

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2825/20
Applicant: Jumna Bai Mani
Respondent: Secretary, Department of Education
Date of Determination: 8 September 2020
Citation: [2020] NSWCC 308

The Commission determines:

1. Award for the respondent.

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

Catherine McDonald
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 CATHERINE McDONALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Junma Bai Mani is employed by the Secretary, Department of Education (the Department) as a teacher. She alleges in the Application to Resolve a Dispute (ARD) that she suffered a psychological injury as a result of bullying and harassment from 29 January 2018 to 22 May 2019. She relies on a series of meetings with the Principal of the school at which she was teaching, commencing with that on 19 March 2019 when she was told about complaints made by parents, and the events which followed.
2. The Department admits that Ms Mani suffered a psychological injury but says that it was wholly or predominantly caused by reasonable action with respect to discipline within the meaning of s 11A of the *Workers Compensation Act 1987* (the 1987 Act). In essence, the case concerns the reasonableness of the Department's conduct, through the actions of the Principal.
3. Ms Mani was paid compensation under an acceptance of provisional liability until 15 August 2019, a few days before the end of the first entitlement period. She claims weekly compensation from 16 August 2019 and s 60 expenses. She also claims permanent impairment compensation.

PROCEDURE BEFORE THE COMMISSION

4. The matter was listed for conciliation conference and arbitration hearing by telephone on 14 July 2020, when Mr Baran of counsel appeared for Ms Mani and Mr Hanrahan of counsel appeared for the Department.
5. So much of the allocated time was spent in conciliation that it was necessary to order written submissions. Those submissions were provided in accordance with the timetable ordered and form part of the Commission's file.
6. At the conciliation conference I told the parties that I had dealt with a previous claim made by Ms Mani as a result of an injury suffered at another school in 2017. The parties agreed the matter had resolved without any findings being made and did not object to me hearing this matter.

EVIDENCE

Documentary evidence

7. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and supporting documents, and
 - (b) Reply.
8. There was no oral evidence.
9. In her statement dated 21 May 2020, Ms Mani said that she began working at the school at the beginning of the 2018 school year as a Year 3 classroom teacher. At the end of the school year, she was told that she would not be a classroom teacher the following year but would be the Learning Support and Relief from Face to Face (RFF) teacher in 2019. She said that she had to take all of her belongings home at the end of the year and was required to carry her resources around with her for some time in Term 1 2019. She said she felt targeted and harassed, despite her class having achieved good NAPLAN results. She also said that she was subjected to racism during 2018 but did not elaborate on that statement.

10. Ms Mani's role included teaching science across a number of grades.
11. Ms Mani said that on 19 March 2019, she was called to a meeting with Mr C Lambert, the Principal and told to bring a support person. She did not take a support person because she thought the meeting would be just a catch up. Mr Lambert told her that he had contacted EPAC (the Department's Employee Performance and Conduct division) regarding some issues and that EPAC told him to sort the issues out locally. She said she felt it was totally unfair that Mr Lambert had contacted EPAC without first informing her. He told her there had been a number of complaints over a period of time and said she was shocked how she could have so many complaints because she understood she was required to be notified within 48 hours. Ms Mani said that Mr Lambert was supposed to provide her with the complaints within five days under the Department's Complaints Handling Policy Guidelines. Ms Mani said she felt disturbed and apprehensive after the meeting. She obtained a copy of the minutes which she said contained inaccuracies. Ms Mani believed that the complaints were minor and easily solvable. She was asked to prepare a written response.
12. Ms Mani said:

"At the end of the meeting, I told Mr Lambert that I wanted the list of complaints so that I could respond to them in writing. If I didn't ask for them in writing, then he would not have voluntarily provided them to me. Mr Lambert told me that he would email me the list of allegations and then after I had responded to them in writing, he would then file it away. Mr Lambert told me that it was not a serious matter. Mr Lambert made no mention whatsoever of the Department of Education's Complaint Handling Policy Guidelines which he should have referred to as the first step in managing any complaint. As per the Department of Education's Complaint Handling Policy Guidelines, he was supposed to provide me with those complaints within five working days which was not adhered to and he accumulated them over a period of time to then dump on me."
13. Ms Mani said that on 28 March 2019, she went to Mr Lambert's office, seeking to reschedule a meeting. She said that he was angry and that she felt intimidated and that, to her, this was "blatant bullying and workplace harassment."
14. At the second meeting, Ms Mani said that Mr Lambert did not accept her response and that she was interrogated by Mr Lambert and the Acting Deputy Principal, Ms Hutton, and denied procedural fairness. She said she was asked to provide proactive actions in response to the complaints. She said:

"After I provided Mr Lambert with my written responses to the parental allegations and my written responses to the minutes of the first meeting that he had emailed me, Mr Lambert said at the second meeting on 29 March 2019 that I was being defensive and that I was not answering his questions. There were no questions for me to answer in his email to me, only listings of parental allegations and the minutes of the first meeting taken down by Mr Lambert and Mrs Hutton which had erroneous statements not made by me. Mr Lambert did not investigate the parental allegations.

...

Meanwhile, I took proactive actions immediately on that very same afternoon, after the first meeting on 19 March 2020 such as talking to my students and investigating some of the allegations presented to me and found out that in 99 % of the cases, it was exaggerated and blown out of proportion by Mr Lambert. It is obvious to me that there is collusion between Mr Lambert, Mrs Hutton and Mrs Mar [the Deputy Principal]. Mrs Mar provided complaints to Mr Lambert from the parents."

15. Ms Mani said she was told by an officer of her union that Mr Lambert's actions were "against protocol." She said Mr Lambert forced her to include a Professional Development Plan (PDP) goal of his choice.
16. A third meeting took place on 8 May 2019 and Ms Mani said that Mr Lambert said he sent her PDP to EPAC, which she said was inappropriate. She said that she had a number of conversations with staff at EPAC which suggested they were not interested in the complaints.
17. On 16 May 2019, Mr Lambert and Ms Hutton met Ms Mani at the classroom door. Mr Lambert told her that "that thing. It is all over..." but followed her as she walked away. She felt intimidated in front of the whole school. He handed her a letter "stating disciplinary action if I did not follow what he wanted me to do." Soon after, she ceased work.
18. Ms Mani also said:

"I would also like to comment on my pre-existing psychological injuries. My pre-existing psychological injuries were all under control by the time Mr Lambert became Principal because I was in a safe and supportive environment. I had two prior Workers Compensation matters for primary psychological injuries (bullying and harassment) which were taken to the Workers Compensation Commission. There, it was determined that I was poorly treated, I was cleared of wrongdoing and placed in alternate schools."
19. Ms Mani reported her injury to the Department on 23 May 2019 and said that the injury occurred on 19 March 2019. This date corresponds with the date of injury in the notice under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) but is not the date relied on in the ARD, which is 22 May 2019. The description of the incident includes the meeting of 19 March and subsequent meetings.
20. Despite the evidence set out at [18] above, there is no evidence about the result of any previous proceedings in the Commission and, as noted above, the parties accepted that the matter which in which I had previously been involved had resolved by agreement.

Mr Lambert

21. Mr Lambert's statement was prepared in response to a series of questions. He said that Ms Mani had not made an official report about racism but said she believed the allegations about her performance and conduct were made because of racism.
22. At the end of the statement, Mr Lambert set out some other complaints which were made when Ms Mani taught Year 3 in the previous year.
23. On 18 March 2020, Mr Lambert sent Ms Mani an email requesting a meeting on the following day. The subject line read "Confidential". He said:

"I need to meet with you tomorrow to discuss a confidential matter. Could you please meet me in my office at 3pm (or as soon as you are able at the conclusion of the school day). Jacqui will be in attendance at the meeting as well, providing she has returned from sick leave. If she is unable to attend due to illness, Renae will be there in her place. If you would like to bring a support person with you, I would encourage you to do so."

24. Mr Lambert said in his statement that the purpose of the meeting was to tell Ms Mani that a number of concerns had been brought to the school's attention and to seek her agreement to "manage the matter locally." He said that the meeting followed a script in EPAC guidelines. Ms Mani agreed but was told she could refer the matter back to EPAC at any time. She was provided with details of the Department's Employee Assistance Program (EAP). Ms Mani was given a copy of the minutes of the meeting and a copy of an email with the details of the complaints and the complainants' names removed.
25. The minutes appear in the Reply and record that Ms Mani was asked if she wanted a support person and told that she could stop the meeting to have a support person present in future. The minutes record:

"Mrs Mani was informed that complaints had been received about her teaching practice and that this complaint had been referred to Employee Performance and Conduct (EPAC). EPAC has assessed the matter and determined that it was not a serious matter and that it could be dealt with under a local management process, which I have agreed to conduct. Mrs Mani was informed that she needed to agree to local management as well and was informed that the alternative would be an EPAC investigation."

