

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6025/19
Applicant: Malaly Dost
Respondent: Target Australia Pty Limited
Date of Determination: 14 February 2020
Citation: [2020] NSWCC 44

The Commission determines:

1. An award for the respondent.

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

John Isaksen
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 ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant, Malaly Dost, claims that she sustained psychological injury on 4 May 2010 whilst employed as a Customer Service Attendant by the respondent, Target Australia Pty Limited.
2. The applicant claims that the Store Manager, Shaun Farnsworth, took over dealing with a customer who the applicant been having some difficulties with at the checkout and that he yelled at the applicant: "You shut your mouth", in front of other customers and staff.
3. The applicant claims that she sustained psychological injury as a result of this and claims weekly payments of compensation, medical expenses for treatment and a lump sum payment for 17% permanent impairment.
4. Mr Farnsworth denies that he yelled: "You shut your mouth" but instead said to the applicant: "...please be quiet, I will speak to you in my office after your shift."
5. The respondent denies the claim for compensation benefits made by the applicant on the grounds that she did not sustain injury in the course of her employment, that the respondent took reasonable action by way of discipline or performance appraisal, and that the applicant has not been incapacitated or required medical treatment or has permanent impairment as a result of any injury.

ISSUES FOR DETERMINATION

6. The parties agree that the following issues remain in dispute:
 - (a) Whether the applicant sustained injury in the course of her employment with the respondent (section 4 of the *Workers Compensation Act 1987* (the 1987 Act));
 - (b) Whether any psychological injury sustained by the applicant was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to discipline or performance appraisal (section 11A of the 1987 Act);
 - (c) Whether the applicant was totally or partially incapacitated as a result of the injury sustained in the course of his employment with the respondent (section 33 of the 1987 Act);
 - (d) Whether medical expenses incurred by the applicant for treatment results from the injury and are reasonably necessary (section 60 of the 1987 Act);
 - (e) Whether the applicant has suffered of any permanent impairment that results from any psychological injury sustained by her in the course of her employment with the respondent (section 66 of the 1987 Act).

PROCEDURE BEFORE THE COMMISSION

7. 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. The parties were informed of my intention to determine the dispute without holding a conciliation conference or arbitration hearing.

8. Ms Zoe Safi, solicitor, appeared for the applicant. Mr David Saul of counsel appeared for the respondent.

EVIDENCE

Documentary Evidence

9. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) Application to Resolve a Dispute and attached documents;
 - (b) Reply and attached documents;
 - (c) Wages Schedule prepared by the applicant;
 - (d) Clinical records from Chatswood Medical and Dental Centre.

Oral Evidence

10. There was no application to cross examine the applicant or adduce oral evidence.

FINDINGS AND REASONS

The lay evidence

The applicant

11. The applicant has provided three statements.
12. In her first statement dated 14 May 2010 and addressed "To whom it may concern", the applicant states that she had been happily working at the Chatswood store of the respondent for almost three years. She states that at almost the end of her shift at 2.00pm on 4 May 2010, she was serving a customer at her register and there was a long queue of customers. She states that a customer came from another register and pushed in front of another customer and told the applicant to serve her.
13. The applicant states that she asked this "pushy and impatient customer" to take her place at the end of the queue. She states that this customer became angry but that the applicant stayed calm. The applicant states that the Target manager, 'Shaun', took this customer to the service desk where he served her but that the applicant could hear Shaun and the customer talking rudely about her. The applicant states that she said that the situation was not her fault but that Shaun answered by yelling very loudly in front of all the customers and all the staff: "you shut your mouth."
14. The applicant then states:
- "I was hurt badly and very humiliated it's as if Shaun had slapped me across my face with those words, I was very scared and was shaking all over, but I tried to continue my work, I couldn't believe that a store manager could yell at one of his staff that way and he put me down and verbally abuse me, he insulted me."
15. The applicant states that when she finished her shift she went to Shaun's office, and was very upset and crying. She states that she asked him why he abused her in front of the customers and staff but that Shaun only replied that he had said "keep quiet".

