

IN THE MAGISTRATES' COURT OF VICTORIA

AT MELBOURNE

WORKCOVER DIVISION

G11968770

BETWEEN:

SUNETHRA ATTANAYAKE

Plaintiff

-and-

SIMPLOT AUSTRALIA PTY LTD

Defendant

MAGISTRATE:

Ginnane

PLACE HEARD:

Melbourne

DATE OF DECISION:

13 August 2018

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr Perry

Arnold Thomas & Becker

For the Defendant

Mr Johnstone & Ms Zhou

Minter Ellison

HIS HONOUR:

1. The plaintiff brings her claim for compensation alleging the occasioning of a mental type injury consisting of a major depressive condition and anxiety caused by being exposed to and subjected to "*various mental stresses and strains of employment as well as harassment including sexual harassment and threatening and/or bullying behaviour*"<sup>1</sup>. The particulars of the conduct and incidents pleaded by the plaintiff in the Statement of Claim are numerous and varied in nature and are:

---

<sup>1</sup> See Statement of Claim

- unwelcome advances by team leader Sachin and unwelcome propositions including to the effect that Sachin wanted to marry the plaintiff
  - repetitive and/or unwelcome requests for private details of the plaintiff
  - unwelcome requests for transportation from the workplace
  - being followed when departing the workplace premises
  - being sexually assaulted including a train station at Ascot Vale in about April 2014
  - unwelcome physical touch including near the labelling station
  - utilising the trays to move stock to make contact with the plaintiff's body
  - unwelcome and/or unwarranted touching of the plaintiff's body including her shoulder
  - failing to cease and desist despite the plaintiff's complaints about unwelcome physical contact
  - unreasonable and/or unwelcome physical contact but Chandu<sup>2</sup> and/or bullying behaviour by Chandu including screaming and/or threatening behaviour
  - Chandu threatening the plaintiff with kidnap and/or physical harm
  - wrongly being accused by Frank<sup>3</sup> of improper conduct and/or being unreasonably required to sign a warning letter
  - in 2015, Sachin creating unreasonable work demands of the plaintiff
  - being called derogatory names by Hussain<sup>4</sup> and/or Chandu in 2015
  - in about September 2015 failing to undertake any or any proper circumstance investigation
  - In about September 2015, undertaking a circumstance investigation in an unreasonable manner.
2. In August 2015 the plaintiff resigned her employment with the defendant.
  3. On 11 September 2015 the plaintiff submitted a claim for compensation seeking weekly payments of compensation together with medical and like expenses.

---

<sup>2</sup> In these reasons the person referred to in some accounts as "Chandu" should be read as a reference to "Sando".

<sup>3</sup> A Supervisor employed by the defendant and who testified on behalf of the defendant

<sup>4</sup> I was told in evidence there were two brothers who worked with the defendant and interacted with the plaintiff, Ali Husain and his brother, whose first name was not identified.

4. By notice dated 12 October 2015 the defendant rejected the claim for compensation on the ground that the plaintiff did not sustain injury arising out of or in the course of her employment; that her employment is not a significant contributing factor to her injury.

#### The plaintiff

5. The Plaintiff was born on 26 September 2005 in Sri Lanka. She arrived in Australia on 24 December 2000. She married in 2008, separated from her husband in 2011 with her divorce being finalised in 2015. She commenced a relationship with a gentleman named Lal Medonza in 2012 and she lives with him. He testified in the proceeding.
6. On arrival in Australia the plaintiff obtained work as a sewing machinist for a period of approximately 3 ½ years. She secured subsequent employment as a packer of processed foods with "Salad Fresh" in Campbellfield and this employment was for a period of about 6 years.
7. The plaintiff travelled to Sri Lanka following her mother's death in 2010 and returned to Australia in 2012. On her return to Australia she applied for various jobs, initially being unsuccessful but then in October 2013 she commenced with the defendant through a labour hire company. At first she was employed on a casual basis but became permanent. The plaintiff's employment called on her to sort and pack seafood products into plastic containers on a production line. She worked an 8 hour shift Monday to Friday. It was repetitive work but said that she enjoyed being employed.
8. The plaintiff said that prior to the matters complained of occurring she had no history of psychological problems. The medical evidence does not contradict the plaintiff on this score.
9. The plaintiff said that Sachin Patel ("Sachin") commenced employment with the plaintiff in January 2014 and from that time onwards he engaged in unsolicited and unwelcome propositioning of her.
10. Sachin was one of two leaders who exercised authority over the morning shift employees. The plaintiff was a morning shift employee. The plaintiff said that she was regularly harassed by Sachin and that he repeatedly importuned her for her telephone number. This conduct occurred at work. The plaintiff said that Sachin constantly asked her to marry him sometimes doing so as often as two or three times a week. This she said, also occurred at work. She said she tried to rebuff him and reminded him that he was a married man. The plaintiff said that she knew Sachin was married because she had seen his wife at work.
11. The plaintiff said that eventually Sachin's attitude towards her changed and he sometimes shouted at her at work. She said he was constantly giving her the "hard work to do" and that he excluded her from the benefits of regular half hourly rotations. For reasons that I will explore more fully later in these reasons, I do not

accept the plaintiff's evidence that Sachin was allocating her hard work to do or excluding her from regular rotation.

12. The plaintiff said there was easy and difficult tasks that formed part of the work undertaken at the employer. She identified easy worker as cleaning trays and straightening trays on the production line. She identified difficult jobs as sorting fish product because it is "*very cold work*".
13. The plaintiff gave account of other behaviour by Sachin that she believed was targeted at her and was retaliatory in nature for her not being complaint to his entreaties. She said he sped up the production line. She said this happened in December 2014. She said Sachin gave instructions to the leading hand to speed up the line. She said that as a result stock fell on the floor and he would yell "*go faster*" at the employees. The plaintiff said 6 people worked on the line. Once again, and for reasons that I will explain in more detail elsewhere, I do not accept the plaintiff's evidence that Sachin sped up the production line and yelled "*go faster*".
14. The plaintiff said that the process of rotation required that every 30 minutes employees were to move down the line to perform a different aspect of the work process but that she was not rotated. The plaintiff recalled an occasion when a Sri Lankan woman tried to rotate her but Sachin addressed her in an aggressive manner asking, "*Are you the team leader?*" implying that it was to him and him alone to whom such authority was reposed. I am not satisfied that alleged conduct has been proved.
15. The plaintiff said that she worked "*every morning*" on the line until she resigned on 26 August 2015. She said sometimes she would work without rotation "*for one hour or sometimes three hours*". She said that she had previously been rotated every 30 minutes. She said this treatment made her feel "*really sad*" and she "*felt cold in the hands and pain in her hands*".

#### The Ascot vale train station incident

16. The plaintiff said that she took the train to work and back home. She said Sachin commenced coming to the station in February 2014. She said he would come to the station "*a lot*". She said he had previously suggested to her that he could give her a lift home in his new car.
17. She related an incident at the Ascot Vale train station after work sometime in April 2014<sup>5</sup>. She said she had been performing some overtime and left for the train station. She said the train had been cancelled. She said she saw Patel at the station and behind the Myki ticket machine. She said an announcement was made about bus replacements for the cancelled train service whereupon Sachin came up behind her and grabbed her and kissed her on the lips. She said "*leave me alone*". He said "*I like you. I want to give you a kiss.*" She described Sachin as "*a fat and strong man*". She

---

<sup>5</sup> The plaintiff made a written statement to police dated 19 September 2015. It includes an account of the incident at the train station and there are some differences in the account from that testified to by her.

said that she pushed him and tried to escape from him. She said her bag fell to the ground. She said she picked up her bag and ran away to and got on a bus. She did not know the destination of the bus but said that she got on in a distressed state and in order to escape him. She said she telephoned a workmate, Dummika and gave her an account of what had occurred.