26. The minutes set out nine separate complaints from parents. The complaints included that Ms Mani yelled at children who felt scared; that a boy was going to sick bay during science and reluctant to attend school on days when science was scheduled; another boy went to the office crying because he was told he had taken too long to complete his work; that children's work had been rubbed out or ripped out and they had been embarrassed in front of the class, and that a girl with an injury was prevented from going to sick bay. Ms Mani provided a response to the allegations in the meeting and Mr Lambert made some suggestions about strategies to use in the future. Mr Lambert sent Ms Mani an email that evening, thanking her for her honesty and attendance and sending a copy of the complaints. He requested a written response. He also provided contact details for the EAP.
27. On the following day, Ms Mani said that she was "totally unaware" of the situation and that she would be contacting the Teachers Federation. Mr Lambert responded, also on 20 March, and agreed that contacting the Teachers Federation was a good idea. He told Ms Mani that she had 14 days to provide a detailed response to the complaints. He also told her that he had been approached with another complaint from a parent that their Kindergarten child was scared to be in Ms Mani's class because she yelled at the children "all the time."
28. Ms Mani provided a brief and general email response dated 21 March 2019. She said:

"Thanks very much for your e-mail. I appreciate this.

Chris, I am absolutely and seriously concerned about this 'yelling' business. Something does not add up here!

I have a very good rapport with the students in my RFF classes. There are no behaviour issues with my students in my classes when I teach them Science.

I also spoke with a couple of teachers of the RFF classes I teach, yesterday, Wednesday 20th March 2019 to find out what their students were like and how they interact with me and the teachers had positive things to say, 'They think you are funny'; 'They love you.'

The last allegation in your e-mail is so untrue!

I am truly very, very upset. I have never got upset with the Kindergarten students at any time. Their [sic] is no reason whatsoever."

29. Ms Mani went on to note her limited interaction with Kindergarten classes that week.
30. Mr Lambert responded to Ms Mani very soon after. He reminded her that the EAP was available. He noted that the new complaint was not in respect of the previous week but the whole term.
31. Ms Mani sent Mr Lambert three documents on 26 March 2020 but they do not appear in the file.
32. Mr Lambert sought to arrange a meeting to discuss those responses. After some changes in the time to accommodate Ms Mani, that meeting took place on 29 March 2020 and a support person attended. Mr Lambert said:

“During the meeting, I encouraged Ms Mani to reflect on her practice, to look for opportunities improve her practice and be more supportive of the students' needs in her classes. On numerous occasions, Ms Mani was informed that the senior executive were committed to supporting her in improving her practice in response to the concerns. At the conclusion of the meeting, Ms Mani advised that early in Term 2, an additional meeting would be held to discuss the issues identified, to identify a program of support and to adjust her Performance and Development goals (PDP). Ms Mani's health was enquired of, to which she indicated that she was 'feeling okay today'. Ms Mani was again reminded of the Employee Assistance Program.”

33. The minutes from the meeting appear in the Reply. They record:

“Chris stated he was disappointed with Jumna's responses to the claims. They appeared to be trying to shift blame onto someone else.

Ms Mani: The parents are putting me down. It's got nothing to do with you Chris. I would like to fix the problem.

...

Mr Lambert: I was not happy with your initial response to my email where I informed you of an additional complaint that had come in. The email clearly stated that there was a recent complaint about conduct over the entirety of the term. If you had come to me and asked a clarifying question then we could have moved forward. Instead, your response threw the complaint back onto me suggesting it was my fault for not passing the complaint on, when in fact I had. I know that I am being a little more direct toady [sic]. I am not trying to get you in to trouble but please know that we need to work together. You have explained that this was just a misunderstanding on my part and that your responses were not trying to blame me. I am happy to believe that this was just a breakdown in communication.”

34. In response to Ms Mani's complaint about the minutes of the 19 March meeting:

“Mr Lambert: Explained that Ms Mani's first two points were in line with the minutes and that the final clarification was inaccurate as that was what was said. You may be changing your response now, but that's what was said.”

35. A similar note was made about another of Ms Mani's responses. The meeting considered Ms Mani's responses to the parental complaints. The minutes record:

“Mr Lambert moved on to point 2 regarding a student being too scared to come to school. He repeated the written response provided by Ms Mani to her. He said that this is not a response to the allegation. All you have written is that the complaint did not come to you, which we have spoken about. What is your response to the allegation?”

Ms Mani: Stated that if the complaints were brought to her then she can call the parents.

Mr Lambert interjected and asked for a response to the specific case where a child is afraid of coming to school and presents in sick bay rather than attending Science classes.

Ms Mani said the children are misunderstanding her. She said that she projects her voice and doesn't yell. She stated that she didn't have any problems in her class.

Mr Lambert asked how it made her feel that a child was afraid to come to school because of the environment of the classroom.

Ms Mani repeated that the children were wrong in saying that she yells.

Mr Lambert repeated the question again. He then said, 'If it was me, and there was a child that was afraid to come to school because of me and the way I conduct myself in class, then I would look at what I was doing and see what changes need to be made to address that child's fears and concerns.'

Ms Mani again stated that the students are misunderstanding her actions."

36. After further discussion, the minutes record:

"Mr Lambert said that there needed to be some self-reflection on Ms Mani's part to see what she was doing to cause these responses to the students in her classes. It was not good enough to blame the children and steps needed to be taken to change her practice.

Ms Mani said that she did not blame the children and they are just misunderstanding her.

Ms Mani continued: I've got no behaviour problems in any of my classes. I never put anyone on a discipline form. Up until Week 8 I have had no behaviour problems.

Mr Lambert: Stated Ms Mani's responses were contradictory. He said that every class has misbehaviour of some sort. Every class in every school has some level of misbehaviour, and that's okay, it's all in how it is managed.

Ms Mani again reiterated that she had no misbehaviour in her classes.

Mr Lambert asked if Ms Mani viewed the complaints that had come through from last year if they were behaviour issues.

Ms Mani stated that they were, but that was last year and said it was 'those boys'. Ms Mani said that she had not had any behaviour issues at all this year."

37. Mr Lambert went on:

"Mr Lambert said that both he and Mrs Hutton had been impressed that they hadn't received many complaints compared to Term 4, 2018. However, over a two day period while Mr Lambert was at a course, many complaints had come in. Mrs Mar received most of these complaints whilst Mr Lambert was away from school and wanted to ask his opinion about how to best proceed.

Mr Lambert said that this was the reason we wanted to have a meeting with you. We received so many complaints that we felt it appropriate to seek advice from EPAC. We scheduled the initial meeting on their advice, with a view to managing it locally, which you (Ms Mani) agreed with. On most occasions, we do come straight to you when there has been issue so we can resolve it together in a timely manner. Please do not assume that we have not passed on the questions to you because our goal is to work collaboratively and support you through this process.

Ms Mani asked why it had been taken to EPAC.

Mr Lambert said the volume of complaints within the short period in which they were received caused us concern. Mr Lambert asked if Ms Mani was still comfortable with him managing the matter locally, which she agreed to.”

38. Mr Lambert summarised the points to be taken from the meeting. In response, Ms Mani said that she did not “want bad things to come out of this like last year.” She also said that she now “understood the EPAC issues.”
39. On 8 May 2019, in Term 2, Ms Mani attended a meeting with Mr Lambert and her support person about her PDPs. The minutes reveal that Mr Lambert said that the purpose of the meeting was to adjust Ms Mani’s goals to work on the complaints made by parents. Ms Mani asked what had happened to the EPAC complaints and Mr Lambert said that he had sent his findings for review and was waiting for a response as to whether he could share them with Ms Mani.
40. Ms Mani said that she wanted to add a particular goal (the details of which are not spelt out) because “I feel that I am very good at that with the parents.” Mr Lambert queried whether it was appropriate to the concerns which had been raised and said that he proposed to suggest a goal. After some further discussion he said:

“I am happy to incorporate your identified goal around 7.3.2 and add some content to it relating to classroom management and a positive classroom environment.”

