SUPREME COURT OF QUEENSLAND

CITATION:	*Hayes & Ors v State of Queensland* [2016] QCA 191
PARTIES:	**SAMANTHA KATHERINE HAYES** (first appellant) **PAMELA GREENHALGH** (second appellant) **TANYA PALMER** (third appellant) **EDITH MATILDA HARRIS** (fourth appellant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 4063 of 2015 Appeal No 4064 of 2015 Appeal No 4065 of 2015 Appeal No 4066 of 2015 DC No 3251 of 2012 DC No 3317 of 2012 DC No 3224 of 2012 DC No 3226 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	District Court at Brisbane – [2015] QDC 63
DELIVERED ON:	29 July 2016
DELIVERED AT:	Brisbane
HEARING DATE:	13 October 2015
JUDGES:	Margaret McMurdo P and Mullins and Dalton JJ Separate reasons for judgment of each member of the Court, Mullins and Dalton JJ concurring as to the orders made, Margaret McMurdo P dissenting
ORDER:	**In Appeals No 4063, 4064, 4065 and 4066 of 2015:** **Appeal dismissed with costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – PARTICULAR CASES – AS BETWEEN EMPLOYER AND EMPLOYEE – where the appellants each worked as managers in a government department – where a large number of workers, together with their union, made complaints against the appellants – where the complaints were investigated by the department and later rejected – where the appellants allege there was a lack of support in the workplace after the complaints were made –

where the appellants each suffered psychiatric injury – where the trial judge concluded that no duty of care was owed to the appellants because the basis for their complaints was an investigation by their employer – whether the trial judge erred in concluding that no duty of care arose in the circumstances

TORTS – NEGLIGENCE – BREACH OF DUTY OF CARE – where the appellants each worked as managers in a government department – where a large number of workers, together with their union, made complaints against the appellants – where the complaints were investigated by the department and later rejected – where the appellants allege there was a lack of support in the workplace after the complaints were made – where the appellants each suffered psychiatric injury – whether the respondent breached its duty of care in respect of each appellant

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – where the appellants each suffered psychiatric injury – where the facts assumed as the basis for the psychiatrist's expert evidence were substantially different from the facts proved at trial – whether the breach of duty caused the psychiatric injury suffered by each appellant

Public Sector Ethics Act 1994 (Qld)

Barber v Somerset County Council [2004] 1 WLR 1089; [2004] UKHL 13, considered
Director General Department of Justice v Civil Service Association of Western Australia Inc [2005] WASCA 244, cited
Gogay v Hertfordshire County Council [2000] Fam Law 883; [2000] EWCA Civ 228, considered
Goldman Sachs JBWere Services Pty Ltd v Nikolich (2007) 163 FCR 62; [2007] FCAFC 120, applied
Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd (2008) 73 NSWLR 653; [2008] NSWCA 206, cited
Johnson v Unisys Ltd [2003] 1 AC 518; [2001] UKHL 13, cited
Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44; [2005] HCA 15, considered
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305, cited
O'Brien v TF Woollam & Son Pty Ltd [2002] 1 Qd R 622; [2001] QSC 217, cited
O'Leary v Oolong Aboriginal Corporation Inc [2004] NSWCA 7, cited
State of New South Wales v Mannall [2005] NSWCA 367, considered
State of New South Wales v Paige (2002) 60 NSWLR 371; [2002] NSWCA 235, distinguished
Sullivan v Moody (2001) 207 CLR 562; [2001] HCA 59, considered
Waters v Commissioner of Police for the Metropolis [2000] 1 WLR 1607; [2000] UKHL 50, considered

COUNSEL:	W Sofronoff QC, with S D Anderson, for the appellants D A Savage QC, with R Morton and N Jarro, for the respondent
SOLICITORS:	Shine Lawyers for the appellants GR Cooper, Crown Solicitor for the respondent

[1] **MARGARET McMURDO P:** These four matters were heard together both at first instance and on appeal. The appellants, Samantha Hayes, Pamela Greenhalgh, Tanya Palmer and Edith Harris, worked in the respondent's Maryborough office of Disability Services Queensland. Their varied roles involved the management of residential care officers who provided essential 24 hour services to vulnerable people with significant intellectual disabilities living in the community. The nature of their work therefore involved a high degree of responsibility and could be expected to be stressful from time to time. In July 2008 Ms Julie Johnson, a team leader of residential care officers in the Maryborough office, made complaints against Ms Hayes alleging workplace harassment and other matters. The respondent, as it was legally obliged, investigated these complaints and in September 2008 found them to be unsubstantiated. By January 2009 the Maryborough office had become a troubled workplace, following further more serious and more extensive complaints from about 20 residential care officers and Ms Johnson against nine managers, including the appellants. The respondent, as it was legally obliged, also investigated these complaints. In November 2009, the further complaints were also found to be unsubstantiated.

[2] Following the complaints, the appellants each suffered from a serious psychiatric injury and brought an action for damages in negligence and breach of contract against the respondent, alleging that it owed each of them a duty of care to sufficiently support her at the time of the complaints and during the resulting investigation. Each alleged the respondent breached that duty and caused her psychiatric injury. My initial observations apply to all four appeals although I later deal with each appeal separately.

[3] The primary judge, relying on the New South Wales Court of Appeal cases of *State of New South Wales v Paige*,[1] *O'Leary v Oolong Aboriginal Corporation Inc*[2] and *New South Wales v Rogerson*,[3] concluded that the respondent owed no duty of care to the appellants as the alleged duty to provide support arose "directly from the fact of the allegations, the investigation, or the removal from the position."[4] Had the respondent owed the appellants such a duty, his Honour found it would have been breached[5] and the breach would have caused each appellant's psychiatric injury.[6] Although giving judgment for the respondent, his Honour undertook what he termed "a precautionary assessment" of damages in each case.[7]

[4] There are essentially four issues in each appeal. The first is whether the primary judge erred in finding the respondent did not owe each appellant a duty of care to provide adequate support while the respondent's investigations into the complaints were completed. If yes, the second is did the respondent breach that duty in each case. If yes, the third, arising from the respondent's notice of contention, is did the respondent cause that appellant's psychiatric injury. Although not in its notice of contention the

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1 (2002) 60 NSWLR 371.
2 [2004] NSWCA 7.
3 [2007] NSWCA 346.
4 *Palmer & Ors v State of Queensland* [2015] QDC 63 [85] – [94], [123] and [124].
5 Above [125] – [127] (*Ms Palmer*), [157] (*Ms Harris*), [180] (*Ms Hayes*), [205] (*Ms Greenhalgh*).
6 Above [111] – [113] *(Ms Palmer*), [157] *(Ms Harris*), [180] *(Ms Hayes*), [205] (*Ms Greenhalgh*).
7 Above [236] (*Ms Palmer*), [253] (*Ms Harris*), [263] (*Ms Hayes*), [279] (*Ms Greenhalgh*).

respondent raised a fourth issue in its submissions, namely, if yes to those three questions, should the matter be remitted for a further assessment of damages.

[5] Dalton J has helpfully set out the relevant facts and issues. I will add to these only as required to state my reasons for allowing each of the appeals, giving judgment for Ms Hayes, Ms Palmer and Ms Harris and remitting Ms Greenhalgh's case to the District Court for a fresh assessment of damages.

Duty of care: general observations

[6] For the following reasons, I consider the primary judge erred in concluding that there was no duty of care in each case because of the principles arising from *Paige*, *O'Leary* and *Rogerson*.

[7] The 2002 decision of *Paige* makes clear that the appellants' claims must fail insofar as they alleged the respondent's breach of duty arose out of its conduct of the investigation of and decision-making relating to the complaints against them. Further, in *Sullivan v Moody*[8] the High Court rejected the notion that the State, or those acting under statutory obligations to report to the authorities those reasonably suspected of child abuse, owed a duty of care to those suspected. But the present appellants' cases turned, not on solely the conduct of the investigation or the decision-making in relation to the complaints against them, but the respondent's lack of support of each of them at the time of the complaints and the investigation. Nothing in *Paige* or *Sullivan v Moody* exempted the employer respondent from its pleaded duties in this case; to provide and maintain a safe workplace; to take all reasonable precautions for each appellant's safety whilst engaged in employment, and not to expose her to risk of damage and injury of which it knew or ought to have known. Nor did anything in the cases exempt the respondent from the particularised aspect of those duties to provide reasonable support to each appellant following the complaints and during the resulting investigation.

[8] In the 2004 case of *O'Leary*, the trial judge found that, whilst the employer owed O'Leary a duty to take reasonable care to avoid injury, and breached that duty, O'Leary's psychological injury (adjustment disorder with depression) was far too remote; it could not be reasonably foreseen as a possible consequence of the employer's conduct that O'Leary would suffer a recognised psychiatric injury. O'Leary appealed, contending that the employer's treatment of him was likely to result in mental anguish of a kind that could give rise to a recognised psychiatric injury. The employer knew that he had previously taken time off work as he had provided a medical certificate stating that he suffered from an adult adjustment disorder. Spigelman CJ and Sheller JA dismissed the appeal, McColl JA dissenting. Spigelman CJ emphasised the distinction between stress and a recognised psychiatric illness[9] and held that, while the employer's conduct was improper, it did not breach a duty of care.[10] Sheller JA also emphasised the distinction between emotional distress and recognisable psychiatric illness[11] but considered that on the evidence the employer had breached its duty of care to take reasonable care of its employee.[12] His Honour concluded, however, that, although the employer's conduct was wrong and perhaps disgraceful, having regard to the

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8 (2001) 207 CLR 562.
9 [2004] NSWCA 7, [3].
10 Above [24].
11 Above [55].
12 Above [38].

psychiatric evidence it was open for the trial judge to find that the employer could not have reasonably foreseen that a possible consequence of its conduct was that O'Leary would suffer a recognised psychiatric injury so that no duty was owed in this case.[13]

[9] *O'Leary* turned on the findings of fact made by the trial judge on the evidence in that case. It provided no statement of principle precluding the present respondent from owing a duty of care to each appellant to provide reasonable support at the time of the complaints made against them and during the resulting investigation.

[10] In the 2007 decision of *Rogerson* the State appealed from the trial judge's award of damages to Owen Rogerson, a former police officer, said to arise from breaches of the State's duty of care to safeguard him from foreseeable risk of psychiatric injury. Owen Rogerson's older brother was Roger Rogerson, the notorious, disgraced former police officer. Owen Rogerson claimed his employer had a duty to protect him from discrimination and victimisation resulting from his relationship with his brother. The particulars relied on by Owen Rogerson to establish the breach were the advice of a legal officer that if Owen Rogerson was called as a witness before the Wood Royal Commission he might be asked questions about his association with his brother; the rejection of Owen Rogerson's formal complaint about that advice; the rejection by the Casino Control Authority of Owen Rogerson's nomination for secondment to that Authority; remarks by a police officer of lower rank who had been recommended for promotion ahead of Owen Rogerson; and the rejection of Owen Rogerson's formal complaint about those remarks. The New South Wales Court of Appeal allowed the appeal, concluding that none of the matters complained of were breaches of a duty owed by the Police Service to Owen Rogerson to protect him from the risk of psychiatric injury. Handley AJA, with whom McColl JA and Hoeben J agreed, noted that:

> "The incidents that [Owen Rogerson] found distressing and his numerous disappointments did not involve any breach of a common law duty of care owed to him by the Service. The only setback caused by his relationship with his brother was the rejection, by the Authority, of his secondment, but this was outside the control of the Service. Most of his other disappointments arose from the application of promotion procedures which he did not satisfy. No one…could give [Owen Rogerson] a guarantee that he would not suffer similar disappointments in the future."[14]

[11] The particularised breaches of duty alleged in *Rogerson* differed from those alleged in each of the present appellants' cases. Nothing said in *Rogerson* precludes a finding that the present respondent, as employer, owed a duty of care to each appellant to adequately support her at the time of the complaints and the resulting investigation.

[12] The respondent's non-delegable duty as employer to each appellant was, in general terms, to take reasonable care to eliminate risks of injury, including psychiatric injury, which could be reasonably foreseen and avoided. In determining if that duty has been breached relevant factors include, but are not limited to, the nature and extent of the employment and express or implicit signs of vulnerability on the part of the employee.[15] The respondent knew the complaints involved allegations against each appellant of serious misconduct and that the investigation of those complaints would

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13 Above [57], [67].

14 [2007] NSWCA 346, [41].

15 *Koehler v Cerebos (Australia) Limited* (2005) 222 CLR 44, [24] (McHugh, Gummow, Hayne and Heydon JJ).

be prolonged. It ought to have known that the appellants, as conscientious managers of those providing essential services to vulnerable disabled people, would be placed under great stress by those allegations, which struck at the heart of their professionalism. In recent years, the community's understanding of mental illness has incrementally expanded. The reasonable employer in the position of the respondent in 2009, although not expected to have medical expertise, could reasonably be expected to have known that prolonged workplace stress could detrimentally effect the physical and mental health of employees performing work like the appellants' and that, if unsupported in the workplace, that stress could develop into mental illness. The possibility of psychiatric injury in such circumstances was real, not far-fetched or fanciful. The consequences for employees who become mentally ill in such circumstances could be catastrophic. So much was recognised by the respondent's provision of free counselling to all employees including both the complainants and the appellants. The extent, nature, and reasonableness of the support the respondent employer was obliged to offer the appellant employees must be assessed in the context that the respondent was required to impartially investigate the complaints against the appellants.

[13] In light of the number and nature of the complaints, the respondent acted reasonably in removing Ms Hayes, Ms Greenhalgh and Ms Palmer from their roles in managing the complainants and in placing them in other positions, at least pending the completion of the investigation. But it should have ensured that each appellant (including Ms Harris who remained in her role) understood that the respondent was independently investigating the complaints and that, for those removed from their roles, this was not an indication that it had prejudged the likely outcome of the investigations. It should have briefed each appellant as to the complaints made against her and as to the investigation process. It should have ensured that each was provided with a support person of whom she could enquire about the progress of the investigation and with whom she could discuss concerns. There was nothing unreasonable about the respondent offering such support in those circumstances. In these circumstances, offering them the free departmental counselling service routinely available to all employees including the complainants did not discharge the respondent's duty to each appellant. A more precise determination of the nature of this duty will require a consideration of the relevant facts of each appellant's case including the nature of the work and signs of vulnerability to determine if the kind of harm each suffered was reasonably foreseeable: *Koehler v Cerebos (Aust) Ltd*.[16]

[14] I will now consider whether in each case the respondent owed a relevant duty of care; if so, whether it breached that duty; if so, whether the breach caused each appellant's injury; and if so, whether judgment should be given for the amount of damages assessed by the trial judge or whether the case should be remitted for a fresh assessment. In undertaking this task it is not possible to avoid some repetition and overlap between the four cases.

Ms Hayes

Duty of care and breach (Ms Hayes)

[15] I agree with Dalton J's reasons for concluding that, by 5 January 2009, the respondent owed a duty of care to Ms Hayes to support her through the investigation process. In addition to the matters mentioned in [13], I particularly emphasise the following.

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16 Above.

[16] The respondent knew that Ms Hayes had been very distressed by the 2008 complaints. She became noticeably very upset when she was wrongly told by the respondent's Ms Simpson in August 2008 that those complaints had been made out.[17] The respondent's workplace health and safety officer, Ms Diane Cuskelly, saw Ms Hayes drive away from work, screeching her tyres. Ms Cuskelly was so concerned that she later rang Ms Hayes at home to check on her. The following month the respondent's Ms Huig told Ms Hayes that the 2008 complaints were not made out.[18] The trial judge accepted that before Christmas 2008 the respondent's Ms Wild, a residential care officer, told Ms Hayes that Ms Johnson, "was out to get" Ms Hayes. Although Ms Wild reported this to the respondent's Mr Costello, the respondent took no action.[19]

[17] The respondent's emails of 13 and 14 January 2009[20] would reasonably have led Ms Hayes to conclude that the respondent did not want the appellants to speak about the complaints, either to each other or to their union. The respondent published, through a departmental intranet, a local newspaper article dated 20 January 2009 reporting the demands of the complainants' union for the "accused bullies" to be stood down.[21] Ms Hayes was distressed about media reports of the complaints.[22] The fact that the respondent's Ms Pam Steele-Wareham had the role of liaising with both the complainants and the appellants undermined her ability to provide genuine support to the appellants. Indeed, Ms Steele-Wareham appeared to have sided with the complainants and prejudged the investigation in her unhelpful observation to Ms Greenhalgh and/or Ms Palmer (passed on to Ms Hayes) to the effect that, "there's got to be something in it because there's so many complaints."[23]

[18] Those circumstances, together with those referred to by Dalton J in her reasons, shows that the respondent's lack of support of the kind discussed in [13] of these reasons to Ms Hayes after the 2009 complaints were made and during their investigation was a breach of its duty of care to her.

