

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1477/20
Applicant: NASMA BIBI
Respondent: TOLL PERSONNEL PTY LIMITED
Citation: [2020] NSWCC 183

The Commission determines:

1. The Application to Resolve a Dispute is amended to include a claim for section 60 of the *Workers Compensation Act 1987* expenses.
2. The Commission finds that the applicant suffered psychological injury in the course of her employment with the respondent in the period of employment from August 2018 to 2 November 2018 (deemed date of injury 2 November 2018).
3. The employment was a substantial contributing factor to the psychological injury.
4. The respondent's defence under section 11A(1) of the *Workers Compensation Act 1987* is not made out.
5. The respondent is to pay to the applicant weekly compensation as follows:
 - (a) from 3 November 2018 to 2 February 2019 at the rate of \$433.17 (s 36 *Workers Compensation Act 1987*); and
 - (b) from 3 February 2019 to 30 September 2019 at the rate of \$364.78 (s 37 *Workers Compensation Act 1987*).
6. The respondent to pay the applicant's section 60 of the *Workers Compensation Act 1987* expenses on production of accounts/receipts.
7. The claim for s 66 of the *Workers Compensation Act 1987* lump sum compensation for psychological injury in the period of employment from August 2018 to 2 November 2018 (deemed date 2 November 2018) is remitted to the Registrar for referral to an Approved Medical Specialist for assessment of whole person impairment.

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

Ross Bell
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 ROSS BELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker
Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Bibi was born in Fiji and came to Australia with her family in 1989 at the age of 18 years. She worked for Australian Wool Testing and then at a Woolworths warehouse for 10 years. She then worked for Chicken Express and Inghams Chickens as a process worker for some six years, and for a labour hire company for two years, before commencing with Toll Personnel Pty Ltd (respondent) in October 2017 as a casual engaged mainly in process work and “picking and packing”.
2. She worked at the Toll “Multiuser” site at Prestons at the beginning with limited shifts available, but on 7 March 2018 she began at the Toll “Enterprise” site at Prestons and was a “regular casual” at that site, on the designated roster as a “Team Member” mostly from 2:00 pm to 10:00 pm five days per week with a total generally of 37.5 hours per week, plus overtime as required. All went well until August 2018 when the circumstances of alleged injury unfolded up to 2 November 2018.

THE APPLICATION

3. This Application to Resolve a Dispute (Application) was filed on 17 March 2020 in respect of a claim for psychological injury in the period of employment from August 2018 to 2 November 2018 including weekly compensation; s 60 of the *Workers Compensation Act 1987* (1987 Act) expenses; and s 66 of the 1987 Act lump sum compensation. The insurer denied the claim in a notice issued under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) dated 9 March 2020.

ISSUES FOR DETERMINATION

4. At the conciliation/arbitration the respondent sought leave to rely on the defence under s 11A of the 1987 Act. This was not objected to by Ms Bibi (applicant) provided the issue was restricted to the issue around the termination of employment.
5. The following issues remain in dispute:
 - (a) Did Ms Bibi suffer psychological injury with the respondent (s4 1987 Act)?
If so, was the employment a substantial contributing factor to the injury (s 9A)?
 - (b) Is the defence of the respondent under s 11A(1) of the 1987 Act made out?
If not,
 - (c) Is Ms Bibi partially or totally incapacitated and, if so, what is her entitlement to weekly compensation?
 - (d) Is the applicant entitled to s 60 of the 1987 Act expenses?
 - (e) Should the claim for s 66 of the 1987 Act lump sum compensation be referred to an Approved Medical Specialist for assessment?

PROCEDURE BEFORE THE COMMISSION

6. The parties attended a conciliation conference and arbitration hearing on 4 May 2020. 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

7. The documents annexed to the Application and the Reply have been taken into account. There was no oral evidence adduced.

