

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2629/20
Applicant: Avila Faria
Respondent: Berri Limited
Date of Determination: 21 August 2020
Citation: [2020] NSWCC 284

The Commission determines:

1. The applicant sustained a psychological injury pursuant to ss 4(b)(i) and 11A(3) of the *Workers Compensation Act 1987* (the 1987 Act).
2. 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 performance appraisal or discipline pursuant to s 11A(1) of the 1987 Act.
3. The applicant has had no current work capacity as a result of the injury since 3 September 2019.

The Commission orders:

1. The respondent to pay the applicant weekly benefits pursuant to ss 36(1)(a) and 37(1)(a) of the 1987 Act as they apply in the present case on the basis of a pre-injury average weekly earnings figure of \$1,033 from 3 September 2019 to date and continuing.
2. The respondent to pay the applicant's reasonably necessary medical and related treatment expenses pursuant to s 60 of the 1987 Act upon production of accounts, receipts and/or valid Medicare notice of charge.

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 Avila Faria (the applicant) was employed as a process worker by Berri Limited (the respondent) for more than 11 years. The applicant alleges that she sustained a psychological injury in the course of her employment as a result of ongoing bullying and harassment.
2. Liability for the alleged injury was disputed under a notice issued pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 4 December 2019. That decision was maintained following internal review under a notice issued pursuant to s 287A of the 1998 Act on 8 April 2020.
3. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) lodged in the Commission on 13 May 2020. The applicant seeks weekly compensation from 3 September 2019 and continuing and compensation for incurred medical expenses pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act).

PROCEDURE BEFORE THE COMMISSION

4. The parties appeared for conciliation conference and arbitration hearing via Modron Spaces on 13 July 2020. The applicant was represented by Mr Luke Morgan of counsel instructed by Mr Andrew Tohme. The respondent was represented by Mr Paul Stockley of counsel instructed by Mr Stephen Lee. A representative from iCare was also present.
5. At the commencement of the arbitration hearing and after oral submissions from the parties, I determined to admit in the proceedings documents lodged under cover of an Application to Admit Late Documents by the respondent on 6 July 2020. Directions were made granting leave to the applicant to file a supplementary statement in response. Owing to some technical difficulties encountered during the arbitration hearing, leave was also granted to the parties to supplement their oral submissions with written submissions. During conciliation, the parties reached agreement that the applicable pre-injury average weekly earnings (PIAWE) rate was \$1,033.
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.

ISSUES FOR DETERMINATION

7. The parties agree that the following issues remain in dispute:
 - (a) whether the applicant sustained a psychological injury in accordance with s 4 of the 1987 Act;
 - (b) if so, 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 performance appraisal and/or discipline for the purposes of s 11A(1) of the 1987 Act;
 - (c) the extent and quantification of any incapacity resulting from injury, and
 - (d) the applicant's entitlement to s 60 expenses.

EVIDENCE

Documentary evidence

8. 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) pages 1-9 of the documents attached to an Application to Admit Late Documents lodged by the respondent on 6 July 2020;
 - (d) documents, including written submissions, attached to an Application to Admit Late Documents lodged by the applicant on 20 July 2020, and
 - (e) written submissions lodged by the respondent on 27 July 2020.
9. Neither party applied to adduce oral evidence or cross-examine any witness.

Applicant's evidence

10. The applicant's evidence is set out in written statements made on 29 May 2014, 26 March 2020 and 14 July 2020.
11. The statement dated 29 May 2014 is handwritten and states:

"Christine states the below to me:

 - I am in a relationship with Sala.
 - Speaks to everyone and refers to my breasts.
 - Calls me fat.
 - Says I am dumb.
 - Says that I shouldn't be working here because everyone knows about you. You should be ashamed and feel ashamed.
 - Tells everyone not to talk to me and ignore me.
 - Says that I am at work every day and never take days off because I am afraid of being sacked.

These are some of the things I remember however there have been many other statements made to me which are not appropriate."

12. The statement of 26 March 2020 was prepared by the applicant's solicitors and signed by the applicant.
13. The applicant stated that she was employed by the respondent on a full-time basis for over 11 years. The applicant claimed she had been subjected to bullying and harassment by another employee, "Kristy", and management and had been off work since 3 September 2019. The applicant said she was unfit to work in any capacity. The applicant said:

"I reported the onset of interpersonal problems whilst working with another co-worker, Kristy, over four years who made personal comments on my weight and started to spread rumours. Some of these rumours were with respect to the fact that I had a relationship with another male colleague, Sala. Kristy always used to call me fat.

I was constantly the subject of verbal abuse from her and I was called dumb as well as receiving racial and derogatory comments.

I did report this to my management and HR over time, who dismissed my grievances and no further investigations were conducted.

I continued working with Kristy and was subjected to further abuse and humiliation. I feared taking any time off work due to fear of being terminated.

In 2019, I raised formal grievances again and management did not believe me and referred me to the company doctor for mental health and fitness assessment.

...

I was not coping and felt alienated and picked on constantly.

I approached Victor, my team leader, as I was not feeling well and requested an early mark. The next day I was emotionally fragile and vulnerable but continued to push myself to work due to fear of being terminated.

I was pre-occupied and distressed all the time.

At the end of each shift, I would constantly feel distressed.

I was eventually taken to Campbelltown Hospital for review with respect to the symptoms that I was showing. My husband took me to the hospital.”

14. In the statement dated 14 July 2020, the applicant confirmed that her previous statement had been read through to her in the presence of her husband and she understood and agreed with what had been recorded. The applicant said it was her signature which appeared at the bottom of the document.
15. The applicant noted that her colleague Christine had denied calling the applicant fat or dumb or spreading rumours regarding an alleged relationship with another employee. The applicant said that Christine was still employed by the respondent and obviously wanted to keep her job.
16. The applicant said that Christine would constantly bully her behind closed doors when no one else was watching. The applicant reported this to her employer but would be told there was no evidence to support her complaints. The applicant tried to explain that Christine would do this when no one else was around. The applicant also made complaints to the union about Christine’s conduct.
17. The applicant said that on one occasion, it was suggested that the applicant sit down with Christine face-to-face. The applicant said:

“I was terrified at the suggestion as she was someone who has verbally abused me and called me fat and dumb on numerous occasions. I am not good at confrontation I try to avoid it, that is my nature, a meeting would have only made my anxiety worse. They also tried to change my machine and my shifts but I would still see her and her conduct never changed.

I felt unsupported by my employer. I tried to explain as best I could what Christine was doing but they kept telling me there needed to be proof before they could do anything; it got to the point that when I made complaints about Christine they just seemed to ignore them and it eventually made the situation unbearable.”

Christine Taku

18. Ms Christine Taku has provided a statement, dated 24 June 2020, giving a handwritten response, "no", to a series of questions. In this statement, Ms Taku denied ever calling the applicant fat or dumb; denied spreading the rumour that the applicant was having a relationship with an employee in or around 2014; and denied having any type of personal conflict the applicant.

Factual investigation

19. The respondent procured a factual report from ProCare dated 1 November 2019. No statement was obtained from the applicant as part of the factual investigation as she was at that time hospitalised. Signed statements were obtained from a number of the respondent's employees.

Samuel Parsons

20. Mr Parsons stated that he had been employed by the respondent since October 2012 and was the manufacturing leader. The applicant reported to a team leader who in turn reported to Mr Parsons.
21. Mr Parsons said the applicant commenced employment with the respondent in January 2009 as a full-time process worker on night shifts. Mr Parsons said the applicant had not struggled in performing her role but was unable to be retrained into any other role as other roles required reading, comprehension and decision-making abilities which the applicant did not possess. Mr Parsons said,

"In terms of the claimant's attitude, she changed. Sometimes she is very friendly, approachable and happy but can then quickly change to be visibly upset, quiet and withdrawn for no apparent reason. The change can be quite sudden where I would be talking to her, do a lap around the factory and return to see her be a completely different person. She has been like this from the time I have been working with the team. Besides this, there are no behavioural issues.

In terms of the claimant's work performance, this is tied in with her behaviour. She can perform her job well if in the right mood but when she is upset or depressed, she can struggle to keep up with the speed of the line. She does not manage change very well and the most minimal change can cause her to become overwhelmed. The Team Leaders would therefore invest a lot of time to explain to the claimant the reason behind any change as she required reassurance."

22. Mr Parsons described an incident in August 2018 when the applicant had alleged that a casual contractor, named Jesslyn, had bullied her. CCTV footage was viewed and no contact between the applicant and Jesslyn on the relevant date had been observed. The applicant was asked to reconfirm the date, time and location of the alleged interaction. CCTV footage of other dates was reviewed but the video did not show any interaction between the applicant and Jesslyn.
23. The applicant attended a meeting with her team leader on 11 September 2018 together with a support person. The applicant was shown the CCTV footage and asked to explain the difference between what this showed and what she had alleged. The applicant was unable to explain the discrepancy. The applicant told the team leader that she was not feeling well and asked for time off. The applicant then took sick leave for three nights. The applicant then took annual leave until 2 October 2018.