Evidence of causation (Ms Hayes)

[19] There is no dispute that Ms Hayes suffered a recognisable psychiatric injury after the 2009 complaints but it remained for her to establish that the respondent's breach of duty caused or materially contributed to her illness.

[20] The principal evidence upon which she relied came from psychiatrist, Dr Andrew Byth, who examined her on 14 June 2011. She complained of adverse effects from stressful work events between 1 May 2008 and 31 October 2009. He diagnosed her as having an Adjustment Disorder with anxiety and depressed mood (Reactive Anxiety and Depression) in the mild to moderate range of severity, at times sharing features of the more substantial diagnoses of Panic Disorder and Major Depression. She underwent counselling and was prescribed an anti-depressant. Dr Byth considered her

> "psychiatric condition was caused by her difficulty coping with allegations of harassment and bullying, which she complained were very slow to be investigated and resolved. She also complained of

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17 T-39 – T1-40, AB 39.
18 T5-67, AB 407.
19 *Palmer & Ors v State of Queensland* [2015] QDC 63, [165].
20 Exhibit 2A25-2A26, 2A27 and 2A31, AB 1019, 1020, 1021, 1023 and 1025.
21 Exhibit 2A45, AB 1049.
22 T2-44, AB 126.
23 T2-8, AB 90.

> being verbally abused by one of her team leaders at work, and she felt her own manager had presumed she was guilty before the investigations were completed."[24]

[21] Her marked lack of confidence and her persistent hypersensitivity about work-related stresses made Dr Byth doubt that she will ever be able to return to work as a service manager or in similar roles managing large numbers of staff. He assessed her permanent psychiatric impairment at 25 to 50 per cent, caused as a result of stressful events in her work in 2008 and 2009. She was unlikely, he considered, to develop anxiety and depression of such intensity and resistance to treatment but for those stressful events which had led to the development of an ongoing Adjustment Disorder for which she will need specialist treatment over the next two years.

[22] She had a past history of depression in 2007 when her brother died but Dr Byth considered this was an independent episode of Adjustment Disorder in response to stressful circumstances at that time and was unconnected.[25]

[23] He interviewed Ms Hayes again on 26 February 2014 by telephone. He noted that since his previous assessment she had taken voluntary medical retirement in December 2013. Her condition had not improved at all since his 2011 assessment. Indeed, she may have deteriorated; she now had some features of Major Depression and Panic Disorder.

[24] Dr Byth gave oral evidence by telephone on 14 March 2014. The trial judge raised with him that Ms Hayes seemed to have felt unsupported by the respondent's management and asked if this was significant in developing her serious condition. Dr Byth agreed, noting that Ms Hayes considered she had made a special effort to assist the respondent by trying to help Ms Johnson (in 2008) but Ms Johnson eventually complained about her. Dr Byth added:

> "And then, at a later date, to have the [respondent] seem not to be supportive towards her over complaints from that same woman was extremely distressing to her. And I am sure that would have been likely to contribute to her decompensating after that."[26]

[25] The judge asked about the impact of Ms Hayes not being permitted to talk about the complaints to anyone other than more senior management whom she saw as unsupportive (Ms Steele-Wareham). Dr Byth responded:

> "I can see she felt that made her more isolated and or prejudged that she must have done something wrong if she was subjected to a gag about it. And she – I think it stopped the natural flow of communication in the office that she would have had and it made her feel ostracised or strange or different from the other workers. And I was surprised that that was expected of her. But – especially if there was some delay in the whole matter being addressed and resolved or investigated. But I'd imagine if she'd had more access to be able to talk freely to people as she chose she might've felt less isolated and less different from her other fellow employees and she might have seen the workplace as more supportive.

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24 Report of Dr Byth, "Re Ms Samantha Hayes" (15 June 2011), [13.2].
25 Above [10.7].
26 T5-20, l 21 – l 48, AB 360.

> His Honour: Yes. And if she had the impression that the more senior management presumed that she was guilty, would the same situation apply with her as with the other two? ---Yes. Yes, your Honour."[27]

[26] Dr Byth provided a file note on 8 April 2014[28] concerning all appellants in which he stated the following. The union picketing of the Maryborough Office was "a definite contributing factor" to their illness, even for those appellants like Ms Hayes, who were not present for it. He added:

> "5. Also there was the complaints and then [the appellants] were not allowed to speak to one another and then they had the RCO's targeting them, no one has met with them and I think when you add all those things the risk of their anxiety increasing is foreseeable.
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> 6. I would agree that quite clearly that their injury would have been foreseeable when you consider all those circumstances.
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> **Impact of Lack of Support**
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> 7. I think if management had said to them, "look I know this is hard, it's going to be ok" they would have felt supported and had they been warned better at the time it might have made a difference but I remember something about that there was not management there supporting them at the time of the picketing.
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> ...
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> 10. I believe that they felt they had the impression of a snow job by management despite the evidence stating otherwise and a feeling of loss by the actions of senior management towards them.
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> 11. It was like I believe a "snow balling" effect in terms of the development of their injury and factors continuing to increase their anxiety, as time went on and the fact they were regarded in their minds as guilty and I think the whole series of events just built up over time.
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> **Investigation**
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> ...
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> 14. I think a lot of it was the lack of support from Pam Steele Warham and that the RCO's couldn't be wrong and the feeling that management thought that they were guilty and so they were stood down.
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> 15. I think in the case of these ladies developing the psychological injuries that they did it was an accumulation of factors, a steady build up.
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> ..."(Errors in the original).[29]

[27] When cross-examined by the respondent's counsel on 9 April 2014, Dr Byth agreed that he had no notes and no recollection that Ms Hayes complained that, in relation

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27 T5-21, AB 361.
28 Exhibit 42, AB 2785-2797.
29 Above.

to the 2009 events rather than the 2008 events, she thought her manager was assuming she was guilty. Dr Byth agreed that an incident involving Ms Hayes' neighbour[30] would be a significant feature in the development of her illness.[31]

[28] Dr Byth also agreed that on 14 March he gave evidence that he was impressed that all appellants clearly linked their anxiety and depression to the same series of events.[32] Whilst he may not have made written notes of it, Dr Byth apprehended that all appellants thought the respondent considered they were guilty and did not believe them in relation to allegations made by junior staff. This was one of many factors to explain their developing anxiety and depression. He did not put this factor in his report or make notes of it because he felt there were many other factors which were sufficient to explain the appellants' developing anxiety and depression; if he put in all relevant factors, the list would be "about six pages long".[33] He maintained, however, he considered this was "a definite factor."[34] The appellants became anxious when the picketing started and did not feel able to rely on their managers for support.[35] They felt unsupported by management both at the time of the picketing[36] and when they were being stood down from their roles.[37] They had the impression that the respondent perceived them as guilty and they had lost confidence in the management acting in their best interests.[38]

[29] Dr Byth recalled that all appellants complained that they were unsure when the investigation was to be conducted, when findings would be made, or if the case was continuing or had been dropped; there was a lack of information moving from management to them which they found upsetting and stressful. He agreed that the picketing and media coverage in a relatively small town significantly contributed to the appellants' anxious and depressive states.[39] Later he added that all appellants told him, "they were sort of cut off from communication about what was happening, and the process could have been worsening, for all they knew, and – but that not knowing was very upsetting for them over quite a long period of months."[40] He recalled one appellant, probably Ms Greenhalgh, stating that her manager asked how so many complainants could be wrong; "there must be some mud that's going to stick".[41] He did not put this in his report because there were so many other contributing factors. Dr Byth added that the fact that he "had to discriminate or choose some statements to put in the narrative doesn't mean that [he] discount[ed] all other factors that might be contributing...there was plenty of other pieces of evidence of – or [Ms Greenhalgh's] complaints of her feeling that there was a lack of support from management."[42] He did not agree that there were many other factors which were much more significant. Dr Byth stated, "[w]ell I may not have written it down, but I'm – I think that was one of the major complaints they all had. It was apparent from all the other complaints they made."[43]

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30 Recorded in Dalton J's reasons at [158].
31 T10-11, l 5 – l 12, AB 773.
32 T10-4, l 20 – l 30, AB 766.
33 T10-16 – T10-17, l 20 – l 29, AB 778-779.
34 T10-17, l 43, AB 779.
35 T10-16, l 13 – l 19, AB 778.
36 T10-19, l 40 – l 45, AB781.
37 T10-20, l 1 – l 2, AB 782.
38 T10-20, l 5 – l 10, AB 782.
39 T10-18, l 1 – l 18, AB 780.
40 T10-20, l 35 – l 37, AB 782.
41 T10-21, l 1 – 1 3, AB 783.
42 T10-21, l 15 – l 23, AB 783.
43 T10-21, l 36 – l 38, AB 783.

[30] The respondent's counsel did not suggest to Dr Byth that Ms Hayes would have suffered her psychiatric injury irrespective of any failure of the respondent to provide her with reasonable support after the more serious complaints were made in 2009. Nor did counsel invite him to apportion the degree of responsibility for her illness according to any individual cause or causes.

[31] In re-examination Dr Byth explained that after someone began to need treatment for psychiatric injury, subsequent stressors often had a greater effect because a person's ability to cope and absorb shocks and challenges was diminished by anxiety and depression. He thought this had happened in each of the appellants' cases:

> "…there was an incremental increase in the anxiety and depression as each of these adverse events evolved at work, to a point where they eventually all saw psychiatrists and had antidepressant medication."[44]

Finding on causation (Ms Hayes)

[32] It is true that the evidence to support causation in Ms Hayes' case was not without difficulty. The primary judge dealt with Ms Palmer's case first, then Ms Harris', Ms Hayes' and finally Ms Greenhalgh's. In Ms Hayes' case, after carefully considering Dr Byth's evidence, [45] his Honour stated:

> "Again I accept the evidence of Dr Byth and accept that the matters referred to him caused Ms Hayes' psychiatric condition. I also accept his evidence to the effect that it was the combined effect of all of those matters which resulted in her developing the psychiatric condition that she came to develop, the subject of the claim. The reasoning is the same as with the other plaintiffs."[46]

[33] In referring to "the same as with the other plaintiffs", I take his Honour to be including a reference to the following comments he earlier made as to causation in Ms Palmer's case:

> "I also accept that the effect of Dr Byth's evidence is that it was the combined effect of all those matters which resulted in her developing the psychiatric condition that she came to develop, the subject of the claim. This is not a case where there were a number of factors acting and the evidence does not permit an inference to be drawn that a relevant factor or factors was at least a cause of [Ms Palmer's] injury; rather it is a case where there were a number of factors which together produced the plaintiff's injury, and in those circumstances each of those factors is a cause of the injury unless in the case of a particular factor its contribution can be characterized as *de minimis*. The analogy is with the dust in *Bonnington Castings*..." (footnotes omitted).[47]

[34] It follows that his Honour concluded that if the respondent breached its duty to support Ms Hayes during the investigation process, Dr Byth's evidence established that this was a cause of her psychiatric injury.

[35] I respectfully agree with the primary judge as to causation. Dr Byth's evidence was that many factors in combination, including the incident with the neighbour, caused

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44 T10-24, l 32 – l 34, AB 786.
45 *Palmer & Ors v State of Queensland* [2015] QDC 63, [171] – [175].
46 Above [176].
47 Above [112].

Ms Hayes' illness. But his expert opinion, unshaken in cross-examination, was to the effect that all appellants perceived the respondent's management team had not provided them with adequate support at the time of the investigation of the complaints, including the 2009 complaints, and that, although there were many other work-related factors which also contributed in combination, this perceived lack of support from the respondent was "one of the major complaints" and a "definite cause" in the development of each appellant's psychiatric injury. As I have explained, there was ample evidence of the respondent's lack of support to each appellant at the relevant time so that their perception was accurate. Dr Byth specifically identified that the respondent's direction that the appellants not discuss the investigation with each other was a definite cause of each appellant's psychiatric injury. Another was the respondent's treatment of the appellants so that each reasonably concluded it had pre-judged the outcome of the investigation and considered them guilty of the complaints. Dr Byth considered that this was inadequate support from the respondent.

[36] Like the primary judge, I consider that Dr Byth's evidence established that the respondent's breach of duty to provide adequate support was a legal cause of Ms Hayes' psychiatric injury. Ms Hayes demonstrated that, although many other factors in combination also contributed, it was more probable than not that the respondent's breach of duty in not providing that support materially contributed to her psychiatric injury: see Gummow, Hayne and Crennan JJ observations in *Amaca Pty Ltd v Booth*.[48] In determining causation, judges should keep in mind that the term "more probable" means more than merely possible but it does not require certainty or precision; it is a relatively low standard to reach and accommodates a level of uncertainty of proof: see Kiefel J's observations in *Tabet v Gett*.[49] As the House of Lords explained in *Bonnington Casting Ltd v Wardlow*[50] and the primary judge appreciated, a negligent breach is a cause of damage if its contribution is real, material and not negligible. The present case can be distinguished from those where there are a number of separate possible causes and the court must determine which was the single probable cause of the damage.[51] Here, there were many matters which in combination caused the injury, one of which was the respondent's breach of duty. This breach of duty was itself a real, material and not negligible cause.

Damages (Ms Hayes)

[37] The trial judge, although not finding that the respondent owed any duty of care to each appellant, properly and conscientiously undertook the laborious task of assessing damages in case there was a different result on appeal. His Honour described these as "precautionary assessments." In Ms Hayes' case he assessed damages at $731,008.53.

[38] The respondent contended in respect of each appellant that, as the primary judge described these assessments as precautionary, and as there were many causative factors other than the respondent's breach of duty, if the appellants were successful, this Court should not simply adopt the primary court's assessment of damages. It argued that this Court should instead remit the matter to the District Court for a fresh assessment to apportion it's liability. It emphasised that the primary judge, when first assessing damages in Ms Palmer's case, stated:

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48 (2011) 246 CLR 36, [70] and [71].

49 (2010) 240 CLR 537, [111], [145] and [148] (Kiefel J); [65] (Hayne and Bell JJ agreeing); [100] (Crennan J agreeing).

50 [1956] AC 613, 621 (Lord Reid); 618 (Viscount Simonds agreeing) and 623 (Lord Tucker agreeing).

51 See, eg, *Robinson Helicopter Company Incorporated v McDermott* (2016) 90 ALJR 679; [2016] HCA 22 [81], [82] and [86].

> "In my opinion it would be artificial for me to attempt an apportionment on the basis of some hypothetical division of stressors into those for which the [respondent] is liable and those for which the [respondent] is not liable, in circumstances where on my findings the [respondent] is not liable for any of them. All I can do is make an assessment on the basis that the [respondent] is liable for the [appellant's] condition, although if the contrary view as to negligence were taken elsewhere this issue would have to be revisited."[52]

[39] In support of this argument, the respondent also relied on the 2006 New South Wales Court of Appeal decision in *State of New South Wales v Burton*.[53] Mr Burton was employed as a marksman with a specialist unit in the New South Wales Police Force. He developed Post Traumatic Stress Disorder (PTSD) after coming under fire in a siege. He successfully sued the State for failing to provide him with proper psychiatric and psychological treatment and counselling in the aftermath of the siege. There was conflicting evidence as to whether counselling would have assisted his PTSD. The trial judge accepted evidence from a doctor to the effect that Mr Burton's condition was caused by the shooting incident and the State's omission to provide counselling further exacerbated his PTSD. The doctor was not cross-examined as to what he meant by "caused" or "exacerbated." On appeal, Basten JA, with whom Spigelman CJ and Hunt AJA agreed on this point, held that, as the Police Service recognised Mr Burton's work involved a risk of psychological or psychiatric harm, his PTSD was foreseeable.[54] Spigelman CJ, Hunt AJA agreeing, held that as Mr Burton's PTSD was caused by being shot at and not by inadequate treatment, the relevant loss was the loss of opportunity for a better outcome.[55] There was little more than tangential evidence that early therapeutic intervention would have reduced the risk of his suffering no PTSD so that it could not be inferred the State had materially contributed to his loss. There was no evidence, the court concluded, that the lack of counselling was a material contribution to the development of the PTSD.[56]

[40] *Burton* may now be of questionable authority as it preceded the 2010 High Court decision of *Tabet v Gett* where Gummow A-CJ, Hayne, Crennan, Kiefel and Bell JJ held that in a claim in negligence arising from personal injury, the loss of a chance of a better medical outcome is not compensable damage. Similar observations were made even more recently by French CJ, Bell, Keane, Nettle and Gordon JJ in *Robinson Helicopter Company Incorporated v McDermott*.[57] The present case, unlike *Burton*, was never presented as a loss of a chance case. Dr Byth's evidence was not that the appellant would have had a better outcome if she had been properly supported by the respondent; it was that this lack of support was a legal cause of each appellant's illness.

