

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 3815/19  
**Applicant:** Elissa Tyson  
**Respondent:** Serendipity (WA) Pty Limited  
t/as Advanced Personnel Management  
**Date of Determination:** 24 October 2019  
**Citation:** [2019] NSWCC 348

The Commission determines:

1. The applicant sustained a psychological injury in the course of her employment with the respondent with a deemed date of injury being 27 August 2018.
2. The respondent has failed to establish a defence pursuant to section 11A of the *Workers Compensation Act 1987*.
3. The applicant has had no current work capacity since 7 April 2019.

The Commission orders:

1. The respondent is to pay the applicant the amount of \$303.64 per week from 7 April 2019 to date and continuing pursuant to section 37 (1)(a) of the *Workers Compensation Act 1987*.
2. The respondent is to pay the applicant's reasonable medical expenses for treatment for her psychological injury pursuant to section 60 of the *Workers Compensation Act 1987*.

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

John Isaksen  
**Arbitrator**

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOHN ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A Sufian*

Abu Sufian  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. The applicant, Elissa Tyson, claims to have sustained a psychological injury in the course of her employment with the respondent, Serendipity (WA) Pty Limited trading as Advanced Personnel Management.
2. The applicant claims that between 2 July 2018 and 27 August 2018 there was interpersonal conflicts between herself and co-workers and management which caused her to sustain a psychological injury.
3. The applicant ceased work on 28 August 2018 and claims that she has had no current work capacity since then.
4. The respondent, through its insurer Employers Mutual NSW Limited, initially accepted her claim and was paid weekly payments of compensation until 6 April 2019.
5. The respondent has subsequently issued notices dated 15 March 2019, 1 April 2019, 1 July 2019 and 23 July 2019 denying liability on the grounds that the psychological injury sustained by the applicant was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to discipline.
6. The parties agree that pre-injury average weekly earnings (PIAWE) of the applicant are \$379.55 per week.

### ISSUES FOR DETERMINATION

7. The parties agree that the following issues remain in dispute:
  - (a) Whether the applicant sustained injury in the course of her employment with the respondent (section 4 of the *Workers Compensation Act 1987* (the 1987 Act));
  - (b) Whether any psychological injury sustained by the applicant was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to discipline (section 11A of the 1987 Act).

### PROCEDURE BEFORE THE COMMISSION

8. The parties attended a conference and hearing on 17 October 2019 at Penrith. 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.
9. Mr Morgan appeared for the applicant, instructed by Mr Driscoll. Mr Doak appeared for the respondent, instructed by Ms Belinda Brown.
10. The Application to Resolve a Dispute (ARD) only claimed weekly payments of compensation even though a Notice of Charge from Medicare was included in the late documents filed by the applicant. In the event that the applicant was successful in this dispute, Mr Doak did not object to there being an order made that the applicant have her reasonably necessary medical expenses for psychological treatment met by the respondent.

## **EVIDENCE**

### **Documentary Evidence**

11. 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;
  - (c) Application to Admit Late Documents filed by the applicant;
  - (d) Application to Admit Late Documents filed by the respondent;
  - (e) Certificates of Capacity from Dr Khaja dated 24 September 2019 and 16 October 2019.

### **Oral Evidence**

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

## **FINDINGS AND REASONS**

### **The applicant's case**

#### ***The applicant's evidence***

13. The applicant has provided a statement dated 25 September 2018.
14. The applicant states that she previously had a 30-year career in banking, including being employed as a bank manager with the Commonwealth Bank. She states that she left the Commonwealth Bank in 2010 to care for her daughter.
15. The applicant states that she recommenced employment with ORS Group in May 2017 as a part-time employment consultant which involved working with clients with various disabilities and assisting them with job search activities and job placements. She states that she worked from 9.00am until 2.00pm on a Monday, Tuesday and Wednesday. She states that she enjoyed her work, found it rewarding, and did not have any stress working there.
16. The applicant states that in 2018 the ORS Group lost its contract with the government and the respondent bought out some of the ORS Group.
17. The applicant states that she commenced employment with the respondent on 2 July 2018 with the same job and hours of work that she had with the ORS Group.
18. The applicant states that there were new tasks that she was required to undertake in her new employment. She states that after about one week in her new employment with the respondent she met Steve Cremona, a business manager for the respondent. She states that Mr Cremona said to her that she was the first part-time person he had employed and he did not know how this was going to fit into the business. The applicant states that around this time Mr Cremona said to her "if you fuck up you fuck up and I expect you to work it out as you are all adults out there."

