

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2739/20
Applicant: Katrina Rabbas
Respondent: Noni B Holdings Pty Ltd
Date of Determination: 4 August 2020
Citation: [2020] NSWCC 265

The Commission determines:

1. The claim for compensation for weekly benefits is discontinued and I dispense with the requirement to file a Notice of Discontinuance.
2. The applicant sustained a psychological injury in the course of her employment with the respondent with a deemed date of injury being 10 December 2018.
3. The applicant's injury was wholly or predominantly caused by reasonable action taken in respect of her employment within the meaning of section 11A(1) of the *Workers Compensation Act 1987*.

The Commission orders:

4. Award for the respondent.

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

Jill Toohey
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 JILL TOOHEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Katrina Rabbas claims compensation for a psychological injury sustained in the course of her employment as a store manager with the respondent, Noni B Holdings Pty Ltd. The deemed date of injury is 10 December 2018.
2. Ms Rabbas claims she was subjected to bullying and harassment by her regional manager and two other employees from around mid-2018. She has not worked since 10 December 2018. It is not in dispute that she sustained a psychological injury in the course of her employment with the respondent.
3. By notices issued on 10 April 2019 and 23 January 2020 pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), the respondent disputed its liability to compensate Ms Rabbas on the ground that her injury was wholly or predominantly caused by reasonable action taken with respect to discipline within the meaning of s 11A(1) of the *Workers Compensation Act 1987* (the 1987 Act).
4. By an Application to Resolve a Dispute lodged with the Commission on 19 May 2020, Ms Rabbas claimed compensation for weekly benefits from 6 May 2019 and lump sum compensation. At a hearing on 15 July 2020, Ms Rabbas discontinued her claim for weekly benefits.

ISSUES FOR DETERMINATION

5. The parties agree that the following issue remains in dispute:
 - (a) Whether Ms Rabbas' psychological injury was wholly or predominantly caused by reasonable action taken in respect of her employment within the meaning of s 11A(1).

PROCEDURE BEFORE THE COMMISSION

6. The parties attended a conference/hearing on 15 July 2020. Mr Ross Hanrahan of counsel appeared for Ms Rabbas. Mr Dewashish Adhikary of counsel appeared for the respondent.
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.

EVIDENCE

Documentary evidence

8. 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 attachments.

Oral evidence

9. There was no oral evidence.

FINDINGS AND REASONS

Ms Rabbas' evidence

10. Ms Rabbas' evidence is set out in a written statement dated 6 May 2020. She gave a statement in similar terms to an investigator on 10 January 2019 in which she stated the "main incident that started the spiral out of control" was the meeting on or around 12 September 2018.¹ The following is a summary.
11. Ms Rabbas started part-time work for the store in about 2014 when it operated under a different name. From around 2016, when she was promoted to store manager, she worked full-time. In mid-2018 the store was bought by the respondent. Ms Rabbas was responsible for the day to day operations of the store including rostering and managing the staff, loss prevention, cash handling, customer service and "visual merchandising".
12. Around mid-2018, Ms Rabbas was working with Amanda Farrer and Crystal Murphy-Bliss. She felt they started treating her differently; their attitudes were cold and she felt isolated. They would not engage in conversation with her and she felt they were disrespectful.
13. Around 12 September 2018, Ms Rabbas called her regional manager, Samantha Taylor, to discuss the others' behaviour towards her. She felt shocked and confused when Ms Taylor responded to her in an aggressive tone and said she would be coming to the store to discuss some issues that Amanda and Crystal had brought to her attention. Ms Rabbas asked what they were and whether the discussion would be formal or informal but Ms Taylor would not divulge that information. Ms Rabbas said she wanted to know if it would be a formal meeting so that she could arrange a support person to be with her. Ms Taylor said she had had a "huge week" and was tired, and Ms Rabbas would only make matters worse if she continued to badger her.
14. The meeting took place on 19 September 2018. Ms Rabbas spoke to Ms Taylor a couple of times in the meantime but she declined to discuss the nature of the meeting. Ms Rabbas took a long-time friend of her mother, who was also a customer of the store, as support person. They arrived on time but had to wait 25 minutes for Ms Taylor who complained they were late and she was now waiting for her own support person. Ms Rabbas immediately felt intimidated. The meeting started half an hour late once Ms Taylor's support person arrived.
15. Ms Taylor then said she was not happy with Ms Rabbas' support person because she was a customer of the store and had a conflict of interest. (However, she was allowed to stay.)
16. Ms Taylor then read out the allegations by Amanda and Crystal. Ms Rabbas felt shocked because they were untrue or out of context. She tried to respond but Ms Taylor would not let her read the statement, then reluctantly let her glance at it before taking it away. Ms Taylor kept cutting her off mid-sentence, constantly butting in with her opinions. She felt victimised and thought it was not reasonable she could not see Amanda's and Crystal's written statements so she could prepare herself. It was clear Ms Taylor was not interested in her version of events and had already formed an opinion. She said she had consistent statements from Amanda and Crystal so believed them. It was unfair for Ms Taylor to determine the matter as she was friends with them outside work.