[41] Dr Byth did not consider Ms Hayes' condition was the exacerbation of a pre-existing disorder or that the respondent's breach of duty had accelerated a pre-existing vulnerability. Nor was it that there was a subsequent event which exacerbated her injury. It was that, in combination with many other factors, the respondent's lack of support on its own was a real, material and not negligible cause of her injury. Unlike the expert medical practitioners in *Burton*, Dr Byth was cross-examined. He maintained

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52 *Palmer & Ors v State of Queensland* [2015] QDC 63, [228].
53 [2006] NSWCA 12.
54 Above, [41].
55 Above, [24]-[28].
56 Above, [14].
57 [2016] HCA 22, [86].

that in his opinion the respondent's lack of support for Ms Hayes and the other appellants during the investigation process was a definite cause of their psychiatric injury. As I have explained, Dr Byth's evidence left open the reasonable inference, which the trial judge drew and with which I agree, that the respondent's lack of support for Ms Hayes after January 2009 was a definite, real and material cause of her injury. As a result the court treats the damage caused as certain. This approach is sometimes known as the "all or nothing rule:" see Kiefel J's observations in *Tabet v Gett*.[58] Once an appellant establishes causation in these circumstances, it is for the respondent to prove with some reasonable degree of precision on the balance of probabilities that other factors for which it was not responsible contributed to the injury so as to warrant an apportionment: see *Purkess v Crittenden*.[59] The respondent has not demonstrated with any precision that there should be such an apportionment or what that apportionment might be. It could have done so at the trial but did not. For these reasons I do not consider it is necessary to remit Ms Hayes' case to the District Court for an assessment of an apportionment of damages.

Conclusion (Ms Hayes)

[42] It follows that I would allow Ms Hayes' appeal, set aside the order of the primary court giving judgment for the respondent, and instead give judgment in her favour in the sum of $731,008.53.

Ms Greenhalgh

Duty of care and breach (Ms Greenhalgh)

[43] Unlike Dalton J, I consider that the respondent also breached the duty it owed to provide support to Ms Greenhalgh after the 2009 complaints. The fact that the respondent moved her to a new position which she had previously sought only two weeks earlier than otherwise planned, did not absolve it from that duty. Her new position, although in a different section of the respondent's Maryborough office, still required her to work in the same office building as Ms Johnson so that Ms Greenhalgh was by no means immune to the difficult, additional stressors in the workplace resulting from the 2009 complaints.[60] She was upset by the picketing, so much so that, in January 2009, she submitted a workplace injury report form in which she stated she felt harassed, stressed, intimidated and bullied by the picketers.[61] It followed that the respondent from that time was aware of her distress and vulnerability yet did nothing to support her.

[44] Instead, shortly after the picketing, Ms Steele-Wareham asked Ms Greenhalgh how 60 complainants could be wrong,[62] understandably leading Ms Greenhalgh to conclude that the respondent had prejudged the issue and abandoned her. By this time, she was being managed by the Sunshine Coast office but she felt a lack of management support within the building in Maryborough. She had no one within the building to whom she could turn for support.[63] Her new manager instructed her not to have any contact with workers from her previous section, not just those who made the complaints. The primary judge found that this upset her and that this direction was not consistent with the requirements of her new position.[64] She became so upset on

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58 (2010) 240 CLR 53, [113] and [150] (Kiefel J); [65] (Hayne and Bell JJ agreeing); [100] (Crennan J agreeing).
59 (1965) 114 CLR 164, 168 – 169 (Barwick CJ, Kitto and Taylor JJ).
60 *Palmer & Ors v State of Queensland* [2015] QDC 63, [44].
61 Exhibit 2A43, AB 1045.
62 *Palmer & Ors v State of Queensland* [2015] QDC 63, [45].
63 T2-69, l 43 – l 45, AB 151.
64 *Palmer & Ors v State of Queensland* [2015] QDC 63, [49].

that occasion that she left work and went home. The trial judge accepted that Ms Steele-Wareham unhelpfully told Ms Greenhalgh, on two occasions when discussing her concerns about the complaints, that she should "suck it up."[65]

[45] The emails of 13 and 14 January 2009[66] would have led Ms Greenhalgh to conclude that the respondent did not want the appellants to speak about the complaints to each other or to their union. Another example of the respondent's lack of support to all appellants was its distribution over the departmental intranet of the local newspaper's article of 20 January 2009.[67]

[46] It was therefore reasonably foreseeable to the respondent that Ms Greenhalgh was vulnerable. If she did not receive appropriate support within the workplace during the complaint investigation process, of the kind discussed in [13], the respondent should have foreseen that she could suffer psychiatric illness, rather than mere unhappiness or stress. This was so, even though she had changed her role to a position which she had sought. She was still working in the same small building where Ms Johnson and the other complainants worked. She was still living in the same provincial town as Ms Johnson and the other complainants. The discord within this workplace was well publicised in the local media. The consequences of psychiatric injury can be reasonably expected to be devastating to a worker's health and finances. There was nothing unreasonable about the respondent offering such support. As noted in Ms Hayes' case, there was no reason to conclude that the cost of providing this support would be excessive. For these reasons, I consider the respondent owed a duty of care to Ms Greenhalgh to provide support to her after the 2009 complaints and during the investigation process.

[47] As in Ms Hayes' case, the respondent, in not providing her with that support, breached that duty.

Evidence of Causation (Ms Greenhalgh)

[48] In discussing causation in Ms Greenhalgh's case, the primary judge referred to the evidence of psychiatrist, Dr Grey, who examined her for WorkCover and provided a report in May 2010. Dr Grey noted her condition deteriorated after a complaint of racial discrimination in January 2010 so that it would take a further nine to 12 months before her condition stabilised.[68] His Honour accepted Dr Byth's evidence that it was the combined effect of a number of matters which caused Ms Greenhalgh's psychiatric condition. His Honour considered, that whilst a number of matters in combination caused her psychiatric injury, the respondent's lack of support was a material cause. His Honour noted, however, that Ms Greenhalgh's case was complicated by the 2010 complaint to the Anti-Discrimination Tribunal which was not relevant to her present action and for which the respondent could not be held liable.[69]

[49] As the primary judge appreciated, Dr Byth's evidence was critical to Ms Greenhalgh's proof of causation. He examined her on 25 August 2011 and diagnosed Major Depression with prominent associated anxiety and agitation. Her complaints of flashbacks about stressful events at work are symptoms resembling PTSD but could be seen as part of

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65 Above, [210].
66 Exhibit 2A25 (AB 1019); 2A29 (AB 1023); 2A31 (AB 1025).
67 Exhibit 2A45 (AB 1048).
68 Above, [194].
69 Above, [200] – [201] and [271].

her Major Depression.[70] She has been receiving treatment since 2009 from her GP, psychologists and psychiatrists. She had not responded to a wide range of anti-depressant medications and a major tranquiliser and was only partially responding to her current anti-depressant. She will need specialist psychiatric treatment over at least the next three years.[71] Dr Byth considered that following a series of stressful events in her work from 2008 to 2010 she was suffering from Major Depression with prominent associated anxiety and agitation. Her condition was caused by her difficulty coping with stressful work events, including her complaint of harassment by a team leader and her being distressed by unfounded allegations by other staff which required extensive investigation.[72] He considered she was suffering from a permanent psychiatric impairment of 25 to 50 per cent. There were no other contributing factors.[73]

[50] Dr Byth noted that in early 2010 she returned from holidays and was "hit with a complaint to the Antidiscrimination Commissioner"[74] by a staff member. She said that this worsened her depression and the case was stressful. Although "the case was dropped in 2011," she said that no one told her this until months later.[75] (This 2010 complaint was unrelated to her claim the subject of this appeal.)

[51] When questioned by the trial judge on 14 March 2014, Dr Byth stated that he considered Ms Greenhalgh was in the same position as Ms Hayes in that she knew that serious allegations had been made against her but for a long time was not aware what they were. She had quite direct contact with Ms Johnson who told her "I'm not out to get you." This alarmed Ms Greenhalgh who feared that the opposite was true. Dr Byth considered that instructions from the respondent's managers to the appellants not to talk about the complaints to anybody suppressed the appellants' support network to chat and discuss stressful work issues. Ms Greenhalgh felt this was unfair, awkward and alienating and she interpreted it as a sign that, before the complaints were investigated, the respondent considered she must have done something wrong.[76]

[52] I have already discussed Dr Byth's memorandum of 8 April 2014 in Ms Hayes' case at [26] of these reasons insofar as it relates to all appellants generally. Dr Byth specifically noted in respect of Ms Greenhalgh that she "felt completely unsupported and unprotected."[77] He did not think in the long term she would be able to sustain functioning in her employment. She was having adverse side effects from her medication but may be helped by "ECT". He would not be surprised if she could not cope for much longer in the workplace and was unable to work until 55 as she had planned.

[53] When cross-examined by the respondent on 9 April 2014, Dr Byth agreed that the stressful events he referred to in his 2011 report were those Ms Greenhalgh described and it was those events which caused her depressive condition. Counsel suggested that none of those matters concerned anything said or done to her by senior management and in particular she did not complain that Ms Steele-Wareham said something like, "how could 60 RCO's all be wrong?" Dr Byth responded that he thought he remembered something like that, although he must not have written it down.[78]

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70 Report of Dr Byth, "Re Ms Pamela Greenhalgh" (8 September 2011), [10.6].
71 Above, [11.2].
72 Above, [13.2].
73 Above, [14.1].
74 Above, [3.8].
75 Above, [3.8].
76 T5-22 – T5-23, AB 362 – 363.
77 Exhibit 42 [18], AB 2787.
78 T10-7 – T10-8, AB 769 – 770.

Later it was put to him that no-one except Ms Palmer complained about any pre-judgement by management in respect of the 2009 complaints. Dr Byth responded that Ms Greenhalgh said she thought management considered the appellants were guilty before the investigation was conducted. He conceded he did not make notes of this but added that all appellants definitely felt that management considered them guilty.[79] All thought that the respondent's management had cut them off from communicating with each other about what was happening; they did not know what was happening with the investigation over quite a long period of months.[80] He was pretty sure that Ms Greenhalgh said that when she complained to her manager, she was told something like, "how can 60 of those support officers be wrong"; there were so many complaints, some mud would stick. Although Dr Byth did not make a note of this, that was his recollection. He considered that, the fact that he did not make a note did not mean this was not crucial. It was a contributing factor to her condition. She made many statements about her apprehension of the lack of support from management. He refused to concede that there were many other factors which were much more significant. The lack of support, he considered, was a major complaint of all appellants and was apparent from their other complaints.[81]

[54] Dr Byth agreed in cross-examination that the complaint of racial vilification against Ms Greenhalgh in early 2010 was very stressful and exacerbated her condition.[82]

[55] In re-examination he agreed that he considered Ms Greenhalgh's development of depression commenced with Ms Johnson's 2008 complaints. He was asked what significance he placed on events which occurred after those symptoms began to develop. He responded, "I thought they had a cumulative effect and that the – they were adding on top of each other and the – they were occurring in a series that evolved in such a way that there was insufficient time for the patient to absorb and cope with one stressful event before the next one occurred, and they were snowballing, increasing in severity to the point where they eventually formed clinically significant anxiety and depression."[83] In September 2008 Ms Greenhalgh took advantage of the free employee assistance scheme and obtained counselling about work-related stressors and she was able to keep working. Subsequent stressors, Dr Byth explained, often have a greater effect as there is an incremental increase in anxiety and depression as each of these adverse events evolve at work to a point where they eventually require psychiatric intervention and anti-depressant medication.[84]

[56] The respondent's counsel did not suggest to Dr Byth that Ms Greenhalgh would have suffered psychiatric injury irrespective of any failure of the respondent to provide her with reasonable support after the 2009 complaints. Nor did counsel invite him to apportion the degree of responsibility for her illness to any individual cause or causes.

Finding on causation (Ms Greenhalgh)

[57] In light of Dr Byth's evidence concerning Ms Greenhalgh specifically, as well as his general evidence concerning all appellants discussed in [26], [28], [29] and [31], for the reasons I have given at [35] and [36], I am satisfied that the respondent's lack of support for Ms Greenhalgh following the 2009 complaints was a real, material and

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79 T10-16, AB 778.
80 T10-20, l 35 – l 38, AB 782.
81 T10-21, AB 783.
82 T10-22, l 8 – l 20, AB 784.
83 T10-24, l 7 – l 12, AB 786.
84 T10-24, l 14 – l 34, AB 786.

not negligible cause of her psychiatric injury. That injury was then exacerbated by the 2010 complaint with which this appeal in not concerned.

Damages (Ms Greenhalgh)

[58] As with Ms Hayes, the respondent contended that if Ms Greenhalgh was successful on appeal, her case should be remitted to the District Court so that damages can be re-assessed as the respondent should not be held liable for the whole of her injury.

[59] Part of that contention must be rejected for the reasons I have given in Ms Hayes' case at [40] to [41]. But for the following reasons I accept that contention in part. The trial judge particularly noted that in Ms Greenhalgh's case there was a later significant stressor arising from a 2010 complaint which exacerbated the psychiatric injury caused by the respondent. That complaint to the Anti- Discrimination Tribunal was independent of the matters litigated in this action. That conclusion was consistent with the evidence of both Dr Grey and Dr Byth. His Honour chose not to assess damages by isolating the effect of that subsequent injury.[85] It follows that his Honour's assessment of Ms Greenhalgh's damages at $395,870.80 at trial failed to take into account the exacerbating effect of the 2010 complaint for which the respondent is not responsible in this action. For these reasons, her case must be remitted to the District Court for a fresh assessment of the respondent's liability for damages, excluding the exacerbating effect of the 2010 complaint.

Conclusion (Ms Greenhalgh)

[60] It follows that in Ms Greenhalgh's case the appeal should be allowed, the order below giving judgment for the respondent set aside and the matter remitted to the District Court for an assessment of damages.

Ms Palmer

Duty of care and breach (Ms Palmer)

[61] I agree with Dalton J's reasons for concluding that, from January 2009, the respondent owed Ms Palmer a duty to take reasonable care to ensure that she did not suffer psychiatric injury and that, knowing the significance of the 2009 complaints, it was reasonably foreseeable that if it did not offer adequate support to her of the kind discussed at [13] of these reasons, she might be at risk of psychiatric injury, not just distress. There was nothing unreasonable about the respondent offering such support in those circumstances. The consequences for Ms Palmer if the risk eventuated could be devastating to her physical health and her ability to earn income. As in Ms Hayes' and Ms Greenhalgh's cases, there is no reason to conclude that the cost of providing adequate support would have been excessive.

[62] I emphasise that the respondent was aware of her vulnerability. In a workplace injury report form dated 19 January 2009 she stated she was "sick and anxious" about the allegations and appeared distressed about not being permitted "to perform the duties of [her] appointed position."[86] After the picketing the following day she completed another workplace injury report form stating that the incident "felt threatening and intimidating" and that she was suffering from psychological stress.[87] On 2 February

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85 *Palmer & Ors v State of Queensland* [2015] QDC 63, [271].
86 Exhibit 2A40, AB 1041.
87 Exhibit 2A44, AB 1046.

2009 Ms Steele-Wareham asked her, "How can all [the complainants] be wrong?" Ms Palmer began to cry but Ms Steele-Wareham did not comfort her.

[63] I also agree with Dalton J's reasons for finding the respondent breached that duty.