24. An independent medical assessment of the applicant was done on 9 October 2018. On 15 October 2018 the applicant requested time off for urgent surgery. In the intervening period, the independent medical assessment report was received which alleged bullying by Christine.
25. The applicant returned to work on 26 November 2018. The applicant's team leader was having daily catch ups with the applicant to support her through any issues she may have been experiencing. The applicant went off sick between 6 and 11 February 2019.
26. On 18 February 2019, the applicant appeared down. Although she did not admit to having any problems when questioned, later during her shift the applicant left work without informing her team leader. The next day, the applicant said she had left work because she was not feeling good but was now okay.
27. On 1 March 2019, during an informal chat, the applicant alleged that she was upset with her team leader Aaron because he had taken photos of her without her permission. The applicant alleged that Aaron had said to her and others that "her boobs looked like fried eggs". The applicant asked if she could change shifts. The next day the applicant was offered a day shift but declined that as she had to drop her grandchildren off in the mornings. From 4 March 2019, the applicant was assigned a different team leader.
28. When the applicant returned to work she was asked about her claim against Jesslyn. The applicant said she didn't remember any claim against Jesslyn. The claim against Aaron was investigated and, on 7 March 2019, the applicant was given notice to attend a meeting to discuss the outcome of the investigation. On the day of the meeting, on 8 March 2019, the applicant said she was not feeling well and wanted to go home. The applicant agreed to meet before she left and was offered a support person.
29. The applicant attended the meeting with Brett Hinde as her support person. During the meeting the applicant was presented with a letter alleging that she had made false claims. The applicant said she did not understand the allegations levelled against her and had only had one meeting previously where she had been shown CCTV footage, without a support person. The applicant's team leader spoke to the applicant informally about her health and time off work. The applicant denied that her time off was related to work. After the meeting, the union intervened and requested that the investigation not be pursued.
30. On 11 March 2019, the applicant reported feeling stressed and wanted to go home. The applicant was offered a cab ride home but said she was okay to drive. The applicant remained off work until 12 April 2019. On 2 April 2019 the applicant attended a well-being assessment. Arrangements were also made for a neuropsychological assessment on 10 May 2019.
31. The applicant took annual leave to travel to see her unwell sister in Portugal between 10 June 2019 and 12 August 2019. During the period the applicant was away, a quality audit had been performed, which meant that the applicant's role had to be modified. On 12 August 2019, Mr Parsons explained the aspects of her role which had changed to the applicant and offered training with a Portuguese interpreter. The applicant was also offered an afternoon shift and a transition to day shifts, which the applicant accepted.
32. The applicant completed training with the Portuguese interpreter on 20 August 2019, this consisted of a one-hour session in a training room followed by two hours on the production line with the interpreter assisting the applicant while she carried out her role. There were no issues raised and the applicant indicated she was happy to continue in the modified role.

33. Some errors in the applicant's work were identified on 21 August 2019 and the applicant was provided with additional one-on-one coaching. The applicant called in sick for the following two days. The following week, similar issues were identified with the quality of the applicant's work. Coaching was again provided, during which the applicant became more and more visibly upset and struggled to complete the task. The applicant called in sick on 28 August 2019 and had not returned to work since.

Linda Newby

34. Ms Newby said she commenced employment with the respondent in 2012 and had held a number of different positions. Between 2012 and March 2017, she was the safety and well-being advisor.
35. On 17 April 2014, the applicant accused two process workers of saying that she was a troublemaker and that she cried to make people feel sorry for her. The applicant continued working but later complained about rumours that she was going to make a complaint about another process worker, Christine, bullying her. The applicant said she was stressed and upset about the rumours and went to see her doctor.
36. The applicant's claims were investigated but not substantiated. Ms Newby said that none of the allegations that the applicant had raised against various individuals had ever been substantiated. Ms Newby said the applicant had been warned about making vexatious claims in the past but was not sure whether this was a verbal or written warning.
37. On 28 May 2014, the applicant made a complaint about Christine and a mediation session was arranged. The applicant alleged that Christine was bullying her and she wanted it to stop. Ms Newby said it was her recollection that Christine had gone to the applicant's home to give her a watermelon and wish her a happy Easter. The applicant alleged that Christine was spreading rumours about her breasts and saying she was fat. Ms Newby said that she believed the mediation went ahead but did not know where the notes of the mediation were.
38. In January 2015, Ms Newby received a call saying the applicant was on a pallet in a forklift area and was sitting up but unresponsive. The area around the applicant was secured and the respondent's EAP providers advised them to call an ambulance. The applicant was conveyed to hospital by ambulance. Following this, independent medical advice was sought. The applicant had reported having a benign brain tumour but was not receiving any active treatment in 2015.
39. Ms Newby said she had not been involved in any more recent events.

Charles Movsessian

40. Mr Movsessian said he had been the applicant's team leader since 4 March 2019. Mr Movsessian said the applicant always looked down and never appeared happy. The applicant was never a star performer but did everything that was required of her.
41. On 4 March 2019, Mr Movsessian said he was asked to attend a meeting with regard to allegations the applicant had made against her previous team leader, Aaron. At the commencement of the meeting on 5 March 2019 the applicant said she had no issues when asked about her well-being. When asked to elaborate on the allegations she had made about Aaron, the applicant appeared to change her mind and just nodded her head and waved her hand indicating "no".

42. On 6 March 2019, Mr Parsons asked Mr Movsessian to be involved in a meeting with the applicant at which he intended to present the applicant with a letter regarding making false claims. On 7 March 2019, Mr Movsessian offered the applicant a support person for the meeting. On 8 March 2019, the applicant claimed to be sick and wanted to go home. Mr Movsessian asked the applicant if they could still meet before she left. A meeting was arranged with the applicant and Mr Brett Hinde, whom the applicant chose as a support person.
43. After reading the applicant the letter, the applicant said she did not understand the allegations. The applicant said the only previous meeting with regard to the allegations was a meeting to view CCTV footage with Aaron. The applicant claimed she had not been provided with a support person during that meeting. The applicant denied having a support person at any meeting prior to the current meeting. The applicant denied knowing anything about an investigation regarding Jesslyn. During the meeting the applicant appeared to be confused, disorientated and was monotone.
44. After the meeting, Mr Movsessian was shown detailed notes of previous discussions with the applicant where it was noted that she had a support person in every discussion. This included the CCTV meeting.
45. Mr Movsessian said he checked in with the applicant during every shift to enquire as to her well-being. The applicant would generally state that she was stressed out. When asked what was stressing her out, she would look down, mumble and shrug her shoulders. Mr Movsessian said he would ask the applicant supportive questions such as, "Do you need to go home? Do you need me to call a cab?" The applicant would decline these offers.
46. During a period of sick leave in mid-March 2019, Mr Movsessian spoke to the applicant at her home and she sounded like a completely different person. She was very upbeat and talkative. This was in stark contrast to her presentation at work. On her return to work, the applicant denied that her issues related to anything at work.
47. Mr Movsessian informed the applicant that an independent psychological assessment was to be organised on 25 March 2019. The applicant agreed but later called back asking for a week of leave due to stress. The applicant mentioned issues at home and not sleeping when asked what her stress related to. The applicant then had extensive leave to go overseas. Mr Movsessian said he had not supervised the applicant in a shift since that time.

Steve Brown

48. Mr Brown commenced employment with the respondent in March 2012 and was employed as a people and culture coach. Mr Brown first had any contact with the applicant when a formal complaint was raised against Christine Taku. Mr Brown supported the team leaders to manage the investigation and at the end of the investigation there was a mediation between the applicant and Christine. Mr Brown estimated that the mediation took place in 2014. The applicant returned to work and the matter was closed off.
49. Mr Brown said he was made aware that there was a pattern where the applicant would raise allegations against others and when this was picked up by the team leader, she would withdraw the allegations and have a period of absenteeism.
50. In August 2018, Mr Brown was made aware that allegations had been made against Jesslyn. On 1 March 2019, the applicant made a complaint against her team leader Aaron. At a further meeting on 5 March 2019, the applicant withdrew her allegations against Aaron, claiming she was confused.

51. The leadership team decided to issue an allegation letter to the applicant around making repeated false claims. Mr Brown said he was involved in drafting the letter but had no further involvement in that matter.
52. A neuropsychological assessment performed on 20 March 2019 identified that the applicant was illiterate. Concerns were raised as to whether the applicant was able to understand updated recent safety instructions. An external training provider was engaged to determine how best to support the applicant in view of her illiteracy. Based on that advice, a Portuguese interpreter was arranged and assisted in a site induction when the applicant's role changed slightly during her time off work. The Portuguese interpreter and one of the quality assurance team members provided the applicant with training on the new task requirements. The applicant was deemed competent and left to work alone.
53. At this point, the leadership team decided that to pursue the allegations of vexatious claims would potentially do more harm than good. The matter was closed with formal expectations being explained to the applicant.
54. Mr Brown was aware that the quality assurance team spoke to the applicant about some errors on 21 August 2019. The applicant had not been seen since 28 August 2019.

Brett Hinde

55. Mr Hinde said he had been employed by the respondent as an electrician since 1990. His first involvement with the applicant was when he was asked to be her support person at a meeting in March 2019. During the meeting, Mr Movsessian produced a letter regarding vexatious allegations.
56. Mr Hinde said he had no prior knowledge of the allegations and asked the applicant some questions. She was very vague, did not really want to talk about it and it was hard to get anything out of her.
57. Mr Hinde said he had a further conversation with the applicant sometime after the meeting. Again, it was hard to understand what her concerns were. The applicant mentioned something about someone having made a comment directed at her that she didn't like.
58. Mr Hinde said he attended another meeting with Mr Parsons as the applicant's support person at a later date. The applicant was stood down pending some sort of medical assessment. The applicant seemed all right and as far as he could tell, understood what was happening. Mr Hinde said he had not seen the applicant since.

Ms Tonie Gilbert

59. Consultant psychiatrist, Ms Tonie Gilbert prepared a fitness for duty assessment and report for the respondent on 9 October 2018. The report indicates that the applicant had been referred by the respondent due to concerns about her health and well-being.
60. Ms Gilbert reported the following background as provided by the respondent:

“On 5/1/15, Mrs Faria made claims of bullying and harassment (had been happening for four years up until this point). Soon after the complaint was made Mrs Faria was found to have developed breathing difficulties, was unresponsive to requests or questions from team leaders, whilst seated staring straight ahead with minimal to no movement. Claims were investigated and unable to be substantiated. Further sick leave was taken for medical reasons during this time.

On 23/9/16, Mrs Faria made claims that a lab technician was harassing her. The claim was investigated and unable to be substantiated.

On 12/9/17, claims were made against Mrs Faria's husband regarding him following another employee (Jeslyn) home. This claim was investigated and unable to be substantiated.

On 9/8/18, Mrs Faria claimed that Jeslyn spoke to her in an offensive manner and was bullying her. The investigation is ongoing, evidence appears to prove that no conversation took place, video footage and witness statements both back this up.

