition, he still kept himself busy and was still able to achieve in an academic level, as he had just completed the second year of his law degree.
85. As of October 2019, Mr Robertson submitted, the statement to A/Prof Kaplan that he was at UTS four days a week and doing his online course for one day a week, showed that he was capable of significant cerebral activity for many hours a week.
86. Mr Robertson noted that the claim commenced on 1 June 2019, notwithstanding that Mr Afifi had been terminated on 6 November 2018. When asked about that in his submissions, Mr Carney conceded that the claim should have started on 6 November 2018 and that the entitlement period accordingly commenced at that time.

87. Mr Robertson accepted that pre-injury average weekly earnings was \$1,046.92 as claimed in the ARD and that for the first entitlement period 95% of that figure was \$994.57 and the appropriate amount for the second entitlement period is 80% that is \$837.54.
88. The first entitlement period had expired so the appropriate PIAWE was \$837.54.

Mr Carney

89. Mr Carney submitted that the respondent had failed to satisfy its onus of proof to establish the various matters that it was required to do under s 11A. He said that there was mention made of the "policy" under which Mr Afifi has been dismissed, but there was no policy lodged in the documentation. Mr Carney submitted that accordingly it was not known what the protocol was supposed to be, whether warnings were supposed to be given, and what the definition for inappropriate conduct or sexual harassment was.
90. Mr Carney submitted that he was not saying that a comment of the nature admitted by Mr Afifi was appropriate "in this day and age," but there was no clue given by the respondent as to whether any more appropriate action was available in this particular situation rather than the instant dismissal, which he submitted did not appear to be reasonable in the circumstances.
91. It was impossible to judge whether the action in summarily dismissing Mr Afifi had been reasonable or not, when the Commission had been denied access to the very policy the employer purported to be applying. There were degrees of conduct which must have been considered within the policy, and which must have merited different disciplinary action. Moreover, the policy would have set out procedural protocol which may itself not have been followed. It was not possible, I understood Mr Carney to submit, for the respondent to satisfy its onus of proof without that document.
92. Mr Carney referred to a number of inconsistencies in the respondent's evidence, saying that although Mr Spackman told Mr Afifi that there was a second person who heard the relevant comments, that person had not been identified, neither had any statement been produced from that individual. Moreover, neither Ms Kesby nor Mr Afifi mentioned a second person being present when the comments were made.
93. Ms Williams had not made a statement, but the respondent simply relied on an email from her which mentioned an Anti-Discrimination – Sexual Harassment Policy, which was further confirmation, if confirmation were needed, that the respondent had such a policy, Mr Carney submitted. Mr Afifi was instantly dismissed for making an allegedly sexist comment, whilst no action appeared to have been taken against Ms Kesby regarding the allegation by Mr Afifi that she had made discriminatory remarks about the Muslim religion.
94. Mr Carney submitted that the sexist element in the comment made by Mr Afifi had not been shown to have been motivated by any lewd or lascivious intent. On any view of the circumstances the comment was a response to a diatribe from an individual who admitted herself that she was a person who often put her foot in her mouth. Whilst the comment was reprehensible when viewed in isolation, the surrounding circumstances showed that it was a sexist comment of a very low grade, and not one that could possibly have justified the extremely harsh and insulting punishment peremptorily handed out to Mr Afifi, I understood Mr Carney to submit.

95. Mr Carney accepted criticism made by Mr Robertson as to Mr Afifi's failure to advise the medical experts of his prior psychological problems, but submitted that Mr Afifi had not followed up his consultation with Dr Miller in 2015. He had kept working as a pharmacist at a time when he was encountering problems with running his pharmacies. The voluminous notes from his psychologist, Dr Attai, his treating psychiatrist Dr Marwat and his GP Dr Abdalla showed that Mr Afifi's current psychological condition stemmed from his dismissal for sexual harassment.
96. As to capacity to earn, Mr Carney accepted that Mr Afifi had demonstrated a continuing capacity to engage in academic study, but emphasised that there was a difference between studying and working. Although Mr Afifi attempted to return to work as a pharmacist, he was unable to do so due to his experiences with the respondent. He submitted that Dr Baker's assessment could be accepted, and that Mr Afifi was able to work in some part-time menial occupation such as a security gatekeeper.