18. The plaintiff said she worked the fish line each day. She said she worked with three other ladies on the line. She said the other ladies were rotated every half hour. She said she was at the starting point on the line and this was a difficult position to occupy because it was left to her to separate the fish and that this was a task that needed to be performed quickly. She said there was a button that allowed the line to be sped up which Sachin would push. The plaintiff agreed under cross-examination that if this was true, the result would have been to affect all the workers on the line. She said the speed did increase for all the women on the line. She said "*they also got angry with Sachin*". She said when fish fell off the line he told them to ignore it.
19. The plaintiff said her lack of rotation made her feel "*very sad, angry and frustrated.*"
20. The plaintiff said Sachin would come up very close to her at work and touch her back with his fingers. She said he would put goods on the line and put his hand near her chest area and then he would smile and say "*sorry accident*". She told him "*don't do this.*" She said this type of conduct occurred up to four times a week in the period from April 2014 through to August 2015.
21. The plaintiff described conduct in which Sachin put his hand on her buttocks and that this conduct occurred more than once and did not cease until June 2015. The plaintiff said that some other workers observed what occurred, however, no worker was called by the plaintiff to testify to the impugned conduct. The plaintiff said some workers told her to ignore it. She said a fellow employee Dummika told her to "*go to the police*" and another worker, Loian, said "*ignore it*" and also posed the suggestion "*why don't you punch him on the face*". Both women who were called by the defendant, denied the account of statements attributed to them.
22. The plaintiff said she did not go to the police initially but "*she kept everything inside and was suffering*". She said after she resigned her employment in August 2015 and in September 2015 she went to the police and made a statement<sup>6</sup>.
23. Senthurn Garamau was also an employee of the defendant and the plaintiff said that about two months after she commenced employment he had resigned his employment but subsequently returned to employment with the defendant. He was known as "Sando". She described him as a "*fellow worker*" but that he also took over as team leader from Sachin on occasions when he was away or on a lunch break.

---

<sup>6</sup> EXP7 dated 19 September 2015

24. The plaintiff recounted an occasion in March 2015 when having taken a half hour lunch she came back on the line with the other ladies. She said she need to *"scale up"* (weigh) the whiting fish and she was standing with other workers near the scales. Two people were packing. Sando said to a female worker *"mum you come here and tell the bitch to go somewhere else."* The plaintiff understood this to mean that she was to go to the packing area. She understood the use of the derogatory expletive *"bitch"* as intended to refer to her. She said that all the Vietnamese women workers on line were referred to as *"mum"*. Sando then said to the plaintiff *"do what I say, fucking go to supplies"*. She said he then pulled her by her uniform collar and took her off the line.
25. The plaintiff said Sachin intervened. She was told to wait until Frank attended. She said Sando said to her that he was going to *"kill"*, and to *"kidnap"* her. He said he had *"killed many people"*. She said this prompted Sachin to say to Sando, *"this is not Sri Lanka. This is Australia."* The plaintiff said she responded to the threat and said to him, *"if you are going to kill me then do it now"*.
26. The plaintiff said that she was subsequently issued with a warning letter by for failing to follow the instructions of her team leader.
27. The plaintiff said that after the incident Sando never talked to her.
28. The plaintiff said in cross-examination that Sando did not call her *"the Sri Lankan bitch"* directly but that he told others about her and that she felt very ashamed. She said she heard him calling her a *"bitch"* to other people. She said she was told by the Vietnamese women workers that if she said anything about it she would be given another warning letter<sup>7</sup>.
29. The plaintiff said she was also told that Sando was given a warning letter by the employer.
30. The plaintiff blamed Sando for giving her difficult jobs to do which she described as the task of packing the cold fish in trays. She said that sometimes her hands and fingers would freeze and she was not rotated. She would be required to do this for half an hour and then she would be given another cold job for another half hour. She said she felt *"very sad"*.
31. The plaintiff was asked about an alleged incident involving Sando in February 2015 whilst working on the line. She said that he came very close to her. He began to kiss her *"close to her neck"*. She said he then went to the toilet and he came back and said that he had masturbated *"by remembering her"*. She said her hands were shaking. She said he then came around and behind her and he said that he *"was still strong"* and that *"if you do it for one day with me you will do it every day"*. She said she felt great

---

<sup>7</sup> The employer issued the plaintiff with a disciplinary letter for not following an instruction from Sando

- shame. She said Sando and Sachin were laughing and Sachin told her that Sando was a "sick man".
32. The plaintiff said that she met a fellow worker named Ali in mid-2015. She said she had a relationship with him for about 6 weeks but it ended on 25 August 2015 when she resigned her employment.
  33. The plaintiff said she stopped work with the defendant because Ali came to her house and her relationship with him became known to her partner. The plaintiff said as well that she resigned her employment with the defendant because "*she felt sick and she had had too much harassment to cope*".
  34. The plaintiff said that in the course of her employment there were days that she went home crying as a result of the treatment she was exposed to. That was not supported by the evidence of her partner.
  35. The plaintiff said her concentration is poor.
  36. The plaintiff said that her appetite decreased. She said she suffered from nightmares thinking about Sando coming to shoot her. She her nightmares have included Sando shooting her dog and breaking into her house. She said could recall the smell of beer Sando had on his breath when he was close to her. She said she sometimes will scream at night. She said she is frightened of opening the curtains when alone at home. She said she will only go out for specific doctor's appointments.
  37. The plaintiff commenced seeing her General Practitioner Dr Ng for her mental problems in September 2015, who in turn referred to her to a psychologist. She said she has been given medication to help her sleep. She said on one occasion she fell because she was dizzy and was taken to Epping Hospital. She said she suffers from vertigo. She said she takes Panadol Forte when she gets strong headaches and has been prescribed stemetil for her vertigo. Associate Professor Doherty in his report dated 10 December 2017 recorded the plaintiff's medication as consisting of stemetil 5mg, maybe one or two daily, nitrazepam (Mogadon) 5mg two or three per week, Ventolin inhaler and Panadol as required. The plaintiff told Associate Professor Doherty that "*she is not taking any antidepressant or anxiolytic medication*" and nor has the plaintiff been taking any antipsychotic medication.
  38. The plaintiff described her employment capacity as non-existent saying she could not work either at Simplot or anywhere else<sup>8</sup>. She said she is scared and still fearful of Sando. She said "*I am very sick now*".

#### Cross-examination of plaintiff

39. The plaintiff said that she had been in a relationship with a man named Lal since 2012.

---

<sup>8</sup> Neither party when asked referred to the decision of Judge Bowman in Kerridge v Monsfelt [2009] VCC 194 as having application

40. She said that she obtained employment with the defendant through her friend Dummika with whom she had worked previously.
41. The plaintiff said Lal would sometimes take her to and from work but she was unaware if fellow workmates knew of her relationship with him. She said she never talked about him with others. She said Dummika knew that she was married and she also said that Ali with whom she had the brief affair knew that she was married.
42. The plaintiff said that to the Vietnamese women with whom she worked she called Lal her "*brother*" and used the English word "*brother*". She said she would not be surprised if Ali had understood Lal to be her fraternal brother. The implication in the questions was to suggest that the plaintiff did not want fellow employees to know of her relationship with Lal.
43. The plaintiff was directed to some commentaries contained in medical histories. These included the plaintiff having variously described Lal as her de facto partner and of having lived in rental properties with him as well as in a home owned by him and elsewhere having recounted living in her ex-husband's home. The plaintiff said that since 2012 she has lived in the same house owned by Lal. In December 2012 she returned to Sri Lanka. Her marriage ended when a separation commenced in 2012.
44. The plaintiff said that the duration of her relationship with Ali was of the order of 6 weeks. She said that she was still living with Lal whilst conducting this relationship and was still sharing an intimate relationship with Lal.
45. The plaintiff agreed that her employment with the defendant was obtained through a labour hire company and this remained the case until she became full-time in around June or July 2014. The plaintiff said that in the period from October 2013 until becoming fulltime her duties remained the same.
46. The plaintiff was asked to comment on the accuracy of an observation recorded by her psychologist that there were approximately 25 or 30 employees working on her morning shift. The plaintiff had said that 6 people worked on the production line with her and this did not include the second line that operated on the other side of the factory. The plaintiff thought each production line was about 6 metres in length. She said that the morning shift commenced at 5.00 am and concluded at 1.00pm and that the defendant also operated an afternoon shift.
47. The plaintiff said that whilst the line is running "*we pack the fish onto the trays*". She described "*dabbing*" that is another of the processes undertaken on the production line.
48. The plaintiff said that some workers were required to lift boxes onto the production line, something she agreed was a heavy job, but not one that she was ever required to do.
49. She said the factory is kept cold and that sometimes "*we wear our own clothes*" but that warm jumpers are supplied and a uniform is supplied.

