

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4665/19
Applicant: Salu 'Sally' Fuimaono
Respondent: Campbelltown Family Support Service
Date of Determination: 12 December 2019
Citation: [2019] NSWCC 400

The Commission determines:

1. The applicant suffered a psychological injury in the course of her employment with the respondent with a deemed date of injury of 8 December 2017.
2. The respondent's defence pursuant to section 11A of the *Workers Compensation Act 1987* fails.
3. At the date of injury, the applicant's pre-injury average weekly earnings were \$1,499.22.
4. As a result of the injury referred to in (1) above, the applicant was and remains totally incapacitated for employment.
5. The applicant was paid weekly benefits up to 3 May 2018.
6. The respondent is to pay the applicant weekly compensation from 4 May 2018 to date pursuant to section 37 at the rate of \$1,199.37 per week.
7. The respondent is to pay the applicant's medical and treatment expenses pursuant to section 60 of the *Workers Compensation Act 1987*, upon production of accounts, receipts and/or Medicare Australia Notice of Charge.
8. The permanent impairment claim is remitted to the Registrar for referral to an Approved Medical Specialist to determine the degree of permanent impairment from the following
 - Date of Injury: 8 December 2017 (deemed)
 - Body systems referred: Psychological/psychiatric injury
 - Method of Assessment: Whole person impairment.
9. The documents to be referred to the Approved Medical Specialist to assist with their determination are to include the following:
 - (a) This Certificate of Determination and Statement of Reasons;
 - (b) The Application to Resolve a Dispute and attachments;
 - (c) The Reply and attachments;
 - (d) The applicant's Application to Admit Late Documents dated 19 November 2019 and attachments, and
 - (e) The respondent's Application to Admit Late Documents dated 15 November 2019 and attachments.

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

Cameron Burge
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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

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



STATEMENT OF REASONS

BACKGROUND

1. Salu 'Sally' Fuimaono (the applicant) alleges she suffered a psychological injury with a deemed date of injury of 8 December 2017, as a result of bullying and harassment in the workplace with Campbelltown Family Support Service (the respondent).
2. The fact of the applicant's injury is not in issue, however, her claim for weekly benefits, medical expenses and permanent impairment compensation is opposed on the basis her injury was caused by the respondent's reasonable actions with regard to discipline (section 11A of the *Workers Compensation Act 1987* (the 1987 Act)).

ISSUES FOR DETERMINATION

3. The parties agree that the following issues remain in dispute:
 - (a) Has the respondent made out a defence pursuant to section 11A of the 1987 Act?
 - (b) If the answer to (a) is in the negative, what was the applicant's pre-injury average weekly earning and what is her level of incapacity arising from her injury?
4. It is agreed that in the event there is a finding in favour of the applicant on liability, the permanent impairment claim will be remitted to the Registrar for referral to an Approved Medical Specialist (AMS) to determine the permanent impairment arising from the applicant's injury. It is also agreed that if there is an award in favour of the applicant, a general order for payment of medical and treatment expenses will be made.

PROCEDURE BEFORE THE COMMISSION

5. The parties attended a hearing on 22 November 2019. 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.
6. At the hearing, Mr L Robison of counsel appeared for the applicant and Ms K Balendra of counsel appeared the respondent.

EVIDENCE

Documentary evidence

7. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (the Application) and attached documents;
 - (b) Reply and attached documents;
 - (c) The applicant's Application to Admit Late Documents (AALD) dated 19 November 2019, and
 - (d) The respondent's AALD dated 15 November 2019.

Oral evidence

8. There was no oral evidence called at the hearing.

FINDINGS AND REASONS

Section 11A of the 1987 Act

9. The respondent employer bears the onus of making out a defence pursuant to section 11A *Pirie v Franklins Ltd* [2001] NSWCC 167 and *Department of Education and Training v Sinclair* [2005] NSWCA 465.
10. There are two limbs to a defence under section 11A. The first is that the conduct upon which the employer seeks to rely must have “wholly or predominantly” caused the applicant's injury. The second component is that the respondent employer’s conduct which has wholly or predominantly caused the injury must be reasonable. It is appropriate to deal with each of these limbs in turn.