¹ Reply at page 20

17. At the end of the meeting, Ms Taylor said that, based on Ms Rabbas' responses, she would be given a first and final warning and she would be required to provide an action plan addressing how she would move forward and right her wrongs. She also had to read and sign the Code of Conduct for her role as store manager. She is yet to receive any paperwork about the meeting or the first and final warning.
18. Ms Rabbas states that, about two weeks later, Crystal spoke to her inappropriately in front of customers. She rang Ms Taylor who seemed supportive and said she would speak to Crystal. When she visited the store the following week, Ms Taylor told her she had "broken the team" and lost all their trust, and was not taking accountability for her actions. She made it clear she would not believe anything she said.
19. Ms Rabbas felt extremely unsupported. She had always thought she had a good relationship with Ms Taylor but it changed after she became friendly with the others. Around late September and October, Ms Taylor commented several times about the fluid condition in her feet and her shoes, and she forced her to try on outfits that she knew would not fit her. She felt humiliated and felt discriminated against because of her medical condition.
20. During November 2018, Ms Rabbas was away on annual leave. She returned on 4 December 2018. In her first week, she was relieved to find that things seemed to be going well.
21. When she arrived at work on 10 December 2018, she saw the store was untidy and the back room messy. Takings for the previous day showed the store had been busy so she accepted that was the reason. That afternoon, she received an email from Ms Taylor to say Amanda had sent photographs showing the store was untidy the previous day. Ms Rabbas realised she had been set up and Amanda had staged the photographs to make her look bad. When she spoke with Ms Taylor by telephone to explain she had left the store tidy, she interrupted aggressively and accused her of not being accountable. She spoke abruptly about her feet and claimed her footwear was affecting her work and the store's performance even though the accounts showed it had performed well. Ms Taylor said she needed to decide whether she wanted her job or not. She felt humiliated and worthless.
22. That night, her sister and a friend forced her to go to the emergency department at the hospital because they feared she was suicidal. The following day she saw her general practitioner who told her she had a psychological injury. She has been unable to return to work since.
23. The remainder of Ms Rabbas' statement concerns her capacity to work, her pre-injury health and her ongoing symptoms. It is not necessary to refer to those parts for present purposes.
24. In conclusion, Ms Rabbas comments on the investigator's report dated 14 January 2019. In particular, she states:
 - (a) She was not told at the start of the meeting on 19 September 2018 that it would be a formal meeting;
 - (b) She was not given a written warning and was advised it had been placed on her HR file Reply and attachments;
 - (c) She was never told she could lodge a grievance in relation to any of the incidents;
 - (d) It was never suggested that mediation could be organised;
 - (e) Ms Taylor knew she was self-conscious about her feet;

- (f) She was not given the details of the allegations against her until the meeting;
- (g) She did not have a proper opportunity to respond.

Ms Taylor's statement

25. In a statement to the investigator on 12 January 2019², Ms Taylor states she had been Regional Manager for six years. She would speak to Ms Rabbas daily by phone or email, and she visited the store fortnightly or monthly. She was aware Ms Rabbas had medical issues with her feet and that her mother had passed away in August/September 2018.
26. In relation to the conversation around 12 September 2018, Ms Taylor states she did not recall Ms Rabbas saying the others were being cold towards her. She did say she needed to have a formal meeting to discuss some issues raised by the others. She advised Ms Rabbas she could have a support person as it was a formal meeting. Ms Rabbas asked what the issues were and she told her she was under direction not to discuss them over the phone, and they would be raised at the meeting on 19 September. She denied using an aggressive tone and she did not recall Ms Rabbas being upset over the phone.
27. Between 12 and 19 September 2018, Ms Taylor had conversations with Ms Rabbas about day to day operations but she was not allowed to discuss the issues over the phone. She would likely have said something to the effect that they would have to discuss them when they met.
28. In relation to the meeting on 19 September 2018, Ms Taylor says she was concerned that Ms Rabbas' support person, who was a customer of the store, could have a conflict of interest and she wanted this noted.
29. Ms Taylor states she made it clear to Ms Rabbas that it was a formal meeting and whether any disciplinary action was taken would depend on her responses. She read out the allegations and handed Ms Rabbas a copy. The meeting went for three hours and she had every opportunity to respond. She denies cutting Ms Rabbas off. Ms Rabbas kept going over and over the same things and she had to move the discussion forward. She kept referring to Amanda as the main person she had a grievance about. Ms Taylor asked her to put it in writing so her complaints could be investigated but she never did.
30. Ms Taylor states that, after Ms Rabbas had responded, they had a break so Ms Taylor could review everything she had said. Based on "the evidence, photos, complaints and history of what had happened since May 2018" she said she would be issuing a first and final warning and Ms Rabbas would be asked to complete "some documentation". The documentation was sent to Ms Rabbas by email on 20 September 2018.
31. Ms Taylor states that the warning was written and was read to Ms Rabbas. A copy was placed on her "HR file". She stated it is "policy" that an employee is not given a copy but it is placed on their file and is available on request at any time.
32. Following the meeting, Ms Taylor recalls conversations with Ms Rabbas about Crystal behaving inappropriately towards her. Crystal gave a different version of the incident. Ms Taylor asked Ms Rabbas to put her grievance in writing but she has not done so. She was not in the store on the day of the altercation; it was "he said she said" and difficult to determine what had happened.