Mr Robertson in reply

97. It was important to remember that the complaints made by Ms Kesby were not to be coloured by subsequent events, Mr Robertson submitted. He also stressed that the significance of Mr Afifi's failure to reveal his past psychiatric condition was that it went to Mr Afifi's credit, and I would accept that he persistently denied any such history to the experts, which demonstrated an ability to deliberately mislead. Accordingly, I would not be able to accept Mr Afifi's version of events.

DISCUSSION

98. The respondent has quite properly withdrawn its denial that Mr Afifi suffered a psychiatric injury and the only issue for determination is whether it is entitled to the protection afforded by s 11A of the 1987 Act.
99. Section 11A provides relevantly:
- “(1) No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.”
100. The onus is on the respondent to establish the defence. It is required to prove that:
- the psychological injury was wholly or predominantly caused;
 - by reasonable actions on its behalf;
 - in respect of one or more of the seven named areas of employment.
101. In *Northern NSW Local Health Network v Heggie*³¹ it was established that an objective test had to be applied which balanced the interests of the employer against the employee in considering the actions of the respondent. Basten JA, Sackville and Ward J JA agreeing, stated that the test in evaluating reasonableness was firstly objective, and secondly to be based on the material that was available at the time the relevant decision was made.³² At [103] Sackville JA said, in reviewing the reasons of the Arbitrator:

³¹ [2013] NSWCA 255 (*Heggie*)

³² @ [10 – 12]

“The Arbitrator next considered whether Mr Heggie's psychological injury was wholly or predominantly caused by the reasonable actions of the employer with respect to discipline. The Arbitrator quoted (at [35]) a passage from *Irwin v Director-General*, cited with approval by Foster AJA in *Commissioner of Police v Minahan*, at [27], as follows:

‘The question of reasonableness is one of fact, weighing all the relevant factors. The test is less demanding than the test of necessity, but more demanding than a test of convenience. The test of ‘reasonableness’ is objective, and must weigh the rights of employees against the objective of the employer. Whether an action is reasonable should be [attended], in all the circumstances, by a question of fairness’.”

(Authorities omitted).

102. When these principles are applied, it becomes apparent that the respondent has failed to show its actions were reasonable, for the following reasons.
103. I reject the submission made Mr Afifi's evidence had been so badly discredited by his failure to advise the expert witnesses of his prior consultation with Dr Miller that I should not accept his account.
104. In the first place, Mr Afifi advised his treating psychiatrist of that consultation. Dr Marwat erroneously recorded the date as being 2014, but even allowing for the fact that the consultation occurred in September 2015, its relevance to the present psychological injury is difficult to discern.
105. Secondly, the respondent was unable to point to any internal inconsistency or improbability in Mr Afifi's accounts of the circumstances which has led to his injury that would indicate an intention to deceive. The allegation simply is that because Mr Afifi did not advise the expert witnesses of a prior visit to a psychiatrist some three years earlier on what appeared to be an unrelated matter, I could infer that he was deliberately misleading the Commission as to his conduct, and I could therefore not be satisfied that he had met his onus. However there is no basis beyond mere speculation to infer that Mr Afifi deliberately withheld that information. It is equally possible that he either forgot it, as he did not follow up with Mr Miller, or he decided that it was not germane to his present condition - a conclusion that a man of his intelligence was capable of making.
106. Thirdly, the respondent has accepted that the omission does not impinge upon the occurrence of the psychological injury, as it has abandoned its denial that such an injury was caused. Indeed, Mr Robertson conceded the point in his address in reply when he said that the respondent relied upon that omission simply to cast doubt on the evidence he gave.
107. In dealing with the reliability of witnesses' accounts it is preferable to base reasons on the basis of contemporaneous materials, objectively established facts and the apparent logic of events.³³
108. I have set out the email correspondence following the termination of Mr Afifi's employment, and it can be noted that nowhere in the respondent's reporting were the actual words alleged to have been said repeated. Mr Robertson submitted that the actual words were immaterial as Mr Afifi had conceded when interviewed by Messrs Spackman and Canning that he admitted that he made “the comments” after he had “initially denied that he had said anything inappropriate.” I, with respect, disagree.