On 16/9/18, Mrs Faria took stress leave for two weeks.

On 2/10/18, she returned to work.

On 4/10/18, she provided another certificate for stress leave.

Mrs Faria has been stood down from her duties until further information can be obtained. You are therefore requesting independent advice as to her prognosis of returning to the inherent requirements of her role.”

61. The applicant told Ms Gilbert that she had been bullied and harassed since 2015 by “Christine”. The applicant said she worked separately from Christine and their contact at work was incidental. Previously they had both worked in a company packaging duty-free goods. The applicant said that she and Christine had a good friendship until approximately 2015:

“Mrs Faria claims that without any explanation Christine's behaviour towards her changed and she would not speak to her when she greeted her in the morning. Mr Sarkis Faria said that after several attempts to engage Christine in conversation without a response, she stopped trying to engage her in conversation.

Mrs Faria stated that both she and Christine started working night shifts approximately 12 months ago. I asked Mrs Faria what was the nature of the ‘bullying’ that she alleged Christine had engaged in. Mrs Faria said she ‘says bad stuff about me’. I asked Mr Sarkis Faria to give me an example of what Christine was saying about her. Mr Sarkis Faria gave as an example that Christine had told people Mrs Faria was having a relationship with another man at work that was not her husband.

Mrs Faria states that Christine's bullying behaviour occurs when there are no other witnesses. For instance, in the lunchroom when they are the only ones there. She stated that Christine purposely positions herself with her back towards the camera when she addresses Mrs Faria verbally. Mrs Faria said that she does not respond to the alleged verbal abuse from Christine.

Again, I asked Mrs Faria to give me an example of what had been the most recent interaction. Mrs Faria said that Christine said to her in the lunchroom ‘I'm not going to stop bullying you until you kill yourself’.”

62. The applicant gave Ms Gilbert a personal history indicating that she had completed her high school education at the age of 17 or 18 in East Timor. The applicant did not work after completing high school because her family fled the conflict and war that was happening in East Timor. The applicant said her parents were both deceased and she had nine siblings.

63. Ms Gilbert gave the opinion:

“Her appearance, behaviour, speech, mood, presentation, report of symptoms and history given on the day of interview were not consistent with a diagnosis of a mood or anxiety disorder as specified in DSM-5. Mrs Faria is reporting some symptoms of significant anxiety in the form of sleep disturbance, poor concentration and a tendency to socially isolate herself. However, the symptoms reported are not sufficient to meet the criteria of a mood or anxiety disorder as specified in DSM-5.

I do have some concern with respect to the confusion over the identification of the person Ms Faria alleged to me (Christine) was bullying her. This differs with the person that the employer has indicated Ms Faria identified to them, (Jeslyn). If this confusion is the result of a misunderstanding of names, then it is not significant from a psychological perspective. However, if this confusion is because Ms Faria is identifying multiple people or is confused about who the perpetrators of the alleged bullying are, then this may be an indication of a more significant psychological condition.”

64. Ms Gilbert said that changing the applicant's or Christine's shift so that they did not work together at the same time would have a positive impact on the applicant's prognosis. Ms Gilbert further suggested:

“However, if Mrs Faria claims that there are a number of people in the workplace engaging in bullying behaviour towards her and these claims cannot be substantiated, then further psychological assessment may need to be completed. The purpose of this assessment would be to exclude the possibility of a Delusional Disorder or Other Specified Psychotic Disorder such as Persistent Auditory Hallucinations.”

Ms Kate Munro

65. A “well-being assessment” of the applicant was prepared by Ms Kate Munro, psychologist, on 2 April 2019 for the respondent.

66. Ms Munro recommended psychological treatment and reported:

“Ms Faria reported experiencing ongoing stress in the workplace. She reported her relationship with one of her supervisors is the source of her stress but declined providing any details, stating ‘I have already told Jess so I don't want to talk about it’. She did become teary eyed when questioned about this subject. Ms Faria reported no other concerns in the workplace, acknowledging that she likes her job but ‘just can't work with that manager anymore’. When asked about bullying and harassment which was mentioned in the Fitness for Duty report (dated 09 Oct 2018), she denied any ongoing issues, reporting the bullying has stopped and she does not have anything to do with Christine anymore. Ms Faria reported she has limited supports in the workplace and keeps to herself at breaks to avoid contact with those who have bullied her in the past. She noted she spends her breaks in the gazebo to avoid the people in the lunch room. Ms Faria reported feeling highly stressed in the workplace, stating she experiences a change in breathing and is unable to calm down. She was unable/unwilling to identify triggers to her stress, stating broadly it's the manager.”

67. Ms Munro noted that the respondent had identified complex and long-standing interpersonal difficulties with inconsistent responses and narrative provided by the applicant about the source and nature of her difficulties.

68. Ms Munro recommended that further neuropsychological assessment take place to ascertain a clear diagnosis in current cognitive functioning. Ms Munro said the applicant would benefit from additional sessions with EAP services until her stressors had resolved. It was also recommended that the applicant be moved to a day shift.

Dr Alex Knopman

69. A clinical neuropsychologist, Dr Alex Knopman prepared a neuropsychological assessment report for the respondent on 20 May 2019.
70. Dr Knopman's report indicated that the applicant had been on paid leave since April 2019 following concerns about her cognitive functioning raised by a well-being assessment by psychologist, Ms Kate Munro. Dr Knopman recorded a background as revealed from the available file material as follows:

"It appears that Mrs Faria has had some interpersonal difficulties in the workplace stretching back several years. She has made unsubstantiated allegations of bullying at work, directed primarily towards one employee ('Christine') but also towards a second employee ('Jesslyn'). She has confused people involved and changed her statements when questioned. She has alleged that the bullying takes place primarily when there are no other witnesses, and takes the form of disparaging verbal slurs. In recent times, she has been observed to be crying at work and reportedly 'refused' to engage with her team leader onsite (she has reported a challenging relationship with her team leader). Additionally, there is some concern regarding the amount of leave she has taken in recent years, although this has largely been annual leave and RDOs, with approximately 20 personal leave days since the beginning of 2018 (most without a certificate). It is unclear how many of these entries relate to full days of leave or shifts cut short. Mrs Faria reports feeling 'stressed' at work but there is little detail around the underlying nature of the stress. She has engaged with an EAP counsellor recently, which she has found helpful, but she has exhausted her allotted sessions and is awaiting approval for more.

...

Ms Munro's well-being assessment report noted that Mrs Faria struggled to articulate her responses and occasionally provided responses inconsistent with the question asked. There were also reportedly some minor inconsistencies in details through the conversation. Mrs Faria told Ms Munro that she has limited supports in the workplace and that she keeps to herself at breaks to avoid contact with the staff members who have allegedly bullied her in the past. She reported she experiences high levels of stress in the workplace and is unable to calm down. She was unable or unwilling to identify the triggers to her stress in the workplace, broadly stating that her manager was the cause."

71. Dr Knopman indicated that the applicant provided a personal history as follows:

"She reported she was born and grew up in East Timor. She was adopted and raised by 'friends' after her parents separated and moved away when she was young. She does not have any siblings. Her adoptive parents could not afford to send her to school. She completed perhaps one year of schooling aged 6 years of age."

72. Dr Knopman noted that this history was very different to that reported to Ms Gilbert. When this was put to the applicant, she said she did not know why Ms Gilbert reported that she had left school at 17 years of age.

73. The applicant gave a history to Dr Knopman which was reported as follows:

"Mrs Faria reported she began having interpersonal difficulties with her colleague Christine approximately 6 years ago, for reasons which are unknown. The 'bullying' constitutes Christine saying 'bad things' to Mrs Faria, often when nobody else is around to witness. Mrs Faria said she had notified her superiors about the bullying and requested to shift to night shift two years ago in order to separate herself from Christine. This was unsuccessful as Christine then shifted to night shift shortly afterwards, and their paths continue to cross in the workplace. Mrs Faria reported she has also had interpersonal problems in the past with Jessalyn, again for reasons which are unclear, and which allegedly involve verbal bullying. Additionally, Mrs Faria described a difficult relationship with her immediate supervisor, who she believed does not like her.

I tried to better understand what sort of verbal abuse had been levelled against Mrs Faria. She provided a single example of Christine allegedly accusing her of infidelity and then spreading this rumour to other employees. I was not able to get Mrs Faria to elaborate further or provide other examples. When I tried to gain a better understanding of her perceived relationship difficulties with her immediate supervisor, Mrs Faria responded that she did not want to talk about it further.

I also tried to gain a better understanding of the emotional impact of the alleged bullying, but Mrs Faria did not elaborate on what she meant by 'stressed' despite careful questioning. My impression was that she did not have the language skills or cognitive sophistication to elaborate, rather than the alternate of her not wanting to elaborate."

74. The applicant indicated to Dr Knopman that she wished to change shifts to a day shift or afternoon shift to avoid having to interact with Christine. The applicant indicated that she did not know why she was placed on leave and was worried about losing her job.

75. Dr Knopman submitted that formal neuropsychological tests were not designed for use with individuals who have virtually zero formal education and it was unknown how healthy individuals with the applicant's cultural, educational and literacy background should be performing on formal cognitive measures. The use of standard formal neuropsychological measures were highly inappropriate in the current situation.

76. Dr Knopman opined:

"Mrs Faria's presentation is significant for several reasons. Firstly, she is illiterate. Secondly, she does not appear to have the vocabulary or other means to explain her emotional experience - and this may very well be secondary to her cultural and educational background. Indeed, this might explain why she seems to have dealt with her emotional stress in the workplace (due to alleged bullying) by reportedly developing breathing difficulties and being '... unresponsive to requests or questions from team leaders, while seated staring straight ahead with minimal to no movement' (page 1 of Ms Tonie Gilbert's fitness for duty report, dated 9 October 2018). She has actively engaged with her EAP counsellor but to date she has exhausted her allocated 3 sessions."