19. The applicant states that she found the workers in the office were not nice and friendly and she formed the view that she was being segregated from other staff. She also states that she was becoming frustrated by not getting out to see clients, undertaking marketing, and the treatment of some clients by others.
20. The applicant describes in her statement an event on a day in late July 2018 when she sought assistance from Simone Rockliff, but that Ms Rockliff was terse and abrupt towards the applicant. She states that this came as a shock to the applicant because Simone Rockliff was supposed to be her buddy and provide the applicant with assistance. The applicant states that a similar attitude was taken by Ms Rockliff the following day and that on this occasion Ms Rockliff stormed into the office of Amanda Becker, the Regional Manager.
21. The applicant states that she followed Ms Rockliff into Ms Becker's office to have a rational discussion of what had occurred. She states that Ms Rockliff in the presence of Ms Becker said that it was not her job to train the applicant and she did not have the luxury of working part-time. The applicant states that Ms Rockliff kept raising her voice when she said this and the applicant then became upset and commenced to cry. The applicant states that she formed the view that in this meeting she "was set up."
22. The applicant states that after going to the toilets so that she could be left alone, she then returned and Ms Becker, in the company of Mr Cremona, told the applicant that she was not going to tolerate that behaviour from her staff. The applicant states that she left work that afternoon in tears but did not seek any treatment.
23. The applicant states that she returned to work the next day with the decision to move past all of what had occurred. She states that Ms Rockliff said to her "I do not want to hear from you or speak with you." The applicant states that she was really hurt by this and as she was walking down to the toilets she mumbled to herself "there is no need to be such a bitch."
24. The applicant states that later that day she left the office to do some marketing but when she returned she found that another employee had moved all his work onto her desk and there were coffee cups all over her desk. She also states that she found a cord pulled out of her computer which she felt "was sabotaged."
25. The applicant states that there were times when staff would occasionally order lunch in but that she was not invited into this arrangement. She states that there were occasions when the applicant was not included when a staff member went to get coffee for other employees. The applicant also describes an occasion when the applicant was eating a Greek salad at her desk and Ms Rockliff said "what is that stink" and sprayed around Glen 20. The applicant states that she had "accepted that I was working with arseholes."
26. The applicant states that on or around 1 August 2018 she was called into a meeting with Ms Becker and Mr Cremona. She states that Ms Becker said that the applicant had called Ms Rockliff "a f...kin bitch." The applicant states that she was shocked by this allegation. She replied that she had said under her breath to herself "there is no need to be such a bitch." She states that she was shocked that this had become an issue. She states that Ms Becker informed her that she would have to refer this incident to the State manager as disciplinary action may need to occur. The applicant states that she reminded Ms Becker that Ms Becker had told the applicant and Ms Rockliff to resolve their problems and the applicant felt that it was childish to take this particular incident further.
27. The applicant states that over the next few weeks the clients from the ORS Group were starting to be transferred to the respondent's business and the applicant was happy to resume her normal duties and get on with her job and ignore the employees around her.

28. The applicant then states that on 27 August 2018 she was called into Mr Cremona's office, with no one else present. She states that Mr Cremona said that he and Ms Becker had decided to proceed with a disciplinary meeting regarding the comment that was made by the applicant about Ms Rockliff. The applicant states that the meeting would occur the following day so that she could get a witness. The applicant states that she was in shock as she had never had any disciplinary action or blemishes against her. She states that she also asked Mr Cremona about her future with the respondent and some feedback on her work performance but Mr Cremona said, with a smirk and smug demeanour, those matters were for discussion on another day.
29. The applicant states that she became stressed about the impending disciplinary meeting, left the office crying, and made an appointment to see her doctor the next day.
30. At the time of the statement made by the applicant, she had not returned to work. She states that she had been searching for work without success but had very little confidence with herself.
31. The applicant was paid weekly benefits of compensation until 6 April 2019. The applicant has continued to provide Certificates of Capacity which certify that she has no current work capacity.
32. There is also in evidence a "Grievance Statement" dated 29 August 2018, being two days after the applicant's last day of work for the respondent. That document includes much of what is in her statement dated 25 September 2018.
33. The applicant states that she was "placed into a hostile environment." She states that Mr Cremona had agreed that her caseload would be 20 clients, the same as at ORS Group, but that she had another eight to ten clients. She states that she had no hands on experience with certain tasks and although some training was provided, the applicant remained unsure of some of those tasks.
34. In this statement, the applicant concedes that she did mutter under her breath "there's no need to be such a bitch."
35. The statement concludes that the applicant has "given more than enough of my self to this psychological abuse, and decidedly bullying and pack mentality from all staff and Management."