Evidence of causation (Ms Palmer)

[64] The trial judge, as in Ms Hayes' and Ms Greenhalgh's cases, determined that Ms Palmer's psychiatric injury was caused by the combined effect of various matters identified by Dr Byth. His Honour reasoned that all these matters were legal causes of that injury unless they were "*de minimis*." The judge rejected the notion that the respondent's lack of support for Ms Palmer was "*de minimis*," even if she was suffering a psychiatric injury by March 2009 caused in part by factors other than those for which the respondent was responsible. The effect, his Honour considered, of the additional stressors after 17 March 2009 was that she suffered a different injury with a potentially different course and level of severity.[88]

[65] Dr Byth's evidence was again critical to establish causation in Ms Palmer's case.[89] Dr Byth interviewed Ms Palmer on 21 July 2011. She had no history of psychological problems prior to 2008. She complained of adverse effects from stress in her work around September 2008 and following. She complained of feeling "shattered and dumbfounded" when in April 2009 she was interviewed by investigators about the complaints.[90] She was upset that the senior manager (Ms Steele-Wareham) made clear she thought Ms Palmer and the other appellants were guilty and solicited more complaints from others.[91] Ms Palmer was upset that her reputation was at stake in a small town and that the complaints were reported in the local newspaper.[92] She was distressed when in May 2009 her claim for WorkCover was rejected.[93] Although Ms Palmer was moved away from Ms Johnson to a different part of the building, Ms Johnson began to enter the building near Ms Palmer's workstation. Ms Palmer felt targeted and had to leave her workstation.[94] When Ms Palmer was advised the investigation was completed, she requested to return to her former work and was very upset when this request was not granted. She had a "massive panic attack, and [she] had to leave the meeting."[95]

[66] Dr Byth noted that Ms Palmer was suffering from Major Depression with prominent associated agitation and anxiety. She had symptoms resembling Panic Disorder and PTSD. Her condition arose following a series of stressful events in her work in 2008 to 2010.[96] Her "psychiatric condition was caused by her difficulty coping with allegations about her at work, and with her being stood aside and placed in other work while she was being investigated over a long period. She thought she was being victimised by a number of staff, including a particular Team Leader and that her management presumed she was guilty until the matter was eventually investigated."[97] She was suffering from a permanent psychiatric impairment of 55 to 75 per cent.[98]

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88 *Palmer & Ors v State of Queensland* [2015] QDC, [112] and [113].
89 Report of Dr Byth, "Re Mrs Tanya Palmer" (3 August 2011).
90 Above [3.1].
91 Above [3.3].
92 Above [3.4].
93 Above [3.7].
94 Above [3.9].
95 Above [3.10].
96 Above [14.1].
97 Above [14.2].
98 Above [15.1].

[67] In a later report of 26 February 2014, Dr Byth noted that she had not improved since 2011 and had been unable to return to paid work. She was "living the sheltered and reclusive life of a psychiatric invalid."[99]

[68] When questioned by the trial judge on 11 March 2014 about the effect on Ms Palmer of not being told the details of the allegations against her for some months, Dr Byth responded:

> "Not knowing the exact nature of the complaints and the details of them would probably be very distressing to a person because of their sort of unknown quality and imagining the worst in her frame of mind when she was very anxious and sleeping poorly and agitated about it. I think she [would have] found the indeterminate quality of the – about the allegations, was quite disturbing."[100]

[69] The judge asked about the effect on her of being taken out of her previous role arranging rosters and not being given meaningful work. Dr Byth responded that she was upset about the complaints and their effect on her reputation but she was also upset at being given less meaningful work and this "added to her decompensation." Her mildly obsessive compulsive pre-morbid personality trait would have contributed to the severity of her condition in that she would not be flexible at adjusting happily to a changed role giving her less important work.[101] When asked about the effect of her perception that some in management were assuming she was guilty of the things complained of, Dr Byth stated that she viewed this as very unfair, contrary to natural justice and quite disturbing. It was one of the factors leading to a snowball effect in her anxiety and depression and, eventually, making her hypersensitive about the work environment. She was very offended and distressed that her employer did not appear to be acting in her interests.[102]

[70] The judge asked Dr Byth, whether Ms Palmer had sensed she was supported by the respondent she would have developed her psychiatric injury to the same extent and severity. Dr Byth responded that it may well have been mitigated. There was an accumulation of events which flowed into each other before the previous stressor had abated. With this build up, any circuit breaker would have been advantageous. A period of sick leave in the middle would have been helpful. She could well then have not got to the point where she was panicking and hypersensitive at work. Had she had more support, such as time off work, earlier treatment, alternative duties or an alternative location for duties, or if she had been less exposure to Ms Johnson, these things "[could have] probably curtailed her anxiety and depression building up so severely and, in the end, affecting her confidence so much."[103]

[71] Some of Dr Byth's file note discussed in Ms Hayes' case at [26] of these reasons is also relevant to Ms Palmer. Of specific relevance to Ms Palmer, he stated he did not think she could ever return to her present work. She was on a higher dosage of anti-depressants, over-sensitive, almost phobic, and not doing well at all. She may have treatment resistant, chronic depression.[104]

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99 Above [6.4].
100 T5-10, l 24 – l 29, AB 350.
101 T5-11, l 35 – l 45, AB 351.
102 T5-12, l 5 – l 20, AB 352.
103 T5-13, l 5 – l 23, AB 353.
104 AB 2786.

[72] Some of the respondent's cross-examination of Dr Byth on 9 April 2015 discussed by me in considering Ms Hayes' case at [27] and [28] of these reasons is also relevant to Ms Palmer. Of particular relevance to Ms Palmer's case, Dr Byth agreed that Ms Palmer's obsessive compulsive personality traits made it difficult for her when she was stood aside from her position. She saw her delegation to work of lesser importance after the complaints were made as a "pretty significant blow."[105] She considered she was an expert in her rostering position.[106] Dr Byth confirmed she still needed significant doses of anti-depressant medication and that she had earlier made clear that she was concerned that senior management thought she and the other appellants were guilty of the complaints.[107]

[73] The respondent's counsel did not suggest to Dr Byth that Ms Palmer would have suffered her significant psychiatric injury irrespective of any failure of the respondent to provide reasonable support to her after the complaints were made. Nor did they invite him to apportion the degree of responsibility for her illness to any individual cause.

[74] When these aspects of Dr Byth's evidence are considered together with the relevant aspects of his evidence which I have already discussed in Ms Hayes' cases as relevant to all appellants at [28] and [29], for the reasons given in Ms Hayes' case at [35] and [36], I am satisfied that the respondent's lack of support for Ms Palmer after January 2009, although not the only cause, was probably a real, material and not negligible cause of her significant psychiatric injury.

Damages (Ms Palmer)

[75] As in the other appellants' cases, the respondent contended that, if the appeal is to be allowed, Ms Palmer's case should be remitted to the District Court for damages to be assessed, given the multi-factorial causes of her psychiatric injury. The respondent again emphasised that the judge assessed damages only on a precautionary basis[108] and *Burton's* case.

[76] As I have noted, the primary judge in his reasons considered Ms Palmer's case first. His Honour rejected the respondent's contention that she should receive little in the way of damages on the basis that only a small percentage of her problems could be attributed to the respondent.[109] In doing so, his Honour determined that, where a plaintiff is suffering a psychiatric injury caused by numerous stressors for which the respondent is liable only for one or some, but the stressors the subject of the breach are significant in the development of the condition, the respondent has caused that injury. Whilst noting the artificiality of assessing damages having found that none of the factors which contributed to the plaintiff's psychiatric condition were the respondent's responsibility, his Honour found that the respondent had not shown, with any reasonable degree of clarity, to what extent Ms Palmer would have suffered psychiatric injury in any event in the absence of any particular negligent stressor.[110] Noting these difficulties, his Honour considered that his task was to assess damage on the basis that the respondent was liable for Ms Palmer's condition, observing that, if the contrary view (to his) as to negligence were taken elsewhere, (that is, on appeal) this would have to be revisited.[111]

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105 T10-12, l 2, AB 774.
106 T10-12, l 7 – l 9, AB 774.
107 T10-25, AB 787.
108 *Palmer & Ors v State of Queensland* [2015] QDC 63, [219].
109 Above, [223] and [224].
110 Above, [226].
111 Above, [228].

[77] In so stating, and in the use of the term "precautionary assessment," his Honour was merely recognising that he was required to assess damages, doing the best he could on the evidence, in case his finding that the respondent did not owe the appellants a duty of care was overturned on appeal. His Honour seems also to have identified the possibility that, on appeal, this Court might determine that the respondent was liable for only a calculated portion of Ms Palmer's psychiatric injury. As I have explained, I consider the respondent's lack of support for Ms Palmer following the 2009 complaints was a real, material and not negligible cause of her psychiatric injury. As I have explained in Ms Hayes' case at [40] - [41], once Ms Palmer showed the respondent's breach was a material cause of her illness, the respondent was responsible for all her damages. The respondent did not establish that Ms Palmer's damages should be apportioned to reflect another cause or causes or that the respondent's breach merely accelerated a pre-existing disorder or, unlike in Ms Greenhalgh's case, that her illness was exacerbated by a subsequent event. In those circumstances, the judge was right to assess damages on the basis that the respondent was liable for all Ms Palmer's psychiatric injury, the respondent's breach of duty probably being a material cause. It follows that it is not necessary to remit the question of the assessment of Ms Palmer's damages to the District Court.

Conclusion (Ms Palmer)

[78] In Ms Palmer's case, I would allow the appeal, set aside the order giving judgment for the respondent and instead give judgment for her in the sum of $597,139.68.

Ms Harris

Duty of care and breach (Ms Harris)

[79] In Ms Harris' case, too, I agree with Dalton J's reasons for finding that it was reasonably foreseeable to an employer in the position of the respondent that, if it did not support Ms Harris in the workplace in the ways identified in [13] following the 2009 complaints, she might suffer psychiatric harm. I emphasise that the respondent, through its manager Mr Costello, knew Ms Harris was distressed about Ms Johnson's difficult behaviour but did nothing to curtail that behaviour. When told of the 2009 complaints, Ms Harris took a week's stress leave and completed a workplace injury report form.[112] The respondent should have known that she was vulnerable to psychiatric injury if not then supported in the workplace. Requiring the respondent to provide support of this kind was entirely reasonable in the circumstances.

[80] I am satisfied the respondent breached that duty in the following ways. The respondent should have ascertained that the January 2009 complaints were also made against Ms Harris and given consideration as to how to support her through the investigation, especially as she was still working with some who had made serious complaints against her. It should have informed her of the complaints in a timely way. Once Ms Steele-Wareham became aware that Ms Harris was the subject of the complaints, the respondent should not have left her working with those who had complained directly against her, particularly Ms Johnson, without strong and appropriate support. The respondent did not give her suitable support tailored to her needs other than written information about the department's free counselling service, available to all employees including the complainants.[113] Ms Steele-Wareham made inappropriate

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112 T4-72, l 30, AB 327.

113 T4-83, l 5 – l 17, AB 338.

comments to Ms Harris' co-workers which were reported to Ms Harris and which strongly suggested that Ms Steele-Wareham had pre-judged the complaints and considered the appellants, including Ms Harris, were at fault, even though the investigation was ongoing and no findings or conclusions had been reached.[114] The respondent's lack of support was also manifested in the email of 14 January 2009, in which it sought to stop Ms Harris communicating with others subject to complaints.[115]

Evidence of causation (Ms Harris)

[81] The primary judge, after analysis of the psychiatric evidence,[116] accepted Dr Byth's evidence and found that some of the pleaded breaches which were established, together with other things, caused Ms Harris' psychiatric injury. For the reasons he gave in Ms Palmer's case, each was a legal cause of the condition.[117]

[82] Like the primary judge, I consider Ms Harris established that, accepting the respondent breached its duty to Ms Harris, this breach caused her psychiatric injury. That conclusion is supported by the following aspects of Dr Byth's evidence specifically relevant to Ms Harris.

[83] Dr Byth originally examined Ms Harris on 26 July 2011.[118] In around 2000 she had been prescribed anti-depressants for two years for menopausal symptoms and mood swings. (Dr Byth did not suggest this had any causal relationship to her current condition). She complained of adverse effects from stress in her work in 2009 and 2010. She reported difficulties since Christmas 2008 with Ms Johnson and another employee.[119] Ms Harris told Dr Byth she had stress leave in March 2009, undertook counselling and commenced anti-depressant medication.[120] In April 2009 she was devastated when she heard that she and eight others were being investigated. She was distressed by the nature of the allegations which were later found to be unsubstantiated. She loved her job and wanted to return to it as she had done nothing wrong. Dr Byth diagnosed Adjustment Disorder with anxiety and depressed mood (Reactive Anxiety and Depression).[121] In 2009 she had difficulty coping with the allegations; she was upset that she and her colleagues were redeployed and she was relieved when the allegations were found to be unsubstantiated.[122] She then struggled to return to work and gradually developed a psychological reaction.[123] She had symptoms resembling PTSD. She had obsessive-compulsive pre-morbid personality traits.[124] She should continue with psychiatric treatment for at least three years, during which he expected partial improvement.[125] She was suffering from a permanent psychiatric impairment of 25 to 50 per cent as a result of stressful circumstances in her work in 2009 to 2010. There were no other contributing factors to this impairment.[126]

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114 T4-75, l 38 – l 46, AB 330.
115 Ex 2A29 (AB 1023).
116 *Palmer & Ors v State of Qld* [2015] QDC 63, [141]-[149].
117 Above [150].
118 Report of Dr Byth, "Re Mrs Edith Harris" (9 August 2011).
119 Above [2.4]-[2.5].
120 Above [3.1].
121 Above [10.1].
122 Above [10.2].
123 Above [10.3].
124 Above [10.8].
125 Above [11.2].
126 Above [14.1].

[84] As noted earlier, Dr Byth was questioned by his Honour on 14 March 2014. When asked whether he thought it was a problem for Ms Harris that she continued to work with those who had complained about her and that this may have contributed to the severity of her condition, Dr Byth stated:

> "I think she became very sensitised to seeing any of the stuff she felt they had complained unfairly about her. And it was making her life at work very aggravated and anxious. And it made it an unpleasant experience to be at work. ... And the situation was more or less ongoing so that she was sort of trapped there. There was no resolution for it. So I think that aspect of it added to her anxiety and depression."[127]

[85] Dr Byth agreed that this was because the complaints took so long to be resolved without her knowing what was happening. Ms Harris knew complaints had been made but for some time she did not know they involved her and she was not given details of them. This might well have contributed to the severity of her condition. When she realised that she was included in the complaints, this confirmed in her mind that there was a conspiracy targeting all of those complained about and she found this even more threatening. It added to her feeling anxious and depressed and she became suspicious that things would worsen.[128] Before these 2008 and 2009 stressors, her mildly obsessive compulsive personality traits fell short of pre-existing Personality Disorder. Her obsessive compulsive defence mechanisms to cope with depression, by throwing herself into her work, would make it hard for her to transfer to other work. Dr Byth considered that the same stressful events as acted on Ms Palmer acted on Ms Harris, although they coped differently. Ms Palmer was more severely affected than Ms Harris who had been able to keep working, although with medication and flare-ups of anxiety and depression.[129]

[86] The judge asked whether it would have made a difference to Ms Harris' condition if she had been supported by management. Dr Byth stated that Ms Harris felt very let down; there was a vacuum of support to cover this contingency; she completely lost faith in her employment situation and her assumptions about feeling safe in a continuous work environment were shaken. Had the approach of management been different she probably would have felt more secure and "not developed so much anxiety and depression."[130] Dr Byth considered that all the appellants clearly linked their anxiety and depression to the same series of events and saw that as "the causation" of their psychiatric injury.[131]

[87] I have already dealt with some aspects of Dr Byth's file note of 8 April 2014[132] in which he reported that the respondent's not allowing the appellants to speak to one another; and the fact that no-one from the respondent had met with the appellants (inferentially to support them through the investigation process) were contributing factors to each appellant's psychiatric injury. Specifically in relation to Ms Harris Dr Byth noted that although she was not at the picketing she was told about it; not knowing what was happening there would have made her anxious even though she was told not to worry.[133] She apprehended that Ms Steele-Wareham had lied to her

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127 T5-15, l 5 – l 13, AB 355.
128 T5-15, l 30 – l 44, AB 355.
129 T5-17, l 5 – l 18, AB 357.
130 T5-18, l 20 – l 30, AB 358.
131 T5-19, l 15 – l 30, AB 359.
132 Exhibit 42, discussed at [26] of these reasons.
133 Exhibit 42 [9], AB 2786.

and this absolutely devastated her. Ms Harris used her work as a structure mechanism to hide her emotions and, instead of dealing with her depression, was soldiering on, using work as a crutch. A new job would be difficult for her as she lacked flexibility.[134]

[88] When cross-examined by the respondent's counsel on 9 April 2014, Dr Byth agreed that when Ms Harris returned from holidays at the beginning of 2009 "she was very upset, crying the whole time". She wondered whether she still had a job because staff had been moved to other positions and some had taken sick leave. She did not then know she was the subject of complaint. Even before she returned to work, she was upset, worried and anxious. This could well have been the start of her anxiety and depression.[135] She was devastated to learn of the complaints and that she was being investigated.[136] I have already set out in Ms Hayes' case Dr Byth's evidence relevant to causation in respect of all appellants at [26], [28], [29] and [31].