16. The applicant states that she was very upset and went to her doctor, explained what had happened, and was provided with a doctor's certificate. At the time that statement was made, the applicant stated that she was still not confident and still sick and emotional and scared of what had happened. Her statement contained a request that the respondent take some action regarding the incident.
17. The second statement by the applicant is that provided to an investigator retained by the respondent and dated 8 June 2010.
18. In that second statement of the applicant states that she had not suffered any stress related illnesses before the incident on 4 May 2010 and "have not experienced any traumatic events in the recent past that have caused me to become stressed."
19. In this statement, the applicant provides further details of the incident which occurred on 4 May 2010. When Shaun began to serve the difficult customer, the applicant states:

"At the same time Shaun approached her and the lady told him that I was rude, Shaun said to her 'yes she is rude.' They were looking over at me and talking about me. I could not hear every word but I knew that they were not speaking well of me. I called over nicely and said, 'excuse me, it was not my fault, I just asked the lady to go into the line like the rest of the customers.' Shaun yelled back loudly 'you shut your mouth.' Shaun yelled this in front of all customers and staff. It was so embarrassing and it really hurt me. I started shaking all over and it was like he had slapped me over the face. I was so humiliated. It was verbal abuse. He was a bully. I cannot believe a manager behaved like that. It was out of character for him to speak like that. Shaun left straight after he had served the lady.'
20. The applicant states that a co-worker, Ziba, was at the service desk and states: "There is no way that she would not have heard what was said. She was right there".
21. The applicant states that she was crying while she served customers. She states that after she finished her shift she went to Shaun's office and, in the presence of a witness, Julie, asked him three times why he abused her in front of all the staff and customers. She states that Shaun denied abusing her and just said to her to keep quiet. She states that he changed the subject by telling her that she was not wearing the right uniform.
22. The applicant states that she left the store very upset but stayed in the bathroom for quite a while to calm down. She states: "I then went straight to my doctor as I was feeling very weak and shaky. I did not feel well enough to get home safely."
23. The applicant states that she did not work from 5 May to 11 May 2010. She states that she did work on 12 May and 13 May 2010 but was shaking all over and very scared. She states that her workmates were asking her what was wrong and hugging her.
24. The applicant states that she returned to her doctor and obtained another medical certificate on 14 May 2010. It was on that day that the applicant wrote out her first statement. She states that she gave that first statement to Julie Hinton in the presence of the union delegate, Gabriela.
25. At the time the applicant made the statement on 10 June 2010, she states that she had not returned to work since 18 May 2010, although she could not be sure of the exact date. She states that she had stayed at home and was crying all the time. She states that she feels that what Shaun had done had ruined her life.
26. The third statement of the applicant is made several years later on 15 September 2016.

27. In that statement so the applicant states that she was off work for a few months following the incident. She states that in September 2010, she had a meeting with a human resources manager from the respondent and was told that she would be placed on the roster at the Macquarie store. The applicant states that she did not think she would be able to work at the Macquarie store as she did not know how she could cope. She states that the thought of even working at a Target store was making her feel sick. She states that she did return to the Macquarie store and was there for about a year and was working 20 hours per week.
28. The applicant states that she could not cope with the work at the Macquarie store. She states that she was told by a human resources manager that she was unreliable and her employment was then terminated. At the time she made this statement, the applicant states that she had not worked since the termination of her employment with the respondent.
29. The material before me indicates that the applicant worked part-time for four hours per day for five days per week with the respondent up until the incident on 4 May 2010. There is a copy of a contract of employment between the applicant and respondent dated 31 January 2008 which states that her salary would be \$323.16 per week. The applicant's solicitors have prepared a wage schedule in accordance with a direction that I made a teleconference on 17 December 2019, stating that the applicant's pre-injury average weekly earnings were \$300 per week.

