

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1212/20
Applicant: Nicole Dookwah
Respondent: State of New South Wales (NSW Police Force)
Date of Determination: 25 June 2020
Citation: [2020] NSWCC 212

The Commission determines:

1. The applicant sustained a psychological injury pursuant to s 4 and 11A(3) of the *Workers Compensation Act 1987* (the 1987 Act).
2. Employment was a substantial contributing factor to the injury pursuant to s 9A of the 1987 Act.
3. The injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to transfer, performance appraisal or discipline pursuant to s 11A(1) of the 1987 Act.

The Commission orders:

1. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for assessment as follows:

Date of injury:	6 May 2016 (deemed)
Body part/system:	Psychological
Method:	Whole Person Impairment.

2. The materials to be referred to the AMS are the include the Application to Resolve a Dispute and all attachments; the Reply and all attachments; the report of Dr Ash Takyar dated 12 August 2019, lodged by the applicant on 25 May 2020; and the Statement of Reasons accompanying this Certificate of Determination.
3. The matter is suitable for video assessment.
4. The matter to be listed for further teleconference upon receipt of the Medical Assessment Certificate to deal with the quantum of any entitlement to lump compensation pursuant to ss 66 and 67 of the 1987 Act and orders as to costs.

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

Rachel Homan
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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Ms Nicole Dookwah (the applicant) claims that she sustained a psychological injury in the course of her employment as a police officer from January 2007 to 6 May 2016.
2. The State of New South Wales (the respondent) has disputed liability for the injury under dispute notices issued pursuant to ss 74 and 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) dated 2 September 2016, 11 October 2019 and 4 February 2020.
3. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) lodged in the Commission on 4 March 2020. The applicant seeks lump compensation for permanent impairment pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) and for pain and suffering pursuant to s 67 of the 1987 Act.

ISSUES FOR DETERMINATION

4. The parties agree that the following issues remain in dispute:
 - (a) whether the applicant sustained a psychological injury pursuant to ss 4 and 11A(3) of the 1987 Act as claimed;
 - (b) whether employment was a substantial contributing factor to the injury;
 - (c) whether the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to transfer, performance appraisal and / or discipline pursuant to s 11A(1) of the 1987 Act;
 - (d) the degree of permanent impairment resulting from injury;
 - (e) quantum of any entitlement to lump sum compensation pursuant to ss 66 and 67 of the 1987 Act, and
 - (f) orders as to costs.

PROCEDURE BEFORE THE COMMISSION

5. The parties appeared for conciliation conference and arbitration hearing by telephone on 25 May 2020. The applicant was represented by Mr Simon Hunt, instructed by Ms Erin Sellars. The respondent was represented by Mr John Gaitanis of counsel, instructed by Mr Mark Jeppesen.
6. 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

7. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and attached documents;
 - (b) Reply and attached documents, and
 - (c) Supplementary report of Dr Ash Takyar dated 12 August 2019, lodged by the applicant on 25 May 2020.
8. Neither party applied to cross-examine any witness or adduce oral evidence.

Applicant's evidence

9. The applicant's evidence is set out in a written statement dated 24 May 2016.
10. The applicant said that she had been employed in her current role as a Senior Constable – general duties for around 12 months and had been employed by the New South Wales Police Force for nine and half years.
11. The applicant gave evidence that she had previously experienced workplace bullying during her first Command which had led to her becoming suicidal. The applicant dealt with the episode on her own and did not report it.
12. The applicant said that in or around April 2016, she was interviewed by the Inspector Paul Stephens with regard to a breach of appointments due to leaving her Taser on her desk. The applicant said she knew who had made the complaint against her and felt the report was a bit underhanded. The applicant said she would have advised the person who had left the Taser on the desk that it was there rather than report the matter to the boss. The applicant said she owned up to what she had done when interviewed.
13. On 4 May 2016, the applicant was informed of around half a dozen further internal complaints including, going home to sleep, refusing to interview a person and failing to search a female. Some of the complaints were six months old and the applicant questioned why they had not been dealt with earlier. The applicant was shocked to hear of the complaints and found them a challenge to her personal morals.
14. On 5 May 2016, the applicant had attended the Coonamble Show in the morning and was finished by lunchtime. The applicant was due to commence work at 3.30 pm. When the applicant got home she began to think about work and this caused her to get a headache and feel sick. The applicant's husband recommended she did not go to work and the applicant booked a doctor's appointment for the next day.
15. On 6 May 2016, the applicant was feeling unwell and in tears about going to work. The applicant telephoned Inspector Stephens and advised him that she could not attend work that day. During the call, Inspector Stephens asked the applicant if she had attended the show the previous day. The applicant said she had until lunchtime. Inspector Stephens also asked if the applicant's husband was working. Inspector Stephens said he was not happy about the applicant taking time off and did not want a pattern emerging.

16. Following that telephone conversation, the applicant was in tears and feeling even worse. The applicant saw her normal family doctor, Dr Mutukumarana and told the doctor about how she had been feeling about work. The applicant was prescribed Lovan and referred to a mental health worker for anxiety and depression. The applicant was given a non-workers compensation medical certificate for one week.
17. The applicant later spoke to her peer support officer at work who explained that her time off could be converted to "hurt on duty". On 11 or 12 May 2016, Dr Mutukumarana issued the applicant with a WorkCover certificate of capacity stating that she was unfit to work.
18. The applicant saw a mental health worker, Mr Lawrie May on 23 May 2016. He recommended the applicant see a psychologist for depression and anxiety. Seroquel was prescribed to help the applicant sleep at night. Mr May told the applicant that she was too fragile to return to work.
19. The applicant said that she had not otherwise suffered from any diagnosed psychological conditions. The applicant denied any abnormal external stressors outside of work aside from the normal vagaries of life.

Witness evidence

Paul Stephens

20. Inspector Paul Stephens prepared a statement dated 1 June 2016. Inspector Stephens said he had known the applicant since March/April 2015. Inspector Stephens was the senior duty officer in charge of the Southern sector including Coonamble, where the applicant worked.
21. Inspector Stephens said that the applicant was becoming competent in her role. After transferring to general duties at Coonamble, the applicant was relearning some things she had not been exposed to for some time. The applicant was able to perform in her role and Inspector Stephens had no issues with the work that she did. Inspector Stephens said that at 5 May 2016, the applicant had not been under any formal conduct or performance management plans.
22. In October/November 2015, there were some issues in relation to the quality of the applicant's work including the time it was taking her to complete tasks. Inspector Stephens tasked two sergeants to informally mentor the applicant as she relearned aspects of her role. In December 2015, the applicant had used all of her sick leave and was placed on a mandatory medical certificate scheme. In April 2016, Inspector Stephens undertook an investigation into the applicant leaving her Taser unattended on a desk. The matter was finalised with the applicant receiving formal counselling and her Taser certification revoked.
23. Inspector Stephens said there was also an investigation being handled by Acting Inspector Bruce Gregory relating to a number of matters dating from December 2015 to March 2016.
24. Inspector Stephens said he had not witnessed the applicant exhibiting any behaviour or making comments that indicated that she was feeling stressed and/or anxious as a result of work. Inspector Stephens said the applicant's workload was not overly heavy. The applicant had made an application for social circumstance transfer out of Coonamble based on issues arising with her husband and treatment being sought by him.

25. Inspector Stephens said that on 5 May 2016, he received a phone call from the applicant's husband advising that she would not be at work that day as she had a migraine. The next day, Inspector Stephens was advised that the applicant had been at the Showground that morning. Inspector Stephens had a telephone discussion with the applicant asking her about her attendance at the Showground. Inspector Stephens also asked about the applicant's husband's work as her roster had been changed to address childcare issues which would have been negated if he was off work. Inspector Stephens advised the applicant that he did not want to see a pattern of behaviour emerge again which may result in her being put back on mandatory medical certificates as had occurred in December 2015. Inspector Stephens said he did not recall the applicant sounding or appearing to be crying or upset.

Bruce Gregory

26. Acting Inspector Gregory prepared a statement on 2 June 2016 indicating that he did not have a lot of interaction with the applicant as he was stationed at Walgett while she was stationed at Coonamble. As such he did not feel able to comment on her competency in her role.
27. Acting Inspector Gregory said he had not heard anything that would have indicated that the applicant was stressed and/or anxious as a result of work and he was not aware of any external stressors.
28. Acting Inspector Gregory stated that on 3 May 2016, he called the applicant to speak to her in relation to a number of internal matters. The applicant appeared to be reasonably confident and Acting Inspector Gregory did not detect any signs of anxiety. The applicant did not ask why the older matters had not been dealt with earlier.
29. Acting Inspector Gregory said that following the telephone discussion he sent an email to the applicant setting out the matters that he had been tasked with investigating and advised her that he intended to interview her at Coonamble Police Station on 5 May 2016.

