

WORKERS COMPENSATION COMMISSION
Amended
CERTIFICATE OF DETERMINATION



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

MATTER NO: 9517-09
APPLICANT: Nurcan Hosoglu
RESPONDENT: Australian Concert & Entertainment Security Pty Ltd

DATE OF DETERMINATION: 12 March 2010

The Commission determines:

1. Respondent to pay \$736.80 per week from 13 March 2008 to 10 September 2008, \$374.90 per week from 11 September 2008 to 30 September 2008, \$381.40 per week from 1 October 2008 to 19 October 2008 and \$246.00 per week from 20 October 2008 to 31 August 2009.
2. Respondent to pay section 60 expenses.
3. Respondent to pay the Applicant's costs as agreed or assessed.

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

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 BRUCE MCMANAMEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

For REGISTRAR

Trish Dotti
By delegation of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The Applicant claims weekly compensation from 13 March 2009 to 31 August 2009 in respect of a psychological injury caused by events at work on 11 March 2009. The Respondent does not dispute the Applicant suffered from a psychological injury. The Respondent disputes liability saying the Applicant's injury was due to reasonable action with respect to either performance appraisal or the provision of employment benefits. The Respondent does not dispute the Applicant was incapacitated for the period claimed.

ISSUES FOR DETERMINATION

2. The parties agree that the following issues remain in dispute.

Matters Previously Notified As Disputed

3.
 - i. Is the injury wholly or predominantly due to reasonable conduct with respect to performance Appraisal or the provision of employment benefits?
 - ii. What is the Applicant's current weekly wage rate and average earnings?.

PROCEDURE BEFORE THE COMMISSION

4. The parties attended a hearing on 17 February 2010. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary Evidence

5. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (1) Application to Resolve a Dispute and attached documents;
 - (2) Application to Admit Late Documents dated 16 February 2010 and attached documents.
 - (3) Reply and attached documents
 - (4) Application to Admit Late Documents dated 14 January 2010 and attached documents.

Oral Evidence

6. No oral evidence was called.

FINDINGS AND REASONS

Section 11A

7. The Applicant claims weekly compensation in respect of a psychological injury alleged to have occurred on 11 March 2008. She claims weekly compensation from 13 March 2008 to 31 August 2009. In the Section 74 Notice the Respondent disputed liability on the grounds that employment was not a substantial contributing factor to the injury (s.9A) and that the psychological injury was caused by reasonable acts of the employer (s.11A). During the conciliation phase the Respondent conceded that employment was a substantial contributing factor to the injury. This concession was proper considering that it was the opinion of the Respondent's own consultant psychiatrist Dr Synnott that the Applicant's psychological disorder had developed following acute psychological distress felt at a meeting at work on 11 March 2008. Dr Synnott considered that the primary cause of the Applicant's reported psychiatric symptoms was her interpretation of the workplace incident on 11 March 2008.
8. The Respondent maintained a defence pursuant to s.11A asserting that the injury had been wholly or predominantly caused by reasonable action with respect to either performance appraisal or the provision of employment benefits.
9. The Applicant says that she was employed by the Respondent as a security guard. She commenced employment in approximately October 2007. She was employed on a casual basis. She did various duties up until 30 November 2007 when she undertook her first shift at the Foxtel site at North Ryde. Thereafter she only worked at that site. She says that she was regularly asked to fill in for somebody else's shift and/or to work overtime as a result of staff shortages.
10. The Applicant sought to earn extra money through Voom Management as a film extra and the like. She says that on 10 March 2008 she received a message offering her work as an extra on the following day. In order to do this she would need to swap shifts with another worker. She approached the second in charge to the manager, Con Tsamardos. She says that, after speaking to him, Con said he would see what he could do. The Applicant then made her own enquiries and found a co-worker, Mohammed Attai who agreed to swap shifts. At about 6pm when signing off she again spoke to Con and advised him that she had arranged a shift swap with Mohammed. At that time Con said he couldn't agree to anything and he would have to speak to the manager, Joseph Ciaglia. Con then telephoned Joe in the Applicant's presence. Following the phone call the Applicant was advised that she could not swap the shift because it was on short notice and that Joe was unhappy that the Applicant had gone behind his back in organizing the swap. The Applicant says that she was teary at that stage and considered the decision unfair as she herself had filled in on other occasions on very short notice and no one had ever objected to that.
11. The Applicant attended work the following day. At approximately 10:45pm another guard, Tony Kay, advised her that Joe wished to see her in the control room before she went on her break. The Applicant attended at the control room at about 11:00pm. She had a conversation with Joe that lasted about 10 minutes. The Applicant said that Joe initially said he had heard the Applicant wasn't happy with the decision about the shift swap. She said that was true but she had accepted it. The Applicant says that Joe became progressively more aggressive. He was getting really angry and pointing his finger at the Applicant saying she was lucky to be there. The Applicant says he was talking louder and louder and then he started swearing, not directly at her, but in general. She says Joe became really agitated and said that from that time on they were going by the book. The Applicant responded by saying that in future she would just come to work, do her allocated shifts and go home and that she would not be as willing in the future to pick up extra shifts to help out. The Applicant felt that Joe was

yelling at her, trying to intimidate her and standing over and pointing at her while she sat there. He was saying things like this (her attitude), was the thanks he got for helping her. He threw the policy handbook across the floor, left the room and slammed the door. The Applicant was crying hysterically by this time. The Applicant says that Con was present at this meeting. She says that both Joe and Con are largely built men and she felt their physical presence was intimidating as well. She says she was afraid of Joe's attitude towards her.