### ***The applicant's medical evidence***

36. The clinical notes from Glenbrook Surgery, the general practice which the applicant attends, are in evidence.
37. The entry on 28 August 2018 includes the following:

"... Adjustment disorder due to depression and anxiety stemming from Bullying at work started since her employment 2/7/18 - worsening now teary - broke down work place bullying and harassment – condescending; humiliating behaviour and comments from workplace colleagues. Deliberate provoking remarks and exclusion from work place involvement which has affected her work."

38. There are references in the notes to the applicant attending a psychologist “Klara”, but there is no report or notes from this practitioner.
39. The applicant’s general practitioner, Dr Khaja, has provided a report dated 4 July 2019. In that report Dr Khaja recites the notes he made for the first consultation that the applicant had with him on 28 August 2018. He opines:
- “Her condition has clearly stemmed from both causes - alleged interpersonal conflict/bullying and harassment at the hands of her co-workers and also from her traumatic experience within/after attending the work disciplinary meetings of 14 and 27 August 2018.”
40. Dr Khaja diagnoses Major depression and Anxiety disorder. He writes that the applicant “clearly is unfit for work at this stage.”
41. The applicant commenced to see Anthony Brown, psychologist, in April 2019. Mr Brown has provided a report dated 5 July 2019.
42. In that report Mr Brown provides a history that is broadly consistent with the evidence provided by the applicant. He diagnoses the applicant as having Major Depressive Disorder and generalized Anxiety Disorder in the context of harassment at the workplace.
43. Mr Brown opines:
- “In my expert medical opinion, I would state that Ms Tyson was harassed and bullied in her workplace in that she experienced repeated aggressive pressure from co-workers and management that could be seen as meaning to harm and intimidate someone who was vulnerable.”
44. Mr Brown refers to significant pressure being placed upon the applicant by her having to do significantly more in her role despite no increase in hours or payment and not being trained sufficiently or supported with these new tasks. He also refers to the applicant being subjected to “deliberate isolation and petty acts of sarcasm and violations of personal space.” He writes that when the applicant attempted to address her concerns with management, those concerns were minimised and dismissed.
45. Mr Brown writes that the mental harm experienced by the applicant was aggravated by the delayed timing of the complaint of when the applicant referred to Ms Rockliff as “a bitch” and the lack of communication regarding this complaint throughout the month of August. He also refers to the “dubious nature of this complaint.”
46. Mr Brown opines that the applicant has no current capacity for work.
47. The applicant attended A/Prof Davies at the request of the applicant’s solicitors and has provided a report dated 5 June 2019.
48. In that report A/Prof Davies provides a history that is broadly consistent with the evidence provided by the applicant. He does record that when the applicant approached Ms Rockliff in regard to their working relationship that Ms Rockliff “launched a tirade” against the applicant. He also records that when the applicant was given 24 hours notice of the disciplinary meeting she was “tense, short of breath and bewildered” and was so upset that she was unable to drive home for a while.

49. A/Prof Davies diagnoses the applicant as having Moderate Depression and Major Depression and opines that the applicant “developed a depressive illness following ongoing problems in a new workplace.” He writes that there appeared to be some prejudice against the applicant despite her good performance in her previous workplace.
50. A/Prof Davies further opines that the disciplinary meetings that the applicant attended had an aggravating effect but was not the primary cause of her illness, which he considers to be interpersonal conflict/bullying and harassment workplace issues.
51. In answer to the question as to the applicant’s capacity for work, A/Prof Davies opines that with appropriate treatment and rehabilitation the applicant could return to a safe and supportive environment.