Statements

8. Ms Bibi,

- (a) There was an onsite manager named "DJ" who organised the daily rostering requirements for casuals at the site. Ms Bibi's supervisor and "Team Leader" was Mr Bennett Chong. Ms Bibi states that her work performance was not ever in question and she received no warnings.
- (b) All was going well until an incident with a work colleague, Maya, in August 2018 about the work duties. Maya became angry towards Ms Bibi, including making a disparaging remark about her religion. This was upsetting for Ms Bibi, who noted that while the two had been friends Maya's attitude towards her changed after this incident.
- (c) A week later another incident occurred during the work duties, with Ms Bibi attempting to gain Maya's attention about an issue at the conveyor by raising her voice when the first attempt was unsuccessful. Maya accused Ms Bibi of yelling at her and made a complaint to Mr Chong, their supervisor.
- (d) Ms Bibi says she was also felt bullied by Maya's friends harassing her about the incident and pressuring her to apologise to Maya.
- (e) Ms Bibi went to speak with Mr Chong who, she says, reassured her he understood she was a good worker trying to assist others. The matter was escalated by Mr Chong to Mr Tevaga. A short time later Mr Tevaga sought a meeting with Ms Bibi and Maya at which he referred to Toll's "zero tolerance" bullying policy, and warned that any further "misunderstanding" between Ms Bibi and Maya would mean a referral to "HR".
- (f) The following day the manager "DJ" also spoke with Ms Bibi and Maya, expressing concern about the conflict and the impact it might have on Ms Bibi's application for permanency. This meeting ended in a hug between Maya and Ms Bibi. Ms Bibi says she thought "that was the end of the matter."
- (g) Another incident occurred on 18 October 2018 when the work was busy and Ms Bibi spoke to her colleague Seini about taking items from a conveyor due to a warning light flashing. Seini was "a very close friend to Maya".
- (h) Ms Bibi was in the process of being transitioned to permanency and had a medical for that purpose of 25 October 2018.
- (i) On 1 November 2018, after arriving for work at 2:00 pm Ms Bibi was met by a management group including Mr Tevaga, who told her she should go home at 6:00 pm and await a phone call the following day. She asked about whether the medical had been received and was told that "HR" was still waiting for it, but not to come to work until the phone call.
- (j) On 2 November, Ms Bibi received a text message stating she was "not required" to return to the Prestons site. Ms Bibi says she believed the reason she had been sent home early was a shortage of work. She contacted "Recruitment Consultant" Mr Ghamrawi who told Ms Bibi that she had been removed from the casual roster

and her permanent position had been revoked. The reason given was a complaint against her of bullying that had been made by Seini and witnessed by Doris. Ms Bibi states this was as shock and she was concerned for her future. Mr Ghamrawi asked her to email him and he would follow up with the managers at the Prestons site.

- (k) On 6 November, Ms Bibi was contacted at 7:30 am by Toll Personnel to start work the following day at 8:30 am at the Prestons Multiuser site where she had worked originally. Ms Bibi replied that she could not start that day because she had a medical appointment, but she could start the day after. She was asked to await further contact but heard nothing more.
- (l) Ms Bibi denies behaving inappropriately towards Seini. She says she was “so upset and stressed as to the way I have been treated.” She says no-one from the employer took the time to get her side of the story but did not hesitate to remove her from her employment. She says, “I feel this is very unfair and it has affected me greatly.”
- (m) Ms Bibi attended Dr Gounder on 21 November 2018 and was referred for counselling. She describes symptoms that include loss of sleep, increased stress and anxiety, and being short-tempered. She says she was smoking more and felt very emotional because of a sense of humiliation. She says she initially wanted reinstatement but later felt unable to “return to that workplace and face them again”.
- (n) In her supplementary statement sworn on 28 February 2020, Ms Bibi says she has been unable to return to work since 1 November 2018 and does not feel able to return to Toll or anywhere else. She describes her symptoms as including irregular eating patterns, loss of confidence, poor grooming, disinterest in socialising, irritability, loss of friendships, reduced motivation for housework, and poor concentration. She says she thinks about what happened “all the time”.