41. Mr Lambert then told Ms Mani that a member of the executive would “do observation lessons and demonstration lessons on how to appropriately manage classroom practice.” The minutes record that the following exchange took place:

“Ms Mani -This is new to me. I did not know this that an executive could come in and observe you. Federation says you cannot do this in the PDP process.

Mr Lambert -This is about supervision. You still have your observation with an agreed upon colleague as part of the PDP process. This observation by the executive member is separate and is to provide you with feedback to improve your practice.

Ms Mani - I am not 6 years old. I have been teaching a long time and I have never had a supervisor observe me.

Mr Lambert - Really? This is quite common practice. Do you not think, as the site manager, I am allowed to see what is happening in classrooms?

Ms Mani - No. You can come in anytime, but not to do an observation.”

42. Mr Lambert then sought to return the discussion of the meeting to the PDP goals. The minutes record:

“Mr Lambert - What is it that you need to do as part of this goal? How are you going to change your practice? How are you going to get the parents to communicate with you better? Are you saying that you would like to be more proactive with the community of parents that you work with?”

Ms Mani - I would like the executive to bring concerns to me. This is why I want this goal.

Mr Lambert - That goal isn't about your practice though. It is about changing someone else's practice. You have no control over what I do, so you can't write a goal about what actions you want me to take. It needs to be about things you can change. The goal needs to be about things you want to improve.

Ms Mani - This has come as a surprise to me. I want to go away and think about the PDP.

I want to be clear that I went through racism in Term 1 from day one in 2018. I told Jacqui and we had meetings and all the executives know about it. The former principal knows about it.

Ms Mani repeated previously relayed stories relating to students who like her in the school.”

43. The minutes also record:

“Mr Lambert - Just so we are clear. If 7 year olds are too afraid to come to school, the problem is not with the students.

Ms Mani - I feel I am being targeted. I feel a mole hill has turned into a mountain. I am very stressed.

Mr Lambert - EAPS is there to support you if you need them. Do you need their number again?

Ms Mani - No, I have their number.

Mr Lambert - Jumna I want to move forward. I do not understand why you are trying to stop a goal going onto your PDP about improving your practice? You should have no problem with any of us coming in observing your lesson. All I want is to support you in this process.

Ms Mani - I feel you are supporting me but I feel very stressed about all of this.”

44. Mr Lambert sent a copy of the PDP to Ms Mani on 10 May 2019 and invited her to discuss which goals should be included with her supervisor.

45. On 13 May 2019, Mr Lambert wrote to Ms Mani. He opened by saying that the purpose of the letter was to support her. He said:

“I am concerned about a number of matters that have come to my attention since late February.

Specifically I have received multiple complaints from parents of students in your class that indicate that you have been making students feel uncomfortable, afraid and publicly embarrassed in front of their peers through your in class demeanour. You would recall that I have spoken to you about the need to ensure that your conduct with students is appropriate and in keeping with your status as a classroom teacher.

...

Pursuant to Section 5.1(iii) of the Department of Education *Code of Conduct* and clause 5 of the *Teaching Service Regulation* 2012, I have the authority to issue reasonable directions with which, together with official guidelines concerning the performance of your duty, you are required to adhere and comply.

Accordingly I direct you to moderate your tone and volume when communicating with students to support inclusive and positive learning environments for all students, refrain from publicly punishing students in front of their peers, provide quality and constructive feedback to all students and to ensure your conduct meets the standards outlined in the Code of Conduct.”

46. The Reply contains a table summarising issues with respect to Ms Mani’s performance at three previous schools and issues in 2018 which led to her being moved off class at the end of 2018. It is not clear if the document was prepared by Mr Lambert or whether it is intended to form part of his statement.
47. The Department’s insurer issued a s 78 notice on 6 January 2020, denying the claim on the basis that the injury was wholly or predominantly caused by reasonable action with respect to performance appraisal and/or discipline. The notice considered the factual and medical evidence.

Policy documents

48. There are several documents in the ARD which set out some of the policies relevant to the matters in dispute.
49. The first is titled Australian Professional Standards for Teachers and it is the source of the statements included as goals in a PDP. The standard numbered 7.3.2 which was discussed at the meeting on 8 May 2019 requires that a proficient teacher will:

“Establish and maintain respectful collaborative relationships with parents/career regarding their children’s learning and wellbeing.”
50. The second document is an email from the Teachers Federation entitled “Know Your Rights and Responsibilities in the Performance and Development Framework.” It notes that observations of classroom teachers are to be carried out by an agreed colleague and that pro forma observation sheets are not mandated, stressing that the only pro forma required is the PDP.
51. The third document is the Code of Conduct and deals with ethical matters. It begins with a Statement of Ethics. The purpose of the Code is “to establish a common understanding of the standards of behaviour expected of all employees of the Department of Education.” Chapter 5 sets out what the Department expects of its employees and includes:

“5. 1. You are expected to:

- i. perform your duties to the best of your ability and be accountable for your performance
- ii. follow reasonable instructions given by a supervisor
- iii. comply with a lawful direction...”

52. A lawful direction is defined as a “direction which falls within the scope of the job description, involves no illegality and which is reasonable.”
53. The fourth document is headed Managing a Complaint and a handwritten notation attributes it to the “NSW Dept of Education and Training Complaints Handling Policy Guidelines.” It states that matters assessed as “less serious” should be resolved informally unless there is a reason why that is inappropriate and that the person dealing with the complaint is responsible for monitoring the well-being of all concerned. It notes that relevant resources include the EAP.
54. The fifth document is a Current Issues Update from the Teachers Federation about Implementing the Performance and Development Framework. It summarises the procedure with respect to observations of professional practice and goal setting for PDPs.
55. The sixth document on which is titled TR6 - Complaints Handling which summarised new complaints handling procedures implemented in 2017 and bears the logos of the NSW Teachers Federation and the Australian Education Union. It says:

“A teacher against whom a complaint or allegation is made should be formally advised of the full, relevant policy and procedure document, either in hard copy or by direction to the electronic source. Teachers are advised to read the full policy and procedures documents carefully and not attempt to respond without seeking advice from their Federation Organiser or the Professional Support section of Federation.”

56. The document is the only evidence in the file which deals with the role of EPAC and reads:

“There are certain complaints and allegations where the complaint manager is not able to use discretion and must automatically refer them to the Department's Employee Performance and Conduct (EPAC) Directorate for advice.

The work of EPAC encompasses management of:

- child protection investigations
- parental and staff complaints against staff and efficiency matters dealt with by the Staff Efficiency and Conduct Team (SECT) of the EPAC directorate
- serious misconduct issues dealt with by the Serious Misconduct Investigation Team (SMIT) of the EPAC directorate. Matters of this nature are those that may lead to disciplinary or criminal charges. Examples of serious misconduct may include misuse of Departmental property or funds
- Public Interest Disclosures, such as complaints of corruption or maladministration (see section TR6.10 below). These types of matters will be referred to EPAC by the principal for investigation or, if necessary, to some other authority.

There are specific details about referral obligations in the Department's tool ‘Referring the complaint’ ”.

57. It says at TR6.3 that the Complaints Handling Procedure and Policy applies to a parent's “expression of dissatisfaction about ... the behaviour or decisions of staff.”

58. TR6.12 sets out time frames and refers to a flow chart which is not attached. It provides that the subject of a complaint should be informed within five working days and that a copy or summary of the specifics should be provided. The complaint manager is required to maintain the confidentiality of the complainant. When a meeting is arranged time should be allowed for the staff member to arrange a support person though the Federation considered that two days was sufficient. Written particulars of the complaint should be provided at the meeting and time allowed for a written response.
59. TR6.20 deals with serious misconduct and the role of EPAC.
60. The seventh document on which Ms Mani relied is a leaflet from the Teachers Federation about Bullying. Bullying is described as repeated and unreasonable behaviour to a worker or group of workers that creates a risk to health and safety.
61. The eighth document is the Department's Guidelines for the Management and Conduct of Performance dated 4 August 2006. The expressed policies of the Guideline include maintaining "appropriate standards of conduct and work related performance for teachers."