## **The respondent’s case**

### ***The evidence of Simone Rockliff***

52. Simone Rockliff has provided a statement dated 2 October 2018.
53. Ms Rockliff states that she commenced employment as an Employment Consultant with the respondent in December 2016. She states working with the applicant “to be fine”, although the applicant presented as being nervous and would get flustered easily.
54. Ms Rockliff recalls an occasion when the applicant asked her for assistance and that Ms Rockliff replied in a normal voice if the applicant could “wait a minute.” She states that the applicant stormed off and when Ms Rockliff tried to speak to her later the applicant just grunted at her.
55. Ms Rockliff recalls another occasion when the applicant asked for assistance and Ms Rockliff replied in a friendly manner that she would after she had finished what she was doing. Ms Rockliff states that when she approached the applicant some 30 minutes later in the lunchroom, the applicant wanted to talk about a previous incident. She states that the applicant said: “I will have my say and you can then have your say” and Ms Rockliff replied: “no that is not how we do things here at APM and if anything has to be said it will be in front of a manager.” Ms Rockliff states that the applicant was not happy with this.
56. Ms Rockliff then states that she approached Ms Becker and told her that the applicant wanted to have a chat. The applicant then entered Ms Becker’s office as well and the applicant became aggressive and hysterical while she complained about the transition of her employment. Ms Rockliff states that she sympathised with the applicant as transition involves a lot of change. Ms Rockliff states that she then left that meeting. She denies that she was aggressive with the applicant and was shocked by the applicant’s hysterical behaviour.
57. Ms Rockliff denies that she said to the applicant that she did not want to hear from her or speak with her. In regard to the incident when the applicant returned to her desk after marketing to find that there were documents on her desk, Ms Rockliff states that she was told by the applicant that the applicant would be back at 2.00pm and had not expected the applicant to return at 12.30pm.
58. Ms Rockliff denies that she made an adverse comment about the meal that the applicant was eating or that she sprayed Glen 20 in response to this.

### ***The evidence of Amanda Becker***

59. Amanda Becker has provided a statement dated 2 October 2018.
60. Ms Becker states that she had held the position of Regional Manager with the respondent since 2013. She states that she had limited interaction with the applicant because the applicant reported to Mr Cremona. She states that she did observe that the applicant was very flustered and seemed hostile at work for no apparent reason.
61. Ms Becker states that on 31 July 2018 Ms Rockliff and the applicant came into her office and Ms Rockliff complained that she did not feel comfortable and had sought the assistance of management when the applicant had berated Ms Rockliff in the lunchroom. She states that the applicant complained that Ms Rockliff had said to her: "don't talk to me, I do not want to see your face, Steve is not in today, if you need anything call Amanda and do not come to me." Ms Becker states that she responded: "I find this hard to believe."
62. Ms Becker states that she told both the applicant and Ms Rockliff that their behaviour would not be tolerated and the matter would be escalated further with formal meetings. She states that Ms Rockliff then left the office and the applicant said, "that was a fuckin set up", left the office and slammed the door. Ms Becker states that she found the applicant in the bathroom and observed her to be crying. Ms Becker denies that she raised her voice when speaking with the applicant.
63. Ms Becker states that on 2 August 2018 she was informed by Mr Cremona that two staff members had reported that the applicant had said "are these two always f...kin bitches." She states that in response to this a meeting was held on 14 August 2018 with the applicant and Mr Cremona in attendance. She states that the applicant said that the words she used was "has she always been so bitchy." Ms Becker states that she told the applicant in a normal voice tone that this incident may move to a formal discussion as the applicant had not followed the code of conduct. Ms Becker states that she formed the view that the applicant did not understand the severity of the offence.
64. Ms Becker states that there were no other issues with the applicant following this meeting but that she was later informed by Mr Cremona that a formal disciplinary meeting with the applicant did not take place because the applicant had sought medical treatment and obtained a workcover certificate.

### ***The evidence of Steven Cremona***

65. Steven Cremona has provided a statement dated 2 October 2018.
66. Mr Cremona states that he has been employed as a Business Manager for the respondent since March 2018 and has run a number of sites for the respondent in western Sydney, including the Penrith office where the applicant commenced to work on 2 July 2018.
67. Mr Cremona states that when he first sat down with the applicant he observed her to be particularly nervous and he told her "we had never had a part-time person working here" but that "we would make it work." He states that the applicant asked a lot of questions in relation to case load sizes. He recalls that the applicant picked 20 clients from the 90 clients that were transitioned to the respondent and that she said of one client "this client is a faggot and a piece of work." He states that he told her that she could not talk like that and was inappropriate and put it down to her anxiety.



68. Mr Cremona states that the only complaint he received about the applicant's workload was on the last day she was there when she said that she did not have enough time to do the work. He states that she was only expected to see three clients per day and was expected to see employers but she did not like leaving the office.
69. Mr Cremona states that on several occasions he sat down with her to explain how to complete a proposal to an employer and the wage subsidy in the same document. He states that she successfully negotiated this with two clients and an employer.
70. Mr Cremona states that he was present in the meeting with Ms Becker, Ms Rockliff and the applicant. He states that the applicant was swearing and complaining that Ms Rockliff was taking out on the applicant the problems with the ORS transition. He states that he was shocked by the applicant's language and that her demeanour during the meeting was abusive, manic and at times emotional. He states that the applicant agreed that he had explained the wage subsidy issue to her but kept on saying that she was frustrated.
71. Mr Cremona states that on 2 August 2018 an employee, Dominic Farrugia, informed him that the applicant had said to Dominic Farrugia in regard to Ms Rockliff and Ms Becker "have these always been fucking bitches to work with?" Mr Cremona states that he was present at a meeting on 14 August 2018 when this was put to the applicant and the applicant admitted what she said was inappropriate and was crying and upset.
72. Mr Cremona states on 27 August 2018 he met with the applicant in his office at 1.30pm. He states that she appeared to be fine. He states that he advised her there would be a disciplinary meeting the next day in regard to the foul language which breached the respondent's Code of Conduct. He states that the applicant said: "this is a fuckin joke." He states that he said that she could bring a support person and that he spoke in a normal voice. He states that the applicant was aggressive and confrontational. Mr Cremona states that the meeting ended at 1.45pm.
73. Mr Cremona states that the applicant never complained that she found the workplace environment to be hostile, that he personally invited the applicant to eat lunch with the staff (even though she was not entitled to a lunch break) and that she was not excluded when invitations were given to get coffee.