³³ *Fox v Percy* [2003] HCA 22; 214 CLR 118 at [31]

109. The contemporaneous material has been of limited assistance as to what was actually said, due to a failure to record the allegations. None of the emails I have referred to from the respondent's management took the matter any further, other than to refer to "inappropriate sexual comments," or "the reference", or "those words", or "inappropriate comments."
110. Mr Afifi sought legal advice within two weeks of the respondent's actions, but the letter from his then solicitors dated 14 November 2018 simply stated that Mr Afifi had asked "a rhetorical question," although it did describe the circumstances in which it was asked, which were consistent with Mr Afifi's evidence.
111. It was in response to that letter on 17 December that the respondent's solicitors first mentioned the allegation made by Ms Kesby - that Mr Afifi had said "is she hot." That is not the allegation made in Ms Kesby's statement, who added the word "though". Mr Afifi's version was first recorded on 9 August by Dr Ingram as being "something to the effect that 'perhaps she was good looking at least.'" In his statements of 29 September 2019 and 9 June 2020, Mr Afifi said that his comment was "is she good looking at least."
112. The emails from Messrs Spackman and Canning I regard as giving a misleading account of the meeting of 2 November 2018. They may well have been intended as a rough summary that would be further clarified as to the actual detail of what was said when proper statements were taken. I note that Mr Canning in his email referred to notes he had made, and it may well be that both gentlemen expected to be further interviewed. It is regrettable that they were not, but the impression given was that Mr Afifi had agreed that he "freely admitted" to deliberately making an offensive sexual comment, and was unrepentant about doing so. The evidence when analysed does not support that interpretation.
113. I do not think that anything turns on the contemporaneous materials. It is regrettable that statements were not taken from Messrs Spackman and Canning. Their truncated versions of events were consistent with that of the applicant, in that Mr Afifi, "when asked to think" did recall making a comment. Properly prepared statements would have given a full account of the conversation and would have enabled the facts to be determined on some evidentiary basis. The conclusionary nature and inappropriate delicacy of the emails of both gentlemen had no probative value from the point of view of what was actually said, what was actually heard, or what they actually perceived in their meeting with Mr Afifi.
114. The objectively established facts are that Mr Afifi was a 40 year old married man who had an impressive academic record and an unblemished character. He had completed five University degrees and had been a pharmacist since 2010. He became bankrupt after he encountered financial difficulties regarding the three pharmacies that he purchased between 2011 and 2017.
115. Ms Kesby was a married woman who had commenced work with the respondent in late July 2017 as a Dispensary Assistant. She is the mother of a child born in March 2019. It is not clear whether she remains employed by the respondent.
116. There is no contest that something was said regarding Ms Melissa Abarca by Mr Afifi on 31 October 2018. It is accordingly necessary to consider the weight to be given to the evidence, given that the respondent bears the onus of establishing that its actions were reasonable.
117. The first difficulty the respondent cannot overcome is that it failed to produce the "Anti-Discrimination-Sexual Harassment Policy" nominated by Ms Williams in her termination letter dated 6 November 2018. It thus becomes impossible to rule on whether Mr Afifi breached it or not. I accept Mr Carney's submissions in that regard. I do not know whether there were degrees of conduct within the policy which merited different disciplinary action. I do not know whether the respondent had a discretion as to the actions it took. I agree that the policy would probably have a procedural protocol, and I am unaware whether it had been followed.