77. Dr Knopman considered that the applicant's cognition was functionally intact and her emotional reaction was specific to the perceived verbal abuse/bullying in the workplace, combined with a feeling that she is unsupported by her manager. The applicant's mood appeared to be completely fine away from the workplace. Dr Knopman considered it safe for the applicant to resume her substantive duties in full, without restriction.

Treating medical evidence

78. A report from general practitioner, Dr Neyamul Bashir, dated 3 February 2015, indicated that the applicant was a new patient, having first visited the surgery on 7 January 2015. Dr Bashir stated:

“On the day of first consultation, she informed that she was admitted on the hospital on 05.01.2015 after having a panic attack at work. She was being verbally abused by her colleagues over 4 years and the situation is getting worse. She tried to take up the matter to the authority but apparently no action was taken by the management over the Issues.

On 05th of January, same thing happened at work she had a fainting attack and was taken to the hospital. She went through different medical examination and test and later on discharged from hospital all the tests did not focus on any other severe medical condition. On the day of her first medical consultation at our medical centre she did not have any abnormal medical signs, but only she was worried and stressed at her working condition. She also informed me that she had Lt frontal meningioma. but her medical examination was normal.”

79. Dr Bashir advised that the applicant could go back to her pre-injury duties as soon as possible.
80. A medical certificate issued by Dr Bashir on 27 September 2016 certified the applicant as “suffering from work-related stress and anxiety” and unfit for work from 26 September 2016 to 27 September 2016. On 19 September 2018, Dr Bashir issued another medical certificate certifying the applicant as unfit for work until 28 September 2018 due to “suffering from severe depression due to bullying and harassment at work”. A GP mental health plan signed by the applicant and Dr Bashir on 4 October 2018 referred to anxiety and depression and a K 10 score of 45/50.
81. An “ED Discharge Referral” from Campbelltown Hospital dated 27 August 2019 records that the applicant presented on that date with headache, chest pain and feelings of anxiety. Investigations were unremarkable and a mental health assessment was done. Hospital records note:

“Developed chest pain since today evening 3 PM soon after work Central chest pain not radiating in nature Lasting about 10 min and states pain is constant Headache for last 1 week duration but no generalize weakness, no associated nausea or vomiting During arrival husband observed shivering her both hands and self-talking to herself lasted 5 min No LOC, incontinence, drooling of saliva States she is experiencing work related stress Auditory hallucinations for last 2 weeks duration”

82. On 29 August 2019, Dr Neyamul Bashir referred the applicant to psychiatrist, Dr Padmini Howpage noting:

“stress and anxiety
due to employment
had MH plan and MH sessions
stress and anxiety got worse
need assessment by psychiatrist and medication”

83. A "MH Discharge/Transfer Summary – Final Report" dated 25 October 2019, indicates that the applicant was admitted to Waratah House at Campbelltown Hospital on 3 September 2019 as:

"a voluntary patient for the treatment and management of a Major Depressive Disorder with melancholic and psychotic features secondary to work related stress."

84. The clinical records in evidence show that on 30 October 2019, the applicant consulted psychologist Carl Nielsen, who noted:

- 1) Employed by Berri Fruit
- 2) Process worker - 40 hours per week
- 3) 11 years of service
- 4) Last date of work - 3rd September 2019 - went to Campbelltown hospital and transferred to mental health unit and remained there for 7 weeks - agitated and melancholic depression
- 5) Deterioration in mental state occurred several years ago and she told her family doctor about the belittling, intimidation and harassment
- 6) Various derogatory statements made towards her from 'Christine'
- 7) Psychological Symptoms: Sleep disturbance, low mood, irritability, impaired memory, impaired concentration, anergia, anhedonia, avoidance, self esteem
- 8) Diagnosed with agitated and melancholic depression"

85. A clinical note and report from general practitioner, Dr Eric Lim, also dated 30 October 2019 states:

"On Tuesday, 3 September 2019, Faria reported that whilst at work she suffered a Psychological Injury from bullying and harassment at work. A co-worker has constantly been making derogatory comments over several years. She has spoken with management several times who claim they will investigate, however no action has been taken. After speaking with management, they continuously moved her shifts and advised there was no work for her which caused her distress. On the 3rd of September, she was admitted to the Mental Health Ward at Campbelltown Hospital."

86. Dr Lim diagnosed Major Depression (Melancholic) and said the history was consistent with employment being the main contributing factor to the injury. Dr Lim considered the applicant was totally unable to work. A referral was made on the same date to psychiatrist, Dr Nirenjen St George.

87. On 6 December 2019, Dr Bashir prepared a report to the respondent's insurer which indicated the applicant had two medical issues - one being a brain haemangioma and the other being severe anxiety and depression. With regard to the haemangioma, Dr Bashir said it was not causing any mental or physical effects as confirmed by an MRI done on 21 November 2017. The applicant had never needed any medical treatment for her haemangioma. With regard to her psychological symptoms, Dr Bashir said,

"Avelia mentioned about stress at work for last 2 years, Her K 10 score was 50/50. A mental health plan done 03.04.2018 to see a psychologist for help, She was also put on medication.

Avelia's MH condition got worse the family decided to take her to hospital. She was in Mh hospital from 03.09.2019 to 18.10.2019.

Avelia's husband used as interpreter to explain the K10 questions.

Avelia still going to hospital and treated for her medical condition as outpatient and she also comes for her follow-up with her GP twice weekly.

...

I am not aware about any of her family, financial issues or drug and alcohol issues that might have given to such a degree of Mh issues. I know the family is very supportive have a close bond. Her Mh issues are work-related due to chronic harassment and abuse at work. She asked for help repeatedly but did not get proper help from them.”

88. Dr St George prepared a report for Dr Lim on 10 December 2019. Dr St George recorded a history as follows:

“She reports being verbally abused by a particular manager for the past 5 years. She reported this at the time to management but no action was taken. The abuse continued to escalate with Avila making a further 3 formal complaints which were not actioned. She reports on 3.9.2019, after her shift she experienced a breakdown consistent of a psychotic episode in the context of acute depressive episode. She required a 7 week admission to Campbelltown Public Inpatient unit and was diagnosed with major depressive disorder. She required significant psychotropic medication including Venlafaxine 300mg daily, Olanzapine 10mg nocte and Melatonin 2mg nocte. She was discharged with acute psychiatric followup.”

89. Dr St George diagnosed Major Depressive Disorder with significant depressive pseudodementia and concentration issues due to high dose psychotropics.
90. In a further report dated 11 February 2020, Dr St George reported that the applicant had experienced a return of previously reported auditory hallucinations in the context of worsening of her major depressive disorder. Changes were made to the applicant’s medication prescriptions.
91. Some improvement was reported to Dr St George on 26 February 2020:

“Her pervasive low mood and negative ruminations continue but she is not as nihilistic as previously and her sleep has improved significantly as well. She was significantly less psychomotor retarded and bradyphrenic than our last review and was able to brighten up at times despite her overall dysphoric demeanour.”

92. On 1 and 29 April 2020, however, the applicant reported to Dr St George that her mental state had deteriorated with feelings of hopelessness and helplessness triggered by the coronavirus and financial distress.

Dr Richa Rastogi

93. The applicant relies on a medicolegal report prepared by consultant psychiatrist, Dr Richa Rastogi, dated 9 March 2020.
94. Dr Rastogi took a detailed history of injury as follows:

“Mrs Faria reported the onset of interpersonal problems whilst working with another co-worker Christie over 4 years who made personal comments on her weight, alleged that she had a relationship with another male colleague, Sala and calling her ‘fat’ time and time again. She further alleged that Mrs Faria did not take time off due to fear of being terminated. She continued to verbally denigrate her calling her ‘dumb’ and made derogatory and racial comments on an ongoing basis directed towards her. Mrs Faria did report this to her management and HR over time who dismissed her grievances and no further

investigation or outcomes were achieved. She continued working with Christie and was subjected to further abuse and humiliation. In 2019, when Mrs Faria raised her grievances against the management, they did not believe her and referred her to the company doctor for mental health and fitness assessment. She had an assessment and was deemed fit to perform preinjury duties and role.

She had another independent assessment and was given feedback that her writing skills were poor following a series of psychological and memory tests conducted. However, she was deemed fit to work in pre-injury duties. During this time her shifts were constantly changed from night shift to afternoon and day shifts randomly and this caused further distress and anxiety. She felt victimised and unfairly targeted. Furthermore, they put pressure on her to learn safety procedures with the help of a Portuguese interpreter otherwise she was threatened that she would be terminated if she did not co-operate and she would not be allowed to work.

She engaged in safety training and completed the training. The management decided to introduce her to keep a log of daily events since 2019 that she was maintaining. She was given more paperwork to take the sticker from the bottles and note the serial number. Following that the management gave her feedback that she was too slow, and this was slowing the production. She stated that whilst she was doing the paperwork the production had to slow down to keep a note of every serial number. She was criticised and denigrated and humiliated for that and unsupported.

The management called the Portuguese interpreter to show her again how to do the paperwork and do things more quickly and speedily. She felt embarrassed and humiliated and developed anxiety with extra tasks and pressures placed on her.

She was not coping and felt alienated and picked on constantly. She approached Victor her team leader as she was not feeling well and requested an early mark. The next day she was emotionally fragile and vulnerable and continued to push herself to work due to fear of being terminated. She was preoccupied and distressed. At the end of the shift, she felt acutely distressed and was shaking excessively and very tremulous requesting her husband to take her to hospital. She presented to Campbelltown Hospital for review.”

95. Dr Rastogi had regard to the discharge summary from Campbelltown Hospital and report from Dr Lim. The applicant was noted to be seeing a psychologist and psychiatrist. The applicant described a range of symptoms as follows:

“Mrs Faria reported that since 2019 she has experienced chronic insomnia, heightened anxiety with fears, ruminations, poor stress coping and negative cognitions. She is socially isolated and withdrawn and emotionally blunted. She is emotionally disconnected and lost interest in activities. Her motivation is poor, and her self-care has diminished. Her concentration is poor with poor retention and recall. She spends most of the time at home and does not like to participate in social activities. Her husband reported that she is preoccupied and talking to herself, hearing voices in her head and can hear someone talking to her and is distracted. She can hear people ‘swearing’ at the back of her head. She is on 15 mg Olanzapine and her sleep has improved however reports being very sedated causing extreme tiredness during the day and unmotivated to do things.