² Reply at page 37

33. On 15 October 2018, Ms Taylor went to the store. Ms Rabbas told her she did not feel respected by the team. Ms Taylor said mediation would be organised between her and her team but she needed to build trust with them and to look at her own behaviour. She said the same at the meeting on 19 September 2018. She asked Ms Rabbas to do an action plan on what she could do better as store manager. She was trying to help and guide her.
34. In relation to Ms Rabbas' shoes and outfits, Ms Taylor stated Ms Rabbas "freely" told her about her feet condition and that her doctor had suggested weight loss surgery. Out of "genuine concern" she recommended some shoes and gave her outfit options. Staff had not been allowed to wear that sort of shoe in the past but she was happy for Ms Rabbas to wear them if she was suffering. Ms Rabbas was never upset or distressed while they were talking about it, and she thanked her.
35. In relation to the incident in December 2018, Ms Taylor said she had received a phone call from Amanda on 9 December 2019 to say the store was in a mess when she arrived. She asked Amanda to send photos which she sent to Ms Rabbas on 10 December 2018. It was clear from the takings that it had not been a busy day. Ms Rabbas denied leaving the store untidy and said Amanda had made it up. She then admitted leaving some things around but not all. Ms Taylor spoke to her about her expectations and said she had previously received photos of the store looking untidy.
36. On 11 December 2018, she received a text message from Ms Rabbas to say she was not fit for work and she was going to see her doctor. Later that day, she sent a message that she was on stress leave. On 13 December 2018, she received the documents she had asked Ms Rabbas to complete.
37. Ms Taylor states that Ms Rabbas is an excellent seller and she thought highly of her "but there is much more to being a store manager than selling".³ Two previous employees had left in early 2018, they said because of her laziness. As they would not make a complaint, she could not investigate it. On 24 May 2018, she visited the store and was "horrified" at the mess. Ms Rabbas apologised and said she was having personal and medical issues. She gave a commitment to improve her standards. Ms Taylor sent another manager the following day to get the store back up to standard.
38. On 6 July 2018, Ms Taylor reiterated the standards required after a customer complained Ms Rabbas was sitting in the back room and not serving. She again said she was having problems with her feet and weight. Ms Taylor received a further complaint in July from Amanda and Crystal about her management of the store.
39. Ms Taylor denies having a friendship with Amanda or Crystal. She asked them to put their concerns in writing. Ms Rabbas have never done so. She does not accept accountability or advice or direction. Ms Taylor wanted to try mediation shortly after Christmas but Ms Rabbas was on leave. All she wanted was for Ms Rabbas to perform her role as store manager.

Other documents

40. Documents submitted by the respondent include:
 - (a) Email dated 22 August 2018 from Ms Bliss to Ms Taylor detailing her complaints about Ms Rabbas' management of the store⁴;
 - (b) "Formal letter of complaint" dated 22 August 2018 from Ms Farrer to Ms Taylor about "the working conditions [she] and other staff have had to endure under Ms Rabbas' management"⁵;