Medical evidence

62. There is no dispute that Ms Mani suffered a psychological injury nor that she is totally incapacitated for work.

Dr Ducic

63. Ms Mani's general practitioner is Dr M Ducic and Dr Ducic's notes from 2007 appear in the ARD. The notes reveal that Ms Mani sought treatment for anxiety as a result of stress at work in 2011, 2012, 2013, 2016, 2017 and 2018.
64. Dr Ducic's reports dated 12 May 2013 and 14 July 2017 are in the Reply and deal with her previous claims. In each of those reports, Dr Ducic considered that Ms Mani had suffered a psychological injury and was fit to return to teaching at a different school.
65. Dr Ducic's notes reveal that Ms Mani reported anxiety as a result of racist comments in March 2018 but declined psychological treatment. In April 2018 Dr Ducic recorded that Ms Mani was "still under stress due to the problems with principal in the previous school."
66. Between April 2018 and 19 March 2019 there are no references in Dr Ducic's notes to anxiety or stress at work. Ms Mani went to Dr Ducic's surgery on 19 March 2019, after the first meeting. At that time Dr Ducic "recommended work cover in regards to deterioration of mental health."
67. On 22 March 2019, Dr Ducic recorded:
 - "Stress-at work.
 - Affected her badly.
 - Didn't yell on kindergarden [sic] children.
 - recommended to see counsellor.
 - parents complained about her yelling
 - Feels it was not correct.
 - Visibly upset.
 - Feels that the principal was not right to tell her about complaints
 - felt that the parents should talk to her first."

68. Ms Mani saw Dr Ducic on a number of occasions over the following weeks. On 15 May 2019, Dr Ducic recorded:

“Very stressed due to the problems with school principal.
principal is threatening her if she doesn't do PDP otherwise it will be reported to IPAC .
She spoke to IPAT and was advised that her case is closed
Principal was not telling her the truth about IPAC .” [sic]

Ms Dilek

69. Ms Mani saw Ms Saime Dilek, psychologist, who reported to Ms Mani's solicitors on 16 March 2020. The report contains Ms Mani's summary of each of the meetings she attended. The psychologist recorded:

“Ms Mani stated that the constant threats, being undermined, humiliated and scrutinized left her feeling worthless, targeted/isolated, self-doubt and overwhelmed. She stated that she experienced heart palpitation, regular headaches, constant feeling of being tired and no energy, nauseous, difficulty with sleeping and felt panicky all the time. She stated that she had dizzy spells 'I was at my breaking point... I couldn't continue working in constant tension of what am I going to do that's going to warrant another meeting'.

Ms Mani reported that she was unaware of any on the complaints that the Principal presented her in the first meeting - please see copy of her response the complaints.”

Ms Dilek also recorded:

“Ms Mani has had two prior harassment and bullying matters which were taken to Work Cover Commission - in both separate cases the outcome of the Commissioner indicated that the matter was a case of ill-treatment. The findings cleared her of any wrong doing and she was placed in an alternate school.”

70. Ms Dilek wrote:

“These significant issues/concerns since the appointment of the new Principal have affected Ms Mani's ability to continue working. It appears that as a result of being targeted and bullied and harassed at work, Ms Mani is experiencing heightened levels of extremely severe depression, anxiety, stress, loss of confidence, lack of energy and motivation , loss of concentration , focus and sleep disorder.

Ms Mani's psychological injury is contributed by her employer Department of Education, namely, the new Principal Mr Lambert. Ms Mani has struggled with being micro-managed, undermined, bullied, harassed and scrutinized.”

71. Ms Dilek's report to the Department dated 9 September 2017 appears in the Reply. At that time Ms Dilek diagnosed major depression, anxiety and stress as a result of a serious accusation made during her employment at another school. She considered Ms Mani was unable to return to work at that school.

Dr Jovanova

72. Dr G Jovanova, psychiatrist, reported to Ms Mani's solicitors on 21 February 2020. She said that she had first seen Ms Mani in 2014 and had seen her four times in 2014, twice in 2017 and twice in 2019 all for "issues related to bullying at work." Dr Jovanova said:

"Between 2014 and 2019, Ms Mani presented to me with three distinct episodes of being bullied at work and on all three occasions her symptoms were consistent with the diagnosis of Adjustment Disorder with Depressed Mood . While in 2014, 2017 and 2019, Ms Mani provided different intricate details about three separate episodes of bullying, she consistently reported that her psychiatric symptoms always developed in the context of bullying at work."

73. Dr Jovanova said that when she last saw Ms Mani on 12 August 2019, she was keen to return to a "teaching position in a safe, supportive environment." Dr Jovanova was unaware of Ms Mani's progress but considered that her "prognosis of recovering and successfully returning to work is not favourable."

74. Dr Jovanova's reports dated 10 February 2014, 28 April 2014, 31 July 2017, 4 September 2017 and 5 July 2019 appear in the Reply. The first four reports deal with Ms Mani's previous two claims.

75. In her report dated 5 July 2019, Dr Jovanova told the Department's insurer:

"Ms Mani informed me that the principal had distorted facts and had deliberately and systematically breached all protocols of conflict resolution. She described feeling threatened and intimidated by the principal and informed me that she has not been able to work since May 2019."

76. Dr Jovanova said:

"Regarding the treatment, it seems that Ms Mani would best respond to the fair treatment at her work-place, rather than any counseling or pharmacotherapy. However, as Ms Mani reported that she is not treated fairly and with respect, her symptoms are not likely to resolve quickly. If the reported bullying continues, it is highly likely that Ms Mani's mental state will further deteriorate."

77. In a report dated 12 August 2019, Dr Jovanova recommended a trial of a small dose of antidepressant medication but "she expressed feelings that she should not take medication as she has not done anything wrong and that it is unjust that bullies are not punished." Dr Jovanova recommended a compassionate transfer to another school.

Dr Rastogi

78. Ms Mani's solicitors arranged for her to see Dr R Rastogi who reported on 7 November 2019. Dr Rastogi had a more detailed history about the events of 2018. She recorded:

"She was constantly being bullied by some of the students on a regular basis and although the Acting Deputy Principal supported her and provided behavioural interventions for the students at fault, they were unable to deal with these behaviours further. She did bring this matter up with the learning support group, who supported her but she kept quiet as she alluded that the blame would come back on her being a failure. She reported a traumatic period and challenging time in 2018 but she worked hard with the students and stated that her class performed well in NAPLAN results that year and the school performance was good."

In Term 4, the new Principal Mr Lambert joined the school and he called her for a meeting. During that meeting, she was informed by the Principal that most of the complaints were directed against her and offered her a job outside of the classroom a RFF (Relief from Face to Face). She agreed to take the role of teaching Science and year three classes (learning support group) liaising with classroom teachers even though she had never performed this role but was happy to accept that. She was elated and felt supported by the Principal and looked forward to working in 2019.”

79. Dr Rastogi obtained a detailed history of the four meetings. With respect to the first, she recorded:

“On 19th March 2019, the Principal called her in for a meeting and requested that she could get a support person but she did not feel the need to do so. She expected the meeting to be a catch up ,meeting however in that meeting, the Principal stated that he had contacted EPAC who advised him to handle her case as local management. She was dazed and in shock and could not comprehend what was happening. He further reiterated that there were 13 complaints lodged against her by parents and went through the details of these complaints with her. She requested the complaints in writing as she was off guard and agreed to respond to the grievances.”

80. With respect to the past, Dr Rastogi recorded:

“There is known previous history of depression and anxiety with work place bullying in 2017 and she had initiated workers compensation. She saw a Psychologist and had several psychological sessions. Her symptoms of anxiety resolved with treatment and changing school placements. She functioned in full capacity from 2018 till March 2019. Prior to 2017 there is no documented history of psychological conditions.”

81. Dr Rastogi diagnosed adjustment disorder with depressed and anxious mood. Her summary opinion contains the following which conflates the various event on which Ms Mani relies:

“She reported that since joining Kings Langley Public School in 2018, she experienced bullying and racial discrimination by the students from the start of her working term. She tried to diffuse the situation however the behaviours continued and she reported these incidents to staff and the Acting Deputy Principal. The new Principal came in term 4 of 2018 and she alleged that he raised multiple complaints against her by parents of students. This was followed by the Principal intimidating and humiliating her on numerous occasions in 2019, with threats to inform EPAC about her behaviours. She challenged these grievances raised against her and was being provided with contradictory information and threats by the Principal. She felt under constant scrutiny and discriminated and treated with injustice. She complied with the Principal with PDP and RFF role but continued to be picked and ostracised with constant persecution. She was able to achieve good NAPLAN results for her class despite the concerns raised by her Principal.”