Mary-Frances Fede

30. Sergeant Mary-Frances Fede prepared a statement dated 7 June 2016 in which she said she had known the applicant since she commenced duties in Coonamble. Sergeant Fede managed the applicant for a little while as she was having a few problems easing herself back into general duties.
31. Sergeant Fede said that she believed the applicant was having some problems with other staff in Coonamble when she commenced. Sergeant Fede said that in the period in which she directly managed the applicant they got on fairly well and she had no issues with her.
32. Sergeant Fede said in late 2015 she was approached by Inspector Stephens to assist the applicant before she was to be put on a work performance plan. Due to her previous work, the applicant had lost touch with the nuances of general duties policing. Sergeant Fede worked with the applicant for around three months and found she actually started working to a level that was quite acceptable. Sergeant Fede advised Inspector Stephens that the applicant had reached a good standard and she was happy with the work she was producing. Another sergeant, Adam Summers told Sergeant Fede that he could not see any of the issues that had apparently been identified in relation to the applicant.

33. Sergeant Fede said,

“I believe that Nicole is not a stock standard Police Officer, she has a life outside of the Police, and is not somebody who tends to blend in well on a social basis (with her workmates).

...

I know that some of the staff at Coonamble do not like Nicole, however, there are personality clashes in every workplace so this is not an unusual circumstance.”

34. Sergeant Fede recalled an incident when the applicant took the initial report of a search warrant. The applicant told Sergeant Fede that a detective had come up to her and asked her if she was coming to execute the search warrant, however, she had been advised by another detective that she was not required. The applicant was then advised by the first detective that it was her job and she should have been doing the search warrant. The detectives left the station without the applicant. Sergeant Fede said she knew this situation had upset the applicant.

35. Sergeant Fede said that she had approached the first detective about the matter. The detective told Sergeant Fede that the applicant had lied about being told she was not required because when she had approached the applicant the other detective was standing right behind her and had not said anything.

36. There was another incident when the applicant had been required to download some CCTV footage from the local council computer. The applicant did not know how to save the footage so bookmarked the relevant footage and advised her supervisor of what she had done. Sergeant Fede arranged for another officer to save the CCTV footage but the station then got extremely busy and the task was forgotten. Even though Sergeant Fede felt she was as much to blame for the error, the detectives saw the applicant as the first person to blame.

37. Sergeant Fede said she was aware that the applicant was the subject of a number of other complaints including going home to sleep whilst on duty. Sergeant Fede said:

“I have spoken to Inspector Stephens about the above complaint, and I advised him that Coonamble is a hard place to work, and sometimes Officers get so exhausted that they need to shut their eyes for 20 - 30 minutes. I also advised him that I know that all Officers at Coonamble (including myself) have fallen asleep whilst on duty there.”

38. Sergeant Fede said she had spoken to the applicant since she had gone on sick leave and she had been very emotional and upset:

“Nicole has advised me that this has happened to her before, where somebody has locked their sights onto her and it does not matter what she does nothing is good enough for that person.

Nicole wants to return to work but she cannot cope with work. She appears to be quite fragile when it comes to dealing with the staff at Coonamble and the only person she is willing to speak to is me.

I know that she is quite upset about not being at work, and also about the fact that she believes that she is being bullied at work.

Whilst I have not seen how the other staff treat Nicole (aside from the two examples that I have given above), I know that whenever she attends work she is really upset.”

Other evidence

Incident Notification Form

39. A New South Wales Police Force Incident Notification Form completed by Sergeant Fede on 11 May 2016 described an incident on 5 May 2016 as follows:

“The officer claimed that there are issues in the work place that she is not coping with. The officer stated that there is conflict in the work place and that she is the subject to unjustified internal complaints. The officer has stated that she is currently suffering with anxiety, work-related stressors and just not being able to cope with going to work. She has stated she does not have any issues with the job but has issues with the work environment as this has happened to her in the past and believes she knows where all these complaints will lead. She is afraid to go to work and is seeking assistance with coping with the workplace.”

Resolution Outcome Report

40. A “Resolution Outcome Report – Mandatory” prepared by Acting Inspector Gregory dated 21 July 2016 identified four alleged breaches of the code of conduct and ethics by the applicant:

“Issue 1: Senior Constable DOOKWAH on the 16 December 2015 was unavailable to assist other officers from Castlereagh LAC as she was at her residential address, possibly sleeping, during a rostered shift. Senior Constable DOOKWAH on the 9 March 2016 has refused to conduct an interview with a young person and left work for an unknown reason leaving another officer as an alpha unit with custodies.

Issue 2: Senior Constable DOOKWAH on the 8 March 2016 was requested to assist with a search warrant relating to a matter of which she was the officer in charge but refused to do so. Senior Constable DOOKWAH on the 9 March 2016 has refused to conduct an interview with a young person and left work for an unknown reason leaving another officer as an alpha unit with custodies.

Issue 3: Senior Constable DOOKWAH on the 7 November 2015 did not adequately investigate the attempted stealing of an LED light bar from a vehicle in Coonamble.

Issue 4: Senior Constable DOOKWAH between the 5 and 11 March 2016 failed to investigate a graffiti offence in Coonamble.”

41. The report indicates that following enquiries, Issue 1 was not sustained. On the balance of probabilities, there was insufficient evidence to conclude that the applicant was unavailable to assist the Castlereagh detectives in a search of a female due to her being at home and possibly sleeping. There was insufficient evidence to conclude that the applicant refused to interview a young person. There was insufficient evidence to conclude that the applicant left work for unknown reasons.
42. Issue 2 was not sustained as on the balance of probabilities there was insufficient evidence to conclude that the applicant was requested to assist with a search warrant relating to a matter where she was officer in charge and refused to do so.
43. Issue 3 was not sustained as there was insufficient evidence to conclude that the applicant did not adequately investigate the attempted stealing of an LED light bar from a vehicle in Coonamble.

44. Issue 4 was also not sustained as there was insufficient evidence to conclude that the applicant failed to investigate a graffiti offence in Coonamble between 5 and 11 March 2016.
45. A number of other issues were raised in the investigation:

“A number of supervisory issues have been raised in this investigation. Detective Senior Constable NEADER reports that Senior Constable DOOKWAH's husband entered the Coonamble Police station, possibly using the front door pin, and then walked through the station near the custody room when there were several prisoners in custody. She reports that this is a common occurrence. NEADER and Leading Senior Constable HERON also report that Senior Constable DOOKWAH has regularly been completing university work on police computers during her shifts. Leading Senior Constable HERON reports that she has worked many shifts with Senior Constable DOOKWAH where she goes to sleep while on duty. These issues will need to be addressed by Senior Constable DOOKWAH's supervisors.”

Medical Discharge File

46. An internal document from the applicant's medical discharge file gives a background of the applicant attesting from the New South Wales Police Academy on 30 January 2007 and performing duties at The Hills Local Area Command until 9 August 2009. The applicant was then transferred to Police Transport Command. On 21 June 2015, the applicant applied for and won a transfer to Castlereagh Local Area Command in a general duties position attached to Coonamble Police Station.
47. On 11 May 2016, the applicant submitted a “P902” relating to conflict in the workplace and a complaint matter. The subsequent WorkCover claim was not supported by the insurer. At an independent medical examination on 27 June 2016, the applicant was diagnosed with an adjustment disorder with mixed anxiety and depressed mood and unfit for any work.
48. The applicant relocated from her residence at Coonamble to Armidale in August 2016. On 12 December 2016, the applicant returned to work in a restricted capacity at Armidale Police Station. In January and February 2017, the applicant was cleared to return to pre-injury duties by her treating doctors.
49. The applicant returned to Coonamble Police Station on 28 February 2017. The applicant remained working at Coonamble until 23 May 2017, when she produced a medical certificate and WorkCover certificate stating she was permanently unfit for work until she was assigned to a workplace other than Coonamble.
50. The document records that during a telephone conversation on 26 September 2017, the applicant indicated that her family relocated due to a job offer for her husband and her oldest child was enrolled in a local school and they were well settled in Armidale. The applicant indicated that she was unwilling to relocate again. The applicant was offered a position at Inverell but rejected the offer after discussing it with her husband and doctor as it was felt the travel would send her mental health backwards.

Academic Transcripts etc.

51. Documents from the University of New England at Armidale indicate that the applicant was enrolled in off-campus study towards a Bachelor of Rural Science. An academic record commencing from Trimester 1 2017 records that the applicant had passed all subjects, achieving credits, distinctions and high distinctions. “Special examination” had been granted in three subjects in Trimester 2 2019.