50. The plaintiff agreed that the factory floor was a noisy environment and employees were free to talk among themselves on the production line and, moreover, that they did.
51. The plaintiff said that there could be up to 10 or 14 people on a production line when it was very busy but that this was not always the case.
52. She said that Dummika and Loian sometimes worked alongside her but "*it depended*" and from time to time they were changed.
53. The plaintiff agreed that she was free to report harassment and it would have been open to her to make such a report.
54. The plaintiff agreed she was at all relevant times in credit as regards her entitlement to sick leave.
55. She said that when Sando fought with her there were some Vietnamese ladies on the line who told her not to speak to Andrew<sup>9</sup> (the Manager) and to wait to speak to Frank Vadnjal, the Supervisor<sup>10</sup>. She said Frank was often on the floor although she said he would come and go but nonetheless accepted that he was more often on the floor than Andrew.
56. The plaintiff agreed that in the course of 2013 she was given training in reporting injuries. She said that all she did was "*sign the forms*".
57. The plaintiff agreed that she never made any formal report to management of the matters of concern regarding the alleged unwelcome conduct.
58. The plaintiff agreed that she could speak freely with Frank but disputed that she spoke frequently to him. She said she did not confide all of her complaints about Sando to Frank because she was afraid for her job. She agreed that she had complained to Frank about the team leaders but that her complaints had not included an allegation of sexual harassment.
59. The plaintiff was told that Vadnjal's evidence would be that she spoke to him about a lot of matters of complaint on the factory floor including an incident involving her having lost a shoe. She disagreed that she complained a lot.
60. She disagreed that she told Frank that she thought people at work were talking about her and that she was unhappy.
61. The plaintiff was told that Vadnjal's evidence would be that he spoke to Sando concerning the incident involving the direction given to the plaintiff about where she should have been working on the occasion of the incident on the line when the

---

<sup>9</sup> Surname was not supplied in the hearing

<sup>10</sup> Sometimes described as a manager

- plaintiff returned from lunch and that that and after investigating the incident he produced the letter of warning addressed to the plaintiff and dated 12 March 2015.
62. The plaintiff said that she told Frank that Sando had threatened her life and threatened kidnapping. The plaintiff was told that Vadnjal's evidence would be that he was not told of such allegations.
  63. The plaintiff also later conceded in cross-examination, that other than the incident when Sando pulled her off the line, no other allegation had been put to her employer prior to ceasing employment.
  64. The plaintiff denied refusing Sando's direction but instead said that the disagreement occurred when she had just come onto the line after lunch and that she was willing to rotate but in the ordinary course of work. She refused to accept that her conduct amounted to a refusal by her to follow an instruction. The effect of the plaintiff's evidence raises as well a question about the reliability of her allegation that she was not in fact being rotated in her work.
  65. The plaintiff was told that Vadnjal would testify that sometime in 2015 he offered her the opportunity to change shifts which she refused. The plaintiff said it was not practical for her to move to an afternoon shift. The plaintiff said however that some workers were happy to hear that she was being moved to the afternoon shift and these included Loian and Sando and Sachin.

#### Inappropriate touching by Sachin

66. The plaintiff said that inappropriate conduct by Sachin occurred between 2014 and 2015 but that she did not report the events to anyone.
67. The plaintiff agreed that she had been provided with training on 13 August 2015 in respect of workplace bullying. She agreed that she had been told to report bullying but said that she did not do so because she was concerned about the security of her job.
68. The plaintiff agreed that she had not told Lal about the allegations of inappropriate conduct by her male co-workers prior to 25 August 2015. She said that her silence was because she believed that had she confided in Lal he would not have allowed her to return to work and she did not want to lose her job.
69. As to the comment recorded by her psychologist that she didn't tell Lal because she didn't want to upset him, she accepted that might have been something she said.
70. The plaintiff disagreed that in April 2014 Sachin was working an extra hour with the result that he would still have been at work at the time she alleged the incident at the train station occurred. No evidence was led by the defendant to establish Sachin's hours of work in April 2014.
71. The plaintiff was told that Sachin's evidence would be that he had no interest in the plaintiff and that he did not follow her to the train station and did not kiss her on the

platform. The plaintiff was also told by counsel for the defendant that Dummika would testify that when she spoke to the plaintiff on the phone she did not seem overly upset about what had occurred. The plaintiff said this was untrue and that she was crying when she related the incident to Dummika on the telephone and that she had called her from the bus after she had jumped on it in order to extricate herself from Sachin.

72. Counsel for the defendant told the plaintiff that Dummika would testify that she saw the plaintiff speaking to Sachin the following day at work without any apparent or evident stress being exhibited by the plaintiff. The plaintiff denied this and said that Sachin avoided her completely after the event.
73. The plaintiff accepted that there was no reference made to her GP of any of the matters recounted by her in her evidence until after she had finished work on 25 August 2015.
74. The plaintiff agreed that she never complained to her employer about Sachin speeding up the production line.
75. The plaintiff agreed that she had not spoken to her psychologist or to any of the independent medical examiners whom she had seen as part of the proceedings claiming that she had been targeted at work by means of the line being sped up.
76. The plaintiff said her nightmares commenced from when Sando threatened to kill her in March 2015. She said Lal was aware of her nightmares because they were sleeping together, but whenever her sleep was disturbed, he would simply tell her to have a glass of water and go back to sleep.
77. The plaintiff was directed to her employment record that disclosed 12 sick days taken however the plaintiff said that a number of them were in truth days she took as recreation leave but under the guise of sick leave in order to preserve her annual leave entitlement. Of the 12 days treated as sick leave, only 3 resulted in attendances on her doctor, and they were for everyday medical matters and contained no reference to any of the matters about which the plaintiff complains.

#### Sando Incident March 2015

78. The plaintiff was told that Sando would deny being rude to the plaintiff or swearing at her or threatening to kidnap and kill her or that he tried to assault her.
79. The plaintiff denied calling Sando a Tamil Tiger prior to March 2015 when she said that Sando described himself as such to her.
80. The plaintiff was told that Ali would testify. A number of matters were put to the plaintiff about the evidence Ali would give. Ali was not called. I have paid no regard to the matters put by counsel to the plaintiff about proposed evidence from Ali.
81. The plaintiff volunteered that her relationship with Ali was sexual.

82. The plaintiff said that Ali telephoned her at home on 25 August 2015 to say that he was coming "to take her away". She denied that she had arranged a confrontation between Ali and Lal at home.
83. The plaintiff said that Ali arrived at her house at about 8:30 pm. The plaintiff said that Lal asked Ali to leave the house. The plaintiff said that Ali had told Lal what had happened to the plaintiff at work at the hands of Sachin and Sando and he told Lal to take care of her. What exactly Ali related to Lal, the plaintiff did not say in evidence and neither did Lal when he testified.
84. The plaintiff said that the following day she gave Lal specific details of what had transpired at work. However, once again in the giving of her evidence in chief she did not disclose what she told Lal.
85. The plaintiff reported to Associate Professor Doherty on referral for medico-legal purposes and he recorded her account that she had felt sick the night of the confrontation at home and had been vomiting and had a severe headache and that everything she had faced in the workplace came to the forefront at that moment.
86. The plaintiff was directed to comments made by her treating psychologist who wrote, "in response to the meeting on 25 August 2015 it was a stressful encounter and she was shaken up by it." She agreed.
87. The plaintiff agreed that a meeting occurred on 1 September 2015 with the manager, Andrew, in which she set out what had happened. A second meeting occurred on 8 September 2015. She said at the second meeting Andrew said that he had spoken to Sando, Ali and Dummika but that they had not supported her version of events.
88. The plaintiff agreed that she telephoned Ali after the meeting on 8 September 2015 and told him that she was not returning to work.
89. The plaintiff denied that she had borrowed money from Dummika and Loian.
90. The plaintiff said that Ali said he was "set up" by Sachin to tell Andrew that she had borrowed money from him or else his job would be in jeopardy and so he told management that he wanted to withdraw a statement allegedly made by him that supported some aspects of the plaintiff's account. Andrew was not called and the statement by Ali was not introduced in evidence. I note also that Sachin was not confronted by this allegation when cross-examined on behalf of the plaintiff. Indeed, Sachin was not asked if he was aware of any matter relating to the plaintiff's personal life. As I have already mentioned Ali was not called to testify and the veracity of the versions of events allegedly relayed to Andrew by Ali cannot be tested.
91. The plaintiff was directed to further entries made by her treating doctor and psychologist.
92. The plaintiff agreed that she told her GP that she had ended the relationship with Ali because it was a sham. She denied the correctness of the comment made by her

psychologist that she ended the relationship with Ali prior to 25 August 2015. She agreed having told police in her statement that she couldn't continue the relationship with Ali because she was married.