### ***The evidence of Dominic Farrugia***

74. Dominic Farrugia has provided a statement dated 2 October 2018.
75. Mr Farrugia has been employed as an Employment Consultant with the respondent since 22 June 2018.
76. Mr Farrugia states that he got on well with the applicant but observed that the applicant had issues with other female staff.
77. Mr Farrugia states that at around 12 noon on 1 August 2018, when most of the other female staff were in the lunch room, the applicant approached him at his desk and said, "have these two always been such bitches." He states that the applicant did not appear stressed when she said this. He states that he decided to report the foul language to Mr Cremona.
78. Mr Farrugia states that the applicant appeared not to be coping with her workload, for example she became stressed when late for an appointment. He states that there was help available whenever she asked for it.

### ***The respondent's medical evidence***

79. The applicant attended Dr Teoh, psychiatrist, at the request of the respondent's insurer and has provided a report dated 13 November 2018.
80. Dr Teoh records that the applicant said that Ms Rockliff was to be the applicant's buddy/mentor but that Ms Rockliff was "cold, not communicative or supportive" and the applicant felt like a nuisance when she asked for help. He records that Ms Rockliff had said to the applicant: "don't speak to me" and "I don't have the luxury to be part-time."
81. Dr Teoh records details of the meeting between the applicant and Mr Cremona on 27 August 2018 but there are no details recorded of the meeting between the applicant, Mr Cremona and Ms Becker on 14 August 2018.
82. Dr Teoh opines that the reaction by the applicant to workplace events, wherein there was a tense relationship between the applicant and Ms Rockliff, was a normal reaction to industrial issues and interpersonal problems at work. He opines that her presentation is not consistent with a psychiatric diagnosis.
83. Dr Teoh opines that the main contributing factor to the applicant's emotional distress is her perceived lack of support at work, a change to her role and the problems she encountered with Ms Rockliff.
84. Dr Teoh opines that the meeting on 14 August 2018 contributed significantly to the stressful events as the applicant perceived that it was unfair, and that the meeting on 27 August 2018 further aggravated her emotional distress. He concludes that the combination of the meetings on 14 and 27 August 2018 are the predominant cause of her emotional distress.
85. Dr Teoh opines that the applicant can return to full time work provided the issues at work can be resolved. He notes that the applicant is attempting to look for a job and is motivated to return to work.

### **Determination**

86. The submissions of the parties at the arbitration were recorded and I do not propose to reiterate each of them in these reasons. I will, however refer to the general thrust of those submissions in the course of this part of my decision.

### ***Whether the applicant sustained a psychological injury in the course of her employment with the respondent***

87. Deputy President Roche in *Attorney General's Department v K* [2010] NSWCCPD 76 (*Attorney General's Department v K*) reviewed a number of authorities which considered psychological injuries sustained arising out of or in the course of employment and said at [52]:

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

- (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."

88. DP Roche then went on to state at [54]:

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

- 89. The respondent does not challenge the applicant's evidence that in the past she had worked for some 30 years in banking. Nor does it provide evidence of the applicant having any poor work performance or poor conduct in the 12 months or so that the applicant worked in a similar position with ORS Group, before it was taken over by the respondent.
- 90. I therefore find it reasonable to conclude that the applicant had a good work ethic and was able to competently manage her job as an employment consultant before she commenced her employment with the respondent. It is apparent, however, that within weeks, if not days, following her commencement of employment with the respondent, the applicant was experiencing stress and anxiety regarding the work that she was required to do and the environment in which she was required to undertake that work.
- 91. All of the witness statements refer to the applicant being stressed or flustered. Ms Rockliff states that the applicant presented as being nervous and would get flustered easily. Mr Farrugia states that the applicant appeared not to be coping with her workload.
- 92. Mr Cremona states that when he first sat down with the applicant he observed her to be particularly nervous. He does state that on several occasions thereafter he assisted the applicant and she was then able to successfully negotiate some tasks. However, at the meeting in late July 2018, which is only some four weeks after her commencement of employment with the respondent, Mr Cremona states that the applicant "kept on saying" that she was frustrated despite assistance being provided to her for new tasks that she was required to undertake.
- 93. Ms Becker states that she had limited interaction with the applicant, presumably because of her role as Regional Manager, but even she observed the applicant to be flustered, as well as seeming hostile for no apparent reason.