Wholly or predominantly

11. As the parties noted, the phrase “wholly or predominantly caused” means “mainly or principally caused”.
12. In this matter, Ms Balendra noted the evidence by the applicant's own doctors, treating and medico-legal, indicates her symptoms arose in November 2017. She submitted the events which relevantly took place around that time were those relating to questions concerning the applicant's driver’s licence and the comprehensive insurance of her private vehicle which she used in the course of her employment.
13. The applicant had lost her drivers licence in or about mid-2017, however, the evidence discloses she was unaware this had taken place as she received no notice of the suspension of her licence from the Roads and Maritime Service. She states the suspension came about because her son incurred various camera detected fines whilst driving her vehicle. The applicant states that by the time she became aware of her loss of licence, the period for challenging that suspension had passed. In relation to the comprehensive insurance, the applicant missed direct debit payments while she was on leave which rendered her vehicle uninsured for a time, however, the insurance was brought up to date upon her return to work. None of that evidence is contradicted by any evidence put forward by the respondent.
14. Ms Balendra noted the applicant's supervisor, Mr Apostolovski made numerous attempts to obtain proof from the applicant that her licence and vehicle insurance had been reinstated. She submitted the applicant having a valid driver’s licence and her vehicle being suitably insured were essential requirements of her employment. The employer was concerned the applicant's vehicle was uninsured for a certain period when she was using it to ferry patients, and repeatedly requested she provide proof of insurance of it throughout the latter part of 2017. Ms Balendra submitted these requirements were by far the predominant cause of the applicant's injury and the requests by the respondent were reasonable.
15. Ms Balendra noted the applicant raised a number of other issues which she alleges gives rise to her injury, however, she submitted the treating medical evidence supported a finding the conduct of the respondent in relation to discipline was the predominant cause of her injury.

16. Mr Robison submitted the respondent's defence pursuant to section 11A was fatally flawed as there was no medical evidence dealing appropriately with the question of whether the respondent's conduct relating to discipline has wholly or predominantly caused the injury. He relied upon the decision in *Hamad v Q Catering Ltd* [2017] NSWCCPD 6, in which a respondent's defence under section 11A failed by virtue of its reliance on factual material alone without medical evidence sufficient to satisfy the "wholly or predominantly" limb of the test.
17. In *Hamad*, Deputy President Snell said at [88]:

"In the current case, as in most, there are a number of potentially causative factors raised in the applicant's statement and the medical histories. Proof of whether those factors, which potentially provide a defence under s 11A(1), were the wholly or predominant cause of the psychological injury, required medical evidence on that topic. The extent of any causal contribution, from matters not constituting actions or proposed actions by the respondent with respect to discipline could not be resolved on the basis of the arbitrator's common knowledge and experience."
18. Ms Balendra said in reply that the history set out in the report of Dr Bisht at page 23 of the Application was sufficient to ground a finding the injury was wholly or predominantly caused by the actions relating to discipline.
19. It is apparent from the decision in *Hamad* together with the accepted positions of the parties that medical evidence needs to be examined to determine whether it is sufficient to support a finding of the injury being wholly or predominantly caused by actions relating to discipline.
20. In my view, the evidence does not sufficiently establish that the actions in relation to discipline wholly or predominantly caused the applicant's injury. Rather, her injury was caused by a multitude of issues in the workplace, including but not limited to the deterioration in her relationship with Mr Apostolovski. Dr Bisht's history, found at page 24 of the Application, does no more than very briefly recount the applicant having difficulties in the context of attempting to provide documentation regarding her licence. In my view, that evidence and history is in no way sufficient to ground a finding that the injury was caused by the respondent's actions regarding discipline. Indeed, Dr Bisht specifically attributes the injury to bullying and harassment.
21. Likewise, Dr Teoh, IME for the respondent, only says the applicant felt as though she was singled out and unfairly treated. He makes no finding that the respondent's actions regarding discipline wholly or predominantly caused the injury at issue. Indeed, Dr Teoh says the applicant's symptoms are insufficient to ground a psychiatric diagnosis, a position from which the respondent has subsequently resiled.
22. In her statement, the applicant sets out a number of interactions with Mr Apostolovski which led to her feeling victimized and harassed. They include issues relating to him requesting certified copies of documents from the RMS despite her having provided other documentation to the respondent together with an explanation for her loss of licence and expiration of her insurance.
23. The applicant also explains feeling victimized upon being told by Mr Apostolovski that she could not attend court with a client. The text message from Mr Apostolovski to the applicant denying her request to attend court is in evidence. To say it is written in strident tones is an understatement. It does not relate to discipline or performance appraisal; however, it is in my view indicative of Mr Apostolovski's approach to the applicant in the lead up to November 2017.

24. One of the central matters which appears to have caused or contributed to the applicant's injury was Mr Apostolovski's insistence on her producing a certified copy of her driving record, after she had already explained her licence had been reinstated and documentation to that effect had been provided. In my view, that request by Mr Apostolovski went beyond matters of discipline or performance appraisal. The manner in which the applicant was treated after losing then reinstating her licence was materially different to the treatment given to a fellow staff member in a similar situation.
25. I accept Ms Balendra's submission that whether the applicant felt bullied in the course of her employment is irrelevant to an inquiry under section 11A, however, the respondent's opinion as to which incidents are causative of her injury is likewise irrelevant. What is required is an objective examination of the evidence, which in accordance with the decision in Hamad, ought to include some medical evidence sufficient to ground a finding in relation to causation. In this matter, for the reasons set out at [20] and [21], there is no such evidence
26. Whilst the factors which caused the applicant's injury included disciplinary matters, they also included matters which related to and were indicative of a breakdown in the applicant's relationship with her supervisor. Accordingly, I am not satisfied that the applicant's injury was wholly or predominantly caused by matter relating to discipline.