Shaun Farnsworth

30. Shaun Farnsworth has provided a statement dated 10 June 2010.
31. Mr Farnsworth states that he is 25 years of age and commenced work with the respondent as a casual service assistant in June 1999. He states that he has worked in various stores and roles for the respondent since then and was promoted to Store Manager at Chatswood in 2009.
32. Mr Farnsworth confirms that the applicant worked four hours per day for five days per week and rarely did overtime. He states that she reported to Ziba Mohammadiéh and Kim Herford, who report to the line manager, Julie Hinton.
33. Mr Farnsworth states that the applicant was spoken to about being argumentative when instructed by supervisors, particularly with Ms Mohammadiéh but that these discussions were always informal.
34. Mr Farnsworth states that there had been previous allegations from customers that the applicant was quite rude and abrupt at times. He states that on one occasion in 2010 two Muslim ladies complained that the applicant had been racist towards them but he did not speak to the applicant about this because he felt that the customers were not being completely honest.
35. Mr Farnsworth states that on 4 May 2010 he was at the registers and tidying up some baskets when he heard a customer getting quite upset at the register which the applicant was working on. He states that he witnessed the applicant tell this customer to line up like everyone else but the customer said that she had been sent to that register.
36. Mr Farnsworth states that the customer had explained her situation very clearly to the applicant and he heard the applicant say: 'you need to be patient too, everybody else wants to be served as well.'

37. Mr Farnsworth then states:

"I approached the register and said to the lady that I was the store manager and will be able to help her. I asked her to come to the service desk with me. The lady said that 'she is the rudest person, she is just so rude.' The customer explained to me what had happened. I think I said that I would look into it and deal with it. I did not say that Malaly had been rude to the customer. My intent was to serve the customer.

Malaly heard the customer explaining what had happened and she raised her voice over the top of the customer she was serving. She addressed myself and the customer that 'Sir, she needs to be patient and there are other people wanting to be served.' I do not think Malaly said anything else. I said 'Malaly please be quiet, I will speak to you in my office after your shift.' The customer then said, 'you can see how rude she is' and I responded that 'I was very sorry and that I would be dealing with it.' The customer was quite upset. She said to me that she did not want to go through with the sale and then left the store."

38. Mr Farnsworth then said he walked away from the registers. He states that he did not want to address the situation in front of the customers. He states that at no stage did he tell the applicant to shut her mouth.

39. Mr Farnsworth states that later on he noticed the applicant sitting in his office. He states he located Julie Hinton and they returned to his office. Mr Farnsworth states that he asked the applicant what had happened at the register and she said that the customer wanted to be served but she was going to serve this lady when it was her turn. Mr Farnsworth states that he told the applicant that it was not all right to treat customers like she did and the applicant then started to talk over the top of him. He states that he put his hand up and said: "Stop Malaly, I am talking now, I am the Store Manager." Mr Farnsworth states that he told the applicant that he expected team members to treat customers with respect and be polite and if she had an issue she could ring the supervisor. He states that he referred to being quite happy overall with her performance as a register operator but what happened with this customer was not satisfactory. He states there was also some discussion regarding the applicant's uniform.

40. Mr Farnsworth states that at the end of the meeting he shook the applicant's hand and she seemed all right when she left. He states that the applicant did not cry or become upset during the discussion but was just defensive.

Julie Hinton

41. Julie Hinton has provided a statement dated 10 June 2010.

42. Ms Hinton states that she is the Operations Manager at the Chatswood store for the respondent.

43. Ms Hinton states that she first became aware of the incident on the registers on 4 May 2010 when she was asked by Mr Farnsworth to witness a discussion with the applicant on that day. She states that Mr Farnsworth explained what had occurred but the applicant continued to talk over Mr Farnsworth and he put his hand up and said that she needed to wait until he had finished. She states Mr Farnsworth also discussed with the applicant that she was not wearing the correct uniform. Ms Hinton states that the applicant stood up and shook the hand of Mr Farnsworth at the end of the conversation and she was not upset at all during their discussion.