94. In her “Grievance Statement”, which is completed within 48 hours of the applicant ceasing work, the applicant refers to having a greater caseload than what she had with ORS Group, that she had no hands on experience with certain tasks and that she remained unsure of some tasks. The respondent does not dispute the applicant’s evidence of an additional case load. Mr Cremona merely states that the applicant picked 20 clients that had been transitioned. The applicant’s complaint that she had no hands on experience with certain tasks seems to be corroborated by at least some training and assistance being provided to her. That the applicant was unsure of some tasks is confirmed by Mr Cremona stating that the applicant kept on saying in the meeting in late July 2018 that she was frustrated.
95. In her statement, the applicant states that she was becoming frustrated by not getting out to see clients, undertake marketing and the treatment of some clients by others. Mr Cremona states that the applicant was required to see clients and employers but that she did not like leaving the office. However, he does not engage with the reasons as to why that might be the case or why he, in his position of Business Manager, had not explored this further with the applicant.
96. In addition to these difficulties outlined by the applicant, there is the comment made by Mr Cremona when he first meets the applicant that the respondent had never had a part-time person working for them. Although there is some discrepancy between the applicant and Mr Cremona as to what was specifically said about her position as a part-time employee, I find it reasonable to accept that this comment, when added to the difficulties the applicant began to experience almost immediately upon her commencement of employment with the respondent, gave rise to a perception on the part of the applicant that she was working in a stressful and hostile work environment.
97. When the applicant first sees Dr Khaja on 28 August 2019 it is recorded that the applicant was subjected to bullying and harassment by work colleagues by way of condescending and humiliating behaviour and comments. The next day the applicant concludes her “Grievance Statement” by alleging “psychological abuse” from bullying and a “pack mentality” from employees and management.
98. A primary element of bullying or harassment is that it is intentional or deliberate. The definition of a worker being “bullied at work” in the (Commonwealth) Fair Work Act 2009 emphasises the behaviour of others towards the worker. Section 789FD (1) provides:
- “(1) A worker is bullied at work if:
- (a) while the worker is at work in a constitutionally-covered business:
- (i) an individual; or
- (ii) a group of individuals;
- repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
- (b) that behaviour creates a risk to health and safety.”
99. I am not convinced from a review of the evidence that other employees or management of the respondent deliberately and intentionally bullied and harassed the applicant. I accept the plausible evidence of Ms Rockliff that on two occasions she was not able to immediately assist the applicant but that Ms Rockliff could do so once she had finished the task she was undertaking.