118. However, I note that Mr Afifi was given no notice that his employment was to be terminated when he attended the meeting with Mr Canning and Ms Williams on 6 November 2018, and indeed that the termination letter had already been prepared. It is clear that the decision had been made before speaking to him, and I do not accept the assertion in the respondent's solicitors' letter of 17 December that such a decision had not then be made. I accept Mr Afifi's evidence in that regard. Mr Afifi was not given an opportunity to talk, and had to hand in his lab coat, his name tag, and to leave immediately. I accept further that he was not asked to have a support person present at that meeting.
119. It is remarkable that no statements were tendered by Ms Williams or Mr Canning as to the circumstances of that meeting, as it was clear from Mr Afifi's statements that serious accusations were being made against their conduct. This, when added to the failure of the respondent to lodge statements from Mr Canning and Mr Spackman regarding the meeting of 2 November 2018, leaves serious doubt as to the case presented by the respondent.
120. The above is sufficient to dispose of the matter, but as matters of credit have been raised it is appropriate to consider the competing accounts.
121. Mr Afifi was consistent in his statements and in the history he gave to the various medical practitioners. He said on more than one occasion that he found Ms Kesby to be a "friendly and chatty" personality, who would make derogatory comments about her colleagues – "slandered several staff members", as he put it – but joke around with everyone employed at the pharmacy. He noted also that Ms Kesby was rude to customers, but not taken seriously. Mr Afifi said he was 'disarmed' by her actions, and assumed that there was a lax culture in the workplace.
122. Mr Afifi had reason to believe that there was such a lax culture, as he drew to Ms Nancarrow's attention on two occasions the fact that only pharmacists or at least interns were permitted to handle drugs of addiction when they were supplied to the pharmacy, and that Ms Kesby should not have been handling them.
123. There was no evidence from Ms Nancarrow, and I accept that Mr Afifi was therefore telling the truth about both the lax conduct, and that he had told Ms Nancarrow about it. I shall consider Ms Kesby's evidence momentarily, but her statement that she would not do what Mr Afifi asked her about drugs of addiction I found to be a gratuitous and unnecessary comment which demonstrated an animus against him. Mr Afifi did not allege that he had spoken to Ms Kesby on the subject.
124. Mr Afifi said that the conversation about his fellow pharmacist Melissa Abarca arose in the context of that lax culture. He said that he expected his comment would be taken light heartedly and never expected that his comment would be interpreted as being an offensively sexual remark.
125. Ms Kesby's statement tended to corroborate Mr Afifi's observations. Her evidence was discursive, and designed to attract sympathy to her situation whilst conceding some of the accusations made against her.
126. Ms Kesby agreed it was likely that she asked whether Mr Afifi was a Muslim, even though she admitted she had no memory of the exchange. I have great difficulty in accepting that evidence, and her admission that she was known as a "foot in mouth person" was an indication that she knew that her query was offensive. Such a question to somebody she did not know and which arose out of her overhearing a discussion in Arabic which did not concern her was offensive, and her foot in mouth comment reflected her awareness. I do not accept that her interest was piqued because she knew some Coptic staff members, which I am satisfied she mentioned in an attempt to excuse her rudeness, and to divert any suggestion that she was biased against people of the Muslim faith.