³ Reply at page 46

⁴ Reply at page 91

⁵ Reply at page 93

- (c) Email from Ms Bliss dated 23 August 2018 to Ms Taylor outlining a complaint that day from a customer about mess in the store, Ms Rabbas' manner with customers and so on⁶;
- (d) Email from Ms Bliss dated 30 August 2018 to Ms Taylor stating Ms Rabbas' had been away following the death of her mother and Ms Bliss' anxiety about her return;
- (e) Email from Ms Farrer dated 5 September 2018 to Ms Taylor complaining about Ms Rabbas' conduct and management of the store⁷;
- (f) Photographs of the store (date not identified)⁸;
- (g) Email from Ms Bliss dated 6 September 2018 to Ms Taylor complaining about Ms Rabbas' conduct and management of the store⁹;
- (h) Email from Ms Bliss dated 13 September 2018 to Ms Taylor complaining about Ms Rabbas' conduct and management of the store¹⁰;
- (i) Email from Ms Farrer dated 18 September 2018 to Ms Taylor about Ms Rabbas' conduct and management of the store¹¹;
- (j) "Summary of Formal Interview Form" 19 September 2018¹²;
- (k) Handwritten notes of meeting on 19 September 2018¹³;
- (l) Letter from Ms Rabbas to Emma Harrison dated 2 January 2019 outlining examples of Ms Taylor's conduct¹⁴;
- (m) "Claim note" by Emma Harrison dated 17 December 2018 documenting her phone conversation that day with Ms Rabbas¹⁵;
- (n) Various workplace policy documents.

41. Also included in the Reply is a two-page handwritten document headed "Action Plan" signed by Ms Rabbas.¹⁶ It states:

"Hi Sam
 Going forward after our discussion I have taken time to reflect on my behaviour and how it may affect those around me. I am now, and will continue to think about the words I use and the manner in which I use them. Also taking consideration into how my words will be received by those around me. I will strive to provide a happy and healthy working environment for my team and delegate jobs in a timely and orderly fashion while making sure all tasks are shared equally [indecipherable]. I will also pay more attention to prioritising important jobs and leaving things such as paperwork until last.

⁶ Reply at page 95

⁷ Reply at page 97

⁸ Reply at page 92

⁹ Reply at page 111

¹⁰ Reply at page 121

¹¹ Reply at page 119

¹² Reply at page 143

¹³ Reply at pages 147 - 175

¹⁴ Reply at page 55

¹⁵ Reply at page 63

¹⁶ Reply at page 179-181

I look forward to growing with my team in future and re-establishing the healthy work relationship we once had.”

Independent medical opinions

42. Dr Thomas Oldtree-Clark, psychiatrist, saw Ms Rabbas on 21 August 2019 at the request of Ms Rabbas’ solicitors. He took a similar, if briefer, history as Dr Allan (below). He did not dispute Dr Allan’s diagnosis but said it had now become a Major Depressive Disorder and was a direct consequence of bullying and harassment during the course of her employment
43. Dr Martin Allan, psychiatrist, saw Ms Rabbas on 7 March 2019 at the request of the respondent. He took a history of Ms Rabbas broadly consistent with her statement of evidence. He noted that it was “very much a ‘he said, she said’ situation”.¹⁷
44. Dr Allan diagnosed Ms Rabbas as suffering from an adjustment disorder with depressed and anxious mood. He said numerous factors led to its development including difficulties in her recruitment process, feeling overwhelmed at her workload, and interpersonal problems and lack of support from her manager. However, the predominant cause related to “the allegations that were raised against her and the disciplinary actions that were placed [sic] as a result, in 2018.”¹⁸ Other issues were relevant and causative in their own regard but were not the predominant cause.

The respondent’s submissions

45. Mr Adhikary submits that the causative events of Ms Rabbas’ psychological injury were the disciplinary process, and the respondent’s actions in undertaking that process were reasonable.
46. Mr Adhikary submits that there is no evidence contrary to Dr Allan’s opinion that Ms Rabbas’ psychological injury was wholly or predominantly caused by the disciplinary process, and no reason I would not accept his opinion. He had regard to a complete history from Ms Rabbas and his opinion was based on a fair foundation. He identified other factors as relevant but, consistent with *Hamad v Q Catering Limited*¹⁹, they were not the whole or predominant cause of her injury.
47. Mr Adhikary submits that the entirety to the respondent’s actions in undertaking the disciplinary process was reasonable. A course of conduct can be reasonable even if some steps in the process were not. Mr Adhikary relies on *Ivanisevic v Laudet Pty Ltd*²⁰, *Irwin v Director General of School Education*²¹ and *Department of Education & Training v Sinclair*²².
48. Mr Adhikary submits that the complaints made about Ms Rabbas in emails from her staff went to her duties as store manager. The process Ms Taylor describes in her statement in response to the complaints was completely reasonable. She told Ms Rabbas she had received the complaints and could not discuss them by phone but she would at the meeting; she does not recall Ms Rabbas being upset at their conversation; she made clear it would be a formal meeting and Ms Rabbas could bring a support person; she allowed that person to be present despite her concerns; she made clear that what would happen next would depend on Ms Rabbas’ responses. She read out the allegations to Ms Rabbas and handed her a copy. The meeting went for three hours. She did not cut Ms Rabbas off, she had every opportunity to respond.