Treating medical evidence

52. The clinical notes of Castlereagh Medical Centre in Coonamble are in evidence. A clinical note recorded by the applicant's general practitioner, Dr Hewa Mutukumarana, on 5 May 2016 stated:
- “work stressors / in police / some personality issues at the workplace made her off from work
very tearful/ and nil other stress factors/
a history of Depression / long ago
nil postnatal blue
has two kids / youngest two years old / partner / lives their own/
poor sleep / low in mood/
nil suicidal ideation”
53. The applicant was commenced on fluoxetine 20 mg.
54. On 11 May 2016, Dr Mutukumarana noted the applicant was experiencing “Anxiety ++” and still did not feel okay to go to work. The applicant was referred to visiting psychiatrist, Natalie Johnston, and a mental health worker, Lawrie May, at Coonamble Hospital.
55. In a letter, dated 18 May 2016, Dr Mutukumarana referred the applicant to Ms Johnston for generalised anxiety disorder. The referral indicated that the applicant was a policewoman in Coonamble who had some ongoing workplace related stressors, mostly personality issues at the workplace. The applicant was very tearful and denied other financial or non-work stressors. The applicant had a history of depression long ago. The applicant was on a trial of fluoxetine.
56. A mental health assessment completed on 23 May 2016 by Mr Lawrie May recorded a history of the applicant moving to Coonamble 12 months earlier as a policewoman. Six months earlier the applicant had been informed that there had been six internal complaints about her including, leaving a Taser on her desk unsecured, sleeping on duty and refusing to interview a perpetrator. The applicant described previous trouble when she first graduated from the Academy. A provisional diagnosis of “depression, personality traits” was recorded.
57. A further mental health assessment, dated 7 June 2016, noted the applicant was considering leaving the police force to go back to training horses. The applicant was worried about why complaints had been made about her. A past history was recorded of the applicant feeling stressed when she received complaints about her work when working in her first station as a police officer in 2007. The applicant had felt victimised by her senior sergeant and his wife.
58. Clinical notes recorded by Ms Johnston on 13 July 2016 noted an onset of symptoms two months earlier when the applicant was told about complaints against her at work. The complaints were unreasonable and made by a particular person at work. Then a cascade of older complaints emerged. The applicant had been bullied before. The applicant was waking at night ruminating about work and had constant dreams about work. The notes also referred to “ups and downs” in the applicant's relationship.
59. On 14 July 2016, Ms Johnston, prepared a report for Dr Mutukumarana indicating that the applicant had moved to Coonamble 12 months earlier for the purpose of taking a job with the police service. The applicant had presented following an experience of bullying at work approximately two months earlier. Ms Johnston described the applicant's symptoms and formed the impression that the applicant was having an episode of major depression with features of anxiety. The applicant's fluoxetine prescription was increased.

60. Clinical records from Marsh Street Medical Practice in Armidale indicate that the applicant first presented to Dr Jeanette Meredith on 22 September 2016 giving a history of prolonged depression/anxiety initially treated under WorkCover. The applicant previously worked as a police officer and had a history of bullying at work. The applicant had been off work since 5 May 2016.
61. On 22 December 2016, Dr Meredith noted that the applicant had completed two weeks of a return to work program in Armidale without problems and was feeling comfortable in the workplace.
62. On 19 January 2017, Dr Meredith reported that the applicant was fit to continue a return to work program involving desk duties and front counter duties, three days per week at 12 hours per day.
63. On 3 February 2017, Dr Meredith certified the applicant as fit to resume full operational duties as a general duties police officer. Dr Meredith's clinical notes of that date indicated that the applicant was enjoying work and was due to return to work at Coonamble in March.
64. On 3 April 2017, Dr Louise Marie Fisher recorded a clinical note as follows:
- “History:** hypersomnia and falling asleep on the job
forgetful- left her gun belt off behind in the work toilet
feels like her depression tiredness again but given her work need to exclude osa
takes lovan first thing before the work
depressed mood, cries at home
doing 3-4 days a week at Coonamble”
65. On 23 May 2017, Dr Fisher noted:
- “History:** husband states she is not coping with the working in Coonamble - doesn't sleep properly, restless all night, irritable and snappy with children, irritable and snappy with him, hypersomnia and crying in the middle of the night no energy, cried for 2 days with the transfer was declined has deteriorated rapidly since the transfer was declined unable to eat, vomiting seeing Carolyn not actively suicidal but getting the thoughts that would rather was dead than had to go back to Coonamble working with the friends of the bully and being treated so badly”
66. Dr Fisher also prepared a medical certificate on 23 May 2017 stating that the applicant:
- “will be unfit for work duties from Tuesday, 23 May 2017 until she is assigned a different workplace other than Coonamble. She is unable to cope with working in this environment due to the reactivation of her depression from the traumatic experiences she went through in her first placement there, and with ongoing bullying and lack of support. Her condition is exacerbated by the travelling she has been required to do, and separation from her 2 young children and husband. She would be fit to work in Armidale or near vicinity, on a 'part time' basis only - 3 x 9.5 hour day shifts a week as per her current agreement.”
67. On 17 August 2017, Dr Fisher responded to a series of questions from the respondent. Dr Fisher diagnosed depression secondary to workplace bullying and community threats in Coonamble. Dr Fisher was asked to outline medical reasons, including any specific triggers, that prevent the applicant from working at Coonamble. Dr Fisher responded:

“She went back in February for four weeks, then back again in late April for about four weeks. These attempts resulted in her becoming steadily more depressed and suicidal. Triggers in Coonamble were Shae Heron (bully from previous placement there) returning and staying next door to police station and socialising with serving police. Other triggers are dealing with the superintendent and duty officer not responding to her distress eg. threaten to sack her for ‘abandonment of duties’ when she was suicidal.”

68. On 18 September 2017, Dr Fisher certified:

“Nicole is unable to return to the posting in Coonamble, and while the posting in Glen Innes would have been suitable, she is unable to psychologically withstand the travel to and from there for the duration of the 3 year posting while her family resides in Armidale. Hence, she will have to decline the offer on medical grounds, and thus will have to be medically discharged having exhausted all other possibilities available.”

69. On 27 March 2018, Dr Fisher prepared a report, stating:

“Mrs Dookwah suffers from depression with some anxiety issues, secondary to her previous employment with the NSW Police force, due to bullying and harassment experienced when working at Coonamble.

Her symptoms are persistent but minor as long as she does not have to work for the police and encounter the stressful situations that lead to her being triggered again. She requires intermittent psychological treatment and Lovan 20 mgs.

Her condition is not in remission.

I agree that Mrs Dookwah is medically fit for fulltime employment outside of the NSW Police Force. I do not think that she is suited for work where violence or public derision is commonplace, so would not suggest prison work/security work/ambulance work or the armed services would be suitable for her any longer”

Dr Patrick Morris

70. Psychiatrist, Dr Patrick Morris conducted an independent medical examination for the respondent on 27 June 2016.

71. Dr Morris took a history consistent with the applicant’s statement and noted the previous incidents of workplace bullying:

“Ms Dookwah reported a period from 2008 to 2009, soon after she joined the Police Force, when she was working at Castle Hill Police Station when she was bullied by a Sergeant and a Detective who were married, who constantly complained about her performance. She felt suicidal at that time but did not report the bullying and did not receive any treatment. She applied for and got a transfer to Computer Crime and these feelings went away. For the six years she was working in Computer Crime she enjoyed her work and there were no psychological symptoms.”

72. Dr Morris made a diagnosis as follows:

“In my opinion, Ms Dookwah has the condition of Adjustment Disorder with Mixed Anxiety and Depressed Mood. She has marked distress that is out of proportion to the severity of the stressor and there has been significant impairment in her social and occupational functioning. She has a depressed mood including low mood, and also symptoms of anxiety including nervousness and worry.

This psychiatric condition appears to have emerged in the context of what she believes was unfair criticism of her by her superiors in the Police Force. It also appears to have triggered feelings she had from 2008 when she said she was severely bullied by a couple of senior police officers to the point where she was feeling suicidal.”

73. Dr Morris said the condition was not an aggravation of a pre-existing condition but the bullying that the applicant said she went through in 2008 fed into her response to the criticism she had received recently in the police force.

74. Dr Morris said he believed the condition was the result of reasonable action of the Acting Inspector who notified her of the complaints about her performance.

Dr Ash Takyar

75. Consultant psychiatrist, Dr Ash Takyar provided a medicolegal report to the applicant's solicitors dated 27 December 2018 and 12 August 2019. Dr Takyar took a history as follows:

“Ms Dookwah reported a change in her mental state that commenced whilst working in the NSW Police Force in Coonamble in the context of difficulties with her policing partner. She recalled that her policing partner (partner hereon in) subsequently made a number of complaints against her; Ms Dookwah reported that she, her supervising Sergeant and the investigating Sergeant felt these were falsified complaints. She described a loss of resilience over time as a result of having to deal with the complaints and the subsequent investigation/resolution process, eventually finding that she began to struggle to function at work. Prior to that, she had no prior psychiatric history.”