93. A progress note made by the plaintiff's GP dated 2 September 2016 records the plaintiff responding well to counselling and of sleeping better and being less anxious.
94. The progress notes of the plaintiff's GP for the period 10 October 2013 to 29 August 2015 records that the plaintiff attended her GP on approximately 14 occasions but that the notes disclose no reference to anxiety or stress or nightmares. A note from 1 September 2015 makes reference to stress. A note of entry dated 2 September 2016 records that the plaintiff had improved as a result of counselling and she was sleeping better and was less anxious. She agreed that she might indeed have given such an account.
95. A first workcover certificate of capacity was provided to the employer on 4 September 2015.

#### Lal Medonza

96. Mr Lal Medonza ("Medonza") said he has been the plaintiff's live in partner since 2012.
97. Medonza recounted events that occurred on 25 August 2015. He said that Ali telephoned on 25 August 2015 and asked to speak to the plaintiff saying that he was the plaintiff's boyfriend, whereupon Medonza hung up. He said Ali phoned again and Medonza threatened him with the police. Medonza again terminated the phone call.
98. Medonza then confronted the plaintiff about Ali. In the midst of this, Ali arrived at the plaintiff and Medonza's residence at about 8.30pm. He was permitted entry. A conversation between the three ensued. Medonza said he was shocked by the revelation of the relationship and he gave the plaintiff an ultimatum asking her whether she wanted to be with him or Ali and the plaintiff elected to stay with Medonza. Medonza said that Ali then abused the plaintiff and called her offensive names including a bitch and slut, the first of which is an offensive description the plaintiff has attributed to Sando. As Medonza put it, he "*went a little wild*". Ali then produced his phone and displayed a picture of his wife who was living in Pakistan and proceeded to state that she was "*very beautiful*". Medonza agreed. Medonza then promptly told Ali to leave. Before he did so, Ali told Medonza that Sachin and Sando were giving the plaintiff a very bad time and said that "*they are filthy bad people*" and he implored Medonza to "*take care of her*".
99. In cross-examination, Medonza said that the call from Ali came through on the plaintiff's mobile phone which he answered because she was upstairs showering. Ali described himself to Medonza as "*her [the plaintiff's] boyfriend*". Medonza denied harbouring suspicion about the plaintiff's fidelity prior to receiving the phone call on 25 August 2015.

100. Medonza was told by counsel for the defendant that Dummika's evidence would be that he approached her outside the workplace. Medonza agreed that he did, but said that this occurred the day after Ali came to their home and not prior to it. He said it was about 1.30 in the afternoon when he spoke to Dummika outside the factory and that she gave him "*lots of information of harassment*". He was not asked to particularise them and he said that he subsequently asked the plaintiff why she had not confided in him but that "*she went quiet*". However, he said that later on the evening of 25 August 2015 the plaintiff "*unloaded*". He said that prior to this the plaintiff had not told him about work harassment.
101. Medonza said the plaintiff still suffers from nightmares about Sando having a gun and shooting her but that he could not recall the plaintiff experiencing nightmares or disturbances prior to the confrontation with Ali at home on 25 August 2015. The plaintiff's account of agitation and distress and nightmares before 25 August 2015 and about which Lal would reasonably have been expected to be aware, was simply not corroborated by him.
102. At the conclusion of the oral evidence the plaintiff tendered in evidence various reports, the contents of which I will address later in these reasons. The plaintiff adduced no oral evidence from the plaintiff's treaters.

#### The Defendant's case

103. Frank Vadnjal testified. He commenced employment with the defendant in July 2009 and resigned his employment shortly prior to giving evidence. He said he worked as a Supervisor on the day shift.
104. He said the plaintiff packed chilled fish into trays. He said there were 2 identical production lines in operation. He said the total length of the two lines was some 25 meters and the packing line was about 6 to 8 meters. He said the number of employees on each line ranged from about 18 to 21 people and he said that in the packing area itself the number ranged from about 8 to 12 workers. He said the fish product comprise salmon calamari and prawns.
105. He said rotation was a requirement but its frequency depended on the product that was being run at any particular time and he gave by way of example that if the production line switched to salmon the line would operate for 5 hours with a rotation to occur every 30 to 45 minutes. He said the whitefish line runs 45 minutes before a rotation. He said the fish arrives in 10 kg baskets and the packing occurs online. He said speed of the production line varies from 25 to 35 trays per minute.
106. He said the plaintiff began employment as a casual and then became permanent. He said her work was of a good standard. He said the plaintiff reported to him. He said directions were given to the plaintiff as with other employees via the Team Leaders or the line leaders. He said that Sachin and Sando were team leaders. He said he would walk the line each morning and said that he would be on the floor every day for perhaps 1 or 2 hours and he would see the plaintiff frequently.

107. In regards to the receipt of complaints by the plaintiff, Vadnjal said the plaintiff made complaints from time to time and had approached him in the past either on the floor or in his upstairs office. He produced no written record of complaints but recalled that they involved the team leader not listening to her or talking about her or being rude to her. He said the plaintiff expressed displeasure with the jobs given to her. If there had been a complaint made by the plaintiff regarding a lack of rotation, however, he could not recall.
108. When asked if the plaintiff had complained about the processing line being sped up he said "*not really*". As to how he dealt with complaints received from the plaintiff, Vadnjal said "*it would depend*" on the nature of the complaint but if it was one that involved a dispute concerning team members then what he would ordinarily do would be to go downstairs to the floor to "*have a look*" for himself. He said he would talk to employees to see if there was any corroboration. He would ask staff if the team leaders were speaking respectfully to them. He said the plaintiff had complained that Sachin and Sando were "*rude*". He said that the plaintiff complained that she believed she was being excluded and spoken to rudely. Vadnjal said he spoke to both men who denied being rude to the plaintiff. He said the difficulty he faced in light of the denials and a lack of corroboration was made the more so because of the plaintiff's failure to provide him with any specific details of rudeness. He said the plaintiff's complaint was general. He said Dummika and Loian were the two staff the plaintiff had mentioned who would provide support. He said he spoke to both of them as they worked shoulder to shoulder with the plaintiff but nothing was forthcoming from them. He said he spoke to them "*quite often to try and find out what was going on*".
109. Vadnjal said that the plaintiff did complain to him about Sachin following her to the train station. He said, however, this was not a matter that he would have raised with Sachin because he did not regard it as a work matter. As to any complaint that the plaintiff was touched at work, he said "*not that I can remember*".
110. Vadnjal explained his reasoning behind the provision to the plaintiff of her letter of warning because he understood the plaintiff had refused to perform a task when directed to do so by Sando. He said he had spoken to the plaintiff at "*great length*" but that her relationship with the team leaders was getting worse.
111. Vadnjal said he had been approached by the team leader who reported that the plaintiff had refused to undertake a task she was directed to perform and had responded by complaining to him that she was always placed on that part of the line, and that she was being, as it were, singled out. He said he thought that there had also been an accusation that she was being followed to the toilets. He said he thought it was Sachin about whom the complaint was directed. He said he looked at the closed-circuit television footage and could see nothing incriminating.
112. He said he had never heard anything relating to the plaintiff being subjected to threats to kill. I formed the judgment, that to some degree, Vadnjal felt frustrated in

advancing the plaintiff's complaints, which he described as generalised complaints against team leaders and other employees who were exhibiting a lack of respect or being rude to her. I do not accept the truthfulness of the plaintiff's account made in her police statement that when she told Frank about the threat made by Sando he refused to speak to the other ladies on the line. I find Vadnjal he did speak to her work colleagues not as regards a specific complaint of a threat, but generally, however, nothing adverse was forthcoming.