127. Ms Kesby also agreed that she told Mr Afifi that her husband was in the Navy, but she denied that she said that he wished to kill Muslims. I have not reproduced the entirety of her praise for her husband, in which she described amongst other things that he was “not that sort of person”, but Ms Kesby’s defence of her husband’s good name was not the point. The question was whether, true or not, Ms Kesby had said that he had joined the Navy to kill Muslims. She did not attempt to give her version of the conversation or how it had arisen, apart from another conversation she said could not exactly remember word for word, but “would have been” because pharmacists in the Navy worked on bases.³⁴
128. Further, Ms Kesby’s comments regarding the subsequent investigation following Mr Afifi’s complaint to the Royal Australian Navy suggests that she did make such a comment. Her inability to understand why Mr Afifi waited months to make the complaint “if he was actually concerned” tends to undermine her assertion that she had never made those comments in the first place.
129. Ms Kesby denied that she had boasted about getting the previous Retail Manager sacked. Again, she made a partial admission that she had been annoyed by the previous Retail Manager, but did not explain why she chose to volunteer that information in her statement, when there was no suggestion that Mr Afifi was aware of that detail. I think it probable that such a boast was made. In view of her conduct with Mr Afifi, her boast may well have been true, but there is no evidence before me on which any conclusion can be drawn.
130. As to the crucial evidence of what was actually said, Ms Kesby admitted that she “did say something to Mohamed” about Ms Abarca. She agreed that she criticised Ms Abarca’s competence, and she admitted further that she told Mr Afifi not to use her initials.
131. Again, Ms Kesby used the device of conceding most of the evidence against her, but avoiding the consequences by denying the actual misconduct alleged against her. There was no suggestion that Mr Afifi had been hitherto behaving in a sexually inappropriate way. There was no evidence that he had involved himself in any conduct that was lewd or offensive with any of the staff he had actually met, and yet Ms Kesby alleged that he suddenly became lascivious over a person he had not even seen at that time.
132. I find that proposition untenable, and I do not accept that Ms Kesby’s reference to Mr Afifi’s wife was anything more than another digression to avoid her culpability. Ms Kesby had been introduced to Mrs Afifi and their son (whom I accept Ms Kesby ignored) earlier that day and it may be that she introduced the comment about Mrs Afifi in an attempt to bolster her plausibility.
133. In any event, it is unlikely that Mr Afifi would have used the words “is she hot though.” The sense of the comment does reflect Mr Afifi’s account, but it removes from it the crucial rider that Mr Afifi consistently described, and that was the use of the words “at least.” I accept that it is more probable that Mr Afifi would have used the expression “is she good looking at least” as both Mr Afifi and Ms Kesby said it occurred at the end of the conversation in which Ms Kesby was belittling Mr Abarca, and indeed the comment ended that conversation, which was Mr Afifi’s intent, he said, in making the comment. It is quite plausible that a new employee being shown around the workplace would be uncomfortable about hearing a fellow worker being described as incompetent when he had never met her. It is also probable that he would wish to divert the conversation, as Mr Afifi said was his intent.

³⁴ Reply page 34

134. That in turn raises the question of Ms Kesby's subsequent conduct. She did not make a complaint until the following day, and it was made in the context, admitted by Ms Kesby, of a number of complaints by her about Mr Afifi's management, principal amongst which were that "he expected me to do the work" and was "not helpful."³⁵ This after Mr Afifi had only been working at the premises for a day or so.
135. I was not persuaded that Ms Kesby was a reliable witness. There was no independent support for any of her allegations, and her statement was ambiguous and implausible.
136. I prefer Mr Afifi's account. It was precise, and related his experiences in a straightforward and objective manner. His account was consistent to all the expert medical witnesses, and no attempt was made by the respondent to engage with his allegations regarding the conduct of Ms Williams in her peremptorily terminating his employment without giving him any reasonable opportunity to be heard, and his account of his meetings with Messrs Spackman and Canning.
137. It follows that there will be an award for the applicant. I note that both counsel were in agreement that Mr Afifi has demonstrated an ability to earn, and I concur with their summary of the medical evidence in that regard.
138. Mr Afifi has shown that he has the mental capability to continue to study, but I accept the force of Mr Carney's submission that there is a difference between study and work. The expert evidence confirms that Mr Afifi is unable to work as a pharmacist at present, due in no small part for his distrust in women that his experience has engendered.³⁶ I accept Dr Kaplan's opinion that he should be "approved" for work for 20 hours per week. I accept that such work is that recommended by Dr Baker as a gate security guard. Mr Afifi could earn given the present economic climate in such employment \$15 per hour, giving him a residual earning capacity of \$300 per week.
139. It was agreed that the relevant PIAWE is \$837.54 per week. Accordingly there will be an award for the applicant in the sum of \$537.54 per week from 1 June 2019 to date and continuing.

SUMMARY

140. The Commission finds:

- (a) That the applicant suffered a psychiatric injury when he was unreasonably terminated from his employment on 6 November 2018.
- (b) That the applicant has become partially incapacitated thereby, and is able to earn \$300 per week in suitable employment.
- (c) The PIAWE applicable for the second entitlement period pursuant to s 37 of the 1987 Act is \$837.54.

141. The Commission orders:

- (d) The respondent will pay to the applicant the sum of \$537.54 per week from 1 June 2019 to date and continuing.
- (e) The respondent will pay the applicant's s 60 expenses upon production of accounts, receipts and HIC documentation.

³⁵ Reply page 35

³⁶ See Dr Kaplan's report; Reply page 3