She felt angry, resentful and betrayed by her employer. She felt ostracised and feels under scrutiny and victimised. She felt persecuted and never humiliated to that extent.

She has lost her confidence and is amotivated. She lost her appetite and became socially reclusive. She is preoccupied with incidents at work and feels punished and targeted. She feels agitated and has high irritability. She feels like a vegetable and reports short attention span and concentration lapses.”

96. Dr Rastogi said there was no history of any psychological conditions. The applicant had a diagnosis of meningioma that had been conservatively managed.
97. Dr Rastogi noted that the applicant was born and raised in East Timor and had four brothers and six sisters. Both parents were deceased. The applicant’s performance in primary school was below average and she did not attend high school. The applicant moved to Australia in 1985 and she was employed as a process worker for Holden for 17 years before commencing employment with the respondent.
98. Dr Rastogi diagnosed major depressive disorder with psychotic features. Dr Rastogi referred to the history reported to her and said

“The culmination of chronic stress and denigration with lack of support by her employer, being targeted and constant ignorance resulted in depressive disorder with psychotic features and inpatient admission to a psychiatric unit.

Since discharge, she has been unit to work and continues to experience derogatory voices, excessive fears and reliance on her husband, social avoidance with a feeling of ineptness and scrutiny, loss of independence and confidence brought by unresolved grievances, perceived persecution and being targeted by her employer.

She remains unfit to work in any capacity due to psychological injury and has extreme poor stress tolerance and holds a poor prognosis.”

99. Dr Rastogi said there was a direct connection between the applicant’s current psychological diagnosis and chronic work-related stressors in the absence of premorbid pathology or vulnerabilities. Employment was said to be “the only substantial contributing factor” to the psychological injury.
100. Dr Rastogi said the applicant required ongoing psychological therapy and sessions with her psychiatrist. Dr Rastogi reiterated the opinion that the applicant was currently unfit to work in any capacity and had no capacity to work in the future.

Applicant’s oral submissions

101. Mr Morgan noted that the respondent’s medical evidence was confined to the reports of Ms Gilbert and Dr Knopman. Absent a medical case, Mr Morgan said it was difficult to discern the basis for the respondent’s assertion that there was no injury pursuant to ss 4 or 9A. Mr Morgan said it was also difficult to see how the defence pursuant to s 11A(1) could be made out.
102. Mr Morgan noted that the evidence revealed repeated contemporaneous complaints with respect to the treatment the applicant experienced at work. A basic factual background was set out in the applicant’s statements with further evidence found in the medical reporting, including the medicolegal report of Dr Rastogi. Mr Morgan noted that Dr Rastogi had access to the factual investigation, s 78 dispute notice, reports from Dr Bashir, mental health plans, materials relating to the applicant’s hospital admission and referrals and certificates from Dr Lim.

103. Mr Morgan submitted that all of the doctors who had provided reports referred to the applicant complaining of perceived bullying in the workplace. The applicant felt her complaints had not been taken seriously. Mr Morgan noted that it had not been disputed that the applicant made constant complaints of bullying. It was also not in dispute that the applicant's complaints had been dismissed. The applicant felt unsupported. Mr Morgan noted the opinion given by Dr Rastogi that the combination of chronic stress, denigration, lack of support and constant ignorance had resulted in a depressive disorder with psychotic features and inpatient admission to a psychiatric unit.
104. Mr Morgan submitted that the factual basis for Dr Rastogi's diagnosis was consistent with the applicant's evidence. There was no competing medical case with respect to injury or competing factual history. Mr Morgan submitted that the Commission was left with the unchallenged opinion of Dr Rastogi, which was consistent with the reports of the applicant's treating practitioners and those who had provided reports for the respondent. Mr Morgan noted that those practitioners accepted a relationship between the applicant's condition and the workplace.
105. Mr Morgan took me to the reports of Dr Bashir, Dr Lim and Dr St George and noted that all consistently identified workplace factors as causative of the applicant's decompensation.
106. Mr Morgan also took me to Ms Gilbert's report. Mr Morgan submitted that the applicant's lack of sophistication and language barriers resulted in a lack of specificity in the applicant's claims. Ms Gilbert's report provided further detail regarding the alleged bullying and the nature of the applicant's relationship with "Christine".
107. Mr Morgan noted that the applicant was referred for a well-being assessment in April 2019. Mr Morgan submitted that the opinions of Ms Munro were similar to those of Ms Gilbert. The applicant was unable to articulate her issues in the workplace in detail. As a result, the respondent was unable to identify issues in the workplace and the applicant felt unsupported. Although Ms Munro referred to the applicant's claim of bullying being "proven" false based on video footage on at least one occasion, Mr Morgan submitted that it was questionable whether this was "proved". The applicant's evidence suggested that Christine had deliberately avoided being seen on CCTV footage. In any event, Mr Morgan submitted that the fact that complaints were made and recorded was not in contest.
108. Referring to the report of Dr Knopman, Mr Morgan submitted that the background information provided by the employer consisted of an explicit concession that the applicant had ongoing interpersonal difficulties in the workplace. Dr Knopman's report identified the applicant's lack of sophistication as an issue. Although a diagnosis was not made, Dr Knopman observed that the applicant derived significant assistance from the EAP and recommended that she be afforded more assistance. The history provided to Dr Knopman was in broadly the same terms as the other histories documented in the medical reports.
109. Despite Dr Knopman's recommendations, things did not improve in the workplace and ultimately the applicant was admitted to Campbelltown Hospital in August 2019. A discharge summary from subsequent admission noted a diagnosis of major depressive disorder with melancholic and psychotic features secondary to work-related stress. Mr Morgan submitted that it was hard to imagine a clearer connection to employment.
110. The applicant made a number of complaints which were investigated. The respondent in its own documents considered a long-standing history of complaints, hence the referrals by the respondent to the psychologists and neuropsychologist. Those practitioners noted the complaints and recorded that the applicant was an unsophisticated individual. The evidence all pointed to a clear relationship between workplace issues and the applicant's current condition.

111. Mr Morgan submitted that the statement from Ms Taku was damning by what it left out rather than what was included. Only four questions were asked of Ms Taku, all of which were answered by the word “no”. Ms Taku refused to add any further detail to her denials nor did she address any specific allegations with respect to the way she treated the applicant. Mr Morgan submitted that the Commission would have serious concerns with respect to the weight that might be given to that evidence.
112. Mr Morgan referred to the statements from the respondent’s employees. Mr Morgan submitted that those statements recounted the steps that the respondent took to investigate the applicant’s complaints. The statements recorded that the applicant appeared at times to be upset. The applicant was noted to be unhappy with change and could become withdrawn although she was never performance managed. Mr Morgan submitted that CCTV footage would not necessarily reveal verbal bullying. At best, Mr Morgan submitted that the respondent’s investigations were inconclusive. The applicant’s complaints were unable to be taken further. Mr Morgan said it was difficult to identify where the s 11A(1) defence arose. There was no evidence of disciplinary action or performance appraisal causing upset and discomfort.
113. Mr Morgan concluded that the medical evidence was all one way with regard to diagnosis, causation and incapacity. Mr Morgan said there was no doubt that the applicant experienced interpersonal conflict in the workplace. This was conceded by the employer and consistently recorded by her general practitioners, Dr St George, Ms Gilbert, Ms Munro, Dr Knopman and Dr Rastogi. The respondent relied on a broadly asserted and unparticularised defence under s 11A(1). No other cause of the applicant’s condition had been identified.
114. Mr Morgan noted that the applicable PIAWE figure had been agreed at \$1,033.

Respondent’s oral submissions

115. Mr Stockley submitted that the respondent had demonstrated an overarching concern to deal with the complaints made by the applicant at an industrial level. It had been unable to corroborate any of the complaints made and formed the view that there may be another health and welfare issue given the applicant’s presentation in the workplace. The applicant’s conduct caused sufficient concern, given the failure to corroborate her complaints that the respondent saw fit to have psychological and neuropsychological examinations performed.
116. Mr Stockley submitted that this was an atypical case. The applicant changed, withdrew and prevaricated with regard to her allegations of bullying and harassment. Mr Stockley conceded that the applicant had made complaints but said the respondent had made an assessment of the quality of the complaints and whether there was any basis for them. The respondent’s own examination of the matter was evidence to be taken into account.
117. Mr Stockley noted that the pleading in the ARD was of a disease injury with a date of injury of 3 September 2019. The only thing that happened on that date was the applicant’s admission to Waratah House. The applicant had not been at work for some time prior to that date.
118. Mr Stockley submitted that the applicant’s statements barely complied with the Commission Rules in view of what was known about the applicant’s illiteracy in the absence of any indication of how the applicant had adopted their contents. The only person identified as harassing the applicant in the statements was a “Kristy”. Mr Stockley submitted that it was necessary to infer that this was a reference to Christine Taku whose involvement with the applicant was identified in the respondent’s factual investigation. No other person was identified as harassing the applicant.
119. The applicant alleged that over a period of four years “Kristy” made personal comments about her weight and spread rumours. Mr Stockley noted that the statement of 29 May 2014 was a handwritten document. Given the evidence of the applicant’s illiteracy it was unclear who the author of that document was.