76. The applicant said that her psychological difficulties were really triggered around 4 May 2016 when the applicant found herself unable to attend work after attending the Coonamble Show in the morning. Further:

“She reported that the difficulties behind this mental state change began ‘a few months before that, I didn't think anything of it, basically one of the Senior Constables had started targeting me - ostracising [me]. I'd work with her and she wouldn't talk to me’. She stated that the Senior Constable would only make minimal and operational conversation, ‘no chitchat, and if I went to say hello to everyone she would ignore it and everyone else would say hello’. She noticed this around late 2015.

She reported that by ‘early '16’, she found that the influence of the Senior Constable started to spread. She reported that the Senior Constable's best friend was a Detective based in Walgett. She stated that the Detectives from Walgett would often spend more time in Coonamble, because of the amount of work in the area. Ms Dookwah reported that she began to see that the Detective began acting in a similar manner to her partner towards her....

She noted that the Detective engaged in similar behaviours – ‘more ostracising, being a small community of 3000, started to hear things back from the Senior Constable who caused the problems, was telling everyone that- I was crazy’. She recalled that she came to find out about these rumours and comments later.”

77. The applicant also said her policing partner had put in a number of complaints against her, only one of which was sustained and which she was able to accept. The applicant had forgotten to put away her Taser once while at work when she was in a rush to go to court. The applicant reported that this was not unusual and other officers would do the same at times:

“She continued, ‘But then, a few weeks later, I got notification of half a dozen complaints [against me]’. She stated that, ‘The Sergeant looked through it. He knew it was bullshit, he was the one who had to interview me for it’. She found that the investigation ‘took longer because I went off’. The process began just before she was given two weeks off by her doctor, as noted above. She stated that she had been interviewed at home and her supervising Sergeant acted as her support person. She stated that her supervising Sergeant also felt that the complaints were untrue.”

78. Dr Takyar noted that the applicant had returned to work in December 2016 but at that stage her psychologist would not sanction her returning to Coonamble for fear that her mental state would worsen if she returned to her pre-injury environment. The applicant eventually moved to Armidale as her husband was able to transfer his work. The applicant worked for a period of around three months in Armidale during a return to work plan but then returned to Coonamble for five weeks:

“She stated that her work partner by that stage had been transferred to Bellingen, a six-hour drive away, but on Ms Dookwah's first day back, the Senior Constable came back to Coonamble and she reported that the entire station except for her were invited to a social function to celebrate her return. She felt excluded. She also reported that despite the six-hour journey (each way), her former policing partner would return on days off, and she found this difficult. She reported that she had to cease work for five or six weeks because she became severely iron deficient and needed time for treatment. This was attributed to poor food intake in the context of her stress and psychological symptoms. She returned to work for a further five weeks after this but found by that stage that she was no longer able to psychologically cope, and she ceased employment.”

79. Dr Takyar made a diagnosis of moderate grade DSM-V major depressive disorder and moderate to severe grade generalised anxiety disorder occurring in the context of a work injury. Dr Takyar said the work injury developed in the context of work bullying and harassment initially by her policing partner, a Senior Constable, and then by a Detective.
80. In his supplementary report on 12 August 2019, Dr Takyar indicated that he had reassessed the applicant on 30 July 2019. Dr Takyar reported that the applicant had informed him that she was medically discharged at the end of 2017. The applicant was continuing her studies towards a bachelor of rural science. The applicant studied by distance education rather than in-person lectures to manage her symptoms and capacity. The applicant was presently studying reduced hours and was on a study access plan which allowed access to special consideration involving flexibility with assessments.
81. The applicant was attending psychological treatment through psychology students in a program with the University of New England. The applicant was not seeing a full clinical psychologist or psychiatrist. The applicant continued on fluoxetine and melatonin to induce sleep.

82. Dr Takyar assessed the applicant as having 21% whole person impairment as a result of the injury described in his previous report.

Dr Peter Young

83. The respondent relies on medicolegal reports prepared by Dr Peter Young dated 3 October 2019 and 28 January 2020.
84. Dr Young first examined the applicant on 26 September 2019. On this occasion, Dr Young took a history as follows:

“Ms Dookwah reported that when she commenced duties at Coonamble she felt entirely well and was not experiencing any psychological symptoms. She said, however, that within a short period of starting she began to be ostracised and ignored by one colleague in particular, however this spread over time to involve a number of different colleagues in her office. She said that she felt increasingly distressed by this and isolated and dissatisfied.

She reported that in 2016, she was criticised regarding leaving a Taser on her desk. She said that this was a common occurrence and a minor issue that did not disturb her or cause distress. She said in May 2016 there were a number of other complaints which were raised regarding her which she viewed as being unwarranted and unjustified and the product of ongoing animosity from other staff at Coonamble. She said ‘I didn't care about it. I knew it was all shit’.

She reported, however, that she continued to experience increasing anxiety, which she described as being related to feeling isolated and ostracised by other staff rather than due to the disciplinary issues themselves. She said that as a result of this she felt that she could no longer continue at work as she was subject to bullying and unjust criticism.”

85. Dr Young noted that the applicant had commenced a return to work which the applicant initially found challenging but coped for a period of about six months before resuming normal duties. With the resumption of normal duties, however, she was required to return to Coonamble. When the applicant returned to Coonamble, although the staff member who had previously bullied her had left, the behaviour had transferred on to other staff. The applicant again felt ostracised and ignored and experienced acute anxiety and distress and was unable to continue at work.
86. At the time of the report, the applicant was two years from finishing a degree in agricultural science.
87. Dr Young made a diagnosis as follows:

“Ms Dookwah presents with subjective symptoms of anxiety and depression in relation to perceived bullying at work by co-workers. She does not report that issues related to performance management and discipline have had a significant impact on her mental state.

... With regard to diagnosis, taken at face value Ms Dookwah reports significant subjective symptoms of anxiety and depression, stress identified as relating to feeling ostracised and otherwise bullied at work such that the DSM-5 diagnosis of Adjustment Disorder appears to be appropriate.”

88. Dr Young noted that Dr Takyar's diagnosis in 2018 of major depressive disorder and generalised anxiety disorder were differential diagnoses but he disagreed on the severity of the symptoms meeting diagnostic criteria for those conditions.

89. Dr Young was asked whether the whole or predominant cause of the applicant's condition was due to performance/disciplinary matters raised with the worker and responded:

"According to Ms Dookwah, her symptoms relate primarily to perceived bullying and harassment by other staff rather than disciplinary matters that occurred during the normal mechanisms of her employment.

...If this is the case, then section 11A issues cannot be considered the whole or predominant cause of her injury. I note however that the explanation by Ms Dookwah appears to be somewhat implausible and has previously been rejected in earlier parts of her worker's compensation claim."

90. Dr Young noted some inconsistencies in the applicant's appearance and report of symptoms and impairments. Dr Young considered these would be best resolved by detailed psychometric testing.

91. In his supplementary report of 28 January 2020, Dr Young said he had reviewed additional documents and said these supported a finding that the applicant was fit for pre-injury duties. Dr Young said:

"The documents indicate that the decision to proceed to medical discharge was made because it was seen as the only way to resolve Ms Dookwah's decision not to accept transfer to a worksite more remote from her new residential location.

Contemporaneous clinical notes from the period of her last period at work indicate that she reported to her GP dissatisfaction with the transfer process, and difficulties related to managing her domestic situation. There is a marked inconsistency in that the issues reported to me of bullying are absent from her contemporaneous clinical notes."

92. Dr Young said he had also reviewed clinical notes which he considered remarkable for the inconsistencies between the content and the history reported by the applicant. There were prominent issues in the notes related to the applicant's husband, other domestic issues and an absence of work-related concerns which had been reported as bullying. Dr Young said:

"The evidence here indicates Ms Dookwah's reported symptoms to me are likely significantly over-reported as well as misattributed. Therefore, the symptoms required to make a diagnosis by DSM-5 criteria are likely not present and the conditions indicating likely malingering behaviour are present."

93. Dr Young additionally reviewed the applicant's academic record from 2017 and 2019 and said:

"These results are not consistent with any significant degree of psychiatric impairment such as to cause occupational disability. The results are also inconsistent with the difficulties in functioning Ms Dookwah reported to me, as occurring over this period and is further evidence of mis-reporting by Ms Dookwah."