[89] The respondent's counsel did not suggest to Dr Byth either that Ms Harris would have suffered psychiatric injury irrespective of any failure of the respondent to provide her with reasonable support after the 2009 complaints, or that a pre-existing condition caused the injury. Nor did counsel invite him to apportion the degree of responsibility for her injury according to any individual cause or causes. And unlike in Ms Greenhalgh's case, there was no evidence of any subsequent exacerbating cause of her injury.

Finding on causation (Ms Harris)

[90] When this evidence specifically about Ms Harris is considered together with aspects of Dr Byth's evidence discussed in Ms Hayes' case relevant to all appellants, for the reasons given at [35] and [36], I am satisfied that the respondent's lack of support for Ms Palmer after January 2009, although not the stand alone cause, was probably a real, material and not negligible cause of her psychiatric injury. The respondent's breach of duty was therefore a legal cause of her injury.

Damages (Ms Harris)

[91] As with the other appellants, the respondent's counsel contended that, if the appeal is to be allowed, Ms Harris' case should be remitted to the District Court for damages to be assessed, given the multi-factorial causes of her psychiatric injury. The respondent again emphasised both that the judge assessed damages only on a precautionary basis and *Burton's* case.

[92] The primary judge assessed Ms Harris's damages at $315,149.82. In Ms Harris' case, too, his Honour's use of the term "precautionary assessment" was merely a recognition that he was assessing damages, doing the best he could on the evidence, in case his finding that the respondent did not owe a duty of care to Ms Harris was overturned on appeal. It may also have reflected the possibility that on appeal this Court might determine that the respondent was liable only for a calculated portion of Ms Harris' psychiatric injury.

[93] As I have explained, I consider the respondent's lack of support for Ms Harris following the 2009 complaints was a real, material and not negligible cause of her psychiatric injury. For the reasons set out in in Ms Hayes case at [40]-[41], once Ms Harris showed the respondent's breach was a real, material and not negligible cause of her injury, the respondent was responsible for all her damage, even though

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134 Above [21], AB 2787.
135 T10-13 – T10-14, AB 775 – 776.
136 T10-14, l 17, AB776.

other factors were also a cause of it. The respondent did not discharge its onus to show that Ms Palmer's damages should be apportioned to reflect another cause or causes or that the respondent's breach merely accelerated a pre-existing injury or, unlike in Ms Greenhalgh's case, that her injury was exacerbated by a subsequent event. In those circumstances the judge was right to assess damages on the basis that the respondent was liable for Ms Harris' psychiatric injury, the respondent's breach of duty being a real, material and not negligible cause. It is unnecessary to remit the question of the assessment of Ms Harris' damages to the District Court.

Conclusion (Ms Harris)

[94] In Ms Harris' case, too, I would allow the appeal, set aside the order giving judgment for the respondent and instead give judgment for her in the sum of $315, 149.82.

Contractual Claims

[95] Although each appellant pleaded that the respondent breached its contractual obligations, the trials and the appeals were conducted on issues of negligence. Because of the conclusions I have reached on those issues it is unnecessary to deal with the appellants' grounds of appeal concerning their contractual claims. I note, however, my agreement with Dalton J that, in light of the way the case was pleaded and the trial conducted, the appellants should not be permitted to put forward on appeal their arguments concerning the *Public Sector Ethics Act* 1994 (Qld) and its codes of conduct (referred to by the appellants as the *Public Service Ethics Act* and the Code of Conduct). No appellant has made out any ground of appeal concerning her contractual claim against the respondent.

Orders

[96] I would make the following orders.

In Ms Hayes' appeal (CA 4063 of 2015)

1. Appeal allowed.
2. The order giving judgment for the defendant is set aside.
3. Instead, judgment is given for the plaintiff in the sum of $731,008.53.
4. Unless the parties file submissions as to costs in accordance with Practice Direction 3 of 2013, paragraph 52(4), within 14 days of the publication of these reasons, the respondent defendant is to pay the appellant plaintiff's costs of the appeal and the trial.

In Ms Greenhalgh's appeal (CA 4064 of 2014)

1. Appeal allowed.
2. The order giving judgment for the defendant is set aside.
3. Instead, the matter is remitted to the District Court for damages to be assessed in accordance with these reasons.
4. Unless the parties file submissions as to costs in accordance with Practice Direction 3 of 2013, paragraph 52(4), within 14 days of the publication of these reasons, the respondent defendant is to pay the appellant plaintiff's costs of the appeal and the trial.

In Ms Palmer's appeal (CA 4065 of 2015)

1. Appeal allowed.

2. The order giving judgment for the defendant is set aside.

3. Instead, judgment is given for the plaintiff in the sum of $597,139.68.

4. Unless the parties file submissions as to costs in accordance with Practice Direction 3 of 2013, paragraph 52(4), within 14 days of the publication of these reasons, the respondent defendant is to pay the appellant plaintiff's costs of the appeal and trial.

In Ms Harris' appeal (CA 4066 of 2015)

1. Appeal allowed.

2. The order giving judgment for the defendant is set aside.

3. Instead, judgment is given for the plaintiff in the sum of $315,149.82.

4. Unless the parties file submissions as to costs in accordance with Practice Direction 3 of 2013, paragraph 52(4), within 14 days of the publication of these reasons, the respondent defendant is to pay the appellant plaintiff's costs of the appeal and the trial.

[97] **MULLINS J:** I have had the advantage of reading the reasons of each of the President and Dalton J.

[98] The appellants' claims arose out of events at the Maryborough office of Disability Services Queensland in connection with complaints made against them by residential care officers (RCOs). Each appellant's case depended on proving that (1) a duty of care was owed to her by the respondent employer to take reasonable steps to prevent psychiatric injury to her, (2) the duty was breached, and (3) that breach caused the appellant to suffer psychiatric injury.

[99] The appellants accepted that they could not hold the respondent liable for any negligence from the fact there was an investigation of the complaints made by RCOs and in connection with the process of the investigation of the complaints. As was confirmed on the hearing of this appeal, each appellant limited her claim for breach of the duty of care to the respondent's failure to provide adequate support to the appellant in the workplace from the time the complaints were made in January 2009 in such a way that the claim raised only matters outside the process of the investigation of the complaints.

[100] On the first issue of whether a duty of care was owed, I agree with the President and Dalton J that the learned trial judge erred in concluding that the decisions in *New South Wales v Paige* (2002) 60 NSWLR 371, *O'Leary v Oolong Aboriginal Corporation Inc* [2004] NSWCA 7 and *New South Wales v Rogerson* [2007] NSWCA 346 precluded finding that a duty of care arose in the circumstances on the part of the respondent to provide adequate support to each appellant in the workplace while the investigation of the complaints was otherwise ongoing, so as to avoid psychiatric injury to the relevant appellant.

[101] It is therefore necessary to consider whether, on the facts found by and/or the evidence before the trial judge, each appellant established the respondent owed such a duty of

care to her. Both the President and Dalton J find that the duty of care was owed in the circumstances to each of Ms Hayes, Ms Palmer and Ms Harris, and I agree with their conclusions. Whereas the President concludes that the relevant duty of care was also owed to Ms Greenhalgh, Dalton J concludes otherwise. I agree with the analysis undertaken by Dalton J in relation to the claim made by Ms Greenhalgh, and the conclusion on the facts that Ms Greenhalgh did not prove that a duty of care to avoid a foreseeable risk of psychiatric injury was owed to her by the respondent in the circumstances.

[102] I also agree with Dalton J's analysis and conclusion in respect of each of Ms Hayes, Ms Palmer and Ms Harris that breach of the relevant duty of care owed by the respondent to each of them was proved by each of those appellants. There is, however, a difference in the respective reasons of the President and Dalton J, as to whether each of those appellants proved that the breach of duty caused the psychiatric injury ultimately suffered by the appellant. Dr Byth's evidence was critical in the case of each of the appellants on whether that appellant could discharge the onus of proving that the breach of the duty of care owed by the respondent to that appellant caused the appellant's psychiatric injury. Dr Byth did not express an opinion on the effect of the conduct that did amount to a breach of the duty of care in relation to the development of the psychiatric injury sustained by each of these appellants. I agree with Dalton J's analysis of Dr Byth's evidence. In each case, the onus of proving causation was, and remained on, the appellant. The case of each of these appellants did not fall in the category of *Purkess v Crittenden* (1965) 114 CLR 164, 167-169 where, after the plaintiff proved the breach of duty caused a particular incapacity, the evidential burden shifted to the defendant to prove that, in the fullness of time, the plaintiff would have suffered from that same condition in any case.

[103] As Dalton J finds that Ms Greenhalgh did not prove that a relevant duty of care was owed to her by the respondent in the circumstances, Dalton J did not consider the issues of breach and causation in the case of Ms Greenhalgh. If a relevant duty of care were owed by the respondent to Ms Greenhalgh, Ms Greenhalgh would have been able to prove breach of that duty in failing to provide adequate support to her in the workplace, particularly in not warning her of the proposed picketing of the Maryborough office on 19 January 2009 or making arrangements for her to stay away from the Maryborough office whilst picketing was underway, and by directing her in April 2009 not to have contact with anyone of her former co-workers. Ms Greenhalgh's case on causation, however, suffers similar problems to that of the other appellants, in that the case relies on Dr Byth whose opinion was based on matters (such as events in 2008, the fact that complaints had been made against Ms Greenhalgh by the RCOs, and delays in the investigation of the complaints) that were not part of Ms Greenhalgh's case against the respondent. This is an alternative reason why Ms Greenhalgh cannot succeed on her appeal.

[104] I therefore agree with the reasons and the orders proposed by Dalton J.

[105] **DALTON J:** The appellants each worked as managers in the Maryborough office of Disability Services Queensland. Each claimed to have suffered psychiatric injury in the workplace due to events occurring in 2008 and 2009. The managers each had slightly different roles, but essentially their jobs were to manage around 50 residential care officers (RCOs). These officers gave 24 hour coverage to what the Department called service users. The service users (residents) had intellectual disabilities and

could not care for themselves. They were located in various houses under the supervision of the Department.

[106] The factual matters giving rise to these proceedings involved complaints made by a large number of RCOs, together with their Union, the AWU, against a number of managers including the appellants (the 2009 complaints). There was a more limited complaint in 2008 against Ms Hayes only (the 2008 complaint). The Department investigated both the 2008 and 2009 complaints. The 2009 investigation was long-running. Remarkably, when it concluded in November 2009 all of the complaints (over 200) were rejected and the managers exonerated. The appellants complain about a lack of support in the workplace during and after the time when the complaints against them were made.

[107] The four proceedings were heard together in the District Court over 10 days. The trial judge dismissed each of the claims. He decided that for legal reasons no duty of care could be owed to the appellants. That legal conclusion was challenged on appeal and, in my view, the trial judge's conclusion was wrong: there was no rule of law which prevented a duty arising in any of the appellant's cases. As a consequence it has been necessary to examine the facts of each matter to decide whether or not, as a question of fact, a duty did arise in any of the cases before this Court for, in cases such as these, the existence of a duty as a matter of fact will almost always be a contentious issue. Questions of breach and causation also had to be revisited.

[108] In my view, the appeals by Ms Hayes, Ms Palmer and Ms Harris fail because causation was not proven at trial; Ms Greenhalgh's appeal fails as in my view there was no factual basis for the duty she alleged.

Employer's Duty of Care in Relation to Psychiatric Injury

[109] There is no doubt that in appropriate circumstances an employer will owe a duty of care to take reasonable steps to prevent psychiatric injury to an employee – *Koehler v Cerebos (Australia) Ltd*.[137] Whether a duty arises in any given case is a question of fact which is to be decided having regard to the foreseeability of risk. In *Koehler* the High Court said:

> "The central inquiry remains whether, in all the circumstances, the risk of a plaintiff … sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful.
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> …
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> The duty which an employer owes is owed to each employee. The relevant duty of care is engaged if psychiatric injury to the *particular* employee is reasonably foreseeable. That is why, in *Hatton*, the relevant question was rightly found to be whether this kind of harm to this particular employee was reasonably foreseeable. And, as pointed out in that case, that invites attention to the nature and extent of the work being done by the particular employee and signs [of distress, eg] given by the employee concerned." – p 57 (footnotes omitted).

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137 (2005) 222 CLR 44; *Goldman Sachs JBWere Services Pty Ltd v Nikolich* [2007] FCAFC 120, [72] per Black CJ, and the cases cited there.

Duty to Employee in Unhappy Workplace

[110] In an appropriate case a duty will arise not because the work, workload, or system of work itself is creating problems, but because there is unhappiness within the workplace, not of the employer's making, but of which the employer is aware. In *Nikolich* (above) the breach was several months delay in alleviating a workplace situation where an employee, "was continuing to work in a small office managed by a person with whom he had come into serious conflict, whose actions he had found extremely intimidating and threatening and with whom he was no longer on speaking terms." – [48]. The employee concerned had written a four page letter to the Human Resources Manager outlining in detail why he found his supervisor's behaviour towards him "threatening and disturbing" and saying that he was suffering "a considerable degree of anxiety, stress and discomfort". By attaching an article to that letter, the employee put the employer on notice that he feared a serious impact on his health. *Nikolich* was a breach of contract case, but the discussion in the judgments makes it clear that the reasoning would support a finding that a duty was owed in tort in these circumstances – see [70] ff.

[111] In *Waters v Commissioner of Police for the Metropolis*[138] the House of Lords held that:

> "… a person employed under an ordinary contract of employment can have a valid cause of action in negligence against her employer if the employer fails to protect her against victimisation and harassment which causes physical or psychiatric injury. This duty arises both under the contract of employment and under the common law principles of negligence."

[112] The case of *State of New South Wales v Mannall*[139] is factually very like the present cases. As part of a restructuring within a Government department aimed at eradicating a poor workplace culture, Ms Mannall was promoted out of turn to head the new restructured team. Over a period of two years she was subject to destabilising behaviour on the part of some members of that team who remained loyal to the "old regime". The employer was aware of this, but offered the plaintiff very little support when she was daily dealing with a non-co-operative and sometimes openly hostile workplace. There were indications that the plaintiff was more than simply upset: she was manifesting signs which should have alerted a reasonable person to her health being at risk. It was held that a duty was owed.

State of New South Wales v Paige

[113] The trial judge thought that no duty of care arose in the present cases as a consequence of the decision in *State of New South Wales v Paige.*[140] The facts of that case were that, as principal of a school, Mr Paige dealt with two complaints of sexual misconduct against a teacher. He notified the Education Department of the first of the complaints, but was dissatisfied with the Department's response. When the second complaint was made, he dealt with the matter himself and did not involve the Department. Then a Royal Commission was conducted into the adequacy of the Education Department's dealing with such complaints. Faults were found. As a response to the findings of the Royal Commission, the Director-General of the Education Department invited re-submission of past cases of misconduct. Mr Paige re-submitted the first complaint.

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138 [2000] 1 WLR 1607, 1615.
139 [2005] NSWCA 367.
140 [2002] NSWCA 235.

As a consequence he found himself being investigated for disciplinary offences relating to how he had handled the two complaints.

[114] Paige's action against the Department alleged that he had been given assurances that he would be fully protected if he re-submitted the complaints. Secondly, he complained that rather than hear him in person, the Department elected to hear the disciplinary charges it preferred against him on the papers. Lastly, he relied upon some tactical manoeuvring of the Department as to whether or not he had resigned, or been dismissed.

[115] The Court of Appeal in New South Wales rejected Mr Paige's claim. Chief Justice Spigelman referred to cases regarding a "safe system of work" and noted that they concerned "the conduct of tasks for which an employee is engaged" – [78]. He said at [21] that Mr Paige's complaint was not about the effects of performing his duties of office, but was concerned with matters peripheral to performance of his duties. Further, that his complaints were about the way the Department had investigated and disciplined him and the way in which it had terminated his employment. In particular, so far as the investigation and enquiry were concerned, the trial judge had considered issues of negligence in terms of whether or not Mr Paige had been denied procedural fairness – [27].