¹⁷ Reply at page 14

¹⁸ Reply at page 15

¹⁹ *Hamad v Q Catering Limited* [2017] NSWCCPD 6

²⁰ *Ivanisevic v Laudet Pty Ltd* (unreported, 24 November 1998) (*Ivanisevic*)

²¹ *Irwin v Director General of School Education*, NSWCC 140687/97, 18 June 1998 (*Irwin*)

²² *Department of Education & Training v Sinclair* [2005] NSWCA 465; 4 DDCR 206 (*Sinclair*)

49. Having regard to Ms Taylor's statement, Mr Adhikary submits that the manner in which the meeting proceeded was entirely reasonable. The fact that it took three hours indicates that Ms Rabbas had every opportunity to respond. It was only after hearing from her that Ms Taylor decided to give her a "first and final warning". Consistent with company policy, she did not give Ms Rabbas a copy but one was available on request to HR.
50. Mr Adhikary submits that it was not unreasonable not to give Ms Rabbas a copy of the allegations before the meeting. She was still working with the complainants and supervising them. Ms Taylor had to consider the impact of providing them ahead of the meeting. The intention of the meeting was that Ms Rabbas would improve and keep working with her staff.
51. Even if not giving Ms Rabbas the allegations before the meeting was not reasonable, Mr Adhikary submits that, applying *Sinclair*, it did not render the whole process unreasonable.
52. Mr Adhikary submits that Ms Rabbas and Ms Taylor give significantly different accounts of the process and I would prefer Ms Taylor's. There is no credible reason why a manager would not tell a member of staff it would be a formal meeting. The fact that Ms Rabbas brought a support person with her indicates that she was told.
53. There is no evidence from Ms Rabbas' support person. Mr Adhikary submits that I should draw a *Jones v Dunkel* inference that she would not support Ms Rabbas' account of the meeting. She was a material witness who could say whether Ms Taylor made clear at the meeting that it would be formal, whether she handed Ms Rabbas the allegations, and whether Ms Rabbas was cut off while trying to respond. Ms Rabbas has provided no explanation as to why her evidence is not available.
54. Mr Adhikary submits there are inconsistencies, some minor, in Ms Rabbas' evidence. She claims she was given no paperwork from the meeting but the notes of the meeting²³ show she was given the Code of Conduct and other paperwork (although not the warning). She did not mention that she was asked to complete a Fitness for Duty document. She claims she was never offered mediation but the meeting notes²⁴ and the Summary of Formal Interview²⁵ show otherwise.

The applicant's submissions

55. Mr Hanrahan submits that the test is not whether the respondent's actions were "not unreasonable" but whether they were positively reasonable.
56. Mr Hanrahan submits that the entire process involves the relationships between the parties. It appears that Amanda wanted to step into Ms Rabbas' position, and "set her up" by complaining about her. The staff went over her head to Ms Taylor and, as regional manager, she should have adopted a collaborative response.
57. In Mr Hanrahan's submission it was not reasonable to require Ms Rabbas' to write up her own Action Plan and Fitness for Duty document. Doing so indicates a lack of communication by Ms Taylor. It was not reasonable to call her to a meeting with no notice of the complaints and say that the outcome would depend on her responses. There was no opportunity for real discussion and nothing reasonable in Ms Taylor's management of the issue. She acknowledges that Ms Rabbas was working satisfactorily then conducted a meeting in the way that she did. She made a fuss over Ms Rabbas' support person and made the ridiculous suggestion that she would have a conflict of interest. It was an "appalling" suggestion that the support person should provide a statement. More relevant is the absence of evidence from Amanda about the allegation that she set Ms Rabbas up.