Applicant's submissions

94. Mr Hunt referred me to the applicant's statement and noted the history of the applicant being subjected to bullying in her first Command at Castle Hill. The applicant was able to transfer away from the bullying, her symptoms improved and the applicant resumed a fruitful career. Mr Hunt noted that there was no factual dispute as to those events.
95. Following the applicant's transfer to Coonamble, there were some interpersonal conflicts and complaints were made about the applicant, including one involving her Taser being left unsecured. The applicant experienced difficulties with her policing partner, a senior constable, and then a detective. In early May 2016, a number of other complaints from the senior constable were investigated. The applicant came to the view that the complaints were of no substance. Mr Hunt noted that Sergeant Fede had agreed with the applicant's assessment.
96. Mr Hunt noted that Sergeant Fede's evidence acknowledged that the applicant was having difficulties with her co-workers. The applicant had been provided with peer support to bring her up to speed with the requirements of general duties policing and Sergeant Fede said there were no longer any performance issues.
97. The complaints made against the applicant were set out in the report of Acting Inspector Gregory. Four complaints were investigated and none were sustained. Mr Hunt said this was consistent with Sergeant Fede's observations and lent support to the applicant's view that the complaints made against her were lacking in substance.
98. Mr Hunt submitted that for the purposes of ss 4 and 9A, the applicant had experienced bullying in the course of employment both at Castle Hill and Coonamble. There was no real dispute that s 9A would be satisfied.
99. Mr Hunt noted that the applicant consulted her general practitioner, Dr Mutukumarana, on 5 May 2016. At that initial consultation, work stressors were identified. The clinical note also referred to a history of depression long ago which Mr Hunt said was consistent with the applicant's evidence about her experience at Castle Hill. The applicant was referred to a psychologist, Ms Johnston, and the referral included reference to ongoing workplace stressors and personality issues at work.
100. Mr Hunt noted that the clinical records of the Coonamble Hospital mental health service referred to work events as well as previous problems in the workplace at Castle Hill. Ms Johnston was also provided a history of bullying in the workplace causing an onset of symptoms about two months earlier as well as previous bullying in her first Command.
101. Mr Hunt noted that the history recorded by Dr Morris in August 2016 was consistent with the contemporaneous evidence. Dr Morris recorded that the applicant's psychological symptoms emerged as a result of unfair criticism in the context of previous events in 2008. Mr Hunt submitted that Dr Morris recorded a history of injury consistent with ss 4 and 9A of the 1987 Act.
102. Mr Hunt referred me to the reports of Dr Takyar and the comprehensive history recorded there of the applicant experiencing difficulties with her policing partner including complaints. The applicant described a loss of resilience over time as a result of dealing with these matters. Although Dr Takyar said there was no prior psychiatric history, Mr Hunt said that that Dr Takyar had recorded a rounded history of events in the workplace which would satisfy ss 4 and 9A.

103. Mr Hunt said it was unclear what materials were initially provided to Dr Young. Based on the history given to him, Dr Young was prepared to make a diagnosis of an adjustment disorder. For some reason, despite making a diagnosis, Dr Young considered the applicant should undertake psychometric testing. Mr Hunt noted there was no evidence of psychometric testing being performed prior to Dr Young's supplementary report.
104. Mr Hunt noted that in his supplementary report, Dr Young referred to the applicant's ability to attend university and questioned the diagnosis. Mr Hunt noted that the applicant's enrolment at university was not secret and had been referred to extensively by Dr Takyar. Mr Hunt submitted that the applicant's ability to perform at university, by correspondence, with a reduced workload, did not mean that she didn't suffer an injury in 2016. Mr Hunt submitted that the contemporaneous medical evidence in 2016 supported a diagnosis of psychological injury. There was ample evidence to support a finding of injury for the purposes of ss 4 and 9A. Mr Hunt submitted that I would place little weight if any on Dr Young's supplementary report. Dr Young had not considered the events in Castle Hill or the events at Coonamble prior to May 2016 in that report.
105. With regard to the defence in s 11A(1), Mr Hunt observed that the respondent bore the onus of establishing the whole or predominant cause of the injury and the reasonableness of its actions. Mr Hunt submitted that any action related to transfer chronologically post-dated the onset of injury.
106. With regard to performance appraisal and discipline, Mr Hunt noted that nothing had been provided from the respondent to establish that its actions were reasonable. There was no evidence with regard to the respondent's policies or procedures for handling Tasers. Further complaints had been put to the applicant that were six months old. Mr Hunt queried why those complaints had not been dealt with earlier. Mr Hunt noted that there was no evidence from the respondent regarding alleged deficiencies in the applicant's performance. No evidence of the process or procedures followed to bring the complaints to the applicant's attention. The only evidence was Acting Inspector Gregory's report.
107. Mr Hunt submitted that I would not be satisfied that the respondent's actions with respect to performance appraisal or discipline were reasonable or that they were the whole or predominant cause of the applicant's psychological injury. Mr Hunt submitted that the events in early May bore a chronological connection with the onset of symptoms but there was no medical evidence to indicate that those actions were wholly or predominantly causative of the applicant's injury. Mr Hunt noted that Dr Morris had given an opinion that earlier events had contributed to the applicant's injury. Dr Young had not engaged in a proper consideration of those earlier events. Mr Hunt submitted that I would not be satisfied that the s 11A(1) defence was made out.

Respondent's submissions

108. Mr Gaitanis submitted that the clinical notes revealed an absence of reporting of incidents of bullying of which the applicant now complained. In contrast, there was a plethora of instances in the clinical notes where complaints were made of psychological symptoms unrelated to employment.
109. Mr Gaitanis noted that the applicant's claim shied away from the issue of transfer and submitted that issues around transfer had caused the applicant significant stress. Mr Gaitanis submitted that the applicant was attempting to attribute her psychological injury to matters other than transfer.
110. Mr Gaitanis referred me to Dr Young's first report and said that, accepting the applicant's history at face value only, he diagnosed an adjustment disorder. Mr Gaitanis said that when one dug deeper, the clinical notes revealed other causative events.

111. Mr Gaitanis noted that the applicant had prepared only one written statement dated 24 May 2016, which alleged workplace bullying and referred to complaints made against her. Mr Gaitanis said the applicant's statement did not go far enough in identifying the perpetrators of the workplace bullying. The evidence from the applicant was non-specific and ill defined. There was no identification of those persons who had caused the applicant grief either at Castle Hill or Coonamble. Mr Gaitanis argued that the applicant had engaged in a reconstruction of events to tailor an argument that her psychological condition was caused by workplace bullying rather than something such as transfer.
112. Mr Gaitanis submitted that by the end of 2016 the applicant was certified as fit for work. The applicant was later certified by Dr Meredith as fit to resume full operational duties. The applicant preferred to work at Armidale where she was then living with her family.
113. Mr Gaitanis said there were other factors to be considered before a conclusion could be reached that the applicant sustained an injury attributable to workplace bullying or complaints made against her. Mr Gaitanis noted that the records from Coonamble Hospital referred to the applicant's husband not liking Coonamble. The applicant wished to leave the police force to train horses. Reference was also made to the applicant wishing to leave Coonamble to be nearer to family and work with horses.
114. Mr Gaitanis accepted that Dr Johnston's report referred to bullying and harassment but said the other material identified a range of other motivations for the applicant to leave the police force and Coonamble. Mr Gaitanis noted that Dr Johnston did record that the applicant had studied agriculture and equine studies at university and her goal for the future was to work with horses.
115. Mr Gaitanis noted that material in the medical discharge file referred to the applicant self-relocating and wanting to work in Armidale where her family resided. There was reference in the clinical records to the applicant's husband having a possible tuberculosis diagnosis, back pain, concerns regarding her husband, being stressed about leaving her husband with the children, missing her children and wanting to be home.
116. Mr Gaitanis said the applicant was resistant to transferring back to Coonamble and preferred to be close to Armidale. Mr Gaitanis said the evidence indicated that the applicant's psychological symptoms deteriorated when her request to transfer to Armidale was declined.
117. Mr Gaitanis submitted that once all of the contemporaneous material was reviewed it was apparent that the applicant was experiencing significant difficulties with respect to transfer in contrast to the vague and ill-defined allegations of bullying and harassment. The contemporaneous material was at odds with the documents created for the purposes of the claim including the expert reports and the applicant's statement.
118. Mr Gaitanis submitted that the applicant denied a prior history of depression to Dr Johnston, Dr Takyar and Dr Young, which was at odds with the contemporaneous medical evidence, which referred to episodes of depression in the past.
119. Mr Gaitanis referred to Dr Young's supplementary report in which the history provided by the applicant was considered to be at odds with the clinical material provided to him on that occasion. Dr Young considered the applicant was not suffering from a diagnosable psychological condition and had no psychological impairment.
120. Mr Gaitanis referred to the applicant's academic record, which showed the applicant had achieved high distinctions and distinctions. Those results were said to be inconsistent with any significant degree of psychological impairment.
121. Mr Gaitanis submitted that Dr Morris's report would not be accepted because it predated the issue of transfer in 2016.