100. I also accept that it was reasonable for Ms Rockliff to seek the input of higher management when the applicant challenged her regarding their working relationship rather than only communicate between themselves, which may have put Ms Rockliff's own employment status at risk.
101. I would also question the assertion made by the applicant that the meeting in late July 2018 between Ms Becker, Ms Rockliff and the applicant, and where Mr Cremona was in attendance, "was set up". There is no evidence that the applicant was called to this meeting, rather her own evidence is that she followed Ms Rockliff into Ms Becker's office.
102. The applicant concedes that she did say out loud that another female employee was a "bitch" even if there is a difference in recollection as to whether she prefaced that the word with "fuck". While there might be different views as to how far up the chain of management that incident should be escalated to, I certainly accept that it warranted sanction of the applicant and could not be regarded as bullying or harassment of the applicant.
103. I accept as plausible and reasonable another employee using the applicant's desk while she was out of the office.
104. Choosing who to have lunch with is surely a matter of personal choice and in the absence of more specific evidence of other employees deliberately objecting to the applicant having lunch with them, I am not satisfied that this complaint made by the applicant amounts to bullying.
105. Nonetheless I do accept that the difficulties which the applicant had with new tasks and procedures, and having additional clients that she was required to handle, which in turn caused to her be nervous and frustrated, were real events. I accept that instances such as being made uncertain about her status as a part-time employee, and being rebuffed by Ms Rockliff when the applicant sought her assistance, irrespective of how these incidents were communicated to the applicant, were also real events which added to the applicant's anxiety and frustration. I consider that all of these events, which start from the very beginning of her employment with the respondent, created a perception of a hostile working environment for the applicant.
106. That finding is reinforced by the unchallenged evidence that for at least 12 months prior to her commencement of employment the applicant had no problems with work performance or conduct and that she had also previously had a long career in the banking industry without any evidence of poor performance or ill-discipline on her part. It is only when she commences employment with the respondent that the applicant very quickly finds that she has several difficulties with both her actual work and the office in which she is required to work.
107. I consider that what the applicant experienced in July and August 2018 fits the criteria set out by DP Roche in *Attorney General's Department v K*, namely that there were real events in the workplace which the applicant perceived to be hostile and which were capable of causing psychological injury.
108. In determining whether a psychological injury results from that hostile working environment, I prefer the evidence from the applicant's general practitioner, Dr Khaja.
109. The first observation I would make is that although it is not apparent from the clinical notes from Glenbrook Surgery as to how long Dr Khaja has been personally treating the applicant, she had been attending that practice for many years. The applicant had been treated at that practice for several conditions including diabetes, hypertension, psoriatic arthritis and a heart condition. I therefore consider that Dr Khaja, who is part of that practice and is armed with information regarding the applicant's overall health, is in a very good position to identify whether the difficulties that the applicant was having at work was a likely cause of a psychological injury.

110. I also prefer the evidence from Dr Khaja because that doctor is the only medical practitioner who has provided evidence of treatment within the first few months of the applicant ceasing work. The report and clinical notes of Dr Khaja provide the most contemporaneous evidence of a history of the applicant's complaints and diagnosis of her condition that allows a finding to be made on the cause of her psychological injury. I did note that the applicant attended a psychologist named 'Klara' soon after she ceased work but there is no report or clinical notes from that practitioner which might assist.
111. Although Dr Khaja records that the applicant was subjected to bullying and harassment by work colleagues, the most telling part of that initial entry is that the behaviour complained of by the applicant is recorded as "started since her employment 2/7/18 – worsening now." That in my view is consistent with my own findings on the lay evidence that the applicant experienced problems right from the start of her employment, those problems worsened as the weeks went by and, although the applicant identifies her experience as "bullying and harassment", she was subject to real events in the workplace which she perceived to be hostile.
112. That conclusion also finds support in the opinion of Dr Teoh, the next medical practitioner after Dr Khaja and the psychologist 'Klara', who examined the applicant. Dr Teoh opines that the main contributing factor to her condition is "her perceived lack of support at work, a change to her role, and interpersonal problems with another staff member, Ms Rockliff." That opinion is not very far removed from the findings and opinion of Dr Khaja, except that Dr Teoh regards all of that as merely causing emotional distress and not a psychological injury.
113. I am cautious in relying on a general practitioner only in regard to a diagnosis of what the applicant has suffered from as a result of what she experienced in her employment with the respondent. However, I have given my reasons as to why I prefer the evidence of Dr Khaja and I consider that should extend to his diagnosis of the applicant's psychological condition. Dr Khaja was in the best position to provide a diagnosis of a psychological injury sustained by the applicant when the applicant attended for treatment on 28 August 2018 and for the months thereafter.
114. The initial diagnosis made by Dr Khaja, which appears in the clinical notes and Certificates of Capacity, is Adjustment disorder due to depression and anxiety stemming from bullying at work. That diagnosis has continued to appear in Certificates of Capacity issued by Dr Khaja, although A/Prof Davies has diagnosed the applicant as having developed a depressive illness and now has Moderate Depression and Major Depression. It may well be that the applicant's main symptoms are of depression but I prefer to accept the opinion of the doctor who has treated the applicant on an ongoing basis for her condition.
115. I should add that I have had no regard for the opinion provided by Mr Brown. I agree with the submission made by Mr Doak for the respondent that Mr Brown has amplified the evidence of alleged bullying and harassment, engaged in hyperbole, and acted as an advocate for the applicant. Furthermore, Mr Brown only begins to treat the applicant in April 2019, some nine months after the applicant ceased work, so that he lacks the advantage of having treated the applicant soon after she developed symptoms.
116. The ARD nominates the date of injury as being 2 July 2018, which is when the applicant commenced employment with the respondent. In light of the findings I have made in this dispute I consider that the deemed date of injury should be 27 August 2018, being the last day that the applicant worked for the respondent.