82. Dr Rastogi said that Ms Mani’s injury was caused by “constant lack of support, chronic victimisation and intimidation with threats” by Mr Lambert. She also said that the injury was caused by “racial discrimination by students, intimidation and scrutiny as persecution by the Principal and ongoing threats and having no support from Department of Education.”
83. Dr Rastogi considered that Ms Mani would, in the future, be capable of a graded return to work as a primary school teacher in a different school.

Dr Smith

84. Dr C Smith saw Ms Mani at the request of the Department's insurer on 15 July 2019. The history he obtained is somewhat different to the other reports. Ms Mani told Dr Smith that she had difficulties with one student from the beginning of 2018 but was worried that if she reported his behaviour, the executive would say her class management was poor. Parents had approached her with their children's reports that "things were not okay". By the end of 2018, Ms Mani said she was being bullied by a number of students and she reported "everything" to the new principal, Mr Lambert. At a meeting, Mr Lambert said that two-thirds of complaints from parents were about her, despite an improvement in NAPLAN results, so that she was given the Relief from Face to Face role. She started the 2019 year happy in her new role.
85. The history about the meeting on 19 March 2020 is also different. Ms Mani said she didn't take a support person because she didn't have one, not being part of the "cliques and groups in the school." Ms Mani said that the complaints were taken out of context and some were lies. Ms Mani described the meetings. Ms Mani said that she later realised the executive had a "hidden agenda to put her on a performance management plan." She had three days sick leave before the final meeting.
86. Dr Smith recorded Ms Mani's symptoms. With respect to her history he noted:
- "Ms Mani said in 2016, that she developed anxiety for six months because 'I had a principal coming after me at a previous school' . She said a similar situation to her current predicament was prevented because she had serendipitously applied for a transfer and ' I got a call out of the blue and I got my transfer'. She said she saw a psychologist at the time as well as her general practitioner. She denied treatment with antidepressant medication. She said she has never seen a psychiatrist. She denied a history of suicidal ideation or self-harm.
- She said she had a WorkCover claim after she fell off a chair and injured her left knee."
87. Like Dr Jovanova, Dr Smith recorded that Ms Mani declined to take anti-depressant medication because "this was put on me, why should I have to take antidepressants?" When describing his mental state examination, Dr Smith said:
- "The content of her thoughts reflected themes of injustice, moral injury and the belief that she has been the victim of a campaign of persecution because she is an older teacher.
...She appeared fixed in her belief that she had been subject to a campaign of persecution, the solution to which she believes is leaving the school."
88. Dr Smith diagnosed an adjustment disorder with depression and anxiety. He said:
- "Pre-existing vulnerabilities identified included obsessive compulsive personality traits with a strong sense of moral justice and rigidity in her thought processes. She also had a similar experience in 2016 and has a long history of recurrent stress leave. She indicated that she had some symptoms of anxiety leading up to her deteriorating relationship with the principal as a result of alleged harassment by a student with a racial basis. Perpetuating factors identified included her loss of faith in the Department of Education and her fixed belief that she has been subject to a campaign of persecution."

89. Dr Smith considered that the predominant cause of Ms Mani's injury was the initiation of informal performance management in respect of parental complaints. He considered Ms Mani fit for a graded return to work with no face to face teaching responsibilities at another school. He said:

"Ms Mani's distress and psychological arousal makes an immediate return to Kings Langley Public School untenable. She lacks the cognitive flexibility to engage in mediation or a process of de-escalation which would allow her to return to Kings Langley Public School in the short term. Should her condition improve, she may regain some flexibility and perspective in her thinking although given the degree of moral injury the prognosis is poor."

Claim documents

90. Ms Mani reported her injury on 23 May 2019. On 31 May 2019, the Department's insurer told Ms Mani that provisional payments would commence for up to 12 weeks from 19 March 2019. The letter noted that provisional payments do not constitute an admission of liability.
91. A list of payments dated shows that weekly compensation was paid from 22 May 2019, when Ms Mani ceased work to 14 August 2019.
92. The Department's insurer issued a notice under s 78 of the 1998 Act on 6 August 2019, accepting that Ms Mani suffered a psychological injury but declining the claim under s 11A of the 1987 Act. The insurer issued a further s 78 notice on 6 January 2020, declining a permanent impairment claim.

SUBMISSIONS

93. The written submissions prepared by counsel form part of the Commission's file.

Ms Mani's submissions

94. Mr Baran said that while Ms Mani was not happy with the change in duties at the beginning of 2019, there is no allegation that it caused her psychological injury. He also said that Ms Mani did not rely on the racist remarks made in 2018.
95. Mr Baran said that Ms Mani was called to a meeting without notice of the assertions that would be made. She was only told to bring a support person and did not do so because she was unaware there was a disciplinary issue. The aftermath of the meeting was "ongoing bullying and harassment."
96. Mr Baran said that the Principal had "taken it upon himself to approach the Office of Employee Performance and Conduct. That Office deals with serious misconduct and quasi criminal behaviour including criminal behaviour." Ms Mani was subjected to veiled threats that she agree to local management or the issue would be referred to EPAC. He said that the complaints "stemmed from the fact that she was a strict Teacher in demand of high standards." Mr Baran summarised the evidence with respect to the later meetings.
97. Mr Baran said that the Department had acted unreasonably because it failed to follow its own processes. He said that the detail of the complainants was not disclosed "merely generalised patterns of behaviour". The Department was required to assess the nature of the complaint and made an assessment under the Code of Conduct "but having regard to the nature of the matters required informal resolution."

98. Mr Baran said this there was no attempt to resolve the matter informally and procedures such as mediation were not explored. He said that the meetings were not held in accordance with the Code of Conduct because they were confronting and frightening to Ms Mani. Mr Baran said the authorised procedures were set out at pages 325-326 of the ARD. That document is the summary headed "Managing a Complaint" which is described at [53] above. Mr Baran said that no specific breaches of the Code of Conduct or other formal guidelines were raised at the meetings.

99. The Principal ignored procedures and bullied Ms Mani, Mr Baran submitted this occurred by

- (a) speaking to EPAC before speaking to her;
- (b) not giving her advance notice and denying procedural fairness;
- (c) not permitting Ms Mani an opportunity to present her case and investigate the matters she raised;
- (d) ignoring what Ms Mani said in her defence, and
- (e) not pointing out if a clause of the code of conduct had been breached and if so, which one.

100. Mr Baran submitted that even if guidelines or the Code of Conduct was being followed, a finding of reasonableness does not automatically follow, relying on *Greater Southern Area Health Service v Walsh*¹ (*Walsh*) Mr Baran said that Ms Mani was treated in a strict disciplinarian way and that

"no attempt had been made whatsoever to sit down with the Applicant and explain to her that it would be preferable for her to no longer engage in certain conduct which at one point may have been acceptable but was no longer acceptable to the Principal or to the school and was causing parents concern."

101. Mr Baran said there was no evidence that Ms Mani would not have complied with such a direction.

102. With respect to the medical evidence, Mr Baran submitted that the payment of compensation from 22 May 2019 to 14 August 2019 counts as an admission. Mr Baran said that the medical evidence supported a finding that Ms Mani was incapacitated. In summary he submitted:

"The Applicant was the subject of a targeted campaign against her because she administered orthodox teaching methods that were alleged and alleged only to have involved conduct that caused trauma to children but in no way were illegal, rather they were outdated modes or methods of providing education services."

103. He said:

"If it be found that the predominant or sole cause of the Applicant's psychiatric injury was in fact the disciplinary action, then having regard to the Code of Conduct and the fact that the Applicant has identified a number of areas, whether applying the Code or not, the conduct was high-handed, vindictive, targeted and extremely disproportionate to the issues that had been raised. There can be little doubt whatsoever that the disciplinary action in the circumstances was entirely unreasonable."

104. Mr Baran said the action was unreasonable because it was unauthorised.

¹ [2010] NSWCCPD 98.