[116] Spigelman CJ found that there was no duty as alleged by Mr Paige because any duty to take care as to the matters Mr Paige complained of would be inconsistent with other parts of the common law:

> "Of particular significance for the present case is the need for coherence in the law, in view of the interaction and interrelation between the proposed duty in tort and the law applicable to termination of employment, that is, the law of contract as modified by statute. In my opinion, the possibility of incoherence in the system of law applicable in this State is such that the proposed duty should not be recognised." – [132].

[117] The common law of contract is that damages are not recoverable for the manner in which an employee is dismissed.[141] As well as incompatibility with the law of contract regarding damages for dismissal, Spigelman CJ thought that imposing a duty such as that contended for by Mr Paige "intrudes into matters within the heartland of judicial review of administrative conduct" – [158]. Compensatory damages are rarely available for administrative error – [172]. Rules as to natural justice are well developed in their own framework, which is not compensatory, but for the purpose of upholding the rule of law, and ensuring effective and accountable decision-making processes within the executive arm of government.

[118] So far as investigation was concerned, the case of *Sullivan v Moody*[142] had established that investigators exercising statutory powers owed no duty to the person being investigated, for that duty would be inconsistent with a proper and effective discharge of the responsibilities under statute. In investigating Mr Paige, officers of the Department were acting pursuant to statute, and were they to owe a duty to Mr Paige, the subject of their investigation, that would be in tension with, and perhaps in conflict with, their statutory duty – [101]. The incompatibility was not so great as that dealt with in *Sullivan v Moody,* for in that case the legislation made it plain that the interests

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141 See [133] ff of the judgment in *Paige* and the cases cited there.

142 (2001) 207 CLR 562, 582.

of the child were to take precedence. Spigelman CJ did not consider that the incompatibility between the statutory duty to investigate and the proposed duty of care was sufficient alone to determine the issue against Mr Paige – [131]. In combination with the incompatibility with common law however, he came to the view that there could be no duty.

Paige Distinguished

[119] Both the 2008 and 2009 complaints made against the appellants were formally investigated by the Department. It was contended on appeal that the trial judge had mis-applied *Paige* because the appellants made "no complaint about the investigation itself".[143] Instead, it was contended that the appellants' cases were based on a duty to support them as employees while the investigations were carried out.

[120] All four statements of claim filed below are very similar. In none is there a pleading of the facts relied upon to say that a duty of care arose. Nor is there any pleading as to the scope of the duty of care alleged. Further, it is hard to discern what matters are relied upon as breaches of the duty owed (in an effort to discern by implication what factual matters are relevant to duty). Resort must be had to the way the case was conducted in order to see what was in issue.[144] The approach taken generally at trial was that paragraph 8 was taken to be the pleading of breach and the particulars of breach were those misnumbered paragraphs which followed it; paragraph 5 was regarded as the factual background against which the breaches allegedly occurred. That is, they can be regarded as the premises in which a duty was said to arise – see AB 51-52 and AB 143-144.

[121] My conclusion is that, <u>for the most part</u>, the investigations (2008 and 2009) conducted by the Department are pleaded as background facts giving rise to a need for the appellants to be provided support in the workplace. There are some particulars of breach which do directly challenge the way the investigation was conducted, eg, failure to provide timely or detailed information about the allegations made. There are pleadings of failure to comply with policies or codes which are indirect allegations of failing to provide natural justice. However, the main pleading of breach – paragraph 9 of the statement of claim in each case – is that in breach of duty the defendant took no steps to provide support or adequate support in circumstances of workplace hostility, and the investigations. It is possible to understand therefore that (<u>for the most part</u>) the duty alleged must have been a duty to take reasonable steps to provide adequate support in those circumstances. This is apparently how the pleading was interpreted – see [123] ff of the judgment below. In my view then, the appellants' cases were not like *Paige*, where the decision to investigate, and the process of investigation, were attacked. Their cases are like *Waters*, *Nikolich* and *Mannall* (above) where, to the knowledge of the employer, the appellants were vulnerable in a hostile workplace while their conduct was being investigated.

[122] There is an English case which is useful in highlighting the difference between this type of case and *Paige*: *Gogay v Hertfordshire County Council.*[145] The plaintiff in that matter worked in a residential home for children who were at risk. A very disturbed child with an IQ of around 50 made statements which, on one interpretation,

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143 Amended outline of submissions, paragraph 10.

144 *Ingot Capital Investments Pty Ltd & Ors v Macquarie Equity Capital Markets Ltd & Ors* [2008] NSWCA 206 [424].

145 [2000] Fam Law 883; [2000] EWCA Civ 228.

meant that the plaintiff had sexually abused her. The employer decided that it was necessary to investigate whether or not the plaintiff had sexually abused the child. The plaintiff was suspended on full pay while the investigation took place. She claimed that the suspension caused her to suffer clinical depression. Hale LJ said:

> "[38] From all of this it is clear that there is a distinction to be drawn between the process of investigating whether a child is at risk of significant harm and the process of dealing with a member of staff who may be implicated in that risk. It is a gross over-simplification to conclude that because some form of investigation is taking place in relation to the child the employee must inevitably be suspended. …
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> [39] …
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> [40] … the issues are different. The child protection issue is whether or not the child is suffering or likely to suffer significant harm and whether or not the local authority should take any action to safeguard or promote that child's welfare. … The staff issue is whether it is appropriate in the interests either of the child, or the staff member, or the investigation, to separate the staff member from his or her usual place of work. If that is appropriate, as often it will be, the next issue is how this should be done: could a transfer be arranged, or a period of leave, or are disciplinary measures appropriate?"
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> …
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> [50] In my view, the courts should be slow indeed to hold that a local authority does not have reasonable grounds such as will justify it in making further inquiries in a case such as this. …
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> …
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> [52] … There is always a separate decision to be taken about the implications for staff. …"

[123] On the facts in *Gogay* it was held that there was no reason to have suspended the plaintiff; other workplace solutions could have been found. There is a clear distinction made in *Gogay* between the duty of an employer to investigate alleged misconduct in the workplace, and a duty to support the employee whose conduct is under investigation. In some circumstances an employer will owe both duties.[146]

[124] In a section of the judgment below which dealt with the claim made by Ms Palmer, the trial judge said this about the application of *Paige*:

> "[123] … Counsel for the plaintiffs did not submit that there was negligence simply because complaints had been made and they were being investigated, or because the plaintiff had been removed from her position; rather it was said that the negligence related to a lack of support in the context where this had occurred. <u>But it does not appear to me that this is a meaningful distinction</u>.
>
> [124] The need for support, if it existed, arose because the complaints were made against the plaintiff, and they were being investigated,

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146 See [144] and [145] below.

> which would be productive of anxiety for her, and because her being removed from her position would also be productive of anxiety for her. It follows from the decisions in New South Wales to which I have referred that there can be no duty of care arising in such circumstances directly from the fact of the allegations, the investigation, or the removal from the position. It would in my opinion be inconsistent with that approach to say that, although there was no duty not to cause psychiatric injury by doing those things, there was a duty to provide support in response to those things so as to avoid psychiatric injury. In my opinion, there was no duty to provide special or additional support arising from the fact of the investigation of the complaints, and the removal of the plaintiff from her position." (my underlining, footnotes omitted).

[125] In my view, the trial judge failed to understand the type of distinction made in *Gogay* (above). In fact the distinction made in *Gogay* was the very distinction which he thought not to be meaningful.[147] Insofar as the appellants did not attack the fact of, or processes of, the investigations, there was no incoherence or inconsistency between any administrative law concepts and the duty of care alleged. Nor was there any inconsistency between the duty of care alleged by the appellants and the employer's duty (common law in this case) to investigate the complaints made by one group of employees against another group of employees. My conclusion therefore is that the principles in *Paige* did not stand in the way of a duty of care arising.

Scope of Appellants' case

[126] As noted above, to some extent, each of the appellants included some complaints about the fact of, or processes of, the investigations of the 2008 and 2009 complaints. *Paige* does, in my view, leave some room to argue that this is not fatal to a tort claim. However, the appellants did not seek to explore this territory. A fair understanding of how the trial was conducted is that the appellants accepted that *Paige* prevented complaints about the fact of, and processes of, the investigations. They characterised their cases as based on the need for support in the workplace because of the investigations and associated hostility and disputation.[148]

[127] The position was the same on appeal. The notice of appeal contained the following paragraph:

> "12. The learned Trial Judge erred in finding that it was inconsistent with the approach in *New South Wales v Paige* (2002) 60 NSWLR 371 to say that, although there was no duty not to cause psychiatric injury by doing those things, there was a duty to provide support in response to those things so as to avoid psychiatric injury. In my opinion, there was no duty to provide special or additional

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147 It was argued that the underlined statement at [123] of the judgment below was a conclusion on the facts of Ms Palmer's case, not a general statement of principle. In fact it was conceded that it could not be correct if it were intended as a general statement of principle – t 1-55. I am convinced that the statement was a general statement of principle – see the repetition of the statement in the judgment below in more abbreviated form at [153], Harris; [179], Hayes, and [203], Greenhalgh, irrespective of the facts of the individual cases.

148 See the statements of claim at paragraph 9 and the opening at trial – AB 19, ll 15-25, and see AB 170 l 37; plaintiffs' written submissions on the trial, paragraphs 5, 44 and 62.

> support arising from the fact of the investigation of the complaints, and the removal of the plaintiff from her position because the Plaintiff did not claim that 'special' or 'additional' support was required (paras 124 and 179)"

[128] Looking to how the appeal was conducted in fact, the appellants were concerned not to run a "borderline case" which did explore territory left undecided by *Paige*. It was contended that the matters of complaint on behalf of the appellants fell well outside the investigation.[149] It does seem that during addresses in the trial, and in the notice of appeal, it was contended that delay in providing information about the allegations made against the appellants was a breach of duty. It was conceded at paragraph 18 of the written outline on appeal that the only point about this run on appeal was a failure to provide support in the context of an investigation – it was not contended that the delay was a breach itself. On appeal there were no complaints advanced on behalf of the appellants concerning the decision of the respondent to investigate the complaints made, or the delays in investigation, or the processes of investigation itself. In dealing with parts of the evidence which were concerned with such matters, I treat it as outside the scope of the case which the appellants ran at trial and on appeal.

Existence of Duty a Question of Fact

[129] Whether or not a duty of care did arise in any of the four cases with which this Court is concerned is a question of fact to be determined in accordance with the tests outlined by *Koehler* (above). One of the difficulties both with the statements of claim below, and the judgment below, is that they do not recognise that, in cases of this nature, whether or not there is a duty owed, and what the content of that duty is, can only be determined after a detailed factual enquiry separate from, and preliminary to, an enquiry as to breach.

[130] The type and amount of work an employee is required to perform is relevant. Generally speaking, where occupations such as the appellants had are concerned, an employer can assume that an employee can perform the work the subject of the contract.[150] Evidence as to what notice the employer had that the employee in question was at risk of suffering psychiatric injury will often play an important role in cases such as these. When employees manifest signs of stress at work, Courts will make a distinction between stress on the one hand and a recognised psychiatric illness on the other – *O'Leary v Oolong Aboriginal Corporation Inc*.[151] The Courts will not assess an employer's capacity to detect signs of mental illness as though the employer were a medical specialist – *Mannall* (above) [116].

[131] In *Barber v Somerset County Council*[152] the House of Lords dealt with a case where the employee suffered significant stress at work due to his workload. It was held in that case that unless the employer "knows of some particular problem or vulnerability, an employer is usually entitled to assume that his employee is up to the normal pressures of the job" – p 1091 – and that "To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it. …" – p 1092. In that case, while the employee was suffering significant psychological distress, he did

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149 t 1-30 of the hearing on appeal.

150 cf *Hegarty v Queensland Ambulance Service* [2007] QCA 366, and see *Barber*, below.

151 [2004] NSWCA 7, cited in *New South Wales v Mannall* (above).

152 [2004] 1 WLR 1089.

not report it; indeed it could be inferred that he attempted to hide the seriousness of his state of mind from his employer: for example he took leave, rather than sick leave, so that his true condition did not come to the employer's notice.

[132] It can be seen from the above statements that, not only can it not be assumed that there will be a duty to take reasonable steps to prevent psychiatric illness in relation to any particular employee, it is not necessarily easy to establish that such a duty does exist. Whether a duty arose in any of the cases before this Court was contentious, as was whether any such duty was breached, and what damage any breach caused. I turn now to the facts of each case relevant to these three issues.

HAYES

[133] Ms Hayes began work in the Department as an AO2 receptionist. Her evidence was that she had worked hard to progress so that she became a service manager in 2007 – AB 32. This was an AO6 position. Ms Hayes supervised around 50 RCOs.

Ms Johnson

[134] In 2006 or 2007 Julie Johnson became a casual RCO. Ms Hayes thought she was competent. Ms Johnson became a permanent team leader under Ms Hayes' supervision. They had a falling out in March 2008 – AB 36. After this falling out Ms Hayes received a complaint from a Departmental officer that the house for which Ms Johnson was responsible was not clean – AB 36. Ms Hayes raised this with Ms Johnson, who did not react well to the criticism. There was one other, more minor, incident.

[135] I think that the force of Ms Johnson's personality can be gauged from the fact that she was apparently the moving force behind the 2009 complaints. These seemed very significant (see below) and were found to be groundless. All the appellants complain about her behaviour in the workplace. I interpret those complaints in the context that she was able to bring about the 2009 complaints.

2008 Complaint

[136] In mid-2008 a Ms Simpson was appointed by the Department to investigate a complaint of bullying and harassment made by Ms Johnson against Ms Hayes – AB 38-39. Ms Hayes had some criticisms about the way that investigation was conducted. For reasons explained above, I treat these criticisms, and consequent injury to her feelings, even if amounting to, or contributing to psychiatric illness, as though they were not part of her claim against the respondent.

[137] At the end of the investigation, Ms Simpson told Ms Hayes that she would uphold the complaint – AB 39.[153] Ms Hayes was very upset and went home from work early. Ms Cuskelly, the workplace health and safety officer, said that Ms Hayes was so upset when she left that Ms Cuskelly and others (unspecified) followed Ms Hayes out of the building and watched her drive off, screeching her tyres on the road – AB 407. Ms Cuskelly was sufficiently concerned that she rang Ms Hayes at home to see if she was okay. That was on a Friday. On Monday Ms Hayes told her manager that she would appeal against the decision of Ms Simpson. She made it clear that the matter was very important to her – AB 40. Ms Hayes' manager, Mr Costello, told her that

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153 The trial judge accepted that this had occurred, although there was a dispute on the evidence about it – [20] of the judgment below.

she must wait for Ms Simpson's report. There followed a delay which was stressful to Ms Hayes. Some weeks later another Departmental employee (Ms Huig) emailed Ms Hayes saying that she had reviewed Ms Simpson's report and put the matters of complaint down to a personality conflict between Ms Hayes and Ms Johnson, not bullying and harassment – AB 40.

[138] It was common ground that the written report Ms Simpson produced came to no conclusions. It was not given or shown to Ms Hayes until disclosure in the litigation. I regard the unsatisfactory matters about the conduct of Ms Simpson's investigation as outside the scope of Ms Hayes' claim. However, I think that the events put the respondent on notice: (1) of Ms Johnson's having made a claim which was not substantiated, and (2) that the making of the claim and subsequent investigation had been a cause of considerable distress to Ms Hayes.

[139] Ms Hayes consulted a GP because she felt stressed during Ms Simpson's investigation – AB 54. There is no evidence that her employer knew of this. She contacted a free counselling service provided by the Department in the middle of 2008 – AB 98. There was no evidence that her employer knew of this; the service was a confidential one so that even though it was operated by the Department, there is no warrant to treat the Department as having knowledge of the consultation.

[140] After Ms Huig's intervention (above), Ms Hayes said she felt happy to continue to supervise Ms Johnson and did so without incident, until September 2008, when Ms Johnson again made allegations against Ms Hayes. Ms Hayes' response to those allegations was to suggest that she no longer manage Ms Johnson. Her suggestion was accepted by the Department and Ms Greenhalgh took over that role in September 2008. Before Christmas 2008, Ms Hayes was warned that Ms Johnson was out to get her. This was reported to Mr Costello.