Reasonableness

27. In any event, if the applicant's injury was caused by matters relating to discipline, the respondent must satisfy the Commission that its actions were reasonable. For the reasons set out below, I am not satisfied they were.
28. The applicant provided documentary proof to her employer as to her licence reinstatement and comprehensive car insurance coverage. Mr Apostolovski, for reasons known only to him, then decided to embark on a further exercise to determine the truth or otherwise of the matters raised by the applicant in her explanation for the loss of her driver's licence. Those actions on his part included but were not limited to demands that the applicant produce a certified driving record.
29. The applicant explained clearly to the respondent why she did not immediately advise of her suspension of her licence. That is, her son had incurred demerit points which were camera detected whilst driving her vehicle and she was not aware her licence had been suspended as she did not receive any notification from the RMS that a suspension was in force.
30. Given this explanation was provided by the applicant at the earliest possible opportunity, in my view Mr Apostolovski's actions in continually doubting her version of events without any reasonable basis for doing so is itself unreasonable. Moreover, an examination of Mr Apostolovski's letter of 17 October 2017 found at page 102 of the Reply, reveals it as essentially an allegation that the applicant committed an act of fraud and deception against her employer by accusing her of being aware that her licence was suspended and failing to report that was the case to her superiors.
31. Mr Apostolovski had no reasonable basis for making that insinuation and allegation against the applicant. The fact that he saw fit to do so in the face of an explanation provided by an employee of nearly two decades' standing who had no adverse disciplinary record reflects upon him, his relationship with the applicant and the manner in which he went about his duties. In my view, it is an action which is clearly unreasonable.
32. The applicant had been employed by the respondent for nearly two decades. There is no suggestion she had ever been the subject of any disciplinary action before. Whilst those matters may appear tangential, the length of an injured worker's service together with her employment record are matters which, in my opinion, help inform the basis of what is or is not considered objectively reasonable in the circumstances.

33. The action of Mr Apostolovski in accusing an employee of the applicant's standing of misrepresentation and fraud was plainly unreasonable, and suggests the processes involved in the relevant disciplinary action were founded not on genuine enquiry and desire to resolve any issue, but rather on the applicant having been singled out as she alleges in her statement.
34. Even though Ms Balendra contrasted the other employee who lost their licence with the applicant on the basis the former had immediately informed the respondent of the loss of their licence, the evidence discloses the applicant also told her employer as soon as she became aware of the circumstances. No reasonable basis for doubting the applicant's word is provided.
35. As already indicated, in my view to fail to accept an employee of such long standing with an exemplary records is a serious matter, and without a reasonable basis for a supervisor doing so, I am unable to find his actions reasonable. An unsubstantiated belief on the part of a supervisor that a worker with an unblemished record over 18 years has been dishonest, in the face of an explanation provided by that worker, is no reasonable basis at all for Mr Apostolovski taking the action he did.
36. Accordingly, for these reasons I find the respondent's actions in relation to discipline were not reasonable in the circumstances.

Capacity

37. Ms Balendra submitted the applicant is not fully incapacitated, as she has been drawing a carer's pension from the Department of Community Services. The respondent submits the applicant has thereby asserted she is fit to act full-time as a carer for a family member and is therefore not incapacitated on a full-time basis.
38. I reject that submission. The carrying out of unpaid care work for a family member within the confines of one's own home is plainly different to embarking upon paid employment in a workplace. Absent some evidence on the part of a qualified medical practitioner to the effect that the applicant's acting as a carer for a family member is equivalent to some capacity for paid employment, I reject that submission.
39. Accordingly, the only medical evidence which is before the Commission, including but not limited to that of Dr Bisht, is strongly suggestive of the applicant being totally incapacitated for employment from the deemed date of injury to date and continuing. I accept that evidence, supported as it is by WorkCover NSW Medical Certificates and the respondent's own Work Capacity Decision dated 21 March 2018

The applicant's pre-injury earnings

40. The respondent has filed a wages schedule with supporting documentation which included the Work Capacity Decision referred to above. Those documents persuade me that the applicant's PIAWE is as set out in that document, namely \$1,499.22 per week. In light of that documentation, I find the relevant figure under section 37 of the 1987 Act for the period claimed is 80% of the PIAWE, namely \$1,199.37 per week.
41. Having found the applicant totally incapacitated from the date she was last paid compensation to date and continuing, I therefore Order the respondent pay the applicant weekly compensation pursuant to section 37 from 4 May 2018 to date and continuing at the rate of \$1,199.37 per week.

SUMMARY

42. Given the above reasons, Findings and Orders will be made in accordance with the attached Certificate of Determination.