9. Email from Ms Bibi to Mr Ghamrawi, 6 December 2018,

- (a) This email was sent at Mr Ghamwari’s request and contains Ms Bibi’s denial of wrongdoing in response to the allegations she was informed of by Mr Ghamwari after her termination at the work site.

10. Ioane Tevaga, Afternoon Shift Fulfillment Manager,

- (a) Mr Tevaga outlines the circumstances of Ms Bibi’s employment. He confirms that Ms Bibi was a “regular casual employee” working “regularly 2pm -10pm”. He also confirms that to his knowledge Ms Bibi never had her work performance questioned.
- (b) Mr Tevaga also confirms the sequence of events around the incident with Maya in August 2018, and the meeting he had with Ms Bibi and Maya including an unofficial verbal warning to both about the policy on bullying behaviour.
- (c) Mt Tevaga states that he received a complaint from Seini about Ms Bibi’s behaviour (18 October 2018) which he asked her to put in writing, as he did with the witness “Doris”. These statements were handwritten. Mr Tevaga states that when he received the statements, he “approached HR and advised them of the Claimant’s inappropriate behaviour and made them aware of two handwritten statements that confirmed that.” He also requested “HR” to put Ms Bibi’s permanency “on hold”.

- (d) Mr Tevaga says he handed the statements to “PM Operations Manager” Mr Smith, who told him that Ms Bibi’s casual employment at the Prestons site was to cease.
- (e) Mr Tevaga says that on the following day, 1 November 2018, at 6:00 pm, after four hours of work there was no discussion with Ms Bibi as to why she was required to leave the site, but she was told “work levels were low and that some people would be sent home, which is a normal practice.” He says that Ms Bibi was not defensive or aggressive when she was told this.

11. Bennett Chong, Afternoon Shift Team Leader,

- (a) Mr Chong outlines his involvement in the August 2018 incidents when Maya complained Ms Bibi would speak to her in an aggressive manner and was “bossing” her around without authority.
- (b) Mr Chong spoke to Ms Bibi who told him she was being bullied by Maya who had “questioned her Muslim religion which offended her.” Mr Chong says that Ms Bibi did not show visible signs of stress or anxiety. He escalated the matter to Mr Tevaga.

12. Alan Ghamrawi, Recruitment Consultant,

- (a) Mr Ghamrawi outlines the structure of the labour services within the respondent, and notes that Ms Bibi was a good worker.
- (b) Mr Smith sent an email to Mr Ghamrawi in early November to the effect that Ms Bibi was no longer required at the respondent’s site due to bullying behaviour towards fellow workers which was confirmed by written statements.
- (c) Mr Ghamrawi states that because of the email he contacted Ms Bibi and informed her that the reason she was no longer required at Prestons was a complaint against her about bullying behaviours. He asked her if the managers at Prestons had spoken to her about the complaint of bullying behaviors to which she replied, “No, they just sent me home after 4 hours”.
- (d) Mr Ghamrawi says that Ms Bibi “did appear upset and angry and thought that it was unfair that she be removed from the site.” He invited her to submit a complaint which she did, citing a grievance about Seini’s complaint.
- (e) Mr Ghamrawi forwarded Ms Bibi’s complaint to Mr Tevaga and Mr Smith and in that message queried the action at the site in not following due process given the sensitivity of the complaint. He received a reply from Mr Tevaga confirming that Ms Bibi was not to return to the site, and no further investigations were to take place.
- (f) Mr Ghamrawi says he has had several telephone conversations with Ms Bibi about trying to get answers from the site managers.

13. Seini Tuiono, handwritten note 31 October 2018,

- (a) Ms Tuiono says in her complaint that Ms Bibi “started screaming and yelling at me to take the boxes out/off”. She also complains that Ms Bibi was rude to her when changing a roll in the printing machine, telling her to “Move” and not showing her how to change the roll.