2009 Complaints

[141] In early January 2009 Ms Johnson and other RCOs made allegations against Ms Hayes and others in the management team at Maryborough. The 2009 complaints were much larger and more wide-ranging than the 2008 complaint. They involved 26 complainants who made over 200 allegations against nine managers – AB 443-444. The subject of the 2009 complaints was similar to the 2008 complaint: that is, allegations of bullying and harassment. Ms Johnson was very active in making and prosecuting the 2009 complaints. She was described as a ringleader, and I think that was appropriate.

[142] From early January the Department was aware of the complaints at the highest level. The Acting Director-General, a Ms Kill, was personally involved. She met with the AWU, the Union to which many of the RCOs belonged, and they demanded that she remove the managers in question, including the appellants. It was evident from the beginning that the AWU were prosecuting the subject matter of the complaints very vigorously. The new complaints were referred to the CMC. They were referred back to the Department for investigation and it was decided that this would be an external investigation by Mr Albietz, a former Ombudsman. There was some delay before Mr Albietz's enquiry began, but it was contemplated from early January that there would be an external investigation of some sort. It must have been obvious to the respondent from the number of detailed complaints made that this investigation

process would take some time – months – to complete.[154] It was the evidence of Ms Kill and also Ms Pamela Steele-Wareham[155] that the subject matter of the complaints seemed significant and serious – that is the complaints did not appear to be vexatious.

[143] From the beginning, the Department sought to involve the Industrial Relations Commission. It was necessary for the safety of the service users that RCOs worked on a continuous basis – AB 121. Were the RCOs to strike many vulnerable persons with disabilities would be put at risk. This was a significant, and, I accept, legitimate, consideration for those Departmental officers who managed events in 2009.[156]

[144] From the beginning of January 2009 the Department recognised, in my view correctly, that it would not be viable to allow managers against whom complaints were made to continue working with the RCOs. The situation was much too volatile. In early January Ms Kill decided that Ms Hayes (and Ms Palmer and Ms Greenhalgh) should be moved from their positions pending the outcome of investigation into the 2009 complaints. She gave evidence as to how she would expect staff to be moved from their position in these circumstances. This evidence was accepted by the appellants and the respondent. It was summarised by the trial judge as follows:

> "Ms Kill said that she would expect that, if staff were being transferred to another position pending the outcome of the investigation, the rationale for this move would be explained to the staff concerned, and that this did not mean that the Department had accepted that the complaints that had been made were justified: p 8-63. She expected that the officers would be told that their redeployment was temporary, though indefinite: p 8-64. She said that <u>she recalled instructing that the staff be clear that the investigation was a separate matter that was not being prejudged, that they were employees in good standing, but that she had made the decision that these changes were necessary, in the interest of maintaining the service to the residents</u>: p 8-64." – [36] of the judgment below. (my underlining, footnotes omitted).[157]

[145] Significantly, the underlined part in the extract above makes the very distinction made in *Gogay*. This illustrates, in my view, that the decision in *Gogay* is one founded on common sense and good management practice.

[146] Ms Kill's evidence also illustrates that from early January, when the decision was made to move managers from their substantive positions pending the outcome of the investigation, the respondent knew that regard had to be had to the managers' interests as employees in good standing who faced some months during which their working life would be significantly affected by the investigation into the complaints made and the wider, vigorous dispute in which the Union was involved. I think any reasonable employer in that situation must have realised that the managers against whom complaint was made were placed in a serious, difficult, and indeed vulnerable, situation which would not be quickly resolved.

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154 In fact it was not complete until November 2011.

155 Ms Wareham was the Regional Executive Director and stationed at the Maryborough office.

156 For some of the evidence as to this see AB 239-240 per Palmer; AB 310-311 per Harris; AB 135 and AB 201 per Greenhalgh; AB 608 per Hogan; AB 653 ff per Kill and AB 723 per Wareham.

157 There was objection to this evidence as there had been no pleaded breach that employees who spoke to Ms Hayes, Ms Palmer and Ms Greenhalgh disobeyed an instruction from Ms Kill. This objection was upheld but the evidence was allowed in as being relevant to whether or not the employees were supported.

[147] So far as Ms Hayes was concerned, the Department had all the information to realise that, because of the similarity between the 2008 and 2009 complaints, and the distress which Ms Hayes experienced when the 2008 complaint was made, it was likely that she would be significantly distressed by the situation which confronted her at the beginning of 2009.

Interactions with the Respondent

[148] Generally, I think that Ms Hayes' recollection of what she was told, when, and by whom, in January 2009 was somewhat unclear. There were two significant meetings, one on 5 January and one on 15 January. At times in her evidence Ms Hayes attributed statements inconsistently to one or other of those meetings. My view is that these discrepancies do not matter. I now outline what is my best understanding from the evidence.

[149] On 5 January 2009 Ms Hayes was told of the 2009 complaints at a meeting with high-ranking Departmental officers. Ms Hayes was not told any detail of the allegations. I think it fair to conclude she was told that the allegations involved bullying and harassment and that Ms Johnson was involved, having regard to the evidence of Ms Greenhalgh who was also at the meeting – see below. She was told there would be an investigation. Ms Hayes was upset. She was absent from work between 8 and 13 January 2009 as a result.

[150] In early January 2009 there was publicity about the claims made against the managers on local television and in newspapers – AB 126. Ms Hayes accepted in cross-examination that this was something which affected her significantly – AB 126.

[151] On 13 January 2009 the Deputy Director-General of Disability Services Queensland sent a memo to many staff, including Ms Hayes. This email informed staff that he had requested Ms Wareham provide direct support to all staff and monitor workplace practices and decision-making, "including the behaviour and conduct of managers and staff". The memo said that Ms Wareham would oversee functions generally and be available to all staff who wished to provide information or raise concerns. The email said that the arrangement would continue for the duration of "any investigation into the issues raised". It was said that Ms Wareham would audit the management practices and administrative decisions in the office to ensure that staff were observing the Code of Conduct at all times. The memo went on to say, "It is important to reinforce for all managers and staff that behaviour in the workplace, including all interactions with others, is consistent with the Departmental Code of Conduct." Lastly, it reminded staff of the free counselling service available to employees.

[152] In a context where there had been complaints about the managers' treatment of RCOs, the admonition to managers and staff to comply with the Departmental Code of Conduct was most obviously interpreted as an admonition to the managers. Further, the idea that Ms Wareham would audit management practices and monitor the behaviour and conduct of managers and staff was, in context, notification that she would be in some way critically assessing the managers' conduct in the light of the allegations which had been made. The general flavour of the memo was not even-handed, but one which contained a significant element of presumption that there was something in the complaints made. The memo did not indicate support for the managers but, to the contrary, involved this element of implied criticism. This was particularly significant given that the memo also purported to advise that

Ms Wareham would fulfil the role of providing "direct support to all staff". It was very unlikely that she could ever provide direct support to both the managers and the RCOs. I think that the overall implication from the email is that she would be providing support to the RCOs and critical review of the managers' performance.

[153] On 14 January 2009 Ms Wareham participated in a hearing of the Industrial Relations Commission concerning the 2009 complaints. After that meeting, Ms Wareham sent an email to all the appellants except Ms Harris. Ms Hayes said she received it although she was no longer attending the office – AB 52. The email concerned Ms Wareham's attendance at an Industrial Relations Commission conference. It said:

> "The Conference finished approx. 4.30pm. Julie Johnson and one other person participated with the Union. A number of statements were presented (in addition to the current statements) which will be provided to the organisation for response. There is no further action at this point in time.
>
> Each of you is requested not to discuss these current matters with any RCO or other staff. Should anyone want to discuss matters with you they are to be referred directly to [a particular manager], and if they feel uncomfortable speaking with [that manager], they are to be referred to me. You are also requested not to seek out any information on these matters from any staff. I will ensure people are kept up to date with information as it becomes available.
>
> Should staff wish to meet as a group via Union or other meetings to discuss these matters you are requested not to participate.
>
> It is imperative that each of us are at all times disciplined and professional and not participate in local discussion on these items.
>
> [The free counselling service] is of course available and I am also available at all times." (my underlining).

[154] Ms Hayes interpreted this email as forbidding her to speak to the other managers about the 2009 complaints and the dispute with the RCOs. This was what Ms Hayes and Ms Greenhalgh were told either in the meeting of 5 or 15 January 2009, and Ms Wareham confirmed in her evidence that this is what she meant by the email direction – AB 692. Further, her evidence was that the second underlined part of the email was intended to prevent the managerial staff speaking to their Union, the QPSU, about the 2009 complaints and the dispute – AB 692.

[155] These were remarkable directions which had the effect of isolating the appellants within the workplace and taking away obvious sources of support to them through the difficult times which lay ahead. There was no justification for the requirements advanced during the trial. There was no evidence that any of the appellants contacted their Union. However, they did disobey the requirement that they not speak to each other about the matters – they would meet at the back of the work carpark to discuss things. I do not think this rendered the effect of the directions much less destructive than they otherwise would have been. The managers could not discuss matters openly, and were well aware of the injustice of the restriction, and the lack of support and confidence in them that it indicated on the part of the respondent – AB 53-54; AB 113 – for Ms Hayes' evidence as to this.

[156] I think it is significant that both the emails of 13 January and 14 January contained references to the Departmental counselling service. It shows that the respondent well understood that the events which had begun were of such significance that affected employees might be so upset and distressed they may need to speak to counsellors.

[157] On 15 January 2009 Ms Hayes attended work. She met with several high-ranking people from the Department on this day, including the Assistant Director-General and Ms Wareham. So far as this meeting was concerned:

(a) There were still no details given of the allegations that had been made.

(b) Ms Hayes was told that she was not to have any contact with RCOs or residents until further notice – AB 48. Ms Hayes understood the reason for this and in fact approved of that decision. She felt she would have been at risk of more complaints had she had any such contact.

(c) Ms Hayes was told that she would be moved to another position and that this was a directive from the Director-General of the Department – AB 124. She was told that the only position available for her was that of Community Resource Officer. This was a lower level position than her current ranking – it was an AO5 position. Nonetheless she was told that she would remain on an AO6 wage – AB 49. She protested that she did not wish to take up this position but was told it was the only one available. Ms Hayes' evidence was that she got very upset when told this and protested to Ms Wareham that she felt as though she were being punished. She was told that "it's what we need to do to do the investigation. We need to have you removed."[158] Ms Hayes said that she was so upset at this point she was told she could go home. Ms Wareham admitted that she would have expected someone who was being stood aside while a complaint was being investigated would be told that they "were presumed innocent" and that the change was temporary. She did not tell Ms Hayes these things, she just told her that the decision was a result of the investigation occurring – AB 704.

Ms Hayes was not supported in the way Ms Kill thought desirable (above) when she was told of her move to a different position. She was not reassured that she was held in good standing by her employer. She was not told that the employer had not pre-judged her. Telling Ms Hayes that the direction had come from the Director-General of the Department, without giving her reassurance, was something which must have added to the perceived stigma of the move.

(d) Ms Hayes was told at this meeting that she could not discuss the matters with the others on the management team against whom complaint had been made – AB 49, AB 53, AB 111 and AB 113. This evidence was disputed – see, for example, AB 113-114. The trial judge accepted it and I think he was right to do so – see the terms of the email of 14 January 2009 (above), and Ms Wareham's admissions at AB 692-693.

Neighbour Incident

[158] On 16 January 2009 one of Ms Hayes' residential neighbours told her that one of the hostile RCOs lived in her street and had spoken to the neighbour about Ms Hayes –

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158 It was admitted on the pleading that on 16 January 2009 the Acting Director-General of the Department of Communities told the AWU that the appellant would be moved to this position. The evidence was that the appellant was not consulted about and did not give her consent to that communication – AB 89. There was no evidence that Ms Hayes was aware of that communication at the time.

AB 50. This made Ms Hayes more upset and fearful. She went to work on 16 January 2009 and told Mr Costello about this situation. With Ms Hayes' consent he sent a Departmental officer to speak to her neighbour. This in fact created more stress and upset as the neighbour resented that action on the part of the Department – AB 51. Ms Hayes was so upset that she did not stay at work on 16 January 2009. She said that she was scared for her own safety and that of her children as a result of this neighbour incident. In cross-examination she admitted that it affected her deeply and said that for her it was "the final straw" – AB 115. That appears to be correct for 16 January 2009 was the last day upon which Ms Hayes attended her workplace.

[159] Although this event concerning the neighbour on 16 January 2009 was led in evidence, counsel for Ms Hayes disclaimed reliance on it as a breach on the part of the defendant – AB 51.

Ms Wareham's Attitude

[160] Ms Wareham met with members of the AWU and some large number of RCOs at a hotel on 16 January 2009. Ms Hayes was aware of this and aware that Ms Wareham had organised the meeting – AB 89. Ms Hayes was told that when she returned from the meeting Ms Wareham said, of the complaints made against the management team, "there's got to be something in it because there's so many complaints" – AB 90. The effect of this statement, indicating pre-judgment against the managers, must have been significant, the more so because Ms Wareham was the person the Department had nominated to support "all staff".

Picketing

[161] On 19, 20 and 21 January 2009[159] the AWU staged a picket outside the Maryborough office. Ms Hayes did not experience it first-hand, however, someone from her workplace rang her at home to warn her that the picket was planned – AB 90. The evidence does not reveal whether this was a friend or whether it was someone from management. After the pickets Ms Hayes was told by friends within the workplace that the pickets had been "horrible"; placards had been banged on the windows; there had been loud noise outside the building and one of the picketers had entered the foyer area. The events were reported in the local paper. Ms Hayes said that this made her feel targeted and humiliated – AB 90-91. She felt that the Union was controlling the Department – AB 91.

[162] It was pleaded that the respondent allowed members of the AWU to distribute a notice expressing no confidence in Ms Hayes and other staff during the picket. The trial judge found that while the distribution occurred, the defendant did not allow it. There is no appeal from that. This finding applies to all four cases. Furthermore, there was no evidence that Ms Hayes ever knew of this notice being distributed.

[163] Ms Hayes consulted with her GP on 8 January 2009. There is no evidence that her employer was aware of that. Ms Hayes says that on 8 January 2009 her doctor advised her that she should take leave and claim workers compensation, but she preferred to return to work. However, after being told that she was being moved out of her position and was not to have contact with other staff, she returned to the doctor and, on 16 January 2009, left work and stayed away from work for six months on workers compensation. When these benefits were decreased after this six month period, she attempted to transition

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159 Witnesses differed on how many days the picket lasted. All agreed on the two days of 19 and 20 January. Ms Cuskelly remembered three or four days – AB 419. See [34] of the judgment below.

back to work. She found that she could not cope working at her old workplace and a prolonged period where she was requesting suitable alternative employment from the Department ensued. Various alternatives were tried but eventually Ms Hayes took medical retirement.

[164] The pleading is that injury was suffered on 19 March 2009. Why that date was chosen was not clear from the evidence in the case but it is consistent with the last of the breaches being pleaded to have occurred in January 2009. It appears to me that events after 19 March 2009 were not relevant either to the question of whether a duty arose or whether it was breached. Evidence as to these later events was relevant to the quantum case and presumably led for that purpose.

[165] In cross-examination Ms Hayes said that she had been stressed since the 2008 complaint:

> "And I guess when the stuff happened in 2009 it was a catalyst. It was the, 'Oh, my' – yeah. It was – I coped with the stress in – as best I could in 2008 because I knew that – I try my best for it not to affect me, as best I could, and I just fell in a – that's why, I think, I fell in a heap so quickly because of … what had happened in 2008, and then when this all happened and I – yeah, I just fell in a heap quickly – quicker than all the others because---" – AB 120.

Duty

[166] The trial judge concluded that because of the decision in *Paige* no duty of care arose. He then proceeded to examine the question of breach "on a precautionary basis". He made no analysis as to whether or not, if he were wrong about the effect of *Paige*, a duty of care arose on the facts of Ms Hayes' case.

[167] The notice of appeal contained a ground that the trial judge:

> "4. Erred in his consideration that the negligence was not proven with regard to the lack of support provided to the Plaintiff in the context of the nature of the whole of the actions of the employer and lack of support by management did not give rise to the employer would have considered that such actions or lack of support would have led to the development of a recognized psychiatric injury (para 127)."