120. Mr Stockley submitted that it was necessary to hunt elsewhere to discern details of the allegations. Ms Newby's statement referred to a mediation in 2014 but Mr Stockley submitted that it was unclear whether the four years of personal comments allegedly made by "Kristy" occurred before or after this event. Mr Stockley submitted that the manner in which the applicant's claim was presented was most unsatisfactory.
121. Mr Stockley submitted that Dr Knopman's report gave insight into the applicant's psychological health as at the date of his assessment. Of all the assessments available, Mr Stockley submitted that Dr Knopman provided the most detailed and intense consideration. Mr Stockley submitted that it was apparent that there was a rapport between the applicant and Dr Knopman and he was able to gain from her a reasonable stream of information. Dr Knopman was the only practitioner to attempt to reconcile the inconsistencies and difficulties in the applicant's evidence. Dr Knopman's report revealed that his examination of the applicant lasted 3.5 hours.
122. Dr Knopman formed the view that the applicant did not have a diagnosable psychological condition. Whether or not there was conduct in the workplace constituting bullying or interpersonal difficulties, a further issue arose as to whether that conduct had resulted in a psychological condition.
123. Dr Knopman noted that there were significant divergences in the personal history given by the applicant. In particular, there were discrepancies in the various reports pertaining to the applicant's education and family including the number of siblings she had and whether or not she was adopted. These inconsistencies were said to add another level of uncertainty to the reliability of the applicant's evidence. Mr Stockley submitted that these handicaps were a problem for the applicant as she bore the relevant onus. It was not for the respondent to make good the narrative. Mr Stockley noted that Dr Knopman concluded that the applicant's cognition was functionally intact.
124. Mr Stockley referred to the statement of Mr Parsons and said it provided a succinct account of events. Mr Parsons noted that in 2019 the applicant took annual leave to see her sister in Portugal. When the applicant returned to work the requirements of her role had changed. The applicant required more training. The respondent had taken on board the comments of Dr Knopman and engaged a Portuguese interpreter to train the applicant to ensure she could cope with changes.
125. On 21 August 2019, errors were identified in the applicant's work. Coaching was conducted on that day. The applicant became visibly upset and struggled to complete her tasks. The applicant ceased work on 28 August 2019.
126. Mr Stockley submitted that it was not apparent that Dr Rastogi had seen or commented upon Dr Knopman's report. Mr Stockley said this would have been an obvious starting point. It was noted that Dr Rastogi took a history that after an independent assessment the applicant was given feedback that her writing skills were poor. Mr Stockley noted that this was a gross understatement of Dr Knopman's observation that the applicant was illiterate. Mr Stockley submitted that the conclusions expressed by Dr Rastogi were diminished by the absence of a correct clinical history.
127. With regard to s 11A(1), Mr Stockley submitted that the alleged conduct by "Kristy" had not resulted in a diagnosable psychological condition by the time of Dr Knopman's report. The applicant presented to hospital on 3 September 2019. The only other relevant event was the training in the new workplace procedures during which the applicant showed visible signs of distress. Mr Stockley submitted that the coaching provided to the applicant constituted an appraisal of her performance.

128. Mr Stockley summarised the respondent's primary submission as being that the applicant had failed to discharge her onus of demonstrating workplace injury. There was no evidence of any involvement with Christine Taku in the period leading up to the date of injury. The only relevant event was training and assessment of the applicant's work performance in August 2019.
129. Mr Stockley noted that the evidence indicated that the applicant had been referred to a psychiatrist other than Dr St George. It was not clear whether the applicant took up referral to Dr Howpage. There was no report or feedback to Dr Bashir in evidence.
130. Mr Stockley submitted that the reliability of the applicant's accounts was also diminished by the allegations against Jesslyn which were subsequently retracted. The applicant's accounts of her interpersonal difficulties varied from time to time.
131. Mr Stockley noted that the records from Waratah House referred to auditory delusions and symptoms associated with psychosis. In light of these symptoms, Mr Stockley submitted that the Commission may have concern as to the psychological reliability of the applicant's own observations and reporting of symptoms. Mr Stockley noted that the respondent had not had the opportunity to medically examine the applicant as her doctors certified her as too ill to undertake an examination. The Commission did, however, have before it the evidence of the employer who had taken steps to respond to, investigate and deal with the complaints raised from time to time by the applicant.
132. With regard to capacity, Mr Stockley submitted that the Commission ought to satisfy itself on the evidence. Mr Stockley noted there were multiple certifications, although these gave a date of injury of 4 October 2018.

Applicant's oral submissions in reply

133. With regard to the date of injury, Mr Morgan referred to clinical notes recorded by psychologist Carl Nielsen and Dr Eric Lim on 30 October 2019, both of which indicated that the applicant's last date of work was 3 September 2019. Mr Morgan submitted that this was a deemed date of injury. Mr Morgan noted also that the Commission was not a place of strict pleading. It was submitted that 3 September 2019 was the last day of work and also the date on which the applicant was admitted to Campbelltown Hospital.
134. Mr Morgan submitted that there was no medical evidence to support a s 11A(1) defence. Mr Morgan submitted that the respondent's submission that the change of duties training provided to the applicant in August 2019 was the whole or predominant cause of the applicant's psychological injury sat uncomfortably with vast volume of material referring to psychological symptoms related to workplace issues in 2018 and early 2019. The applicant kept working but her condition deteriorated.
135. Mr Morgan submitted that the training provided to the applicant in August 2019 appeared to be an informal process related to the modification of the applicant's duties which had taken place. Mr Morgan noted that the respondent bore the onus of establishing the defence in s 11A(1). Mr Morgan submitted that it would be dangerous for the Commission to attempt to make its own medical diagnosis in the absence of medical evidence for the respondent. The applicant had been referred for treatment and had been using the EAP in 2018. There were no other background issues to identify an alternative cause.
136. Mr Morgan noted that although it was not apparent that Dr Rastogi had been given Dr Knopman's report, that report was not relied on in the s 78 notice of 4 December 2019 and had not been served upon the applicant by the time of Dr Rastogi's report. If anything, Dr Knopman's report was said to be supportive of the applicant's assertions with regard to what she was experiencing in the workplace.

137. Mr Morgan submitted that there was no evidence indicating anything other than that the applicant was totally incapacitated for work.

Applicant's written submissions

138. Supplementary written submissions were prepared by Mr Morgan on 17 July 2020. Mr Morgan noted that the applicant had prepared a supplementary statement on 14 July 2020 confirming that her initial statement was completed on her instructions. The critical element to emerge from the applicant's evidence was that she was not coping and felt alienated and picked on constantly. The applicant continued to push herself to work but was preoccupied and distressed until she was taken to Campbelltown Hospital by her family. The applicant was not able to deal with confrontation, had tried to express herself to her employer but to no avail. Mr Morgan noted that both Dr Knopman and Ms Gilbert had recorded that the applicant had difficulty expressing herself in a comprehensible fashion. This could be attributed to her level of education and non-English-speaking background.
139. On this background, in considering the credibility of the applicant's claims, Mr Morgan submitted that the consistent reporting of issues associated with the workplace and a co-worker to treating medical practitioners, the treating psychiatrist as well as the specialists commissioned by the respondent, was critical.
140. Mr Morgan referred in more detail to the well-being assessment prepared by Ms Munro and submitted that the workplace itself identified that there were complex and long-standing interpersonal difficulties in the workplace. This was consistent with the referral to Dr Knopman.
141. The diagnosis of the applicant's emotional responses fell to the medical examiners such as the admitting psychiatrist at Campbelltown Hospital's mental health unit, Dr Bashir, Dr Lim and Dr St George. Mr Morgan submitted that there was no competing opinion with respect to diagnosis.
142. Mr Morgan noted the timeline of events provided by Dr Bashir in his report of 6 December 2019, which referred to the applicant reporting stress at work for the last two years and a mental health plan being done on 3 April 2018. Absent any other cause of injury, Mr Morgan submitted that it was clear that the applicant sustained injury arising out of and in the course of her employment. There was no legitimate ground for a defence under s 11A(1).

Respondent's written submissions

143. The respondent's solicitor, Mr Lee supplemented the respondent's oral submissions with written submissions dated 27 July 2020. Mr Lee submitted that in order to meet a claim of bullying and harassment, the respondent was entitled to know the identity of the relevant perpetrator. The applicant's primary statement identified this person only as "Kristy". The respondent had accepted that this was probably a reference to Christine Taku about whom the applicant complained in 2014.
144. Mr Lee noted that the applicant still did not identify any conflict with Christine Taku beyond 2014. Nor had the applicant explained or identified the events which led to her hospital presentation on 27 August 2019. The respondent had produced evidence rebutting the specific allegations against Christine Taku. The applicant's evidence did not deal with the fact that a mediation was organised by the employer although she now claimed that she was incapable of accepting the respondent's offer of a face-to-face meeting.
145. Mr Lee submitted that the clinical references to complaints of workplace problems on various occasions did not deal with the central claim in this application being the conduct of Christine Taku.

FINDINGS AND REASONS

Injury

146. 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:

“4 Definition of ‘injury’

In this Act:

injury:

- (a) means personal injury arising out of or in the course of employment,
- (b) includes a disease injury, which means:
 - (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
 - (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and
- (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers’ Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined.”

147. “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.”

148. 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:

- (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)

¹ [2010] NSWCCPD 76.

- (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."

149. 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."

150. The first issue for determination is whether the applicant sustained an "injury", as claimed, for the purposes of ss 4 and 11A(3) of the 1987 Act. The applicant bears the onus of proving this matter on the balance of probabilities.
151. The respondent's submissions assert that the applicant has failed to discharge her onus. In part, this is said to be due to the lack of relevant detail in the applicant's evidence. It is true to say that the primary statement prepared by the applicant in relation to the current claim, being the statement of 26 March 2020, lacks detail in relation to the identification of the co-worker said to have subjected the applicant to bullying and harassment; the period during which the conduct was said to have occurred and the context in which the alleged conduct occurred. Some further detail in relation to the identity of the co-worker and context in which the alleged conduct occurred was provided in the supplementary statement of 14 July 2020. There remains, however, ambiguity as to the timing and period during which the events on which the applicant relies took place.
152. Further information about the applicant's experiences in the workplace can be discerned from the other evidence before the Commission including, the medical and psychological reports and the factual evidence provided by the respondent. There are, however, a number of discrepancies or inconsistencies between the various accounts, including with regard to the identity of the person or persons said to have bullied or harassed the applicant. The respondent's evidence identifies complaints made by the applicant against co-workers who are not mentioned in the applicant's statements in these proceedings. It appears from the respondent's evidence that the applicant has at times retracted or denied knowledge of complaints she made previously against her co-workers, Jesslyn and Aaron. The applicant's narrative, as described in these documents, is characterised by a lack of specificity and elaboration when pressed for further detail. There are also discrepancies in the accounts of the applicant's personal history and background. The respondent submits that these uncertainties diminish the reliability of the applicant's evidence.