²³ Reply at page 175

²⁴ Reply at page 175

²⁵ Reply at page 143

58. Mr Hanrahan acknowledges that the notes of the meeting indicate that mediation was mentioned but says they do not show the respondent agreed it would actually occur. Precisely what was discussed at the meeting is not clear. Ms Taylor's notes might be detailed but they are self-serving and indicate that she had pre-judged the issues rather than trying to generate a resolution.
59. In response to my question what in the notes indicated Ms Taylor had pre-judged the issue, Mr Hanrahan submits that it is reflected in Ms Rabbas' statement at paragraph [32] where she says she spoke to Ms Taylor by phone after the photograph incident (in December 2018) and she "interrupted [her] quite aggressively" and said words to the effect that she was not taking accountability for her actions. In Mr Hanrahan's submission, Ms Taylor seems to have assumed the photograph was true and that Ms Rabbas had failed. The fact that she went on to talk about her feet reflects Ms Taylor's unreasonable state of mind and approach.
60. Mr Hanrahan submits that there was no need for Ms Rabbas to mention she was given the Fitness for Duty document as it concerned her feet and had nothing to do with her performance. In any event, it seems from Ms Taylor's statement that she had a very superficial understanding of Ms Rabbas' medical condition.
61. Mr Hanrahan submits that, following *Northern NSW Local Health Network v Heggie*²⁶ it was not necessary for Ms Taylor to conduct the meeting as she did. The procedure was opaque and the fact that it took three hours is itself telling. Ms Taylor claims Ms Rabbas kept repeating herself but perhaps that was because she was not being heard. I suggested to Mr Hanrahan that Ms Rabbas' comments in her Action Plan seemed conciliatory. He submitted she had to be like that to keep her job but he acknowledged that was not Ms Rabbas' evidence.

Respondent's submissions in reply

62. In reply, Mr Adhikary agreed that the test is whether the respondent's actions were reasonable rather than "not unreasonable". Ultimately, he submits, the whole of the respondent's conduct was reasonable.
63. Mr Adhikary submits there is nothing "appalling" in suggesting Ms Rabbas' support person could provide a statement. She is a material witness who could have said what transpired. Ms Rabbas' account of the meeting is quite contrary to Ms Taylor's and this is a prime case in which evidence of a third person could shed light on what occurred.
64. Whether Amanda set Ms Rabbas up in December 2018 is not relevant to the issue. Even if it were, Amanda has not refuted the allegation. There is no proof and I would give it no weight. Further, there is no evidence from Ms Rabbas that she had no option but to write her action plan as she did.

Consideration

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

“(1) No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.”

²⁶ *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255 (*Heggie*)

66. The respondent must establish, firstly, that Ms Rabbas' injury was wholly or predominantly caused by disciplinary action and, secondly, that that action was reasonable. The focus of the dispute is whether the disciplinary action that caused her injury was reasonable.
67. The respondent bears the onus of making out the defence: *Pirie v Franklins Ltd* [2001]²⁷; *Sinclair*.
68. Ms Rabbas' statement of evidence focuses on the meeting on 19 September 2018 as the cause of her psychological injury, starting from her conversation by phone with Ms Taylor the previous week, in the week leading up to the meeting, and the conduct and outcome of the meeting itself. There is no dispute that process constituted "discipline" for the purposes of s 11A(1).
69. There is no challenge to Dr Allan's opinion that "numerous factors" led to the development of Ms Rabbas' Adjustment Disorder including difficulties in her recruitment process, feeling overwhelmed at her workload, and interpersonal problems and lack of support from her manager. However, he found, the predominant cause related to "the allegations that were raised against her and the disciplinary actions that were placed [sic] as a result, in 2018."²⁸ Other issues were relevant and causative but were not the predominant cause.
70. I am satisfied that Ms Rabbas' psychological injury was wholly or predominantly caused by the disciplinary process of the meeting on 19 September 2018.
71. What is "reasonable" in the context of s 11A(1) was considered by Geraghty CCJ in *Irwin* where he said:
- "...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."
72. In *Ivanisevic*, 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."
73. In *Sinclair*, Spigelman CJ, with whom the other members of the court agreed, said:⁶
- "Furthermore, the case ... primarily focused on the whole course of Departmental conduct as constituting the relevant 'substantial contributing factor' for purposes of s 9A. 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 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.

²⁷ *Pirie v Franklins Ltd* [2001] NSWCC 167; 22 NSWCCR 346

²⁸ Reply at page 15

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'."

74. In *Heggie*, Sackville AJA said the following propositions are consistent with the statutory language and the authorities that have construed s 11A(1):

(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 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;

(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."

75. 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.”

76. A number of matters are not in dispute in the present case:

- (a) that on 12 September 2018, Ms Taylor spoke to Ms Rabbas by telephone and said she needed to meet with her about a number of issues raised by her staff;
- (b) that Ms Taylor said she could not disclose the nature of the allegations but would discuss them at the meeting;
- (c) that Ms Taylor told Ms Rabbas she could have a support person at the meeting;
- (d) that Ms Taylor raised concerns at the start of the meeting that Ms Rabbas’ support person could have a “conflict of interest” as a customer” but the support person was allowed to remain at the meeting;
- (e) that Ms Rabbas was given a “first and final warning” at the end of the meeting; that she was not give a written copy but was told one would be available on request to HR;
- (f) that at the end of the meeting Ms Rabbas was asked to complete certain forms including an Action Plan addressing how she would “move forward” (or words to that effect).