The Department's submissions

105. Mr Hanrahan summarised the history disclosed by Dr Ducic's notes of Ms Mani's prior claims. In the context of managing Ms Mani, Mr Lambert prepared the document in the Reply setting out the circumstances leading to Ms Mani making previous claims.
106. Mr Hanrahan said that Ms Mani's own evidence did not specifically address the predominant cause of her injury and is premised on an acceptance of Ms Mani's judgement that she has been bullied and harassed. However, he said it was clear that Mr Lambert was acting on parental complaints when he asked to meet with Ms Mani, having been permitted by EPAC to manage the issues locally. In the course of that meeting, Ms Mani sought to justify and defend her actions by blaming the victims. Ms Mani's denial is persistent, Mr Hanrahan said, in the submissions made on her behalf which trivialise the serious matters. It was necessary that Mr Lambert manage the multiple complaints about Ms Mani's "strict" teaching methods which had induced fearful reactions in some students.
107. Mr Hanrahan said that the responses Mr Lambert made are detailed in his statement. Ms Mani admitted the substance of some of the complaints – for example that she has a loud voice "so yes, I yell." The minutes of the relatively informal meetings showed that Ms Mani did not perceive she had a problem and sought to shift responsibility. In those circumstances, Mr Hanrahan asked rhetorically, what was the Principal to do?
108. With respect to the reasonableness of the Mr Lambert's actions, Mr Hanrahan submitted that they were objectively fair, being guided by the Code of Conduct and sound educational policy. The action was reasonable action with respect to performance and discipline and in accordance with the Code of Conduct and the duties and responsibilities set out in it. The actions taken must be assessed objectively, citing *Northern NSW Local Health Network v Heggie*² (*Heggie*). Taking a broad view of the whole process and the context of Ms Mani's employment history, the actions of the Department were reasonable. Meetings were informal, arranged to suit Ms Mani's convenience and offered "tactful and diplomatic encouragement" to support Ms Mani "recognising that her behaviour required serious reconsideration and reform." Mr Hanrahan said that Mr Lambert's version of events should be accepted.
109. Ms Hanrahan also submitted that provisional payments of compensation do not amount to an admission of liability.

Ms Mani's submissions in reply

110. In reply, Mr Baran submitted that the defence under s 11A must fail because the s 78 notice identified a deemed date of injury of 19 March 2019 and the relevant events were the series of meetings between Ms Mani and Mr Lambert. The events at previous schools were irrelevant and are of no assistance in determining whether the Department acted reasonably and Ms Mani's pre-existing vulnerabilities meant that the claim must succeed because the Department was required to "take her as it finds her", relying on *State Transit Authority (NSW) v Chemler*³ (*Chemler*).
111. Mr Baran said that the Department's submissions ignored the events before the meeting – in summary that Ms Mani was given no notice of the nature of the meeting. He said that Mr Lambert's statement "glossed over" the contemporaneous evidence.
112. Mr Baran also said that the Department did not implement the correct process of informal discussion, mediation, alternative dispute resolution and counselling. Instead, Mr Lambert went "without justification" straight to EPAC which deals with "the most serious of infractions" and Ms Mani was threatened that would occur again. Mr Baran submitted:

² [2013] NSWCA 255.

³ [2007] NSWCA 249 at [40].

“Understandably, EPAC told the Respondent to deal with the matter locally because it was not serious. This was simply an issue of teaching methods and if the school wanted teaching methods to be altered or reformed, then a simple discussion would have been sufficient.”

113. Mr Baran submitted that there was no evidence that Ms Mani had been given notice about issues with respect to her teaching methods or that she had refused to change. He said that the Department was wrong to submit that Ms Mani sought to invoke the Code of Conduct – the Department bore the onus of proving its defence but “it was left to the worker to provide the critical documents to the commission which ought to have been supplied by the Respondent”.

114. Mr Baran said that the Department’s submissions were dominated with the rights of children but said:

“the rights of a worker to be employed in a safe place, free of bullying and harassment with a legitimate expectation the policies for discipline will be followed and disputes resolved in an appropriate fashion, is equally important as well.”

115. Mr Baran said that Ms Mani was entitled to make enquiries when her reputation was being attacked. She gave examples of when she was praised by parents but she did not resist or defy the directions of her supervisors. There was no objective investigation and she was not provided with the identity of the children in respect of whom the complaints had been made.

116. In summary, Mr Baran submitted:

“The worker was mercilessly managed, harassed and subjected to a process that was entirely out of proportion to the objective seriousness of the situation and entirely inconsistent with what was reasonable in the circumstances.”

FINDINGS AND REASONS

117. Section 11A(1) of the 1987 Act provides:

“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.”

Injury

118. There is no dispute that Ms Mani suffered a psychological injury on 22 May 2019 nor that it was caused by the action taken by Mr Lambert on behalf of the Department between March and May 2019. The injury as pleaded in the ARD encompasses the events of 2018, including Ms Mani’s experience of racism, but Mr Baran relied only on the events of 2019 in his submissions.

119. There is also no controversy, as I understand the submissions, that the injury was wholly caused by those events, despite Ms Mani’s previous history of psychological injuries.

120. Dr Ducic’s notes show that Ms Mani did not seek treatment in respect of a psychological injury or condition between March 2018 and 19 March 2019. Dr Rastogi said that despite her previous history, Ms Mani functioned well until March 2019. Dr Smith agreed, even though he did not have the full history of Ms Mani’s previous claims.

121. I am satisfied that the injury was wholly caused by the events of March to May 2019.
122. The diagnosis made by Dr Jovanova, Dr Rastogi and Dr Smith is consistent. Dr Jovanova diagnosed adjustment disorder with depressed mood. Dr Rastogi and Dr Smith diagnosed adjustment disorder with depressed and anxious mood.
123. Ms Mani was paid weekly compensation on a provisional basis. I do not accept Mr Baran's submission that the provisional payments of compensation constitute an admission. The letter dated 31 May 2019 says that the payments do not constitute an admission and s 280 of the 1998 Act provides:

“280 Provisional acceptance of liability

- (1) An insurer can accept liability for medical expenses compensation on the basis of the provisional acceptance of liability for an amount of up to \$5,000 or such other amount as may be specified by the Workers Compensation Guidelines.
- (2) The acceptance of liability on a provisional basis does not constitute an admission of liability by the employer or insurer under this Act or independently of this Act.”

Reasonable conduct

124. The parties did not specifically address which of the factors in s 11A applied but I am satisfied that both made submissions on the basis that the action was with respect to discipline. The only issue to be determined is whether the steps taken by Mr Lambert on behalf of the Department between 19 March and 22 May 2019 was reasonable action with respect to discipline.
125. The test of reasonableness was considered by Geraghty CCJ in *Irwin v Director-General of Education*⁴

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

126. In *Ivanisevic v Laudet Pty Ltd*⁵ Truss CCJ said:

“In my view when considering the concept of reasonable action the Court is required to have regard not only to the end result but to the manner in which it was effected.”

127. Ms Mani relies on the conduct of the Department over the course of a series of meetings between 19 March and 22 May 2019. In *Department of Education and Training v Sinclair*⁶ (*Sinclair*), Spigelman CJ, with who the other members of the court agreed, said:⁷

“Furthermore, the case ... primarily focused on the whole course of Departmental conduct as constituting the relevant ‘substantial contributing factor’ for purposes of s9A. His Honour appeared to approach the s11A issue on the same basis. This is an appropriate course to adopt in a context concerned, and concerned

⁴ NSWCC 14068/97, 18 June 1998.

⁵ unreported, 24 November 1998.

⁶ [2005] NSWCA 465.

⁷ At [96]-[97].

only, with psychological injury arising from matters such as 'demotion, promotion, performance, appraisal, discipline, retrenchment or dismissal'. Such actions usually involve a series of steps which cumulatively can have psychological effects. More often than not it will not be possible to isolate the effect of a single step. In such a context the 'whole or predominant cause' is the entirety of the conduct with respect to, relevantly, discipline.

His Honour's analysis, as that of the Arbitrator, appears to assume that any specific blemish in the disciplinary process, however material in a causative sense or not, was such as to deprive the whole course of conduct of the characterisation 'reasonable action with respect to discipline'. In my opinion, a course of conduct may still be 'reasonable action', even if particular steps are not. If the 'whole or predominant cause' was the entirety of the disciplinary process, as much of the evidence suggested and his Honour appeared to assume, his Honour did not determine whether the whole process was, notwithstanding the blemishes, 'reasonable action'."

128. In *Walsh*, O'Grady DP said⁸:

"The fact that legislation and guidelines may require and/or authorise certain action does not, alone, render action as being reasonable. Proper exercise of judgment and assessment of facts and circumstances must be made by those responsible to determine the threshold question as to whether such action is required. Any subsequent action must, if a defence is to be made out, be reasonable."