12. Joe Ciaglia has also made a statement in this matter. He says the Applicant was a good worker. She was promoted within about 6 weeks of her being at Foxtel. She showed initiative and all the attributes a manager could ask for to promote to the next level of responsibility. Although she kept to her shifts she did swap shifts quite frequently. He said that the practice at Foxtel has always been for guards to arrange their own shift swaps. He says that on 11 March 2008 he heard the Applicant on the two-way radio and thought that she seemed different from normal. He thought there might be something wrong and he called her into the control room. He says that when she arrived in the control room the Applicant seemed upset and she said that she was upset that she hadn't been given the shift swap the day before. He says he calmly explained to the Applicant the reasons why he wasn't able to accommodate her. He denies yelling or raising his voice. He also denies standing over her or physically intimidating her. He says that the Applicant began crying and became very upset. He says he only realized for the first time during the meeting that the Applicant had tried to arrange a shift swap with another guard. He says that he ended the meeting and on his way out he casually threw the hand book onto the desk. He says the Applicant was nowhere near the desk at the time. Mr Ciaglia says the meeting was not disciplinary in any way, it was just a discussion.
13. Mr Ciaglia says that he didn't get upset when the Applicant said she would only do her allotted shifts and no more. He says this is because he can always call head office and get another guard. Earlier in his statement Mr Ciaglia had justified his decision not to allow a shift swap because they were short staffed.
14. Con Tsamardos has also given a statement. He says that on 10 March 2008 the Applicant approached him to ask Joe for a shift swap for the next day. He says that he spoke to Joe who said that he couldn't approve the shift swap partly because they were two guards short at the time. He says he did not speak to the Applicant again until about 6pm. The Applicant told him she had found another guard to do the swap but he said it was too late to arrange the swap. He says the Applicant started crying saying it was not fair.
15. Con says that on the next day he had heard the Applicant on the two-way radio and thought she sounded different to her normal self. He was present in the control room when he says that Joe did most of the talking. He said Joe wasn't angry or raising his voice. He does say that soon after the start of the meeting the Applicant started crying and getting upset about things. The Applicant got more and more upset during the meeting.
16. It is common ground that the Applicant became visibly and increasingly upset during the meeting on 11 March 2008. In my view the Applicant's version of events is more consistent with that occurring. I also note a contradiction in Joe Ciaglia's statement about the availability of other guards. I also note the contradiction between Jo and Con about the afternoon of 10 March 2008. Jo says that at that time the Applicant appeared to accept the decision and nothing more was discussed regarding the matter whereas Con asserts the Applicant started crying saying it was not fair. It is clear that the Applicant was a good worker up until that incident.