77. There is a dispute as to:

- (a) whether Ms Taylor told Ms Rabbas the meeting would be formal;
- (b) whether she gave Ms Rabbas a copy of the allegations to read at the meeting;
- (c) whether she allowed Ms Rabbas an opportunity to put her point of view;
- (d) whether Ms Rabbas was told she could lodge a grievance herself about the staff;
- (e) whether mediation was offered.

78. Ms Rabbas’ evidence is that she wanted to know if it would be a formal meeting so that she could arrange a support person to be with her but Ms Taylor declined to say. Ms Taylor maintains she did say it would be a formal meeting, and she advised Ms Rabbas she could have a support person for that reason. I prefer Ms Taylor’s evidence. The fact that Ms Rabbas took a support person with her indicates to me that she knew it was to be a formal meeting. She knew that Ms Taylor was going to put to her matters raised by her staff for her response.

79. I am not persuaded that Ms Taylor spoke to Ms Rabbas in an aggressive tone when they spoke on 12 September 2018. Ms Taylor denies doing so. Ms Rabbas does not suggest their relationship had been difficult before then, and Ms Taylor appears to have thought well of her generally. They spoke to each other over the week leading up to the meeting and, apart from Ms Taylor saying she would not disclose details of the allegations, Ms Rabbas does not suggest she was aggressive or hostile. Given that Ms Rabbas had initiated the call to complain about the staff, I accept that finding they had complained about her could have come as a shock, but I am not satisfied that Ms Taylor spoke in an aggressive tone.
80. In my view it was reasonable for Ms Taylor to wait until the meeting to detail the allegations made by the staff. She told Ms Rabbas who the complainants were. Ms Rabbas was their manager and had to work with them in the week leading up to the meeting. I accept Mr Adhikary's submission that Ms Taylor had to consider the impact on their working relationship if she detailed the allegations by phone. There is no evidence from Ms Taylor to that effect but I am nevertheless satisfied it was reasonable to wait until the meeting. The evidence shows Ms Taylor had received several lengthy emails from the staff about Ms Rabbas' management of the store and how she treated them, including complaints from customers. They were not matters to outline informally by phone.
81. It is not clear to me why Ms Taylor would think that a customer might have a conflict of interest in attending the meeting to support Ms Rabbas. However, having voiced her concern and saying she wanted it noted, she allowed the support person to remain throughout the meeting. In my view that was reasonable.
82. It is not in dispute that Ms Taylor handed Ms Rabbas a copy of the statement of the allegations at the meeting. Ms Rabbas says she "reluctantly let [her] glance at it before taking it away". Ms Taylor's evidence is that she "read out the allegations and handed Ms Rabbas a copy". I think it unlikely that Ms Taylor let her do no more than glance at it. In any event, however long Ms Rabbas held on to the document, and however closely she read it, she does not suggest that the allegations were not made clear to her. The allegations were put to her and that was reasonable. I cannot see how it was unreasonable for Ms Taylor to say that whether any disciplinary action would be taken would depend on Ms Rabbas' responses. It was entirely reasonable. Anything else would have suggested that Ms Taylor had prejudged the issues.
83. Ms Rabbas says she was not given an opportunity to respond to the allegations and that Ms Taylor kept "cutting her off". Ms Taylor maintains that Ms Rabbas had every opportunity to respond but that she kept "going over and over the same things" and she had to "move the discussion forward".
84. I am satisfied on the evidence that Ms Rabbas was given a reasonable opportunity to respond to the allegations. The handwritten notes of the meeting run to 14 pages. They detail the matters raised by three staff members and dates of various incidents. Ms Rabbas' responses to each matter are noted, including her view that Ms Taylor had already made up her mind about them.
85. Consistent with Ms Rabbas' evidence, the notes show the meeting went for three hours. There were three breaks of approximately five to ten minutes. I do not accept Mr Hanrahan's submission that the fact it took three hours is itself unreasonable. The notes indicate discussion of all the matters raised with Ms Taylor, and Ms Rabbas' responses. They had several breaks. There is nothing in the notes, and Ms Rabbas does not suggest, that she felt unable to continue or wanted a break. The notes record her support person's concerns at the end of the meeting that Ms Rabbas was not told "it was a first and final meeting and was not told it was formal", not that Ms Rabbas had been cut off or was not allowed to put her point of view.