129. In *Heggie*, Sackville AJA said:

"The following propositions are consistent both with the statutory language and the authorities that have construed s 11A(1) of the WC Act:

- (i) A broad view is to be taken of the expression 'action with respect to discipline'. It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation.
- (ii) Nonetheless, for s 11A(1) to apply, the psychological injury must be wholly or predominantly caused by reasonable action taken or proposed to be taken **by or on behalf of the employer**.
- (iii) An employer bears the burden of proving that the action with respect to discipline was reasonable.
- (iv) The test of reasonableness is objective. It is not enough that the employer believed in good faith that the action with respect to discipline that caused psychological injury was reasonable. Nor is it necessarily enough that the employer believed that it was compelled to act as it did in the interests of discipline.
- (v) Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of **that action** that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury.

⁸ At [102].

- (vi) The assessment of reasonableness should take into account the rights of the employee, but the extent to which these rights are to be given weight in a particular case depends on the circumstances.
- (vii) If an Arbitrator does not apply a wrong test, his or her decision that an action with respect to discipline is or is not reasonable is one of fact.” (emphasis in original).

130. Sackville AJA said:

“In my opinion, the better view is that the reasonableness of an employer's action for the purposes of s 11A(1) of the WC Act is to be determined by the facts that were known to the employer at the time or that could have been ascertained by reasonably diligent inquiries. The statutory language directs attention to whether the psychological injury was caused by reasonable disciplinary action taken or proposed to be taken by the employer. Ordinarily, the reasonableness of a person's actions is assessed by reference to the circumstances known to that person at the time, taking into account relevant information that the person could have obtained had he or she made reasonable inquiries or exercised reasonable care. The language does not readily lend itself to an interpretation which would allow disciplinary action (or action of any other kind identified in s 11A(1)) to be characterised as not reasonable because of circumstances or events that could not have been known at the time the employer took the action with respect to discipline.”

Meeting on 19 March 2020

- 131. Mr Baran argued that Ms Mani had no notice that any assertion would be made at the meeting on 19 March 2019 that her conduct would attract disciplinary action.
- 132. Ms Mani acknowledged that Mr Lambert “told me to bring a support person” but said she did not think the meeting would be about anything serious. She said it was her first meeting with Mr Lambert. The latter statement cannot be accepted.
- 133. Mr Lambert commenced at the school in Term 4 2018. He was involved in the decision to allocate her to a new role in Learning Support and RFF in 2019. The history Ms Mani gave Dr Smith conveys her understanding that she was allocated the new role as a result of parental complaints the previous year. The action taken between March and May 2019 should be seen in the context.
- 134. The email Mr Lambert sent on 18 March was sufficient to convey to Ms Mani that the meeting was more than a “catch up”. The email conveyed that the meeting was necessary by saying “I need to meet with you...”. The reference to confidentiality clearly suggests that the meeting was about a serious matter rather than a catch up. Mr Lambert did not merely suggest that Ms Mani bring a support person, he encouraged her to do so.
- 135. Ms Mani’s statement was prepared nearly a year after the last meeting. In July 2019 she told Dr Smith that she did not take a support person to the meeting because she did not have one. The contemporaneous history is more likely to be correct.
- 136. At the meeting, Mr Lambert told Ms Mani about a series of complaints which had been brought to his attention. He also told her that EPAC had been informed.
- 137. Mr Baran sought to characterise the behaviour which was the subject of the complaints as orthodox teaching methods which were outdated and not illegal. He said Ms Mani was a strict teacher in demand of high standards. The only evidence in support of that contention is Ms Mani’s own.

138. Less than two months after the beginning of the school year, Mr Lambert had received nine complaints from parents. He received another immediately after the meeting. The complaints are the kind of complaint that a school would be expected to take very seriously – particularly those relating to the reluctance of children to attend school on the day of Ms Mani's science classes and that children were being publicly embarrassed in front of their peers.
139. I am satisfied that the complaints as described in the Department's evidence were serious and that they reflected more than a disagreement about teaching methods. Ms Mani's responses suggest that she did not understand the seriousness of the complaints. She has interpreted efforts to resolve those complaints as intimidating and threatening.
140. Mr Baran said that a report to EPAC was reserved for the worst kind of misbehaviour. However, the Complaints Handling Policy, of which a summary appears in the ARD, shows that the work of EPAC covers a range of areas and that the Staff Efficiency and Conduct Team manages, among other things, "parental ... complaints against staff." Mr Lambert was acting on parental complaints received about Ms Mani's teaching. On that basis, contacting EPAC was reasonable.
141. In accordance with advice from EPAC, Mr Lambert gave Ms Mani the option of having the issues dealt with locally or dealt with by EPAC.
142. Mr Baran argued that "none of the complaints were the subject of any disclosure of the actual complainants themselves." He described them as "merely generalised patterns of behaviour which was causing the Principal some concern."
143. Because Ms Mani was still teaching, I consider it was reasonable for Mr Lambert not to disclose the identity of the complainants. Again, the Complaints Handling Policy requires confidentiality.
144. Rather than sending Ms Mani a series of complaints, Mr Lambert sought to discuss them in a meeting. The minutes of the meeting show that Mr Lambert opened by again offering that Ms Mani could have a support person present and offering to defer the meeting. Again, Ms Mani declined. Ms Mani did not describe that offer in her statement.
145. While her statement provided a description of what occurred at the meeting, the description is editorialised with comments about what Ms Mani considered that Mr Lambert should have done by reference to the Code of Conduct and the Complaints Handling Policy and the time frames set out in those documents.
146. Mr Lambert provided copies of minutes of meetings. He signed his statement on 7 June 2019, only two weeks after Ms Mani ceased work. Where his evidence differs from that of Ms Mani in her statement about what occurred, I prefer his contemporaneous statement and the documentary evidence.
147. An example is the evidence about how Ms Mani was to respond to the allegations. Ms Mani said that she had to ask for the complaints and sought time to respond in writing. The minutes of the meeting show that Mr Lambert asked Ms Mani to respond in writing. That evening he emailed Ms Mani the minutes of the meetings and sought her written response. He acknowledged that the complaints were unpleasant and provided Ms Mani with the details of the EAP.
148. Ms Mani said that there were inaccuracies in the minutes but did not explain what they were. In the absence of an explanation as to how they were incorrect, I accept that the minutes are accurate.

149. On the following day, Ms Mani wrote to Mr Lambert thanking him for the email and confirming that she would respond in writing. Mr Lambert replied soon after, confirming that Ms Mani should seek advice from her union and respond in writing and that she had 14 days to do so. He told her about the additional complaint.
150. Ms Mani provided her response on 26 March 2020, well within the time frame of 14 days. Her response does not appear in the file. That is not an impediment to a finding that the Department's conduct was reasonable. Mr Lambert wrote an email to Ms Mani thanking her for her response and arranging another meeting. He again suggested that Ms Mani bring a support person.
151. Between the first and second meetings Ms Mani saw Dr Ducic three times, including on the afternoon of the meeting. On 22 March Ms Mani told Dr Ducic that she felt that Mr Lambert was "not right to tell her about the complaints, felt that parents should talk to her first." That complaint suggests a lack of insight and a lack of understanding of the seriousness of the complaints. The parents made the complaints to the school rather than to Ms Mani. Once the complaints were made, Mr Lambert was required to act on them.

Meeting on 29 March 2019

152. Ms Mani said that she was not afforded procedural fairness at the second meeting and that she was interrogated. She said her professional responses did not receive due respect. She complained that she was asked to provide pro-active responses and to show that she was taking action to improve her interactions with students. She said she had advice that this was against protocol.
153. The minutes of the meeting on 29 March record a discussion about Ms Mani's written responses and show that Mr Lambert pointed out where the responses were inconsistent with what had been said at the first meeting. The minutes record that her response to each complaint was discussed. Ms Mani sought to refute the allegations. Mr Lambert noted that her replies were non-responsive and sought to complain about his handling of the complaint rather than responding to it.
154. The minutes reflect a careful record of a careful discussion and show that Ms Mani was provided with an opportunity to explain her responses. They also reflect that Mr Lambert stressed that the school was seeking to work with Ms Mani. In that context, a request that she consider how to interact with students in future was not unreasonable.
155. He explained that EPAC had been contacted because of the volume of complaints in a short period. He noted that many of Ms Mani's responses failed to show self-reflection. He summarised the points that needed to be taken from the meeting, including that Ms Mani needed to change her manner and take account of all learners in her care. He explained the next step was that her PDP goals would be reviewed in the following term to reflect that need. He again reminded Ms Mani about the EAP.