**Whether any psychological injury sustained by the applicant was wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to discipline**

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

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

118. I accept that the meetings on 14 August and 27 August 2018 were with respect to discipline and that the action taken by the respondent to conduct those meetings were reasonable.
119. Whether the applicant thought she had muttered under her breath so that no one could hear her or that her words included ‘fuck’ is, in my view, irrelevant. What she said had been heard by another employee, the word ‘bitch’ was demeaning and hurtful, and was aimed at a fellow employee. The respondent was entitled to investigate the incident further.
120. Mr Doak points out that the applicant did not seek treatment following any episodes at work that caused her to be upset until the meeting between herself and Mr Cremona on 27 August 2018. He submits that it is this meeting, along with the previous meeting on 14 August, which were part of reasonable disciplinary action taken by the respondent which caused her to cease work. Mr Doak submits that the applicant seeks at a later time, particularly through the reports of Mr Brown and A/Prof Davies, to alter and amplify the description of other events at work to claim that her injury was due to bullying and harassment and not reasonable disciplinary action taken by the respondent.
121. There is no dispute that it was following the meeting between the applicant and Mr Cremona on 27 August 2018 that the applicant sought medical treatment and obtained a Certificate of Capacity certifying that she had no current work capacity. Dr Khaja, whose evidence I have had particular regard to, opines that the two meetings on 14 and 27 August 2018 were a cause of the applicant’s psychological condition, along with interpersonal conflict/bullying and harassment.
122. I accept that the two meetings were a cause of the applicant’s injury but I do not accept that those meetings were the whole or predominant cause of the applicant’s injury. In *Ponnan v George Weston Foods Ltd* [2007] NSWCCPD 92 Handley ADP applied at [24] the dictionary meaning of “predominantly caused”, being “mainly or principally caused.”
123. I have set out the events in the workplace that I consider did create for the applicant a perception of a hostile environment. I have accepted that those real events that caused the applicant to be nervous and flustered commenced from the start of her employment with the respondent. That the applicant did not choose to see her general practitioner for some two months during which she was experiencing stress and anxiety does not mean that she was not in the process of sustaining a psychological injury during this time. I return to the history taken by Dr Khaja upon the applicant’s first attendance on 28 August 2018: “started since her employment 2/7/18 – worsening now”, which I accept as an accurate record that the applicant’s psychological injury was mainly sustained as a result of real events throughout the two months that she was employed with the respondent.
124. My review of the evidence leads me to find that the two meetings were a cause of the applicant’s psychological injury but not the whole or predominant cause. The predominant cause was what had occurred in the workplace in the two months leading up to the meeting on 27 August 2018.

125. Further, the evidence which supports the respondent's defence that the applicant's psychological injury, if any, was caused wholly or predominantly by reasonable disciplinary action is very much based on the opinion of Dr Teoh. I agree with a submission made by Mr Morgan that this opinion is flawed and cannot be relied upon because Dr Teoh opines that the meeting on 14 August 2018 "has contributed significantly to the stressful events" but recites no details of that meeting in his report.
126. I therefore do not accept on an analysis of the lay and medical evidence available that the respondent has established a defence pursuant to section 11A of the 1987 Act.

## **Conclusion**

127. The dispute notices issued by the respondent only put the applicant's work capacity in issue on the basis of the applicant not having sustained an injury and/or there being a successful section 11A defence.
128. The applicant has produced Certificates of Capacity since 6 April 2019 which certifies that she has no current work capacity.
129. There are entries in the clinical notes from November 2018 onwards which records the applicant searching for employment and being motivated to return to work. A/Prof Davies opines that with appropriate treatment and rehabilitation the applicant could return to a safe and supportive environment. Dr Teoh opines that the applicant can return to full time work provided the issues at work can be resolved.
130. Given the applicant's prior work experience it is not hard to envisage that the applicant could work at the very least in a part time capacity in general clerical or administrative work in a supportive work environment.
131. However, the respondent has not put the extent of the applicant's work capacity in issue or provided evidence of what work the applicant might be capable of doing. The medical evidence that has been provided supports a finding that the applicant has had no current work capacity since 6 April 2019.
132. The rate of weekly payments of compensation that is paid to the applicant is governed by section 37 (1)(a) of the 1987 Act, whereby the applicant is to receive 80% of PIawe, being \$303.64 per week.
133. There will therefore an order that the respondent is to pay the applicant the amount of \$303.64 per week from 7 April 2019 to date and continuing pursuant to section 37 (1)(a) of the 1987 Act.
134. There will also an order that the respondent is to pay the applicant's reasonable medical expenses for psychological treatment as a result of the psychological injury that she has sustained in the course of her employment with the respondent.