153. I accept Mr Stockley's submission that the respondent demonstrated a concern to address the complaints made by the applicant at different times and took steps to investigate them. The respondent has also demonstrated a concern to ensure the applicant's health and well-being. I accept that the respondent's own investigations did not corroborate the applicant's claims of bullying and harassment in the workplace and the view was formed that the applicant's allegations were vexatious. The conclusions reached by the respondent have been taken into account and given weight.
154. In assessing the reliability of the applicant's claims it is, however, necessary to carefully consider the applicant's particular circumstances and background. I accept, on the evidence of Dr Knopman, that the applicant is illiterate and had an extremely limited formal education in East Timor. The applicant also faces linguistic barriers, noting that English is not her first language. Dr Knopman found that the applicant did not have the vocabulary or cognitive sophistication to explain or elaborate upon her experience. In those circumstances, it is appropriate to approach her claims with caution and take into account the range of available information in making an assessment as to whether the relevant onus has been discharged.
155. An additional difficulty arises in this case due to the nature of the condition with which the applicant has been diagnosed. The diagnosis eventually given to the applicant was major depressive disorder with melancholic and psychotic features. It was recorded in a discharge referral from Campbelltown Hospital dated 27 August 2019 that the applicant had been experiencing auditory hallucinations for the last two weeks. The symptoms described by the applicant's treating psychiatrist, Dr St George have included pseudodementia, concentration issues, psychomotor retardation and bradyphrenia. In early 2020, the applicant reported a return of previously reported auditory hallucinations. Auditory hallucinations were also identified as ongoing by Dr Rastogi. Whilst Dr St George appears to attribute to some of these symptoms to the psychotropic medication prescribed to the applicant, I find that the applicant was experiencing some psychotic symptoms prior to her admission at Waratah House on 3 September 2019. It may be that these features of the applicant's condition can explain some of the more recent confusion and inconsistency documented in the respondent's evidence. It is, however, unclear when these symptoms first started. Dr Knopman found, at the time of his report, that the applicant's cognition was functionally intact.
156. The treating medical evidence indicates that the applicant had complained of psychological symptoms which she connected to her experience in the workplace for a considerable period of time prior to 3 September 2019. The applicant first consulted Dr Bashir with regard to psychological symptoms related to work in January 2015. Dr Bashir reported that the applicant had a "panic attack" at work after being verbally abused by work colleagues over a period of four years. The applicant said she had tried to take up matters with management to no avail.
157. This evidence broadly aligns with the written statement on 29 May 2014 and the evidence of Ms Newby, who recorded that in April 2014 the applicant had accused two process workers of bullying her. Ms Newby gave evidence that the applicant also claimed to be stressed and upset about rumours. In May 2014, the applicant made a complaint about Christine Taku as a result of which a mediation was arranged. Ms Newby stated, and other evidence lodged by the respondent confirms, that in January 2015 an ambulance was called after the applicant was found conscious but unresponsive in the workplace.

158. The applicant returned to work following this event although she continued to report psychological symptoms from time to time. In September 2016, Dr Bashir certified the applicant as unfit for work for one day due to work-related stress and anxiety. In a report to the respondent dated 6 December 2019, Dr Bashir indicated that the applicant had reported stress related to work for the previous two years. Dr Bashir reported that a mental health plan was done on 3 April 2018 and the applicant was put on medication. The applicant's K10 score at that time was said to be 50 out of 50. A further medical certificate was issued by Dr Bashir in September 2018 certifying the applicant as unfit for work due to severe depression due to bullying and harassment at work. A GP mental health plan dated 4 October 2018 refers to anxiety and depression and a K10 score of 45/50. Unfortunately, Dr Bashir's full clinical records are not in evidence.
159. It was in mid-2018 that the applicant made a complaint with regard to her co-worker Jesslyn. Mr Parsons' evidence was that in August 2018 the applicant alleged that Jesslyn had bullied her and an investigation was undertaken. The applicant attended a meeting in September 2018 at which she was shown CCTV footage and asked to explain the discrepancy between what she had alleged and what the footage showed.
160. The applicant was examined by Ms Gilbert on 9 October 2018 at the respondent's request. During Ms Gilbert's examination, the applicant did not complain of bullying and harassment by Jesslyn but rather complained of conduct perpetrated by Ms Taku. Ms Gilbert noted that there appeared to be confusion over the identity of the person bullying her. The respondent's evidence indicates that the applicant later denied that she had been bullied or harassed by Jesslyn and said she could not recall making a complaint about her.
161. Although Ms Gilbert did not consider the applicant's presentation and history to be consistent with a diagnosis as specified in DSM-V, she did record that the applicant was experiencing psychological symptoms of significant anxiety, sleep disturbance, poor concentration and a tendency to socially isolate herself.
162. The applicant returned to work in late 2018 although again took leave complaining of stress in early 2019. Allegations were made against the applicant's team leader in March 2019. The allegations relating to the team leader were unusual in so far as they alleged that unauthorised photographs were taken of the applicant and comments made about her breasts. Those allegations were discussed during a series of meetings in March 2019 at which the applicant was approached with regard to making vexatious allegations. It is apparent from the respondent's evidence that during these meetings the applicant either did not appear to recall or did not elaborate on the allegations made against Jesslyn or Aaron. Mr Movsessian described the applicant's presentation at a meeting on 8 March 2019 as "confused, disoriented and monotone".
163. Shortly afterwards, the respondent referred the applicant to psychologist Ms Munro and later, on her recommendation, to neuropsychologist Dr Knopman. During the assessment with Ms Munro, the applicant reported workplace stress although she attributed this predominantly to problems with her "manager". The applicant said the bullying by Ms Taku had stopped but the applicant had limited supports in the workplace, was feeling highly stressed in the workplace and reported experiencing a change in breathing and being unable to calm down. The applicant was said to be unable or unwilling to identify the triggers to her stress.
164. During the assessment by Dr Knopman, the applicant appears to have focused predominantly on her experiences with Ms Taku although the applicant had difficulty expressing the nature of the verbal abuse alleged. The applicant also referred to interpersonal problems with Jesslyn and her manager. Dr Knopman formed the view that the applicant's difficulties expressing herself were the result of linguistic and cognitive barriers rather than deliberate avoidance.

165. Neither Ms Munro nor Dr Knopman diagnosed a psychological condition in accordance with DSM-V although both described psychological symptoms. It was also noted that the applicant had availed herself of the EAP program. Dr Knopman considered it was safe for the applicant to resume her substantive duties without restriction at that time.
166. The applicant took significant periods of leave in mid-2019. On her return, the applicant's duties had changed and she was retrained with the assistance of a Portuguese interpreter. It is also apparent that the applicant was offered an afternoon shift and a transition to day shifts, most likely in accordance with the recommendations of Dr Knopman and Ms Gilbert. Around this time, the applicant's condition appears to have deteriorated resulting in the presentation to Campbelltown Hospital on 27 August 2019 and the admission to Waratah House on 3 September 2019.
167. Based on the foregoing analysis of the contemporaneous evidence, I am satisfied that the applicant experienced psychological symptoms from at least 2015 onwards which she uniquely and consistently attributed to interpersonal difficulties in the workplace, predominantly involving Ms Taku.
168. In order for the applicant to discharge the relevant onus, I must be satisfied that there were real, and not imaginary, events which actually occurred in the workplace, which were perceived as creating an offensive or hostile working environment.
169. The respondent's submissions suggest that there were no real events in the workplace as alleged by the applicant. In support of this contention there is the brief statement of Ms Taku. Whilst I have taken that evidence into account, I have noted that Ms Taku's evidence consists of single word denials and an unwillingness to elaborate or further respond to the allegations made by the applicant. Weighing against Ms Taku's evidence is the considerable, contemporaneous, and consistently repeated evidence of the applicant that she was subjected to verbal harassment by Ms Taku over a period of several years. The applicant's complaint to the respondent about the conduct of Ms Taku in 2014 appears to have been considered sufficiently credible as to prompt a mediation between the two workers. The more recent investigations by the respondent of "vexatious allegations" related to Jesslyn and Aaron rather than Ms Taku.
170. Whilst the evidence remains unclear as to the precise nature of the interactions between the applicant and Ms Taku or the period of time over which they occurred, I am satisfied on the balance of probabilities that there were real interactions between the applicant and Ms Taku which were perceived by the applicant as hostile and which were causative of psychological symptoms. Although it appears those interactions may have ceased at some point, I am satisfied on the medical evidence that they continued to affect the applicant and her experience in the workplace, given the applicant's repeated identification of these interactions as a source of her "stress" during her medical assessments.
171. I am further satisfied that there were other difficult interactions experienced by the applicant in the workplace. The evidence indicates that the applicant experienced other general interpersonal difficulties with her colleagues at work including her manager and kept to herself at breaks to avoid contact with other staff. I am satisfied that the applicant experienced particular difficulty with change including, changes made to her shifts and duties in August 2019.
172. The history provided to Dr Rastogi indicates that the changing of the applicant's shifts caused the applicant distress and anxiety. The applicant felt victimised and unfairly targeted. Whilst I am not persuaded that this perception of the respondent's motivation in changing her shifts was accurate given the recommendations of Ms Gilbert and Dr Knopman, I do accept that these were real events which were perceived by the applicant as hostile.