- (b) Ms Tuiono says she felt bullied in the incident and had told her team manager about it who had advised her to put the complaint in writing.

14. Doris Borg, handwritten note 31 October 2018,

- (a) Ms Borg says she witnessed the interchange between Ms Tuiono and Ms Bibi, and that Ms Bibi spoke rudely to Ms Tuiono, told her to move, and changed the roll in the printer without showing her how to do it.

Internal emails of respondent

15. These emails are consistent with the statements relied on by the respondent.

Medical evidence

16. Dr Gounder, First Care Medical Centre,

- (a) There are 18 certificates by Dr Gounder from 21 November 2018 to 2 March 2020. The first certificate included the diagnosis of “ACUTE STRESS REACTION WITH ADJUSTMENT DISORDER WITH DEPRESSED MOOD” due to “UNDERWENT BULLYING AT HER WORK BY HER WORKMATE FOR THE PAST MONTH & UNFAIR DISMISSAL FROM WORK”. Ms Bibi was certified as totally unfit for work.
- (b) Dr Gounder’s clinical notes cover the period from August 2018 to 5 April 2019. There are regular references to anxiety and other symptoms attributed to the work incidents.

17. Dr Devsam, FamilyWise Medical Practice,

- (a) A Certificate dated 9 December 2018 was given by Dr Devsam and certifies Ms Bibi as able to work full-time on condition she did not have to work with her previous colleagues involved in bullying her.

18. Dr Anderson,

- (a) Dr Anderson takes the history of the work incidents described by Ms Bibi in her statements. He summarises the entries in Dr Gounder’s notes referring to the complaints of symptoms from early November 2018. He also notes the diagnosis by Michelle Jackson, clinical psychologist of adjustment disorder with anxiety and depressed mood. He also refers to the statements relied on by the respondent.
- (b) Dr Anderson diagnoses Major Depressive Disorder which he attributes to the events at work involving both the conflict with colleagues and their jealousy and plotting; and to the effective termination of her employment when she was about to be made permanent. He notes her sense of unfairness regarding this action by the employer because she was not given the opportunity to rebut the allegations before being effectively dismissed.
- (c) Dr Anderson says the condition had deteriorated over time and Ms Bibi is totally unfit for any work.

19. Michelle Jackson, psychologist,

- (a) The report of 26 February 2020 notes there had been five consultations from 21 November 2018.

- (b) Ms Jackson assesses that the depression had developed into psychotic depression with symptoms including no sleep, anxiety, panic attacks, difficulty breathing, trembling, sweating, heart pounding as well as visual, auditory and tactile hallucinations. There were also worries about work and gossip at work.
- (c) Ms Jackson's notes from 21 November 2018 as to Ms Bibi's mental state are consistent with the history Ms Bibi gives in her statements. Two elements relevant to causation are noted, comprising the belief that her colleague was trying to destroy her career, and the unfair dismissal from her work site by the respondent's managers.

20. Dr Lee, report 3 December 2019,

- (a) Dr Lee takes a history consistent with the other evidence. He refers to the reports of Ms Jackson and Dr Anderson.
- (b) Dr Lee found "conclusive evidence of feigning/marked exaggeration". He does not believe there is a psychological injury, or any incapacity for work. He says he conducted tests which proved exaggeration and malingering.
- (c) Dr Lee disagrees with Dr Anderson's reasoning because it is "illogical" that an adjustment disorder would have worsened after leaving the workplace. He also says Dr Anderson's assessment of impairment is based on likely exaggeration.

Issue – Did Ms Bibi suffer psychological injury arising in the course or out of the employment with the respondent? (s4 1987 Act); if so, was the employment a substantial contributing factor to the injury?