44. Ms Hinton states that on 10 May 2010, the applicant came in for her shift and did not look very happy. She states that she went into an office with the applicant to have a chat and the applicant said: "Shaun last week shouting at me." She states that she asked the applicant to put her complaint in writing and that it would be handled by the State human resources manager.
45. Ms Hinton states that she spoke to the applicant on 18 May 2010 and the applicant told her she had sent her complaint by email to head office. She states that the applicant said she wanted to give a copy of the complaint to Ms Hinton in the presence of Gabby, the union delegate. Ms Hinton does not state that she received the complaint from the applicant. She states that she did the applicant that forwarding the complaint to head office was the right thing to do.

Ziba Mohammadieh

46. Ziba Mohammadieh has provided a statement dated 10 June 2010.
47. Ms Mohammadieh states that she has been employed with the respondent as a front end supervisor at its Chatswood store for approximately 20 years. She states that she has quite a lot of day-to-day contact with the applicant because she is the applicant's supervisor.
48. Ms Mohammadieh states that on 4 May 2010, she was working on a register with her back to the applicant. She states that during her shift she heard something happening with a customer behind her back. She states that she heard Mr Farnsworth trying to calm down a customer and after a while she heard the applicant talking loudly to Mr Farnsworth. Ms Mohammadieh states that she does not remember what the applicant said because Ms Mohammadieh was concentrating on serving a customer.
49. Ms Mohammadieh states that she heard Mr Farnsworth say: "can I see you in my office when you finish your shift?" She states that at no stage did she hear Mr Farnsworth tell the applicant to shut her mouth. She states that it is not in Mr Farnsworth's character to speak to the staff like that.
50. Ms Mohammadieh states that the applicant was not upset or crying at all and there was nothing wrong as far as she knew.

The medical evidence

51. The first entry in the clinical notes from Chatswood Medical and Dental Centre which relate to the subject incident is on 5 May 2010, wherein Dr Lawrence records:

"Verbal abuse at work with Target store manager
for refusing customer to break into her queue
pt now weepy and unable to work"
52. The same clinical notes indicate that the applicant saw a psychologist, Kiran Sidhu, on eight occasions between 21 May 2010 and 30 July 2010. The history recorded in several of those entries is of the applicant suffering a high level of anxiety and depression after a manager abused her at work.
53. The applicant's general practitioner at the time, Dr Lawrence, initially issued medical certificates certifying the applicant as being unfit for work. The first Certificate of Capacity was issued by Dr Lawrence on 1 June 2010 and certified the applicant as being unfit for work from 4 May 2010 to 30 June 2010 on the diagnosis of "reactive depression to verbal abuse."

54. Dr Lawrence provided a handwritten response on 4 June 2010 to questions asked by the respondent. Dr Lawrence diagnosis post-traumatic stress reaction and that this developed when the applicant was abused by the store manager. Dr Lawrence also confirms that the applicant is fit for alternative employment where she is not working with the store manager.
55. The applicant was referred to Dr Basil Cameron, psychiatrist, and there is a report from Dr Cameron in evidence dated 28 June 2010. Dr Cameron writes:

“As you know, she has been very distressed with high levels of anxiety symptoms suggestive of hyperventilation tearful outbursts feeling helpless and hopeless and very injured by what she felt as an abusive attack by her store manager at work on the 4th May 2010. She tried to return to work but was overwhelmed by these symptoms and has been very avoidant being unable to shop or venture into that part of the Chatswood shopping centre where she was previously employed. The site of the name of her store on television can precipitate these emotional symptoms. She said, “he ruined my life my happiness and my confidence”.”
56. Dr Cameron records that the applicant believes that no witnesses would come forward because of fear of discrimination if they gave evidence in support of her.
57. Dr Cameron also records that the incident has stirred up memories for the applicant of her own abusive husband whom she left over 10 years ago.
58. Dr Cameron makes a diagnosis of Situational Stress Reaction. He concludes that the applicant “has certainly been emotionally traumatised by this incident and the way it has been handled by her employer.”
59. In a further report dated 2 September 2010, Dr Cameron writes:

“She remains very distressed about the circumstances of her dismissal from her job at Target Chatswood. She views the whole incident as being unfair and unjust disputing the account given by her manager and supervisor. The wrongful accusation and the alleged verbal abuse that she suffered have been compounded by the unsympathetic treatment she has received in the attempts to justify the management’s action.”
60. In a report dated 3 February 2011, Dr Cameron writes that the applicant is fit to commence rehabilitation at the respondent’s store at the Macquarie Centre for four hours a week. He records that the applicant’s depressive illness had largely lifted but she remained anxious.
61. The final report of Dr Cameron that is in evidence is dated 9 June 2011. Dr Cameron records the applicant had not returned to her pre-injury work hours and had only done two days of work in the past two weeks.
62. There is no medical evidence in the ARD or Reply between that last report of Dr Cameron dated 9 June 2011 and a report from Dr Clark, psychiatrist, dated 13 March 2017, other than clinical notes from Chatswood Medical and Dental Centre.
63. The applicant attended Dr Clark at the request of her then solicitors. Dr Clark records that in 2010 there was a contretemps between the applicant and her manager and that the applicant “felt verbally abused.” Dr Clark records that the applicant took time off work following this incident but she did return to the respondent’s Macquarie store and remained there for a year before her employment was terminated.
64. Dr Clark also records that the applicant “said that the manager at Target, who caused all her distress, was what she calls “a chaser”, that is going after the female staff, a show off, who thought he was “God’s gift”.”

65. Dr Clark makes a diagnosis of the applicant having an Adjustment Disorder. He opines that the applicant's employment was a substantial contributing factor to her psychological injury. He opines that the applicant cannot go back to any retail work where she has to cope regularly with the public.
66. Dr Clark assesses the applicant as having 17% whole person impairment, including being in class 4 of the PIRS category 'Employability', on the basis that she is unemployable at present. Dr Clark acknowledges that the applicant's psychological injury "has this resonance with her marriage collapsing" but makes no deduction in his assessment of permanent impairment for any pre-existing condition.
67. The applicant attended A/Prof Kaplan at the request of the respondent. A/Prof Kaplan has provided a report dated 29 July 2019. It is apparent from that report that the applicant initially saw A/Prof Kaplan on 19 December 2017, but he was unable to complete the interview. That interview was not completed until 29 July 2019 and his report was then issued.
68. A/Prof Kaplan records that the applicant alleges she was verbally abused by Shaun Farnsworth in front of customers when dealing with an aggressive customer who had pushed in front of the line and was rude to her. He records that up until then she had a good relationship with Mr Farnsworth and liked her work. He records that the applicant says she has lost nine years of her life, feels useless and has lost confidence and has a sense of deep humiliation.
69. A/Prof Kaplan opines that the applicant may have had an adjustment disorder of mild severity when she left work but that this occurred in a setting of depression and anxiety related to difficulties in her personal life and loss of her parents. He opines that the diagnosis of adjustment disorder can no longer be sustained, and his finding is a V-Code Disorder (occupational difficulty). He writes that V-Code Disorders are of clinical interest but do not constitute a clinical disorder.
70. A/Prof Kaplan opines that a reading of the factual statements indicate that the managers response appears to have been appropriate and reasonable under the circumstances and her response was mediated by personal factors, including exposure to violence in Afghanistan and a violent marriage after she came to Australia in 1996.
71. A/Prof Kaplan opines that because the applicant does not have a formal psychiatric disorder, she does not require assessment for permanent impairment.

Determination

72. There are two different versions of what was said by Mr Farnsworth in a short, discrete period of time when the applicant was nearing the end of her shift on 4 May 2010.
73. The applicant claims that Mr Farnsworth yelled at her: "you shut your mouth" in front of customers and staff.
74. Mr Farnsworth claims that he said to the applicant: "Malaly please be quiet, I will speak to you in my office after your shift."
75. The applicant states that what was said to her by Mr Farnsworth was out of character for him. A/Prof Kaplan records some seven years later that the applicant considered she had a good working relationship with Mr Farnsworth until this incident occurred.