86. There is no dispute that Ms Rabbas was not given a copy of the “first and final warning” at the meeting. Ms Taylor says that was in line with the employer’s policy and that a copy could be requested from “HR”. The reason for the policy is not clear. No copy of a relevant policy document has been submitted by the respondent.
87. Ideally, in my view, an employer would take active steps to provide an employee with a written copy of a warning, especially a “first and final warning” but the fact remains that a copy was available from HR and Ms Taylor advised Ms Rabbas of that. It is not clear that Ms Rabbas has ever requested a copy of the warning. Even if it might have been preferable to provide a copy at or following the meeting, it is not clear what unfairness it caused Ms Rabbas. Following *Sinclair*, it did not in my view deprive the whole process of the characterisation ‘reasonable action with respect to discipline’.
88. Contrary to Ms Rabbas’ assertion that mediation was never offered, the notes show at the end: “Action Plan needed to move forward mediation offered. 3 weeks to submit Action Plan” and “Katrina – happy with mediation”.
89. Mr Hanrahan submits that mediation was never actually arranged. It is not clear from the notes when it was to happen. Ms Rabbas was on leave throughout November and returned to work on 4 December 2018. Ms Taylor’s evidence is that she planned to organise mediation in early January but Ms Rabbas went on sick leave from 11 December 2018. I do not accept Ms Rabbas’ assertion that mediation was not offered. I am satisfied that it was and that it was reasonable to do so.
90. Ms Rabbas has not challenged the accuracy of the notes themselves. I do not accept the submission that they are self-serving or show that Ms Taylor had pre-judged the issues. They record in detail what was discussed with Ms Rabbas and her responses. Ms Taylor’s evidence, which I accept, is that she took a break towards the end of the meeting to consider what Ms Rabbas had said. The fact that she concluded that Ms Rabbas needed to improve her management of the store is not evidence that she had pre-judged the issues.
91. The Reply contains a two-page “Summary of Formal Interview Form”²⁹ dated 19 September 2018. It records the reason for discussion and “Required Performance of Behaviour” in brief form. It shows “Suggested mediation with all team members at TBC” and “Told Katrina to put any grievances regarding any team member on writing”. A box is ticked indicating “Final written warning”. No evidence has been led or submissions made as to why other actions indicated on the form including “First written warning” and “Second written warning” were not considered appropriate.
92. It is not clear whether this is the document that HR would have provided on Ms Rabbas’ request. In any event, I am satisfied that it shows that Ms Taylor told Ms Rabbas she could put any grievance in writing. I do not accept Ms Rabbas’ evidence that she did not.
93. I do not accept Mr Hanrahan’s submission that Ms Rabbas had no option but to express her comments in the Action Plan in the way that she did. That is not Ms Rabbas’ evidence. Her note indicates that she had reflected on her behaviour and thought it could improve.
94. I do not accept that Ms Taylor’s overall approach was uncommunicative and not conciliatory. She gave Ms Rabbas a week’s notice of the meeting. She told her who the complaints were. She allowed a support person of Ms Rabbas’ choosing to attend the meeting. I am satisfied that she afforded Ms Rabbas a reasonable opportunity to be heard at the meeting. I am satisfied that she wanted Ms Rabbas to improve and continue managing the store. She offered mediation with all team members and I find Ms Rabbas indicated she was happy with that suggestion. I do not accept that Ms Taylor had prejudged the issues or the outcome of their discussion.

²⁹ Reply at page 143

95. Mr Adhikary submits that I should draw an inference pursuant to *Jones v Dunkel*³⁰ against Ms Rabbas to the effect the evidence of her support person would not have advanced her case. I do not think it necessary to do so. Considering the evidence as a whole, even without that person's evidence, I prefer Ms Taylor's account of the meeting. Moreover, the "Summary of Formal Interview Form" indicates that a "Company Witness" was also present. It would not be appropriate in my view to draw that inference without considering whether it should also be drawn against the respondent.

SUMMARY

96. Considering the whole of the evidence, I am satisfied on the balance of probabilities that Ms Taylor's evidence concerning events leading up to and at the 19 September 2018 reflects what occurred. I find it was reasonable for Ms Taylor to request a formal meeting with Ms Rabbas after receiving a number of complaints in writing and that it was reasonable to wait until the meeting itself to disclose them. I am satisfied that manner in which the meeting was conducted was reasonable and that the outcome was reasonable.
97. I am satisfied the respondent has discharged its onus of establishing that Ms Rabbas' psychological injury was caused wholly or predominantly by reasonable action taken by her employer with respect to discipline.
98. There will be an award for the respondent.

³⁰ *Jones v Dunkel* [1959] HCA 8; 101 CLR 298