113. In cross-examination Vadnjal described the plaintiff's work as "*quite good*". He could not recall when the plaintiff's complaint of being treated rudely was first raised. He said he was unable to offer an explanation why the plaintiff's relationship with the team leader deteriorated.
114. He said the line speed can be adjusted by metal buttons.
115. He said he spoke to Sando and told him to confine his discussions with the plaintiff to work matters.
116. Vadnjal said that the plaintiff had told him that Sachin and Sando were bothering her outside work and he told her that if it was serious she should go to the police. The plaintiff did not complain in her evidence of Sando bothering her outside work.

#### Sachin Patel

117. Sachin Patel testified for the defendant. He said he was born on 16 August 1981. His employment with the defendant commenced in 2009/10 and he ceased employment in September 2017.
118. He said he had been a team leader involved in the production work at the defendant workplace. He said he knew the plaintiff through her employment. He said he always communicated with her in the English language.
119. He denied that in April 2014 he approached the plaintiff at the train station and kissed her.
120. He denied having ever sworn at the plaintiff.
121. He denied a variable speed was placed on the production line in order to disadvantage the plaintiff and in retaliation for her rebuffing his approaches. He said the conveyor always operated at one speed and although its speed can be altered, to the best of his knowledge, it never was.
122. He said that employees were rotated every 30 minutes.
123. He said he knew Sando.
124. He said that in March 2015 a confrontation arose between the plaintiff and Sando and he came to the plaintiff's aid and pulled her by the collar away from him.
125. He denied that Vadnjal had brought complaints of any sort to his attention.

126. Patel's account was not challenged in cross-examination.

#### Chando Garama

127. Chando Garama was born in 1988. He testified for the defendant.

128. He said he was a truck driver and that he ceased employment with the defendant approximately 10 months ago. He said everyone calls him "Sando". He said he worked as a team leader with the defendant organising the line. He said "*everyone is my friend.*" He said he would speak with the plaintiff in English. He said he is a Tamil. He denied ever using bad language. He said he rotated staff every 30 to 45 minutes but that the plaintiff always resisted being rotated. He said it is a part of his work as a team leader to achieve a proper balance of employees undertaking the various tasks on the production line.

129. When asked if in March 2015 he physically pulled the plaintiff off the production line he denied it. He added that had it occurred there would have been other employees on the line who would have witnessed it. He denied having masturbated at work and telling the plaintiff he had done so while thinking about her.

130. In cross-examination he said that Sachin was one level above him in seniority.

131. He agreed he was a team leader who worked the same day shift as the plaintiff.

132. He said that although he regarded originally the plaintiff as a good worker after she became permanent "*she was not so good*".

#### Dummika Viyannanag

133. Dummika testified. She said she commenced employment with the defendant in 2009 and was employed as a process worker. She said approximately 5 years ago she became aware that the plaintiff was looking for work and she spoke with her Supervisor and put in a good word for the plaintiff. She said after the plaintiff commenced work she saw her on a daily basis but did not have a relationship with the plaintiff outside of work.

134. She said Sachin was the line leader and Sando worked on the line and that they and the plaintiff were very friendly. She did not witness Sando smelling the back of the plaintiff's neck or standing noticeably close to her. She said she did not witness Sando pulling the plaintiff off the line. As to the incident involving the threats to kill and the kidnapping requiring Sachin to intervene again she said she did not witness anything of that type.

135. In April 2014 she said she received a telephone call from the plaintiff who told her that Sachin had hugged her. She could not recall any distress in the plaintiff's voice. She said she saw the plaintiff at work the following day. She said she saw Sachin as well. She said they appeared to be working "*normally*". She denied having on any occasion heard the plaintiff referred to as a "*Sri Lankan bitch*".

136. She said she had loaned money to the plaintiff on a number of occasions in the past but that the plaintiff had always repaid her.
137. In cross-examination she said she does mostly packing on the production line but on other occasions was working putting stickers on trays. She denied having told Sando to stop referring to the plaintiff as a "Sri Lankan bitch".

#### Loian Le

138. Loian said that she commenced employment with the defendant in July 2013.
139. She said she and the plaintiff were some 5 to 6 metres apart from one another on the production line. She described Sachin's job as that of a Supervisor and Team Leader. She said she also knew Sando as a co-worker.
140. She said that in her experience the line "always ran at a normal speed" although "sometimes speed a bit faster".
141. She denied any knowledge of Sando coming up behind the plaintiff and placing himself close to her.
142. She denied being aware of any incident in March 2015. She was unaware of any threat to kidnap the plaintiff or of any inappropriate touching or swearing.
143. She said she has loaned money to the plaintiff on possibly 4 or 5 occasions totalling \$300.
144. She said she could not read the English language and when she made her statement <sup>11</sup>as to the train station incident she said she "did not truly believe it". She said the plaintiff told her only that someone met her at the railway station but she did not say who. She said she told the plaintiff to report the matter to the workplace.

#### The plaintiff's burden of proof

145. The plaintiff bears the burden of proving the essential elements of her claim for compensation on the balance of probabilities. The defendant denies the plaintiff suffered injury. It denies the occurrences of sexual harassment and bullying. Counsel for the defendant placed considerable reliance on the evidentiary principles set out by Dixon J in that Briginshaw v. Briginshaw (1936) 60 CLR 366 in which his Honour said that "reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from particular finding" are relevant to deciding whether a matter is proved on the balance of probabilities.
146. The standard of proof required on the balance of probabilities is for the plaintiff to satisfy me on the evidence sufficiently to enable me to reach a state of "actual

---

<sup>11</sup> Not tendered

*persuasion of the occurrence or existence of the fact in issue before it can be found". It should be emphasised that the test in Briginshaw is not one that creates a different standard of civil proof.*

#### Work Relatedness requirement

147. The defendant argued that if I was satisfied that the plaintiff was grabbed or hugged or kissed at the Ascot Vale train station by Sachin and subsequently responded adversely to that conduct and developed a mental type injury as a consequence of the same then because the conduct occurred outside the workplace and outside work hours, it would not amount to a work injury. Furthermore, the defendant contended that unless it was proved by the plaintiff that she was treated wrongly at work by inappropriate conduct and language thereby suffering injury then the plaintiff's claim for compensation must fail. The defendant submitted that I could not aggregate a non-work injury (the train station incident) and a work injury to find a work incapacity. The defendant also submitted that the plaintiff exhibited no incapacity until after the confrontation involving her personal affairs at home on 25 August 2015, after which she failed to return to work and ceased her employment. The defendant's counsel submitted therefore that if the plaintiff suffered an incapacity for work at all then it did not arise until 26 August 2016, and I should be satisfied it arose as a result of the confrontation that occurred at the plaintiff's home when her lover and partner confronted one another and therefore is not a compensable injury.
148. The principal pillars upon which the defendant relies to support its defence to the plaintiff's claim for compensation are:
- (I) The plaintiff has not discharged her burden of proof in establishing the occurrence of work place conduct;
  - (II) The plaintiff therefore to the extent that she labours from an incapacity for work has not proved it was caused by her work;
  - (III) To the extent that the plaintiff experienced conduct directed at her by a colleague at the Ascot Vale train station that caused in her a mental type disorder resulting in a work incapacity that such conduct did not have work connectedness and therefore the defendant is not liable for its consequences to the plaintiff;
  - (IV) Certain other conduct about which the plaintiff has alleged occurred in the workplace and that caused her anxiety and depression has not been proved on the requisite standard of proof;
  - (V) The history recorded by several of the medical treaters is either incomplete or at odds with other recorded accounts such that any determinative reliance placed on one or more of them would be unsafe.
149. It is a basic tenet that a person will not be entitled to compensation by way of payment of weekly payments or associated medical and like expenses unless there

has been a work injury that results in an incapacity for work. However, if a plaintiff suffers injury then work need not be the sole cause in order to give rise to an entitlement for compensation by way of weekly payments and medical and like expenses.