173. Similarly, Mr Parsons' evidence confirms that the applicant's duties changed and she was provided with one-on-one training and coaching in relation to those new tasks, during which the applicant was observed to become increasingly upset. The history provided to Dr Rastogi by the applicant indicates that the applicant felt criticised, denigrated and humiliated by these events and felt anxiety with the extra tasks and pressures placed upon her. The respondent has explained why the applicant's duties were changed and the reasons for the additional training and coaching. Whilst these actions appear objectively reasonable I accept that the applicant perceived them as hostile.
174. Although not relied on by the applicant in her statements, to the extent that the evidence suggests that the applicant may have been bullied or harassed by her co-workers Jesslyn and Aaron, I am not satisfied that there were real events of the nature described in the respondent's witness evidence. The applicant herself appears to have resiled from these allegations. Having regard to the confusion, inconsistency and nature of the allegations, and noting the features of the applicant's illness as reported in the records from Campbelltown Hospital, Dr St George and Dr Rastogi, I would not be satisfied on the balance of probabilities that these events as described in the respondent's evidence actually occurred.
175. At the time of their assessments, neither Ms Gilbert, Ms Munro nor Dr Knopman made a clinical diagnosis consistent with DSM-V, although they have clearly recorded that the applicant was experiencing a number of psychological symptoms. I am comfortably satisfied that by the time of the applicant's admission to Waratah House on 3 September 2019 the applicant was suffering from a diagnosable psychological condition.
176. The medical evidence both before and after that admission consistently identifies a causal relationship between the applicant's psychological condition and her employment with the respondent.
177. There is nothing in the evidence to suggest any pre-existing or previously diagnosed psychological condition. Nor is there anything in the evidence before the Commission to suggest an alternative cause for the applicant's psychological condition. I note, in particular that it has not been suggested by any of the practitioners that the applicant's meningioma has contributed to her psychological symptoms.
178. Dr Rastogi has provided the medicolegal opinion that the diagnosis of major depressive disorder with psychotic features was the culmination of chronic stress, denigration and lack of support in the workplace. I do not accept that the history reported to Dr Rastogi is factually correct in its entirety. That history was heavily coloured by the applicant's own perception and reporting of events. Having regard to the totality of the evidence, and for the reasons given above, however, I am satisfied that there is a fair climate for the acceptance of Dr Rastogi's expert opinion. Dr Rastogi's opinion on diagnosis and causation is broadly consistent with the opinions of the applicant's treating practitioners and the specialists engaged by the respondent.
179. There is no contrary expert opinion from the respondent, although I accept that this was because the applicant's treating practitioners certified her unfit to undergo further medicolegal examination.
180. In all the circumstances, I am satisfied on the balance of probabilities that there were real events in the workplace, which the applicant perceived as hostile and which gave rise to psychological symptoms. I am satisfied that as the cumulative result of those events, the applicant sustained a diagnosable psychological condition in the course of and arising out of her employment with the respondent. I am further satisfied that employment was the main contributing factor to the applicant's psychological condition.
181. I am satisfied that the applicant has sustained a psychological injury for the purposes of ss (4)(b)(ii) and 11A(3).

182. I note that the applicant relies on a deemed date of injury of 3 September 2019 on the basis of clinical records prepared by Mr Nielsen and Dr Lim, which identified that as the last date of work and the date of the applicant's admission to Waratah House. Whilst there is some suggestion in the respondent's witness evidence that the applicant's last day of work may have in fact been 28 August 2019, I am prepared to accept that the date relied on by the applicant in the ARD is appropriate.

Section 11A(1)

183. 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.”

184. Subsection 11(A)(1) is a disentitling provision and an employer who wishes to rely upon it carries the onus of establishing that defence².

185. 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.”

186. The dispute notice of 4 December 2019 raised a defence under s 11A(1) relying on “performance appraisal” although it is unclear which particular action by or on behalf of the respondent was relied upon as causative of psychological injury. The notice simply asserted that no information had been provided to “counter the information provided by your employer which indicates they have acted reasonably to date”.

187. The subsequent dispute notice of 8 April 2020 relied on both “performance appraisal” and “discipline” on the basis that the evidence indicated that the applicant had gone off work and sought treatment following the training and coaching provided at the end of August 2019 when errors were identified in the applicant's quality forms. This was said to be consistent with the history obtained by Dr Rastogi that the applicant felt pressured to learn safety procedures and was criticised for being too slow.

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

³ [2017] NSWCCPD 6; BC201701872.

188. At the arbitration hearing, Mr Stockley submitted that the alleged conduct by Ms Taku had not resulted in a diagnosable psychological condition by the time of Dr Knopman's report. The applicant presented to hospital on 3 September 2019. The only other relevant event was the training and coaching in the new workplace procedures during which the applicant showed visible signs of distress. Mr Stockley submitted that the coaching provided to the applicant following the identification of errors in her work constituted an appraisal of her performance.
189. A primary difficulty for the respondent in establishing this defence is that there is no medical opinion before me which identifies this coaching or training as the "whole or predominant cause" of the applicant's psychological injury.
190. I do accept that Dr Rastogi took a history of the applicant feeling criticised, denigrated and humiliated by the events in late August 2019 and experiencing anxiety with the extra tasks and pressures placed upon her. I also accept that temporally these events coincided with the applicant going off work and being admitted to Waratah House. I do not, however, take Dr Rastogi to have implicitly or explicitly given an opinion that these events were the whole or predominant cause of the applicant's psychological condition. Rather, Dr Rastogi identifies numerous events over a period of many years as being cumulatively causative of the applicant's injury, including being bullied and targeted by a colleague with no support from management; being given new duties; and the applicant's shifts being changed. Dr Rastogi expressed disagreement with the reliance on a s 11A(1) defence in the first dispute notice.
191. There is also nothing in the other medical evidence to suggest that the coaching and training provided in August 2019 were "the whole or predominant cause" of the applicant's injury. Although I accept that the practitioners to whom the respondent referred the applicant did not diagnose a psychological condition at the time of their assessments, they did record significant psychological symptoms related to work prior to the events of August 2019. Dr Lim expressed the view that the applicant suffered a psychological injury as a result of "years" of repeated workplace harassment by a co-worker, lack of action by management, the applicant's shifts being moved and the change in the applicant's work. Mr Nielsen's clinical notes refer to a deterioration in the applicant's mental state "years ago" due to "belittling, intimidation and harassment".
192. In all the circumstances, I am not satisfied that the applicant's psychological injury was "wholly or predominantly caused by" action with respect to performance appraisal or discipline. I am not satisfied on the evidence before me that the respondent has discharged the onus of establishing a defence under s 11A(1) of the 1987 Act. The applicant's psychological injury is therefore compensable.

Extent and quantification of incapacity

193. Section 33 of the 1987 Act provides that if total or partial incapacity for work results from an injury, the compensation payable by the employer to the injured worker shall include a weekly payment during the incapacity.
194. The applicant in this case seeks weekly compensation from 3 September 2019 on an ongoing basis.
195. In order to determine the applicant's entitlement to weekly payments, it is necessary to determine whether she had "no current work capacity" or "current work capacity" as defined in s 32A of the 1987 Act during the period of weekly benefits being claimed.

196. Section 32A of the 1987 Act defines the relevant terms as follows:

“current work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment.

no current work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker’s pre-injury employment or in suitable employment.

suitable employment, in relation to a worker, means employment in work for which the worker is currently suited:

- (a) having regard to:
 - (i) the nature of the worker’s incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
 - (ii) the worker’s age, education, skills and work experience, and
 - (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
 - (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
 - (v) such other matters as the WorkCover Guidelines may specify, and
- (b) regardless of:
 - (i) whether the work or the employment is available, and
 - (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
 - (iii) the nature of the worker’s pre-injury employment, and
 - (iv) the worker’s place of residence.”

197. The evidence before me consistently indicates and I accept that the applicant has since 3 September 2019 had a present inability arising from her injury such that she was and is not able to return to work, either in her pre-injury employment or in suitable employment.

198. Both Campbelltown Hospital and Dr Bashir issued medical certificates certifying the applicant as unfit for work during the period of her admission from 3 September 2019 onwards. WorkCover certificates of capacity issued by Dr Bashir, Dr Lim and other general practitioners at Dr Lim’s practice after that period continued to certify the applicant as having no current capacity for work. Dr Rastogi expressed the view in her report of 9 March 2020 that the applicant was unfit to work in her pre-injury role and was currently unfit to work in any capacity. Dr Rastogi also considered there was no capacity for work in the future, identifying the applicant’s working memory deficits, psychotic depression and impairments and interpersonal distress as barriers. Dr Rastogi’s opinion and the certifications are consistent with the reports of Dr St George. There is no evidence before me which suggests that the applicant did have capacity for work.

199. I find the applicant is entitled to weekly benefits on the basis that she had no current work capacity pursuant to ss 36(1)(a) and 37(1)(a) of the 1987 Act as they apply in this case. The parties have agreed that the applicable PIAWE figure is \$1,033. There will be an award for the applicant accordingly.

Entitlement to medical expenses

200. Section 60 of the 1987 Act relevantly provides:

“(1) If, as a result of an injury received by a worker, it is reasonably necessary that:

- (a) any medical or related treatment (other than domestic assistance) be given, or
- (b) any hospital treatment be given, or
- (c) any ambulance service be provided, or
- (d) any workplace rehabilitation service be provided,

the worker's employer is liable to pay, in addition to any other compensation under this Act, the cost of that treatment or service and the related travel expenses specified in subsection (2).”

201. The applicant has made a claim for past treatment expenses particularised as GP consults and pharmacy expenses. In view of my findings above, it is appropriate that a “general” award for s 60 expenses be made.

SUMMARY

202. The Commission determines:

- (a) The applicant sustained a psychological injury pursuant to ss 4(b)(i) and 11A(3) of the 1987 Act.
- (b) 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 performance appraisal or discipline pursuant to s 11A(1) of the 1987 Act.
- (c) The applicant has had no current work capacity as a result of the injury since 3 September 2019.

203. The Commission orders:

- (a) The respondent to pay the applicant weekly benefits pursuant to ss 36(1)(a) and 37(1)(a) of the 1987 Act as they apply in the present case on the basis of a PIAWE figure of \$1,033 from 3 September 2019 to date and continuing.
- (b) The respondent to pay the applicant’s reasonably necessary medical and related treatment expenses pursuant to s 60 of the 1987 Act upon production of accounts, receipts and/or valid Medicare notice of charge.