122. Mr Gaitanis submitted that any injury, if it occurred, was wholly or predominately caused by reasonable action by the employer with respect to transfer, performance appraisal or discipline. Sergeant Fede had been appointed as a mentor to the applicant due to performance issues. Further, it would have been irresponsible of the employer not to investigate the complaints raised against the applicant.
123. Mr Gaitanis said, however, that the respondent's main position was that the applicant had a series of relatively benign interactions in 2016 and was later certified as fit for pre-injury duties. The applicant returned to work but then had a series of grievances with regard to the issue of transfer but this did not amount to a psychological injury.
124. Mr Gaitanis said there was simply insufficient evidence as to what took place whilst the applicant was at Castle Hill. The applicant was able to resume work in any event.

Applicant's submissions in reply

125. Mr Hunt said it was important not to get lost in the argument about the transfer because the transfer followed the decompensation which had already occurred. The applicant was experiencing symptoms which had been diagnosed, even by Dr Morris, as a psychological condition well before the issues of transfer arose.
126. Mr Hunt said the applicant was reluctant to return to Coonamble as that place had been the source of the applicant's psychological injury. Mr Hunt suggested that the respondent's submissions were more relevant in the case of a claim for weekly benefits than that before the Commission in these proceedings
127. Mr Hunt submitted that the relevant test was whether employment was a substantial contributing factor to the injury because the applicant was an exempt worker. It was possible for there to be more than one contributing factor.
128. Mr Hunt submitted that there was no factual dispute as to the existence of interpersonal problems in the office. The applicant's supervising officer, Sergeant Fede had conceded as much. There was a pattern of behaviour in the workplace which Sergeant Fede agreed involved real events.
129. With regard to costs, Mr Hunt submitted that the matter was complex and involved a significant volume of material and a complex history of events and treatment. Mr Hunt submitted that the maximum uplift for complexity would be appropriate.

FINDINGS AND REASONS

130. Section 9 of the 1987 Act provides that a worker who has received an 'injury' shall receive compensation from the worker's employer in accordance with the Act. The term 'injury' is relevantly defined in s 4 as it applies to this case as:

"In this Act:

injury:

- (a) means personal injury arising out of or in the course of employment,
- (b) includes:
 - (i) a disease which is contracted by a worker in the course of employment and to which the employment was a contributing factor, and

- (ii) the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration...

131. An injury to which s 4 applies is only compensable if employment was a substantial contributing factor to the injury:

“9A No compensation payable unless employment substantial contributing factor to injury

- (1) No compensation is payable under this Act in respect of an injury unless the employment concerned was a substantial contributing factor to the injury.
- (2) The following are examples of matters to be taken into account for the purposes of determining whether a worker’s employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination):
 - (a) the time and place of the injury,
 - (b) the nature of the work performed and the particular tasks of that work,
 - (c) the duration of the employment,
 - (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker’s life, if he or she had not been at work or had not worked in that employment,
 - (e) the worker’s state of health before the injury and the existence of any hereditary risks,
 - (f) the worker’s lifestyle and his or her activities outside the workplace.
- (3) A worker’s employment is not to be regarded as a substantial contributing factor to a worker’s injury merely because of either or both of the following:
 - (a) the injury arose out of or in the course of, or arose both out of and in the course of, the worker’s employment,
 - (b) the worker’s incapacity for work, loss as referred to in Division 4 of Part 3, need for medical or related treatment, hospital treatment, ambulance service or occupational rehabilitation service as referred to in Division 3 of Part 3, or the worker’s death, resulted from the injury.”

132. “Psychological injury” is further defined in s 11A(3) of the 1987 Act:

- “(3) A psychological injury is an injury (as defined in s 4) that is a psychological or psychiatric disorder. The term extends to include the physiological effect of such a disorder on the nervous system.”

133. In *Attorney General's Department v K¹ (K) Roche* DP summarised the principles to be applied in determining causation in cases of psychological injury at [52]:

“The following conclusions can be drawn from the above authorities:

¹ [2010] NSWCCPD 76.

- (a) employers take their employees as they find them. There is an 'egg-shell psyche' principle which is the equivalent of the 'egg-shell skull' principle (Spigelman CJ in *Chemler* at [40]);
- (b) a perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in *Chemler* at [54]);
- (c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in *Chemler* at [69]);
- (d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in *Sheridan*);
- (e) there is no requirement at law that the worker's perception of the events must have been one that passed some qualitative test based on an 'objective measure of reasonableness' (Von Doussa J in *Wiegand* at [31]), and
- (f) it is not necessary that the worker's reaction to the events must have been 'rational, reasonable and proportionate' before compensation can be recovered."

134. Further at [54]:

"The critical question is whether the event or events complained of occurred in the workplace. If they did occur in the workplace and the worker perceived them as creating an 'offensive or hostile working environment', and a psychological injury has resulted, it is open to find that causation is established. A worker's reaction to the events will always be subjective and will depend upon his or her personality and circumstances."

135. The first question for determination is whether the applicant sustained an injury, as claimed, for the purposes of ss 4 and 9A of the 1987 Act. This task is made more difficult in the present case due to the lack of detailed evidence from the applicant directly as to the circumstances which, in her view, contributed to her psychological injury. As noted by the respondent, it is the applicant who bears the onus of establishing, on the balance of probabilities, that she sustained a psychological injury which satisfies the statutory tests.

136. The only evidence from the applicant is a single statement prepared in May 2016. That statement referred to a complaint made in respect of the applicant leaving a Taser unattended on her desk in April 2016; a series of other older complaints being investigated in May 2016; being unable to attend work on 5 May 2016; and a phone call with Inspector Stephens on 6 May 2016 regarding her absence the previous day. The statement indicates that thinking about work caused the applicant to experience a headache and feel sick on 5 May 2016 but does not provide any detail regarding any difficulties the applicant was experiencing whilst at work in the period prior to 5 May 2016. The applicant has provided no evidence in response to the issues raised by the dispute notices or the supplementary report given by Dr Young.

137. It is, however, necessary to consider the evidence as a whole. A history of events occurring in the workplace prior to 5 May 2016 is conveyed by the other evidence before me including, the witness statements, contemporaneous medical evidence, the histories provided to the medicolegal experts and other materials. I am satisfied having regard to the totality of that evidence that the applicant transferred to a general duties position at Coonamble Police Station in mid-2015 after a number of years working in a different role. I also accept on the evidence that the applicant's first Command after attesting from the Police Academy was at Castle Hill. It is not disputed that the applicant experienced interpersonal difficulties, which the applicant regarded as bullying, by her senior sergeant and his wife whilst in that role. The difficulties were not reported but the applicant became suicidal as a result.
138. It is apparent from the evidence of Inspector Stephens and Sergeant Fede, that the applicant experienced some initial difficulties adjusting back into a general duties role. I find that Sergeant Fede and another sergeant were appointed as informal mentors to assist the applicant improve the quality of her work. I am satisfied that the applicant was then able to perform her work to a satisfactory standard. Inspector Stephens indicated that he had no issues with the applicant's work and she was not under any formal conduct or performance management plans as at 5 May 2016. Similarly, Sergeant Fede considered that the applicant had reached a good standard and she was happy with her work.
139. It is also apparent from Sergeant Fede's evidence that the applicant experienced a number of interpersonal difficulties with her colleagues at Coonamble Police Station. Sergeant Fede described the applicant as somebody who did not tend to blend in well socially with her workmates. Sergeant Fede confirmed that some of the staff at Coonamble did not like the applicant and there were personality clashes.
140. These difficulties were described in more detail by the applicant in the history provided to Dr Takyar. Dr Takyar reported that one of the Senior Constables had started targeting the applicant and ostracising her. The Senior Constable would not talk to the applicant and would only make minimal and operational conversation. The Senior Constable would not say hello to the applicant. By early 2016, the applicant found that the influence of the Senior Constable had spread to other staff including a Detective based in Walgett. The Detective began acting in a similar manner, which the applicant found ostracising.
141. Dr Young took a history of the applicant feeling ostracised and ignored by one colleague in particular, within a short period after commencing at Coonamble. This spread over time to involve a number of different colleagues in her office. The applicant felt increasingly distressed by this and isolated and dissatisfied.
142. Reference to interpersonal difficulties in the workplace also appears in the contemporaneous medical evidence. The clinical note recorded by Dr Mutukumarana on 5 May 2016 indicated that "some personality issues at the workplace" had caused the applicant to go off work. Dr Mutukumarana's letter of referral to Ms Johnston indicated that the applicant's main difficulties were personality issues in the workplace.
143. The incident notification form completed by Sergeant Fede on 11 May 2016 also referred to conflict in the workplace and issues with the work environment.
144. No evidence has been presented by the respondent to contradict the account of interpersonal difficulties provided by the applicant to the doctors. It is not necessary, however, for me to find that the applicant was objectively bullied and harassed as claimed and, in the circumstances, I would not be prepared to do so. It is enough that there were real events which the applicant perceived as hostile. I am satisfied on the evidence, including that of Sergeant Fede, that the applicant did have a series of interactions with her colleagues at Coonamble Police Station which she perceived as hostile.