#### Discussion of the medical evidence

150. It is inevitable that in a case such as this, where the oral evidence is reduced to largely competing accounts by way of accusation and denial and which is on their face plausible, that any contemporaneous account of matters later complained about by a plaintiff and to a medical treater will be of assistance in a judicial determination. Against such a template, the plaintiff's case is substantially wanting. The plaintiff made no report of any mental symptoms to her general practitioner until after finishing her employment with the defendant. The medical notes from the Craigieburn Medical Centre embrace the period 24 January 2013 until 19 March 2017. Although the plaintiff presented previously to her general practitioner on 29 August 2015 that is, after she had ceased employment with the defendant, she complained only of flu like symptoms but however, there was no report of any emotional or psychological concerns. That did not arise until her attendance in September 2015.
151. There is an appreciable gap in time in terms of any attendances by the plaintiff on her general practitioner and, more particularly, on her treating psychologist. For example, there is no record of the plaintiff having attended on her general practitioner or her psychologist following her first appointment on 9 September 2015 until some 4 months later on 14 January 2016, and thereafter, she was not seen again by her psychologist until 17 March 2017.
152. The defendant's counsel contended that to the extent the medical opinions provided a measure of support for a connection between injury and the plaintiff's work, it is tenuous, and would amount to a dubious basis to rely upon for a finding of entitlement under the Act because of the unreliability of the factual accounts presented in several of the medical reports. Counsel submitted that no single report provides an exhaustive history of events or, moreover, one that contains reference to the conduct relied on by the plaintiff in her Statement of Claim and evidence in chief. In my judgement, that was a fair characterisation by counsel. The plaintiff's general practitioner Dr Ng in a report dated 2 February 2016, recorded having seen the plaintiff first on 1 September 2015, (after she had concluded her employment following the confrontation that occurred at home) and recounts a history that:
- The plaintiff was sexually harassed in January 2014 when approached by her team leader Sachin (not particularised)
  - Sachin's harassment was "*constant*"
  - The harassment "*continued for some time*"
  - The harassment included being followed to the train station

- Sachin making advances to the plaintiff at work
  - Sachin stalking the plaintiff (reiterated by reliance on following the plaintiff to the train station)
  - Sachin forcing himself on the plaintiff at the train station and holding her tightly to his body and kissing her
  - Sachin squeezing her buttocks and legs in a sexual way at work
  - Ali coming to the plaintiff's defence at work in the face of harassment from Sachin
153. In a further report dated 5 June 2017, Dr Ng, reported that the plaintiff alleged that *"she was harassed by fellow workers....they threatened to harm her if she did not agree to their advances"*.
154. In the event I am satisfied on the balance of probabilities of the occurrence of the events which the plaintiff alleges occurred at work, then there is no reasonable basis to not find that the plaintiff suffered an adjustment disorder with depressed and anxious mood and that her condition became intense including presenting itself with features of a major depressive disorder by reason of that conduct.
155. Shirlene Jayasundera is a clinical psychologist who treated the plaintiff on referral from Dr Ng. Ms Jayasundera conducted an initial assessment of the plaintiff on 9 September 2005, followed by 5 sessions of "supportive psychotherapy and cognitive behaviour therapy" on 14 January, 28 January, 1 April and 3 June 2016. The written report of Ms Jayasundera included the following matters some of them not particularised:
- Sachin commenced engaging in unwelcome conduct in January 2015
  - Sachin requested the plaintiff's phone number
  - "Just sleep with me once" (an allegation that is reflected in the plaintiff's evidence of Sachin boasting about his sexual prowess)
  - Sachin making physical contact with her in the workplace (not detailed)
  - Sachin offering to drive her home as she was en route to the train station after concluding her work of a day
  - The incident at the train station in April 2014 when she was grabbed and kissed by Sachin
  - The plaintiff phoning her co-worker that day
  - Continuing touching and grabbing of the plaintiff and of her breasts, legs, buttocks and shoulders
  - Emptying the residual contents of bags of fish over her

- Frequently allocating the plaintiff heavy work to perform
  - Seeking medical help from her GP for these complaints although not disclosing the harassment to her GP due to embarrassment
156. Ms Jayasundera reported that the plaintiff commenced to be harassed by Sando from March 2015. The harassment recounted by Ms Jayasundera was not sexual in nature and there was also reported a second occasion in June 2014 when Sachin allegedly followed the plaintiff to the train station. Ms Jayasundera reported the plaintiff claiming the existence of further abuse but that she was protected by Ali Husain with whom she formed an intimate relationship.
157. The account related in the report by Ms Jayasundera of the plaintiff's relationship with Ali and the manner in which it ended is very much at odds with the account given by the plaintiff in her evidence in chief and cross-examination.
158. The facts recounted by Ms Jayasundera and her acceptance of them having occurred formed the basis in which she wrote on 4 July 2016, that it was her *"clinical opinion that Sunethra's distressing, sustained and prolonged experience of sexual harassment, intimidation and bullying at her workplace have brought about a significant deterioration in her mental state, current functioning, future mental wellbeing and stability as well as employability. This has been further compounded by her feeling that her experiences were not validated by management"*.
159. Ms Jayasundera reported what was in the first instance an indicative diagnosis of adjustment disorder (subtype – with mixed anxiety and depressed mood) but as well a clinical diagnosis of Post-Traumatic Stress Disorder with concomitant anxiety and clinical depression. In a further report dated 8 May 2017 Ms Jayasundera wrote that she had been seeing the plaintiff *"on a fairly regular basis and saw her most recently on the 28<sup>th</sup> April 2017"*. The account recorded, and the conclusion expressed, was not markedly different from the earlier report and certainly not probatively different.
160. The plaintiff was also seen by, and a report prepared by, Dr Tagkalidis, Consultant Psychiatrist, dated 16 August 2018. It is correct to say, as counsel for the defendant put it, that there is a lack of uniformity between the account by Dr Tagkalidis and that of Ms Jayasundera, or indeed, matters recounted by the plaintiff in the course of her evidence. I have borne in mind that it is not always the case to expect that over time there will be recounted by a plaintiff an identical narrative of time place and circumstance, such that a divergence in any particulars, renders vulnerable the central narrative by a plaintiff or, more readily results in a conclusion, that evidence recounted must be false. Mr Johnstone sought to distinguish omissions that one might regard as to be expected from omissions that one may objectively assess as significant. He relied on the omissions from the GP of the incident at the train station or complaint of conduct alleged to have occurred on the production line and in the report of Dr Rathnayake, the absence of reference to Ali. I find it difficult to rationalise how Sando's aberrant sexual conduct at work is not referred to otherwise than in the

report of Associate Professor Doherty. The increased speed of the processing line is not mentioned in any report and was mentioned only in Court. The report of the train station incident whilst referred to in one report of the GP is not referred to in the second report by the GP rendering its importance (diminished or enhanced and to what extent) unable to be assessed.

### Findings

161. I make the following findings:

- (i) I am satisfied on the balance of probabilities that Sachin made unwelcome advances to the plaintiff at the Ascot Vale train station in April. He may have approached her a second time also outside work and also at a train station in or about June 2015. I found Sachin to be an unimpressive witness and I expressed my view to this effect in the course of final address by counsel for the defendant. My view of him has not altered in the period since the reservation of my reasons for decision. Sachin denied the train station incident. Vadjjal said he was aware of it and Dummika admitted some aspects of the phone call made by the plaintiff from the bus. I am satisfied this incident occurred and that Sachin pulled the plaintiff to him against her will and kissed her against her will. I am satisfied the plaintiff was shocked and frightened by Sachin's conduct and that she fled the station in a distressed manner in consequence of his behaviour. I expect that it remained a matter of concern and upset to her.
- (ii) I am satisfied that the plaintiff telephoned her workmate Dummika from the bus and related the event at the train station. I reject the evidence given by Dummika that the plaintiff did not "*sound upset*" as being unreliable. Dummika also said that the plaintiff and Sachin appeared to be engaging normally with one another the following work day. The plaintiff said otherwise and that she was ignored by Sachin the following day upon attending work. I think the plaintiff's assessment of her interaction with Sachin the next day, is to be preferred.
- (iii) I find that the incident at the train station was not work related.
- (iv) I am not satisfied based on the sole account of the plaintiff that the incident at the train station was but one instance of Sachin's conduct and that he harassed and importuned the plaintiff at work both before and after the train station incident. I make this finding conscious that I have rejected Sachin's denial that he approached the plaintiff at the Ascot Vale train station. The fact that I prefer the plaintiff's account on that allegation for the reasons noted that include other evidence from which support for it can be drawn, does not equate to the requirement that all other allegations made by the plaintiff against Sachin and lacking corroboration must also be accepted.
- (v) I am not satisfied that the plaintiff has proved that Sachin engaged in the behaviour complained of at work namely, requests for marriage and for the plaintiff's telephone number.