76. I would not discount that Mr Farnsworth could have lost his temper or failed to exercise discretion for a short moment in a situation where he had to deal with both a disgruntled customer and an employee wanting to ensure that she had followed proper protocol in serving customers, and yelled at the applicant: "you shut your mouth." However, the applicant bears the onus of proof in establishing that this did occur, and I am not satisfied of this on my review of the evidence.
77. The applicant states at the time the incident occurred, Ms Mohammadieh was working at the service desk, whereas Ms Mohammadieh states that she was working on a register with her back to the applicant. Although there is a difference in these two pieces of evidence, the applicant does place Ms Mohammadieh close enough to her for the applicant to state: "There is no way that she would not have heard what was said. She was right there."
78. Ms Mohammadieh provides an independent account of what occurred. She states that she heard Mr Farnsworth trying to calm down a customer and then the applicant talking loudly to Mr Farnsworth. She concedes that she does not remember what the applicant was saying because she was concentrating on serving a customer. However, she states that she did hear Mr Farnsworth say: "can I see you in my office when you finish your shift?" She states that she did not hear Mr Farnsworth tell the applicant to shut her mouth.
79. The applicant confidently states that "there is no way" Ms Mohammadieh "would not heard what was said", which would include the applicant's claim that Farnsworth yelled at the applicant: "you shut your mouth", but that is not corroborated by Ms Mohammadieh. Although it is possible that Ms Mohammadieh did not hear those specific words, I consider it likely that she would have, if indeed those words were said by Mr Farnsworth, given the close proximity of Ms Mohammadieh to the applicant, the applicant's own belief that Ms Mohammadieh would have heard those words, and the applicant's concern that what was being said by Mr Farnsworth was heard by customers and other staff.
80. Given that the applicant is adamant that what Mr Farnsworth said was done in front of other staff, the applicant has not provided evidence from any other employees of the respondent who may have witnessed the incident. Nor has she provided any evidence of any attempts by herself or her legal representatives to obtain such evidence.
81. Dr Cameron does record that the applicant believed that no witnesses would come forward because of fear of discrimination if they supported her, but this is no more than a belief on the part of the applicant. The applicant does not provide her own evidence as to why another employee might not be able to provide evidence that would assist her in supporting her version of the incident which took place.
82. There are also inconsistencies in the applicant's evidence which causes me to doubt the reliability of what she claims to have occurred between herself and Mr Farnsworth.
83. Firstly, the applicant states that after she left Mr Farnsworth's office she stayed in the bathroom for quite a while but then went straight to her doctor because she did not feel enough to go home safely. The clinical notes from Chatswood Medical and Dental Centre record the applicant attending Dr Lawrence on the morning of the following day, 5 May 2010.
84. I would accept that in many circumstances little significance should be placed upon a person making an error in identifying the date of attendance upon a doctor, when the difference is less than 24 hours. However, in this instance the inconsistency is significant because the applicant states that her ability to get home safely was contingent upon her attending her doctor. The evidence from the clinical notes, however, is that the applicant did not attend her doctor that afternoon.