- 21. The respondent submits that Dr Lee should be accepted regarding injury because his opinion on injury is supported by the inconsistencies in Ms Bibi's statements. Dr Anderson simply accepted what Ms Bibi said in her statements without delving further into what happened. Dr Lee on the other hand found feigning and exaggeration. Dr Lee noted exaggeration in reported rapid breathing difficulties and Ms Bibi's report that she sometimes forgot her husband's name. Dr Lee noted that Ms Bibi's breathing returned to normal during the examination and she ceased appearing anxious or distressed.
- 22. In my view Dr Lee gives insufficient attention to the factual events and the medical evidence. He does not address Dr Gounder's notes and certificates, or the findings of clinical psychologist Ms Jackson. It is not clear how Dr Lee found exaggeration in Ms Bibi's degree of apparent anxiety, with her rapid breathing returning to normal during the examination. He does not explain how this goes to Ms Bibi's reliability or how this is not because Ms Bibi naturally relaxed as the examination went on. He does note that she said at the end of the consultation that he had been "very kind", which may well explain why she relaxed as it went on.
- 23. Relevant here are the findings of Ms Jackson regarding diagnosis in her consultation on 26 February 2020 on the history of visual, auditory and tactile hallucinations, as well as panic attacks, and rapid breathing. Ms Jackson was of the view that Ms Bibi's depression had developed into "psychotic depression". This is consistent with Dr Anderson's opinion that the condition had worsened since the events at the workplace. Dr Gounder records panic attacks as early as 13 November 2018, and the prescription for Aropax by 14 February 2019. He notes the panic attacks occurring "very often" on 14 February 2019. There was a referral to hospital on 22 February 2019 due to shortness of breath and chest pains.

24. Dr Lee is on his own in his diagnosis and view of exaggeration and feigning illness. His opinion does not sit easily with the history of the onset of symptoms and the course of treatment. I note that Dr Lee has an error in the history. He records Mr Bibi saying her problems began in December 2018, which was the month after she was excluded from the workplace. The respondent submits that this should be taken as inconsistency in Ms Bibi's evidence, but this is clearly a simple mistake in recording the history. When the events recorded by Dr Lee occurred is established by the rest of the evidence including that of Ms Bibi and the respondent's investigation statements.
25. The respondent submits that Ms Bibi is inconsistent in her statements and what she told Dr Lee compared to the factual history of events in the workplace. It is submitted that while Ms Bibi says she was upset by the conflict with colleagues and was "crying every day", there is nothing in the clinical records of this being the subject of complaints to Dr Gounder.
26. There is no doubt that being told on 2 November 2018 by Mr Ghamwari of her dismissal from the workplace and about a complaint by colleagues had a significant impact. What shocked and distressed Ms Bibi most was Mr Ghamrawi informing her for the first time of her dismissal from the workplace and also of the complaint. She was suddenly aware a complaint by her colleagues meant that she had lost her position and permanency without any opportunity to give her side of the story. As confirmed in the management statements, Ms Bibi was not distressed when told, untruthfully, that the reason for her being sent home on 1 November 2018 was a shortage of work. However, it is clear from the materials that she was overtly distressed when told the truth by Mr Ghamwari.
27. The respondent submits that it is significant there is no evidence in Dr Gounder's notes about psychological symptoms or complaints about the August 2018 incidents; Ms Bibi's first clash with Maya.
28. It is not inconsistent of Ms Bibi to say she cried every day after the incidents in August 2018, when there was no medical consultation about it. The evidence is clear that the incidents occurred and I accept that Ms Bibi found them stressful. Things then seemed to settle down for Ms Bibi a couple of weeks later following the meeting with "DJ" and Maya when she thought the problem had ended, until 2 November 2018 the day after she was sent home early.
29. There is no record of a consultation with Dr Gounder in August 2018. The first after the August events was on 4 September 2018 about unrelated issues. It is not clear when the meeting with "DJ" and Maya had occurred, which had in the mind of Ms Bibi ended the matter, although it appears to have been approximately two weeks after the incident. In any case, while Ms Bibi was upset by the altercations with Maya in August 2018, this was nowhere near as significant to her as the later events of the dismissal and the behaviour of her colleagues in making what she believed to be a false complaint. It was after hearing about these things that Ms Bibi consulted Dr Gounder.
30. From all this I do not find Ms Bibi's evidence unreliable. It is supported by the respondent's statements in general.
31. The respondent submits that Dr Anderson simply accepts what Ms Bibi says in her statement and does not delve into the events behind the alleged injury. However, the references in the history taken by Dr Anderson to the statements do not indicate there was no direct questioning of her at consultation. The history recorded is generally consistent with the other evidence. Dr Anderson also refers to Dr Gounder's notes and those of Ms Jackson. His conclusion follows a logical sequence and reflects the comprehensive evidence of distress suffered by Ms Bibi from 2 November 2018.