(vi) The plaintiff complained as well of other unwelcome conduct of a sexual nature to which she subjected by Sachin. I was urged by counsel for the defendant to reject as unreliable such allegations that comprised:

- Sachin coming up very close to the plaintiff on the line making her feel uncomfortable
- Touching the plaintiff's back with his fingers
- Placing goods on the line and putting his hand near her chest and smiling and saying "sorry" whenever he did so to which the plaintiff would admonish him and say to him. "Don't do it".
- Putting his knee towards her back
- Putting his hand on her buttocks.

162. The plaintiff said this conduct by Sachin occurred "*about 4 times a week*" over the period from April 2014 to August 2015. In other words it was persistent. The plaintiff said Dummika and Loian observed the conduct and Dummika told her to complain to the police and Loian suggested that the plaintiff ignore it and on one occasion asked the plaintiff why she didn't "*punch him in the face*". Dummika and Loian denied the plaintiff's account. Both women remained employed with the defendant at the date they gave evidence, and that is a matter I have considered in light of their denials. Nonetheless, the fact of their continued employment with the defendant is itself not a reason enough to dismiss their evidence. I am not satisfied that I should dismiss it, and on balance, I prefer their denials to the plaintiff's evidence.
163. The allegations made by the plaintiff against Sando coming close to her and kissing her "*close to my neck*" and proceeding to tell her he masturbated while imagining her, and that he remained aroused by her, are serious and disturbing allegations. They were denied by Sando.
164. The resolution of the allegations of offensive and degrading and arguably criminal conduct alleged against Sando at work by the plaintiff is important. A conclusion that Sando engaged in the alleged conduct should not be readily assumed. The allegations given their serious nature warrant an application of the means for assessment that was spelt out in Briginshaw v Briginshaw per Rich J at 350 and Dixon J at 362-3. The passages are well known and I will not repeat them. However, the passages are not intended to be applied as if they consist of a formula that can be readily adopted in every case where serious allegations are made in civil proceedings. Where a determination depends on a choice between competing and mutually inconsistent allegations of unlawful conduct the most that can be done is for the Court to be conscious of the gravity of the allegations. As was said in Bale v Mills (2011) 81 NSWLR 498 at [72] the consciousness of the gravity of the allegations is prudent because of the proposition that members of the community do not ordinarily engage in serious misconduct. The inability of the plaintiff to adduce evidence corroborating

the alleged conduct by Sando of coming close to her and touching her and subsequently telling her what he claimed to have done in the toilets is hard to reconcile with the nature of the process line and number of workers described in the evidence. The plaintiff said that as a result of Sando telling her what he had done privately while thinking about her, she was shaking. She however, remained at work and there is nothing to suggest anything untoward occurred. The plaintiff said Sachin and Sando were laughing and Sachin said to the plaintiff that "*Sando is a sick man*". The defendant, however, points to the absence of any report to anyone of the conduct allegedly engaged in by Sando. An allegation of sexual assault, whilst particularised in the Statement of Claim, pertains to Sachin's conduct at the train station. No allegations involving the egregious sexual comments allegedly made by Sando and his lewd and offensive conduct is referred to in the pleading or, in any note by the plaintiff's GP, or the written reports of the GP, and moreover, the allegations of sexual misconduct by Sando are not referred to in the police statement made after the plaintiff had ceased her employment. No mention is made in the written reports of the plaintiff's clinical psychologist Ms Jayasundera. The plaintiff's psychiatrist, Dr Tagkalidis, in his report dated 18 August 2016, makes no reference to any matter other than to Sachin's conduct at work and at the train station. His account related in his report about the circumstances that unfolded, at and about the train station, are different as well in their recording of certain details to the narrative given elsewhere and by the plaintiff in her evidence in chief. Dr Rathnayake, in a report dated 30 September 2015, only wrote of Sando in the context of the incident where he was allegedly physically abusive to her and pulled her away from her work area. No mention was made of any aberrant sexual misconduct. However, Associate Professor Doherty, wrote in his report dated 10 December 2017, of the allegation that Sando had confided to the plaintiff of having masturbated.

165. Having considered all of the evidence, I am not satisfied that the plaintiff has proved the conduct alleged against Sando of a sexual nature.
166. I am also not satisfied that the plaintiff was called a "*Sri Lankan bitch*" on more than one occasion at work by Sachin or Sando. Simply put, the plaintiff said in cross-examination, that she never heard that language being spoken directly to her.
167. I am satisfied and find that the plaintiff was confronted by Sando when she questioned a direction given her by him that she was to change location this led to Sachin intervening to temper the incident. I am not satisfied, however, that in the course of this incident that Sando then made threats to the safety of the plaintiff by threatening to kill her and kidnap her.
168. I am not satisfied on the plaintiff's evidence that in retaliation for her not succumbing to Sachin's overtures and or stemming from the incident on the line with Sando, that she was targeted by actions taken at Sachin's direction or complicity with Sando to increase the speed of the process line or that she was not rotated through the line or that she was allocated the more difficult of duties. I heard evidence that the effect of

increasing the speed of the process line would have been not just to cause disadvantage to the plaintiff in trying to keep up with work, but would in addition, have adversely affected the other workers alongside her, and presumably, have initiated complaints to management. The plaintiff might have thought this occurred, but I am satisfied it did not. As to rotation, I am satisfied that there appears to have been the requirement for it (in fact the confrontation with Sando related to a direction to rotate through to a different place on the line) and it may have been from time to time, strict adherence to the requirement was lacking, and perhaps led the plaintiff to assume that she was being treated less favourably than others.

169. I am also not persuaded on the balance of the evidence that the plaintiff was allocated hard jobs. The evidence I heard included that one hard job, for example, was lifting boxes, a task the plaintiff agreed she had not been requested to perform. Not all tasks are equal, of course, but I am not satisfied that there was a decision to allocate the plaintiff difficult jobs as payback. Indeed the plaintiff appears to have performed ordinary duties.
170. I am satisfied that although the plaintiff did not complain about the conduct of Sachin either at the train station or in the workplace that Vadnjal had heard about the train station incident but because the conduct happened outside the workplace he did not take the matter further.
171. The defendant criticised the plaintiff because of her failure to take the matter of Sachin's alleged ongoing harassment at work or the alleged sexual conduct of Sando to management despite having been aware of the processes that would have allowed the same or of not raising them with Vadnjal or Andrew. The criticism levelled at the plaintiff was that the omission to do so was evidence that the conduct did not occur. In my judgement, the Court should be wary of concluding that whenever a female worker fails to complain of importuning conduct by male superiors this means that the conduct did not occur. Certainly the absence of complaint is a matter that makes the assessment of the probability of the conduct having occurred more burdensome for a plaintiff, and this is a reason why, among other reasons expressed, that I have concluded that I am not satisfied that some of the conduct alleged has been proved. My findings however do not mean that in every case where some conduct is only related to third parties well after the employment ceases, and then perhaps only in the context of medico legal reporting, that this must tell in favour of a conclusion of a concoction of evidence as opposed to a genuine retelling of a matter about which a plaintiff has previously been reluctant to discuss. In short, there is no absolute about how evidence that is essentially uncorroborated must be judged. It will always depend.