85. The applicant makes this statement on 10 June 2010, just over one month after the incident occurred, and not months or years later, which might otherwise explain the error in her recollection of events.
86. Secondly, the applicant states that she had not suffered any stress related illnesses before the incident on 4 May 2010 and that she had not experienced any traumatic events in the recent past that had caused her to become stressed.
87. A review of the medical material which predates the incident on 4 May 2010 does not identify any traumatic events that the applicant was exposed to in the recent past, but there is considerable evidence that the applicant had suffered from stress related illnesses prior to the incident on 4 May 2010.
88. There is a report from Dr Rahme, Registrar in Psychiatry at Northern Sydney Health, dated 5 March 2001, which records a five year history of depressed mood and multiple physical pains. The report records that the applicant reports poor concentration and difficulties with her memory and PTSD-like symptoms consistent to domestic violence.
89. There are multiple entries in the clinical notes from the Chatswood Medical and Dental Centre which record the applicant seeking treatment for stress related problems prior to 4 May 2010. For instance, there is an entry on 25 October 2005 for a prescription for Zoloft as the applicant "feels depressed." There is an entry on 12 June 2007 of "anxiety and depression", "domestic violence 2000", and "financial stress." There is a query in the notes as to whether antidepressant medication would suit the symptoms that are recorded.
90. It may well be that the financial stress that is recorded on 12 June 2007 might have subsequently abated because some months later the applicant was able to commence her employment with the respondent, which she says she enjoyed. However, that entry also makes reference to domestic violence, and the applicant's treating psychiatrist, Dr Cameron, records on the first occasion that he sees the applicant on 22 June 2010 that the incident at her workplace stirred up the applicant's memories of her own abusive husband from 10 years before.
91. The applicant has not been forthright in the statement that she provides to a representative of the respondent at the initial stages of an investigation into her claim. This, in addition to her evidence as to when she attended her doctor and the reason for that attendance after the subject incident, reinforces my doubts as to the reliability of the applicant's evidence.
92. I accept the evidence of Ms Mohammadieh, who was in close proximity to the applicant, did not hear Mr Farnsworth tell the applicant to shut her mouth, and who the applicant believes would have heard those words being spoken. I have also identified inconsistencies in the applicant's evidence which causes me to doubt the reliability of the applicant's evidence. It is for these reasons that I am not satisfied that Mr Farnsworth did yell: "you shut your mouth" at the applicant on 4 May 2010 at the registers at the Chatswood store of the respondent.
93. During the course of the arbitration I asked Ms Zafi, who appeared for the applicant, as to why I would accept the applicant's evidence as to what occurred during the subject incident as opposed to the witnesses relied upon by the respondent. Ms Zafi said that the applicant had not been the subject of any previous disciplinary action. She also said that it was out of character for the applicant to say something or overreact in the circumstances which she found herself in.
94. That response did not really answer my question. There is nothing to cause me to doubt that the applicant was not a good employee. She had worked for the respondent for some three years and states that she enjoyed her job. Mr Farnsworth states that he had cause in the past to counsel the applicant about being argumentative with her supervisors, but this was done informally. Ms Mohammadieh, as one of the applicant's immediate supervisors, makes no complaint about the applicant in her statement.

95. In *Attorney General's Department v K* [2010] NSWCCPD 76, DP Roche said in regard to psychological injury in the workplace at [54]:

“The critical question is whether the event or events complained of occurred in the workplace. If they did occur in the workplace and the worker perceived them as creating an ‘offensive or hostile working environment’, and a psychological injury has resulted, it is open to find that causation is established. A worker’s reaction to the events will always be subjective and will depend upon his or her personality and circumstances. It is not necessary to establish that the worker’s response was ‘rational, reasonable and proportional’.”

96. From my review of the evidence the applicant has failed to meet the “critical question” that the event which she claims to have caused her injury, being that Mr Farnsworth yelled at her: “you shut your mouth”, did actually happen.
97. The applicant does not claim that her psychological injury has been caused by anything other than quite specific verbal abuse. The cause of injury described in the ARD is:

“The Claimant sustained severe psychological injury during the course of her employment when she was ‘abused’ by her manager following a disagreement with a customer.”

98. The first two medical certificates issued by Dr Lawrence following the subject incident refer to psychological symptoms after abuse from a manager. Dr Cameron records that the applicant was injured by what she felt was an abusive attack by her manager and makes a diagnosis of Situational Stress Reaction. There are no other causes of injury identified by these treating doctors. The applicant does not claim that she has been injured by being the subject of a reprimand by Mr Farnsworth in front of customers and other staff, or by any conduct by anyone on behalf of the respondent following the incident on 4 May 2010.
99. The applicant has claimed that the cause her psychological injury was verbal abuse by Mr Farnsworth, but she has failed to prove this. There will be an award for the respondent.