17. Following the incident the Applicant saw her general practitioner Dr Williams who issued a series of WorkCover medical certificates in which he diagnosed post traumatic stress disorder. Dr Hampshire (psychiatrist) diagnosed mild to moderate post traumatic stress disorder with a co-morbid anxiety which may or may not take the form of panic attacks together with a moderate severe adjustment disorder when he saw the Applicant on 31 July 2009. In a report dated 1 June 2008 Dr Williams diagnosed an acute post traumatic stress disorder. Dr Synnott diagnosed an adjustment disorder. In my view, all of these diagnoses are more consistent with the Applicant's version of events.
18. I am satisfied that the events of 11 March are as described by the Applicant. It is common ground amongst the doctors that it is the events on that day that are the cause of the Applicant's psychological injury. In my view the actions of Joe Ciaglia on that day were not reasonable.
19. If I am wrong about that the question arises as to whether any of the events on that day were in respect of any of the matters itemized in s.11A. The Respondent submits that the action was either in respect of performance appraisal or the provision of employment benefits.
20. In my view the meeting was clearly not performance appraisal. No one suggests that the meeting was called in order to discuss or assess the Applicant's work performance. The meaning of the words "performance appraisal" were considered by Judge Geraghty in *Irwin v Director General of School Education (18 June 1998 unreported)*. His Honour thought that performance appraisal is somewhat like an examination, not a continuing assessment. Performance appraisal is more like a limited, discrete process, with a recognized procedure through which the parties move in order to establish an employees proficiency and performance. The decision in *Irwin* was followed by Neilsen J in *Bottle v Wielan Consumer Pty Ltd (1999) 19 NSW CCR 135*. His Honour said: -
21. "Consistent with my decision in *Yeo v Western Sydney Area Health Service (1999) 17 NSW CCR 573* an assessment preliminary to demotion, transfer or retrenchment, dismissal or discipline will be part of those respective processes. There would be no need for there to be a separate provision for performance appraisal. That, again, leads me to the view that performance appraisal is putting a value or putting an estimate of value (that is, monetary value) upon the work being performed by the employee. The decisions in *Irwin* and *Bottle* have been followed in the Commission in *Ponnan v George Western Foods Ltd [2007] NSW WCC PD 92* and in *South Eastern Sydney and Illawarra Area Health Service v Nikolis [2009] NSW WCC PD 74* and other cases. In my view the events of 11 March 2008 do not fall within the tests described in either *Irwin* or *Bottle*.
22. The term "provision of employment benefits to workers" has been the subject of little consideration. In this case the Respondent was not able to refer me to any authority which considered its meaning. My researchers have not found any cases in which the term was considered in the Compensation Court. In *ISS Property Services Pty Ltd v Milovanovic [2009] NSW WCC PD 27* Acting Deputy President Candy accepted that a reduction in working hours was action with respect to the provision of employment benefits. He did this without reference to authority or without consideration of the term other than to comment that "with respect to" was sufficiently wide to encompass such reduction. In *Temlkov v Kemblawarra Portuguese Sport and Social Club Ltd [2008] NSW WCC PD 96* Deputy President Roche considered that a letter which advised the worker that his employment was to be terminated and offered him re-employment at a reduced rate of pay was action with respect to "retrenchment or dismissal" or "provision of employment benefits". The Deputy

President reached this conclusion without reference to authority or specific consideration of what was meant by the term “provision of employment benefits”.

23. The Oxford Dictionary defines “benefit” as “advantage” whereas the Macquarie Dictionary defines benefit as “anything that is for the good of a person or thing, or to gain advantage; make improvement”. It seems to me that an employment benefit is some advantage gained from employment. On the other hand there is a distinction to be drawn between a benefit and an entitlement. Matters such as agreed wages under a contract of employment would not be an advantage but represent the basic entitlements under the agreement with which the worker provides their services. In my view an employment benefit would involve additional matters which are not part of the contract of employment and are not routinely available to all employees. Matters such as use of an employer’s corporate box at the football would fall within that category whereas provision of a company car as a term of the contract of employment would not.
24. In this case the Respondent was not able to describe the employment benefit to which the employer’s actions related. The only possible matter that could be described as an employment benefit is the action of swapping a shift with another person. I do not think that would constitute an employment benefit. The worker does not obtain an advantage by swapping a shift. She would have given up the salary for the shift she vacated and would still be required to work another shift. In the circumstances it is difficult to see how there is a benefit or advantage over and above her usual terms of employment. In any event the Applicant’s injury is not due to the failure to allow her to swap shifts but rather is due to the meeting the following day.
25. In my view the cause of the Applicant’s injury does not fall within any of the categories within s.11A.
26. There is no agreement concerning the Applicant’s current weekly wage rate or comparable earnings. The wages schedule alleges that comparable earnings are \$820 per week. It is unclear how that figure was arrived at. The Respondent has filed records which demonstrate that over the course of her employment from 28 October 2007 until 11 March 2008 she worked an average of 38 hours per week. The pay slips demonstrate that by March 2008 she was being paid \$20.99 per hour. On that basis the Respondent submits that the Applicant’s average weekly earnings were \$797.62 per week. The Applicant says that in the circumstances it is not appropriate to look at the period from commencement of employment.
27. The time records show that the Applicant worked for four hours on 28 October 2007. She did not work again until 27 November 2007 and thereafter worked regularly until she ceased work on 11 March 2008. Section 43 provides that average weekly earnings shall be computed in such manner that is best calculated to give the rate per week at which the worker was being remunerated. It does not prescribe any set period to be used as the basis for calculations. In my view the appropriate period in this case is from 27 November 2007 to 11 March 2008. The pay slips filed by the Applicant disclose that average weekly earnings during that period is \$921 per week. Pursuant to s.42 the current weekly wage rate is 80% of that figure or \$736.80 per week.
28. There is no dispute the Applicant was totally incapacitated from 13 March 2008 to 19 October 2008. From 20 October 2008 to 31 August 2009 the Applicant was engaged in suitable employment earning \$675 per week. After the Applicant commences suitable

employment the difference between her probable earnings and her actual earnings is \$246 per week. The Respondent does not submit that there should be any reduction on that figure.

29. The Applicant is entitled to receive her current weekly wage rate of \$736.80 per week from 13 March 2008 until 10 September 2008. Thereafter she is entitled to the statutory rate for a single worker from 11 September 2008 until 19 October 2008 and thereafter at the rate of \$246 per week from 20 October 2008 to 31 August 2009.