### Injury

172. The plaintiff alleged that she has suffered a mental type injury arising out of or in the course of her employment with the defendant. It is plain enough from my findings that I am satisfied the plaintiff was subjected to unwelcome work conduct from Sachin. It occurred outside work. If I am wrong about this, then did it cause a mental injury? If it did, then there was no objective manifestation of it in a temporal sense. The plaintiff made no complaints to management of sexual harassment by Sachin and her complaint to management about Sando arising from when she was given the direction with which she cavilled, resulted in a written warning. Her complaint alleging that Sando threatened to “*kill her, to kidnap her*”, made after her employment ended is not a matter that I am satisfied occurred<sup>12</sup>. There was no absence from work by the plaintiff and the progress notes of her doctor and her attendances reveal that over the course of time when she claimed that she was subjected to the almost daily unwelcome attention by Sachin, and subsequent alleged sexual behaviour by Sando, there is no reference or account recorded by her doctor. Mr Perry submitted that there may be a delay between injury and incapacity. I agree and the law certainly recognises this phenomenon. The problem is, I have no reliable evidence of injury. The plaintiff said she was experiencing physical manifestations caused by Sando’s conduct of threatening her with physical harm. She said she was crying, and that she saw manifested in herself, symptoms caused by his behaviour, that included loss of appetite, fatigue, mild panic attacks and nightmares about him. She has related as well a fear of leaving her house other than when required to do so to attend medical appointments. The plaintiff testified that her nightmares occurred whilst still employed and that Lal was witness to them, however, this was not corroborated by Lal, who said that her disrupted sleep did not occur until after 25 August 2015. Lal certainly did not corroborate the other symptoms of which the plaintiff testified and the doctor’s progress notes are silent on this and other salient matters.

### Incapacity

173. Under the scheme of the legislation and for there to arise an entitlement to a worker for compensation in the form of weekly payments, a worker’s incapacity for work must result from or be materially contributed to by, a work injury. Here the defendant submitted that any incapacity did not result from and neither was it materially contributed to by a work injury.

---

<sup>12</sup> To the extent the accounts in oral evidence allowed for the possibility that such a threat was made by Sando to the plaintiff and Sando was made aware of it, is not a matter about which I have been able to make a positive finding and therefore be satisfied it occurred. There is some evidence from Sando to the effect he was asked about having made some such threat to the plaintiff by Vadjnal whereas Vadjnal denied the fact and Sando was not cross examined on the implied inconsistency. The presence of disparate accounts that might have led to a definite finding was not pursued in cross-examination.

174. Mr Johnstone submitted that the events at the train station could not be treated as a workplace injury. I have already noted my acceptance of that submission. I accept that it was an upsetting matter for the plaintiff to have been approached by Sachin outside her work. Had his alleged conduct continued at work and certainly occurred with the frequency alleged by the plaintiff, then on the balance of probabilities, it would have been very evident in the workplace. The plaintiff was unable to adduce any corroborative witnesses. Mr Johnstone further argued that the lurid sexualised behaviour alleged to have occurred at work of a physical nature including being touched by Sachin should not be accepted as having been proved. I have also accepted that submission for the reasons expressed earlier.
175. I have accepted the plaintiff has proved that she was confronted by Sando in the workplace. I am satisfied that this upset the plaintiff. I am not satisfied that the plaintiff has established that Sando verbally threatened her with death or kidnapping and I am also satisfied that the plaintiff had herself described Sando to his face as a Tamil Tiger. I am not satisfied of the occurrence of the more egregious and offensive sexualised conduct alleged against Sando. Whilst feelings of sadness and upset are perhaps understandable reactions to the plaintiff's employment based on her constitution and perhaps driven by her sense of being excluded and not receiving the ordinary benefits of her employment such as the provision of a range of duties or rotations, I am not satisfied work conduct was a cause of an injury. I am satisfied that the complaints against Sachin were enlarged upon by the plaintiff in response to that event at the train station, and that the aberrant work behaviour alleged against Sando was concocted by the plaintiff in response to her sense of being addressed in a manner she regarded as unfair by Sando.
176. The plaintiff said in evidence that had Lal been made aware of the harassment she alleged she had experienced at work before being told of "it"<sup>13</sup> by Ali on 25 August 2015, he would not have permitted her to return to work and that was not something she wanted. I am satisfied that the reasonable conclusion to draw, is that but for Ali's intervention, the plaintiff would have continued in her employment. She was not prior to that time incapacitated for work. I am not satisfied that the evidence is capable of reasonably supporting a finding that the plaintiff experienced an aggravation or exacerbation type mental injury subsequent to ceasing employment by reason of Sando's conduct at work in the sense that it would need only to amount to a significant contributing factor to injury.
177. The definition of "no current work capacity" in the Act, calls for an assessment to be made to ascertain a sufficient connection between the workplace injury and incapacity for the purpose of establishing a right to compensation. Arguably, a similar content should apply to the expressions "arising from"; "resulting from or materially contributed to by"; and "arising out of". Against these precepts underpinning

---

<sup>13</sup> The "it" amounting to the alleged conduct not being described by Lal

compensation pursuant to the Act, I am not satisfied the plaintiff has discharged her burden. I am satisfied that the plaintiff not returning to work after 25 August 2015 was as a result of Lal becoming acquainted with an account of workplace conduct and not allowing the plaintiff to do so but this is not evidence that equates to incapacity due to a work injury. Furthermore, and on the evidence adduced before me, the plaintiff was experiencing numerous stressors including Sachin's conduct and her sense of being treated unequally at work by Sando. The plaintiff also commenced a relationship at work with a work colleague, the existence of which she was seeking to keep from her partner, and this included deception on her part in having Ali drop her some distance from her home in order to avoid detection. The use of the word "brother" to describe Lal to work colleagues was also part of the plaintiff juggling the demands of her personal life. I am also satisfied on the evidence that the plaintiff was experiencing financial need and was borrowing and repaying money to work colleagues during her employment. Although initially having denied the same, it seems that this was the case, and something ultimately acknowledged by the plaintiff. The confrontation between Ali, and Lal at her home, and howsoever that meeting came about, was extremely upsetting to the plaintiff and the evidence was that she was vomiting at home as a result of her relationship with Ali being "outed" to Lal.

178. For the reasons I have explained, I am not satisfied that the plaintiff suffered a work injury and I am not satisfied that any incapacity from 26 August 2015 was due to a work injury.
179. In light of my findings, it does not fall to me to endeavour to explain the accounts that the plaintiff has self-reported to some treaters since she ceased her employment with the defendant. To do so would be to succumb to a form of "reverse engineering" of a claim for compensation. Ultimately, I have found the opinion of Associate Professor Doherty dated 10 December 2017, the most helpful of the reports relied on in the proceeding, in which he wrote in response to a number of questions, but on the matter of diagnosis:

*"The unreliability of the worker's history would cause the making of a psychiatric diagnosis to be unreliable, and thus invalid".*

180. The unreliability of the plaintiff's history is telling and the account recorded by Associate Professor Doherty included the plaintiff rationalising Sando's alleged threat to kill her as retaliation for her refusing to have sex with him. Associate Professor Doherty obviously not immune to the plaintiff's reporting of symptoms wrote:

*"The history given, and the clinical picture can be explained by either the presence of a psychotic condition, where the worker misinterprets, elaborates events into having delusional meaning and has imaginary fears and experiences. That is, she is very psychiatrically, psychotically unwell.*

*The other explanation is that the unreliable and inconsistent history is largely made up."*

181. I am not immune to the existence of the plaintiff having presented post-employment with a symptoms that she alleged have severely and adversely impacted her life. The most prevalent complaint focussed upon is the plaintiff's belief that Sando threatened her life and that she has developed a deeply disturbed psychological state as a result. I am also conscious that a plaintiff may develop an exaggerated response to work events by reason of perception of an event or of conduct, and that this may be sufficient for a plaintiff to establish injury, so long as the event or events have some grounding in fact. I am not satisfied that the plaintiff's alleged fear for her safety is either rational or based in a sufficient semblance of facts upon which I have been able to make a positive finding such that her claimed response and fear may be assessed as rooted in fact. Overall, I am satisfied, that in large measure the plaintiff's complaints are unreliable. Amidst the many matters that the plaintiff has alleged, I have found that what did occur that caused her upset, occurred outside work, that furthermore her evidence was on occasions exaggerated or concocted and, in some areas identified by me in my reasons, the plaintiff has dissembled. A number of reports put in evidence lacked currency and, indeed, the report of Dr Rathnayake makes no reference to the plaintiff having identified the relationship with Ali at all, or canvassed the circumstances in which it came to a head and was either the reason for, or a reason that, informed her decision to not return to work. The report from the Craigieburn Medical Centre and Dr Ng, refers to the plaintiff having had a relationship with Ali but does not describe the fact of it becoming known to Lal and its effects physically and emotionally on the plaintiff.
182. Overall, I am not able to place reliance on the plaintiff's attribution of condition to cause.
183. The plaintiff's claim is dismissed with costs.