145. In this context, a number of complaints were made about the applicant. Although the applicant accepted that she had inappropriately left her Taser unattended on her desk, the applicant considered this matter could have been dealt with informally without having to be reported to her boss.
146. Four other complaints were identified in the report prepared by Acting Inspector Gregory. It is not clear from that report who made the complaints that were investigated by Acting Inspector Gregory. The other evidence indicates, however, that it was the applicant's perception that it was her policing partner who had made the complaints.
147. Acting Inspector Gregory's report confirmed that the complaints were not sustained following investigation. The applicant reported to the doctors involved in her case that she considered these complaints to be underhanded and lacking in substance. The incident notification form indicates that the applicant felt the internal complaints were unjustified. Sergeant Fede's evidence also suggested that the applicant felt she was being blamed or criticised unfairly for matters that others were equally responsible for. Sergeant Fede said the applicant had told her that this had happened to her before where somebody had locked their sights onto her and it did not matter what she did, nothing was good enough for that person.
148. That the complaints were perceived as hostile and triggered the applicant's psychological symptoms is confirmed by the clinical notes recorded by Ms Johnston on 13 July 2016. The notes recorded by Mr May also noted the applicant felt stressed when she had received complaints about her work when working in her first station in 2007. The applicant was said to be worried about why the new complaints had been made against her.
149. I am satisfied on this evidence that there were real events in the workplace, in the nature of difficult personal interactions with her colleagues and internal complaints, which, on the background of her past experiences at Castle Hill, the applicant perceived as hostile. I am further satisfied that these events were causative of a diagnosable psychological condition.
150. In the letter of 18 May 2016, Dr Mutukumarana considered the applicant had a generalised anxiety disorder. In early June 2016, Mr May made a provisional diagnosis of depression. Ms Johnston diagnosed an episode of major depression with features of anxiety in July 2016.
151. The medicolegal experts involved in this case have also all diagnosed a psychological condition caused by these events at different times. The medicolegal expert who examined the applicant for the respondent in June 2016, Dr Morris, diagnosed an adjustment disorder with mixed anxiety and depressed mood. Dr Morris said the applicant's psychiatric condition emerged in the context of what the applicant believed was unfair criticism of her by her superiors which had triggered feelings she had from 2008.
152. Dr Takyar made a diagnosis of moderate grade major depressive disorder and moderate to severe grade generalised anxiety disorder occurring in the context of bullying and harassment by the applicant's policing partner and then by a detective.
153. Dr Young also initially made a diagnosis of adjustment disorder with significant subjective symptoms of anxiety and depression related to feeling ostracised and otherwise bullied at work in his first report in October 2019.
154. Dr Young altered his opinion in his supplementary report in January 2020. My analysis of that report, however, indicates that Dr Young was primarily concerned on that occasion with events which occurred after May 2016. In particular, Dr Young appears to have turned his mind to events around the applicant's medical discharge in late 2017 and difficulties experienced by the applicant after she returned to work following the period of incapacity commencing in May 2016. Dr Young specifically considered the clinical notes from the applicant's last period of work which indicated dissatisfaction with a transfer process and her domestic situation at the time. Dr Young said the clinical notes showed an absence of work-related concerns which had been reported to him as bullying.

155. It is on the basis of Dr Young's supplementary report that the respondent argues that the applicant did not sustain a diagnosable psychological condition related to bullying and harassment at work.
156. I accept that there are references in the medical evidence to difficulties experienced by the applicant's husband, family issues, the applicant's desire to leave the police force, the applicant's desire to work with horses and her desire to leave Coonamble soon after she ceased work in 2016. I accept that the applicant relocated to Armidale in around August 2016 and appears to have been reluctant to return to work in Coonamble despite being certified as fit to resume pre-injury duties in early 2017. I accept that the applicant ultimately requested a medical discharge because she was unwilling to work in Coonamble and had declined a transfer to Inverell.
157. None of these circumstances, however, causes me to doubt that the applicant sustained a psychological injury caused by events at work in the period leading up to 6 May 2016.
158. Whilst there may have been other stressors or circumstances in the applicant's personal life during this period, there is no evidence before me to suggest that those were causative of the psychological condition diagnosed by the practitioners involved in the applicant's case. Those practitioners consistently indicated that it was the applicant's employment circumstances, which had caused the onset of psychological symptoms giving rise to the condition they diagnosed.
159. By the time of Dr Young's 2020 report there were questions raised about the veracity of the applicant's complaints and whether or not she had a diagnosable psychological condition. Dr Young's report and his consideration of the contemporaneous medical evidence and events occurring after May 2016, do not, however, suggest to me that there was not a genuine psychological condition previously. I am not satisfied that, in his supplementary report, Dr Young focussed his mind on the question requiring determination in these proceedings. That is, whether the nature and conditions of the applicant's employment between 2007 and 6 May 2016 caused a psychological injury.
160. After careful consideration of the evidence as a whole, I am satisfied for the purposes of s 4(b)(i) that, as a result of the nature and conditions of her employment between 2007 and May 2016, the applicant contracted a psychological injury in the course of employment to which employment was a contributing factor. Having regard to the examples set out in s 9A(2), I am further satisfied that the applicant's employment was a substantial contributing factor to the injury for the purposes of s 9A(1) of the 1987 Act.
161. The ongoing effects of that injury is not a matter which I am tasked with determining in these proceedings, there being no claim for weekly benefits or medical treatment. The degree of permanent impairment resulting from that injury would be a matter for an Approved Medical Specialist (AMS) to assess, if the injury is compensable.

Section 11A(1)

162. A worker who receives a psychological injury which meets the statutory definitions will not be entitled to compensation if the defence in s 11(A)(1) of the 1987 Act is made out:
- “(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.”

163. Subsection 11(A)(1) is a disentitling provision and an employer who wishes to rely upon it carries the onus of establishing that defence².
164. In *Hamad v Q Catering Ltd*³, Snell DP found that in many cases there will need to be medical evidence to establish that the employer's action was the "whole or predominant cause" of the injury:

"The extent to which aspects of the appellant's history contributed to causing the psychological injury was not, in the circumstances, something which could be decided in the absence of medical evidence. There may be cases in which causation of a psychological injury can be established without specific medical evidence, for example where there is a single instance of major psychological trauma, with no other competing factors. The need for medical evidence, dealing with the causation issue in s 11A(1) of the 1987 Act, will depend on the facts and circumstances of the individual case. In the current case, as in most, there are a number of potentially causative factors raised in the appellant's statement and the medical histories. Proof of whether those factors, which potentially provide a defence under s 11A(1), were the whole or predominant cause of the psychological injury, required medical evidence on that topic. The extent of any causal contribution, from matters not constituting actions or proposed actions by the respondent with respect to discipline, could not be resolved on the basis of the Arbitrator's common knowledge and experience."

165. The test of reasonableness is an objective one⁴. In *Commissioner of Police v Minehan*⁵ Foster AJA (Sheller and Santow JJA agreeing) cited with approval a passage from an unreported decision of Geraghty J in *Irwin v Director-General of School Education*⁶:

"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".

166. In *Northern New South Wales Local Health Network v Heggie*⁷ (Heggie) Sackville AJA considered a number of authorities dealing with s 11A(1) and distilled the following propositions:

"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.

² *Pirie v Franklins Ltd* [2001] NSWCC 167; *Department of Education and Training v Sinclair* [2005] NSWCA 465.

³ [2017] NSWCCPD 6; BC201701872.

⁴ *Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138.

⁵ [2003] NSWCA 239.

⁶ (unreported 18 June 1998).

⁷ (2013) 12 DDCR 95; [2013] NSWCA 255; BC201311746.

- (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.
- (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.”