32. Dr Lee takes the history of distressing events and symptoms but then essentially disregards it in favour of what he says were the results of a “Medical Symptom Validity Test” with a “Structured Inventory of Malingered Symptomatology”. Dr Lee says this provided, “conclusive proof of markedly exaggerated psychiatric disturbance and cognitive impairment.” In other words he believes it proves Ms Bibi is fabricating her illness. This seems to me a rather sweeping conclusion which is not properly explained; a conclusion contrary to that of three other key medical practitioners. For these reasons I prefer the evidence of Dr Anderson, Dr Gounder and Ms Jackson to that of Dr Lee.
33. As all the reports confirm, there is no evidence of any other factors being causative of the psychological condition. The parties did not make submissions on substantial contributing factor, no doubt for that reason.
34. I find that Ms Bibi suffered psychological injury of Major Depressive Disorder in the course of her employment with the respondent as diagnosed by Dr Anderson. The employment was a substantial contributing factor to the injury.

Issue – Was the psychological injury suffered by Ms Bibi wholly or predominantly caused by the reasonable actions of the employer with respect to dismissal? (s 11A(1) 1987 Act)

35. In *Chisholm v Thakral Finance Pty Ltd trading as Novotel Brighton Beach* [2011] NSWCCPD 39 (*Chisholm*) Roche DP set out a useful guide to the legislation and authorities equally relevant to the section 11A (1) issues in this case:

“Section 11A(1) of the Workers Compensation Act 1987 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.’

In a claim for compensation for psychological injury, the Commission has to decide whether the whole or predominant cause of the psychological injury was the employer’s action or proposed action with respect to one or more of the actions listed in s 11A(1), and, if so, whether the action or proposed action was reasonable (*Manly Pacific International Hotel Pty Ltd v Doyle* [1999] NSWCA 465; 19 NSWCCR 181 at [4]).”

36. The onus of establishing a s 11A(1) defence is on the employer (*Ritchie v Department of Community Services* [1998] NSWCC 40; (1998) 16 NSWCCR 727; *Department of Education and Training v Sinclair* [2005] NSWCA 465; 4 DDCR 206; (*Sinclair*)).

Wholly or predominantly

37. The s 11A(1) category of action relied on by the respondent is dismissal.
38. The concepts “wholly” and “predominantly” need to be considered separately.¹ The expression “wholly or predominantly” has been held to mean “mainly or principally” caused.²

¹ *Smith v Roads and Traffic Authority of NSW* [2008] NSWCCPD 130

² *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; *Ponnan v George Weston Foods Ltd* [2007] NSWCCPD 92; *Temelkov v Kemblawarra Portuguese Sports and Social Club* [2008] NSWCCPD 96