Meeting on 8 May 2019

156. Again, the contemporaneous notes of the meeting contrast with Ms Mani's summary of it. The minutes record that Ms Mani asked what had happened to the EPAC complaint. Mr Lambert said that he had sent his findings to EPAC and was waiting for a response. In the meantime, he said that adjustments should be made to Ms Mani's PDP goal.
157. The minutes reflect that Ms Mani again sought to discuss the issues and that she considered that the issues stemmed from a misunderstanding by the parents. The minutes show that Ms Mani was resistant to amendment of a PDP goal to address the issues about classroom management and that she had little insight into how the complaints had arisen and how she should respond. She said she felt stressed and was allowed time to consider the goal.

158. The minutes reflect the conversation at the meeting, in a way that suggest they record some of the words used rather than merely the content of the conversation.
159. Ms Mani said that Mr Lambert lied about his interactions with EPAC, in particular that the PDP was part of the process. That is not what the minutes reveal. There is no suggestion in the minutes that the PDP form would be sent to EPAC.

Letter dated 13 May 2019

160. Ms Mani said she felt humiliated to be asked to attend another meeting. At that meeting she was given the letter dated 13 May, providing a direction under the Code of Conduct. Shortly afterwards, she ceased work.
161. Mr Lambert said that he gave Ms Mani the letter and told her that a program of support would be arranged. The letter confirms that its purpose was to support Ms Mani. It was cast in clear language and explained the consequences of non-compliance, as would be expected of a direction.
162. Mr Lambert's statement records that Ms Mani said that she would not accept changes to the PDP and that she would not participate in the support offered.

The Department's conduct

163. Mr Baran's submission that it was left to Ms Mani to provide relevant policy documents to the Commission is inappropriate. The documents were attached to the ARD. In those circumstances, it was not necessary for the Department to attach those documents to the Reply. Clause 10 of Practice Note 3 says:

"Multiple copies of the same document should be avoided. It is not necessary for parties to reproduce documents which have already been lodged and served in the proceedings."

164. Ms Mani relies on the events between 19 March 2019 and 22 May 2019 as causing her injury.
165. In accordance with the decision in *Sinclair*, I am required to assess the whole of the process. The action may be reasonable even if there are some defects in the process.
166. The conduct is to be assessed objectively, based on what the school knew at the time. When the process commenced, the Department knew that there had been nine complaints within a short period. Those complaints were received in respect of a teacher
167. Ms Mani's case is that the Department's conduct was unreasonable in:
- (a) speaking to EPAC before speaking to her;
 - (b) not giving her advance notice and denying procedural fairness;
 - (c) not permitting Ms Mani an opportunity to present her case and investigate the matters she raised;
 - (d) ignoring what Ms Mani said in her defence, and
 - (e) not pointing out if a clause of the code of conduct had been breached and if so, which one.
168. I do not accept that any of those matters have been made out. As I said above, I accept the generally contemporaneous evidence in Mr Lambert's statement and the minutes of the meeting over that of Ms Mani.

169. I accept that Ms Mani is telling the truth about her perception of what occurred. Ms Mani's evidence shows a lack of insight about her previous claims. It is accepted that the Commission did not make any findings in previous proceedings despite the history she has given to medical practitioners that her claims were vindicated. Her evidence also shows a lack of insight in respect of the complaints which are the subject of these proceedings. Her subjective view does not assist in the objective assessment of the actions taken by the Department.
170. Mr Baran said that the Department was required to take Ms Mani as it found her, citing *Chemler*. In *Chemler*, the Court of Appeal said that the worker's perception of events was relevant in determining whether there was an injury to which employment was a substantial contributing factor.
171. Here there is no dispute that Ms Mani suffered a psychological injury to which employment was a substantial contributing factor. There is no dispute that the injury was caused by the Department's action, which I am satisfied was with respect to discipline. The issue is whether the action was reasonable. That is an objective test and not a subjective one.
172. The school had received a series of nine complaints about Ms Mani's teaching in a short time in early 2019 and another complaint was received as the disciplinary process began. Mr Lambert as the Principal was required to consider and act on those complaints. Ms Mani was not told about the complaints immediately because Mr Lambert was away from the school. If a policy was breached by failing to do so, that non-compliance is not unreasonable. It was appropriate that the complaints be dealt with by the Principal.
173. I do not accept that the complaints were as trivial as Mr Baran submitted. The complaints were about actions which made students fearful of attending Ms Mani's classes because she spoke loudly and embarrassed children in front of their peers. One child was reluctant to even attend school on those days. While speaking loudly might be described as an outdated teaching method, the complaints were about the consequences of those methods on the children. The school was required to take them seriously.
174. Even if the complaints were not serious, the sheer number of complaints in a short period required action, particularly where Ms Mani's role had been changed at the end of the previous year after the other complaints described in Mr Lambert's statement.
175. Ms Mani focussed on the report to EPAC. The Complaints Handling procedure shows that the work of EPAC includes parental complaints about staff. EPAC agreed that the complaint could be managed locally and Ms Mani also agreed.
176. The Complaints Handling policy mandates confidentiality. There was nothing unreasonable in Mr Lambert not disclosing the identity of the complainants, particularly as Ms Mani continued to teach the children.
177. The Complaints Handling policy shows that the Teachers Federation considered that staff who are the subject of a complaint should be informed within five days. That did not occur in respect of all of the complaints because Mr Lambert was absent from the school. I do not accept that breach of a recommendation amounts to unreasonable conduct.
178. The first meeting that Ms Mani attended was an attempt to sit down with Ms Mani to discuss the complaints and explain why her actions were inappropriate. She was given detail of the complaints and provided with an opportunity to respond in writing. She was offered a delay to obtain a support person and referred to the EAP. She was given 14 days to respond but did not take that long.
179. I am satisfied that Ms Mani was given an opportunity to address the issues at the second meeting. At both of those meetings she was given an opportunity to present her case.

180. At the first meeting Ms Mani accepted some of the issues raised though she did not accept her actions were inappropriate. She agreed she had a loud voice. She agreed she had torn some pages out of children's books.
181. I am satisfied that Mr Lambert did not ignore what she said in her defence. The minutes of the first and second meetings show that Mr Lambert was careful to give Ms Mani an opportunity to present her case, though he was sometimes required to direct her attention to the matters under discussion. She sought - and was given - an opportunity to say what she wanted to say. In the second meeting, he sought more detail about Ms Mani's written responses.
182. While the Code of Conduct is relevant, it is not the only document which governs teaching practice. It was one of the sources of the direction imposed by Mr Lambert. He also relied on the Teaching Service Regulation 2012. I am satisfied that Mr Lambert gave Ms Mani a detailed explanation of the areas in which her teaching practice required improvement.
183. The Department did not, however, accept Ms Mani's explanations of her conduct. Ms Mani said that the rights of the children at the school had to be weighed against her right to be employed in a safe environment, free of bullying and harassment. Because of the serious substance of the complaints, Mr Lambert's action was not only reasonable but necessary. I am satisfied that the process undertaken was a reasonable process, was conducted in a reasonable manner and did not amount to bullying and harassment.
184. The third meeting on 8 May 2019 was arranged to discuss amendment of the PDP. The minutes suggest that Ms Mani considered that her professional development was quite separate to resolving the complaints. Objectively, the amendment of the goals to seek to improve Ms Mani's performance in the areas in which there had been complaints was reasonable.
185. The fourth meeting was called to give Ms Mani the letter dated 13 May 2019. Mr Lambert stressed that the purpose of the direction was support. The letter was the first time in 2019 that there was any reference to disciplinary or remedial action if she did not comply. It was handed to her in a meeting rather than being sent to her.
186. While the events can be described as a disciplinary process, no discipline other than the direction was undertaken in 2019. I am satisfied that the process was conducted in a careful manner over an extended period and that it was aimed at improving Ms Mani's performance as a result of parental complaints about serious issues.
187. I am satisfied that the Department's conduct, taken as a whole, was reasonable conduct with respect to discipline. As that conduct was the cause of Ms Mani's injury, no compensation is payable under s 11A(1) and I make an award for the respondent.