167. The respondent in this case claims that the applicant’s psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to performance appraisal, discipline and/or transfer.
168. For the reasons given above, I am satisfied that events pertaining to transfer occurred after psychological injury to which these proceedings pertain was sustained. Whether or not those events caused a deterioration in the applicant’s psychological symptoms or a separate condition or merely a grievance, chronologically those events could not have been the whole or predominant cause of the injury under consideration in this case. The defence pursuant to s 11A(1) insofar as it relates to “transfer” therefore fails.
169. Chronologically, there were a series of events which may broadly speaking be categorised as actions with respect to performance appraisal or discipline occurring in the period during which the psychological injury was sustained.
170. I accept that the applicant demonstrated some performance difficulties associated with the quality of her work when she first transferred to Coonamble. This is evident from the statements of Inspector Stephens and Sergeant Fede. That witness evidence indicates, however, that the applicant’s work improved following the appointment of informal mentors and, at the time she ceased work, there were no issues with the quality of the applicant’s work.
171. I also accept that there were some issues around the utilisation of sick leave in December 2015 although these appear to have resolved after the applicant was required to produce medical certificates. Although the respondent’s actions in this regard may best be described as action with respect to the provision of employment benefits, I have assumed for present purposes these actions might also be categorised as actions with respect to performance appraisal or discipline.

172. There is, however, no medical evidence before me to indicate that action with regard to the applicant's performance and work quality in October/November 2015 or her use of sick leave in December 2015, were causative of the applicant's psychological injury.
173. There were a number of other events in the workplace occurring more proximately to the cessation of work which could also be described as action with respect to performance appraisal or discipline.
174. I am satisfied on the evidence that there was a discussion between Inspector Stephens and the applicant with respect to her leaving her Taser unattended on her desk in April 2016. I accept that the applicant was formally counselled and her Taser certification revoked as a result.
175. I accept that on 3 May 2016, Acting Inspector Gregory contacted the applicant by telephone to advise her of a number of internal complaints. Acting Inspector Gregory advised the applicant that he intended to interview her on 5 May 2016 at Coonamble Police Station.
176. I also accept that on 6 May 2016 there was a telephone discussion between Inspector Stephens and the applicant regarding her absence from work the previous day in which he conveyed that he did not want to see a pattern of behaviour emerge again which may result in the applicant being put back on mandatory medical certificates as had occurred in December 2015.
177. Both Inspector Stephens and Acting Inspector Gregory have indicated in their statements that they did not perceive that the applicant was distressed, upset or otherwise demonstrating psychological symptoms during their interactions with the applicant on these occasions. The proximity of these actions to the cessation of work is, however, such that careful consideration must be given to whether they were the whole or predominant cause of the applicant's psychological injury.
178. Work stressors were identified in the clinical record of Dr Mutukumarana on 5 May 2016 but there was no specific reference to the respondent's actions with respect to the Taser incident, the investigation of the internal complaints or the use of sick leave. The clinical note rather suggested that personality issues in the workplace had caused the applicant to go off work. This was reflected in the letter of referral from Dr Mutukumarana to Ms Johnston.
179. Mr May referred to the internal complaints but not specifically the investigation of those complaints in his clinical notes. Mr May's notes did not suggest that the applicant was worried about the investigation itself or the possible outcome of the investigation. Rather, the applicant was worried about why the complaints had been made. This was expressed in the context of her previous experience of feeling victimised by her senior sergeant at Castle Hill and his wife.
180. Ms Johnston recorded that there was an onset of symptoms when the applicant was told about the complaints against her at work. The applicant was concerned that the complaints were unreasonable and made by a particular person. This caused symptoms due to the applicant having been "bullied" before.
181. The contemporaneous medical evidence thus suggests that it was the interpersonal difficulties the applicant was experiencing in the workplace and in particular the making of what she perceived as hostile complaints by her colleague that was the predominant cause of the applicant's condition. The contemporaneous evidence does not suggest that the conversations between Inspector Stephens and Acting Inspector Gregory and the applicant, or their investigations or other actions in response to the complaints were causative of the psychological injury.

182. Turning to the medicolegal evidence, in a statement, which is somewhat difficult to reconcile with his previous opinions and the history provided to him, Dr Morris did indicate that the applicant's condition was the result of reasonable action by the Acting Inspector who notified her of the complaints about her performance. That opinion was not further explained.
183. Dr Takyar attributed the work injury to bullying and harassment by the applicant's policing partner, a Senior Constable and then by a Detective. The history recorded by Dr Takyar placed particular emphasis on the problematic personal interactions between the applicant and these other officers but also referred to the making of complaints which the applicant felt were untrue or unreasonable.
184. Dr Young was, in his first report, specifically asked to comment upon the whole or predominant cause of the applicant's psychological injury. Dr Young reported that the applicant related her symptoms primarily to perceived bullying and harassment by other staff rather than disciplinary matters that occurred during her employment. The applicant did not report that issues related to performance management and discipline had any significant impact on her mental state. Dr Young said, if this was the case, then s 11A issues could not be considered the whole or predominant cause of her injury. Dr Young did, however, express concern as to the plausibility of the applicant's explanation. In his later report, Dr Young did not consider there was any psychological injury at all.
185. On my assessment of the evidence there was nothing unreasonable about the action taken by Inspector Stephens in response to the Taser issue or the use of sick leave or the actions of Acting Inspector Gregory with regard to the investigation of other internal complaints made against the applicant. I am not satisfied on the evidence before me, however, that those actions were the whole or predominant cause of the applicant's psychological injury. A distinction must be drawn between the complaints and the respondent's actions in response to the complaints.
186. The weight of medical evidence indicates that it was the difficult personal interactions and personality conflicts between the applicant and her co-workers and the making of complaints about the applicant by those co-workers, which were the whole or predominant cause of the psychological injury. I am not satisfied that those actions are appropriately described as actions taken or proposed to be taken by or on behalf of the employer with respect to performance appraisal or discipline.
187. Even if I am wrong in my characterisation of the internal complaints, there is insufficient evidence to satisfy me on the balance of probabilities that those complaints which were investigated by Acting Inspector Gregory were reasonable. The report of Acting Inspector Gregory indicates that none of the complaints investigated by him was substantiated. The applicant consistently expressed the view that those complaints were unfair or unreasonable. There is some support for this view in the evidence of Sergeant Fede.
188. The complaint with respect to the applicant's Taser does appear to have been reasonable and the applicant appears to have accepted this whilst also acknowledging that she would have approached the matter differently. I am not satisfied, however, that the complaint about the Taser in April 2016 was the whole or predominant cause of the injury, having regard to the totality of the evidence.
189. I am not satisfied that the respondent has discharged the onus of establishing on the balance of probabilities that the applicant's psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to performance appraisal, discipline and/or transfer. The applicant's psychological injury is thus compensable.

Degree of permanent impairment

190. In view of my findings above, it is necessary for an assessment of the degree of permanent impairment resulting from the applicant's injury to be made in order for the applicant's entitlement to lump sum compensation to be determined. I am not satisfied that this is a case where it is appropriate for me as arbitrator to determine that matter on the evidence before me, given the divergence of medicolegal opinions. The matter will be remitted to the Registrar for referral to an AMS for a whole person impairment assessment.
191. Noting the protocols currently in place in response to the COVID-19 pandemic, the parties have agreed that this matter is suitable for video assessment and is not urgent. All of the materials lodged in the Commission, together with this Statement of Reasons, are to be referred to the AMS for consideration.
192. The matter will be listed for further teleconference upon receipt of the Medical Assessment Certificate to deal with the quantum of the applicant's entitlement to lump sum compensation under s 66 and 67 of the 1987 Act.
193. Although submissions were made by the applicant at arbitration hearing with regard to costs, I consider it appropriate to defer making orders or any certification as to complexity until the outstanding matters are resolved.

SUMMARY

194. The Commission determines:
- (a) The applicant sustained a psychological injury pursuant to s 4 and 11A(3) of the 1987 Act.
 - (b) Employment was a substantial contributing factor to the injury pursuant to s 9A of the 1987 Act.
 - (c) The injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to transfer, performance appraisal or discipline pursuant to s 11A(1) of the 1987 Act.
195. The Commission orders:
- (a) The matter is remitted to the Registrar for referral to an AMS for assessment as follows:

Date of injury:	6 May 2016 (deemed)
Body part/system:	Psychological
Method:	Whole Person Impairment
 - (b) The materials to be referred to the AMS are the include the Application to Resolve a Dispute and all attachments; the Reply and all attachments; the report of Dr Ash Takyar dated 12 August 2019, lodged by the applicant on 25 May 2020; and this Statement of Reasons.
 - (c) The matter is suitable for video assessment.
 - (d) The matter to be listed for further teleconference upon receipt of the medical assessment certificate to deal with the quantum of any entitlement to lump sum compensation pursuant to ss 66 and 67 of the 1987 Act and orders as to costs.