39. In *Manly Pacific International Hotel Pty Ltd v Doyle* [1999] NSWCA 465; (1999) 19 NSWCCR 181, Fitzgerald JA said whether actions, in respect of one of the specified matters, were the whole or predominant cause of psychological injury was “a question of fact and degree, which involves consideration of all the factors which produced (the worker’s) condition”.
40. Ms Bibi says that she was stressed and upset by the incidents in August 2018 with Maya. These events no doubt contributed to the onset of the psychological condition. However, there was a much more significant reaction to what she was told on 2 November 2018 by Mr Ghamwari.
41. The shock of the information was no doubt made worse by the fact she had been given false information by the local managers when sent home early. There were two elements to Ms Bibi’s distress at the time of that discussion. The first of these was the immediate concern for her future, and the sense of unfairness of being dismissed without being heard on an allegation she was not made aware of until told by Mr Ghamrawi. The second was her work colleagues making the allegation against her, which she saw as an attempt to destroy her career.
42. Dr Gounder cites in his certificates both bullying and unfair dismissal as the basis of the psychological distress. Ms Jackson also refers to the two elements in her notes for 21 November 2018, noting the symptoms due to the dismissal and the “belief that a colleague had tried to destroy her career”. Ms Jackson also notes on 26 February 2020 that Ms Bibi “worries about her work and the gossip that happens at work”.
43. Dr Anderson records preoccupations with the workplace events,

“Her explanation was that, ‘They hated me, especially the Indian girls, because I got the overtime and was the best picker’. She expressed feelings of humiliation and was preoccupied with the thought that she had been looking forward to permanency in the job.”
44. Dr Anderson says Ms Bibi was affected by the complaint made by her work colleague and also the effective dismissal without being given any opportunity to rebut the complaints.
45. The respondent submits that because there was no clinical note of the effect of the conflict between Ms Bibi and colleagues before she was terminated then this leaves the dismissal as wholly or predominantly the cause of the condition.
46. However, the competitors for causative responsibility are not limited to, on the one hand, the workplace incidents in August and October 2018 that Ms Bibi was aware of; and the employer’s action in dismissing her on the other.
47. As noted above there were two elements to the psychological distress arising from the discussion with Mr Ghamwari on 2 November 2018. One of these elements is not action of the employer in dismissal, but action by colleagues against Ms Bibi. Both elements are significant. It is difficult to see one element as being more causative than the other.
48. Dr Lee records the history of events at work including Ms Bibi’s reported distress at the time of dismissal but does not assist the respondent in giving an opinion as to “wholly or predominantly” given he believes there was no psychological injury in the first place.
49. What is established by the evidence is that the injury was not “wholly” caused by the action of the employer. The evidence also does not establish either of the two causative elements as “predominantly” the cause of the injury. Both are identified as components, but they appear to be equal in significance.

50. Given the element of causative distress from the actions of Ms Bibi's colleagues at the end of October 2018 that was not part of the employer's action in dismissal, the respondent is unable to discharge the onus on the issue.
51. For these reasons I find the employer's action regarding dismissal was not wholly or predominantly the cause of Ms Bibi's psychological injury.

Reasonable action

52. The issue of reasonable action should also be addressed in case I am wrong on the issue of "wholly or predominantly".
53. The Court of Appeal considered the meaning of the words "reasonable action" in *Commissioner of Police v Minahan* [2003] NSWCA 239; 1 DDCR 57, in which the Court cited with approval the following passage from *Irwin v Director-General of School Education* (Unreported, NSW Compensation Court, Matter No. 14068/97) where Judge Geraghty said:

"The question of reasonableness is one of fact, weighing all the relevant factors. The test is less demanding than the test of necessity, but more demanding than a test of convenience. The test of 'reasonableness' is objective, and must weigh the rights of employees against the objective of the employer. Whether an action is reasonable should be attended, in all the circumstances, by a question of fairness."
54. The assessment of whether an employer has acted reasonably requires an objective assessment of the conduct involved (*Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138 at [50] (*Jeffery*), and not the subjective opinions of the employer or worker.
55. In *Ivanisevic v Laudet Pty Ltd* (unreported, 24 November 1998), 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."
56. Reasonableness is judged having regard to fairness appropriate in the circumstances, including what went before or after a particular action (Burke J in *Melder v Ausbowl Pty Ltd* [1997] 15 NSWCCR 454). Armitage J in *Jackson v Work Directions Australia Pty Ltd* [1998] NSWCC 45 stated "only if the employer's action in all the circumstances was fair could it be said to be reasonable."
57. In *Sinclair Spigelman* CJ observed that one must look at the entire process to see if it was reasonable action within s 11A. That includes looking at the circumstances surrounding the action, both before and after the action.
58. The respondent refers to *D-G, Dept of Education and Training v Pembroke* [2006] NSWCCPD 182 (*Pembroke*) in which it was found that all relevant factors must be taken into account including the rights of both the employee and the employer.
59. In *Balranald Shire Council v Walsh* [2013] NSWCCPD 47 at [50] an employer's failure to follow its own procedures in relation matters of discipline led to a finding that the employer's actions were not proven to be reasonable.
60. As the applicant submits, the difficulty for the respondent in discharging the onus on this part of the defence is that there is no material before me that establishes that a reasonable process occurred. The evidence is that there were many flaws, and an insurmountable one; that is, Ms Bibi was denied procedural fairness. The adverse action against her of being removed from her workplace position and having her transition to permanency cancelled was taken as the result of an allegation without giving an opportunity to Ms Bibi to be heard. The issue of procedural fairness was raised by Mr Ghamwari with the local manager after his discussion with Ms Bibi, and he expressed concerns about the process. However, the local managers at the work site appear to have rejected his concerns.

61. There is no evidence as to any formal guidelines of the respondent of its own for dealing with complaints and grievances between workers that would assist it in establishing that the respondent followed a reasonable process. I note that no internal guidelines that allowed the action taken by the employer in this matter would themselves be reasonable.
62. It is submitted for the respondent that because Ms Bibi was aware of the “zero tolerance” policy against bullying, the process taken by the employer was reasonable. It is also submitted that the whole of the process must be considered on the principles from *Sinclair* and *Pembroke* including the fact that Ms Bibi was a casual. The implication of this submission is that an employer should not be expected to cater to casuals with the same standards of procedural fairness as might be expected for permanent employees.
63. As discussed above the test is objective so does not depend on the belief of an employer or employee (see *Jeffery*). What may be an otherwise commendable policy against bullying, such as the respondent’s, does not displace basic principles of fairness being afforded a worker, permanent or casual, before adverse action is taken against them.
64. Ms Bibi had commenced with the respondent in October 2017 and in March 2018 had become an established “regular” casual rostered for the 2:00 pm to 10:00 pm shift. She was considered by the respondent’s managers to be a good worker. She was in the process of being made permanent, having had the medical for this on 25 October 2018, when this was suddenly cancelled as part of the adverse action of the respondent.
65. The respondent does not identify in its submission any separate principles for casual workers to the effect that basic procedural fairness concepts are suspended. I note that the disagreement seems to have been a relatively minor issue between two or three workers.
66. In all the circumstances it is not possible for the respondent to discharge the onus regarding reasonable action.
67. The respondent’s defence under s 11A(1) of the 1987 Act is not made out.

Entitlement to weekly compensation

68. The evidence, apart from that of Dr Lee, which I have rejected, is that Ms Bibi was totally unfit for work in the period claimed, and I find that way.
69. There were no submissions made as to the pre-injury average earnings (PIAWE). The applicant’s Wages Schedule in the Application to Resolve a Dispute has the rates applicable for the period claimed as shown in the orders.

Medical expenses

70. It follows from the above finding that Ms Bibi is entitled to s 60 medical expenses for the compensable injury.

SUMMARY

71. Ms Bibi suffered psychological injury of Major Depressive Disorder in the course of her employment with the respondent; the employment was a substantial contributing factor to the injury.
72. The respondent’s defence pursuant to s 11A(1) of the 1987 Act fails.
73. Ms Bibi is entitled to weekly compensation based on total incapacity for the period claimed.

74. Ms Bibi is entitled to s 60 of the 1987 Act medical expenses.
75. The claim for s 66 of the 1987 Act lump sum compensation should be remitted to the Registrar for referral to an Approved Medical Specialist.