[168] I interpret this as raising a ground of appeal that the trial judge erred in not making a factual finding that, in the circumstances of Ms Hayes' case, it was reasonably foreseeable that she would suffer psychiatric illness if her employer did not provide her with support in the workplace. The notice of contention included a ground that the trial judge erred because there was no basis for saying that a reasonable employer in the position of the respondent should have foreseen a risk of psychiatric injury as opposed to mere stress. The issue of whether or not there was a factual basis for the duty alleged was therefore raised on appeal. There was no expert evidence on this point. In any case, the decision is one for the Court, rather than experts.[160]

[169] At the end of 2008 the Department knew, or ought to have known, that Ms Johnson was a difficult person in the workplace who had made and pursued an unfounded complaint against Ms Hayes. The Department knew Ms Hayes had been upset at the

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160 *O'Leary v Oolong Aboriginal Corporation Inc* [2004] NSWCA 7 [117] – [119].

complaint being made and that there had been a distressing error in the resolution of the complaint, so that for some time Ms Hayes falsely believed the complaint had been upheld. While these matters are not justiciable because of the principles in *Paige*, it is legitimate to consider the respondent knew of them when assessing what it could reasonably foresee in 2009.

[170] The Department knew that after the 2008 complaint, Ms Johnson had created more difficulties in the workplace such that it had been necessary to remove Ms Hayes as her supervisor. It knew that Ms Johnson had created other difficulties in the workplace which were serious enough that Ms Palmer and Ms Greenhalgh had made complaints, including written complaints, about her, see below. The Department knew that Ms Johnson was overbearing and intimidating.

[171] In fact, Ms Hayes had consulted a GP about the stress she felt during 2008 but the Department did not know this. As well, from the psychiatric evidence in the case[161] Ms Hayes had a previous episode of adjustment disorder or depressed mood in circumstances of family tragedy. There was no evidence that the Department knew anything of this.

[172] The Department knew, through Mr Costello, that by the end of 2008 Ms Hayes feared further attack from Ms Johnson. As discussed, the Department knew the magnitude of the 2009 complaints. It knew their similarity to those which had been made in 2008. By early January 2009 the Department knew that there would be a substantial period of delay while the complaints were investigated and that Ms Hayes would have to be removed from her position during the investigation.

[173] I cannot see that any duty arose towards Ms Hayes before the 2009 complaints were made. However, once the 2009 complaints were made, the Department was well aware that there would be a substantial, serious and protracted dispute and investigation. The Department should not be judged as though it had psychiatric expertise. However, it was a large Government Department and had, or ought to have had, enough sophistication to reasonably foresee by 5 January 2009 that if support were not offered to Ms Hayes in the difficult circumstances which lay ahead, she might suffer more than just distress, but psychiatric harm. In *Johnson v Unisys Ltd*[162] the speeches in the House of Lords recognised that in modern times it is generally recognised and understood that "work is one of the defining features of people's lives" and that workplace stress can give rise to recognisable psychiatric illness.

Breach

[174] A second factual question arises as to whether or not the Department breached that duty of care. The trial judge found that there had been a breach of duty. He noted that apart from referral to the free Departmental counselling service no support was provided – [180]. Two difficulties arise. First, the trial judge did not consider when a duty on the part of the respondent arose. Secondly, he dealt with breach on an assumption that *Paige* had no application to Ms Hayes' case, rather than recognising that some of the breaches pleaded concerned matters which were not justiciable. It is necessary to re-examine the question of breach. The notice of contention was to the effect that if a duty of care arose, it had not been breached.

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161 Report of Dr Andrew Byth, 15 June 2011.

162 [2003] 1 AC 518, 549 and 532.

[175] It is necessary first to dispose of a question of vicarious liability which was raised on appeal. It was argued below that the respondent was vicariously liable for the actions and behaviour of Ms Johnson and the other RCOs in making complaints. Rightly, the trial judge decided against this argument. Although this decision was challenged in the notice of appeal, it was conceded in the appellants' outline of argument that the respondent was not liable for Ms Johnson's behaviour, or that of other persons who made complaints. It was contended however that it was "the making of the complaints, encouraged by the employer, and in pursuit of its business for which … the respondent ought to have been found liable". There was no evidence at the trial that the employer encouraged Ms Johnson or the other RCOs to make complaints. Ms Kill and Ms Wareham gave evidence that they met with representatives of the RCOs and of the AWU. Most likely other Departmental officers did too. They were concerned to know the totality of the complaints made against the managers, but the evidence does not reveal more than this.

[176] The trial judge found that the respondent was liable for the actions of Ms Wareham, and I think that was correct. There was no issue raised by the respondent as to this point.

[177] In my view, the Department breached the duty it owed Ms Hayes. There was no support offered to her except to offer the free Departmental counselling service. As well, various things were done and said which unreasonably added to the difficulties she faced. The emails of 13 and 14 January 2009 were unsympathetic to the position of the managers and the email of 14 January, in particular, imposed restrictions which were unreasonable and likely to cause the managers to be isolated from, and unsupported by, their workmates and professional organisation. I do not regard directions given to Ms Hayes at the meeting of 15 January to have no contact with the RCOs or residents as unreasonable, and indeed nor did Ms Hayes. I do not regard the decision to assign her a new position, one level lower, but on the same wage, as unreasonable. However, doing this without reassurance was unreasonable, as Ms Wareham and Ms Kill accepted.

[178] After Ms Hayes left work on 16 January 2009, there seems very little evidence that there was any care or support, or indeed enquiry made after her. Ms Cuskelly gave evidence that she remained in contact with Ms Hayes and even visited her on one occasion because she was so worried about her, but there is no real evidence that this was any official part of her job, rather than something she did as a good work friend concerned about a colleague.

[179] Ms Wareham gave evidence that she met with the AWU on 16 January 2009 because she had been directed by the Acting Director-General to ascertain the scope of the complaints which were being made by the RCOs and the AWU. Viewed in that light, meeting with the AWU was not an unreasonable thing for her to have done. However, it was unreasonable for the Department to expect Ms Wareham to fulfil this role, and the role of auditor and monitor of the managers' behaviour, as well as be the designated person to whom managers could come for support. Clearly one person could not perform both roles. Moreover, it is clear from the comment which was repeated to Ms Hayes – so many people would not complain if there were not something in the complaints – that Ms Wareham was not impartial as to the veracity of the complaints. She took the view that the managers must have behaved wrongly.

Causation

[180] A real question arises as to whether or not the breaches which were established on the evidence caused the psychiatric injury which was suffered by Ms Hayes. The notice

of contention raised the issue of causation at paragraph 4. The appeal was conducted on the basis that causation was in issue.[163]

[181] After having considered the lack of support provided by the Department, the trial judge made this observation, "On the evidence of Dr Byth, support provided at this point would probably have made a difference."[164] In fact the evidence from Dr Byth did not support that proposition. When asked a very general question about support, not limited in time in any way, and with no definition or precision as to what was meant by support, the doctor acceded to the proposition that lack of support may have been a matter of some significance in the development of Ms Hayes' condition, but did so on a particular factual basis which he related at AB 360. This factual basis was not proved.

[182] The trial judge found that matters referred to by Dr Byth in his evidence caused Ms Hayes' psychiatric condition – [176] of the judgment below. He added that, "I also accept his evidence to the effect that it was the combined effect of all those matters which resulted in her developing the psychiatric condition that she came to develop, the subject of the claim. The reasoning is the same as with the other plaintiffs." This is presumably a reference to [112] of the judgment in which the trial judge said of Ms Palmer's claim:

> "I also accept that the effect of Dr Byth's evidence is that it was the combined effect of all those matters which resulted in her developing the psychiatric condition that she came to develop, the subject of the claim. This is not a case where there were a number of factors acting and the evidence does not permit an inference to be drawn that a relevant factor or factors was at least a cause of the plaintiff's injury; rather it is a case where there were a number of factors which together produced the plaintiff's injury, and in those circumstances each of those factors is a cause of the injury unless in the case of a particular factor its contribution can be characterised as *de minimis*. The analogy is with the dust in *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, 621, rather than with the asbestos fibres in *Amaca Pty Ltd v Ellis* (2010) 84 ALJR 226."

[183] I cannot see that Dr Byth's evidence was to the effect as described by the trial judge in this paragraph. Matters such as these were never raised with Dr Byth in his oral evidence. There was just no attempt to put a case similar to that which Ms Hayes proved at trial to him as one which did cause, or was capable of causing, the injuries she suffered.

[184] The difficulty with concluding that the matters in Dr Byth's evidence caused Ms Hayes' psychiatric condition is that there was a significant mismatch between the factual basis upon which Dr Byth proceeded, and the facts which were proved at trial.[165] The trial judge did not analyse these discrepancies. There were three distinct problems. First, it is apparent that Ms Hayes gave Dr Byth a factual account of what had occurred in the workplace which was different in significant respects from that which she gave in her evidence. Second, some significant parts of the account that Ms Hayes

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163 The respondent's oral arguments begin at t 1-61 ff, and are in the written outline at paragraphs 73-83, and paragraph 4 of the supplementary outline.

164 [180] of the judgment below.

165 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

gave to Dr Byth were complaints about non-justiciable issues relating to the investigation. Third, because the trial judge took the course of analysing the issues of causation and injury before analysing issues of duty and breach and made no specific finding as to when a duty arose, he had regard to matters occurring in 2008 as causing Ms Hayes' psychiatric condition (as did Dr Byth). All this is apparent from the discussion of causation at [171] – [176] of the judgment below. The trial judge's finding of causation cannot stand. It is necessary to revisit the evidence of Dr Byth in some detail.

Dr Byth's Evidence

[185] Dr Andrew Byth provided a report dated 15 June 2011 in relation to Ms Hayes. The substance of it is introduced by the sentence, "Samantha Hayes complained of adverse effects from stressful events in her work with Disability Services between 1/5/08 and 31/10/09." The first of these dates is seven months before any duty arose. The report does not explain why Dr Byth took 31 October 2009 as an end date. It is about the time that Ms Hayes began to investigate a return to work because after six months on workers compensation her payments reduced by 75 per cent – AB 74. As noted, Ms Hayes' case was that she had suffered injury by 19 March 2009. It is clear from this introductory sentence that Dr Byth considered far more factual information in forming his conclusions than can be properly considered in determining what the matters established as breaches caused.

[186] Furthermore, there are factual matters relied upon by Dr Byth in reaching his conclusions which were not proved by the appellant. At paragraphs 2.9 and 3.3 of the report Dr Byth records that both in 2008 and in January 2009 part of the complaints made against Ms Hayes involved her sexual orientation. I cannot think this an insignificant matter, yet there was no evidence in relation to this. Another matter which Ms Hayes reported to Dr Byth as distressing to her was that the AWU put out a flyer naming her, and the members of her management team, and expressing no confidence in them. There was no evidence that Ms Hayes knew of that matter before the time it is pleaded that she suffered injury. As well, Ms Hayes complained to Dr Byth about being verbally abused by Ms Johnson. There was no evidence of this in the trial.

[187] Next, some things about which Ms Hayes complained to Dr Byth were clearly enough matters integrally related to the investigation or the decision to investigate: ie, matters not within the scope of her claim against the respondent. Ms Hayes complained to Dr Byth that she found the fact that any investigation was undertaken in 2008 something which significantly upset her because she considered the allegations rubbish – paragraph 3.1 of his report. By August 2008 she was upset that there was no outcome of the 2008 investigation – paragraph 3.2. Further, she complained to Dr Byth that both the 2008 and 2009 investigations were slow to be completed and reviewed, and that it took so long for her to be exonerated – paragraph 9.5.

[188] Lastly, much of what Ms Hayes reported as distressing to her was conduct from 2008 which cannot constitute a breach of a duty which only arose in 2009.

[189] Dr Byth summarised all Ms Hayes' complaints at paragraph 10.2 of his report:

> "In 2008-2009, she had difficulty coping with allegations of bullying and harassment, and she was upset that the investigations of the allegations were protracted and slow to be finalised. She also complained of being verbally abused by the alleged victim of the bullying, and she thought her own manager had presumed she was guilty of bullying, which led to her feeling relatively unsupported in the workplace."

It is indicative, rather than definitive, but it can be seen how the conduct which was in breach of the respondent's duty of care forms a relatively small part of the conduct which Dr Byth considered caused Ms Hayes' psychiatric illness.

[190] On Day 5, when Dr Byth was scheduled to give evidence, counsel announced that they had not arranged for his attendance because counsel for the State of Queensland did not require Dr Byth for cross-examination. The trial judge objected that he, at least, had questions for Dr Byth and Dr Byth attended by telephone and was questioned on that day by the trial judge. There was no objection to this course. This examination elicited Dr Byth's opinion that Ms Hayes' attempts to have Ms Johnson comply with proper management standards leading to Ms Johnson's attack upon her (Ms Hayes) might be a matter of some significance in terms of her feeling unsupported by management. I cannot clearly discern what evidence there was of Ms Hayes attempting to have Ms Johnson comply with management standards.

[191] Dr Byth gave evidence that he believed Ms Hayes had been "especially" asked to deal particularly with Ms Johnson, and that she had been wary of doing so because she could see that it would lead to problems, so that when later her employer seemed not supportive to her over the problems which had arisen from her making a special effort to help both Ms Johnson and her employer, Ms Hayes felt "extremely distressed" – AB 360. Dr Byth said he was sure that would have been likely to have contributed to Ms Hayes' decompensating. There was no evidence led from Ms Hayes to support this factual basis assumed by Dr Byth.

[192] Further, Dr Byth said that the significant delay between being told of the 2008 complaint, and being told the detail of the 2008 complaint, and being given an opportunity to respond, was likely to have heightened Ms Hayes' anxiety, insomnia and depression and made her more vulnerable to subsequent events – AB 361. That was not something which could be the subject of the claim against the respondent.

[193] Dr Byth said that Ms Hayes' belief that she could not speak to others in the workplace about what was going on made her feel ostracised and unsupported in the workplace, as did her conclusion that her management presumed she was guilty – AB 361.

[194] Counsel for the State of Queensland was not ready to cross-examine Dr Byth on Day 5 of the trial, so the doctor's evidence was continued on Day 10. In the meantime the appellants' solicitors produced a note of a telephone conversation with Dr Byth which gave the opinion that, although Ms Hayes was not at the workplace when the picket occurred, hearing about it second-hand would have increased her levels of anxiety, and particularly anxiety about her reputation. Dr Byth thought that the fact that the picket occurred would have made it more difficult for Ms Hayes to go back to work.

[195] On later cross-examination by counsel for the State of Queensland, Dr Byth conceded he had not heard of the incident of 16 January 2009 concerning the neighbour. He gave his opinion that the event would have been a significant feature in the development of Ms Hayes' condition – AB 773. As noted above, this was not something relied upon by Ms Hayes as a breach of duty.

[196] I cannot see there was any safe basis to conclude on the evidence below that the matters which were in breach of the respondent's duty to Ms Hayes caused her injury. The factual case which Dr Byth considered as causing injury was so different and so much more extensive than the matters which constitute the breach of duty in this case that it would be unsafe to conclude that the breaches were even a substantial cause of

the injury suffered or that, to look at it in another way, Ms Hayes would not have suffered the injury she did had those matters which constitute a breach of the respondent's duty not occurred.

PALMER

[197] Ms Palmer first started working for Disability Services Queensland in July 1977. At the beginning of 2007 she transferred to Maryborough and was put in charge of rostering the RCOs. Ms Palmer had particular expertise in rostering. When she arrived at the Maryborough office she found that the roster was understaffed so that many RCOs were working overtime to fill positions which should have been allocated to full-time employees – about six or seven as it turned out – AB 236. Appropriate changes were made. This saved the Department money and caused dissatisfaction among some of the RCOs – AB 238.[166]

2008 Complaint

[198] Ms Palmer was asked questions by Ms Simpson about Ms Hayes in 2008. Ms Palmer was aware contemporaneously of Ms Simpson's telling Ms Hayes that she had found her guilty of bullying and harassment; of Ms Hayes being off work, and of the subsequent reversal of decision by Ms Huig – AB 241.

[199] Ms Palmer had difficulty working with Ms Johnson in late 2008. She described her as "rude, obnoxious, loud" – AB 241. Ms Johnson's desk was quite near Ms Palmer's desk – AB 249. Ms Palmer complained to her manager, Mr Costello, in late 2008. Ms Palmer put in a written complaint, dated 3 September 2008, saying that Ms Johnson's behaviour was causing her anxiety and creating additional workload and pressure in an already demanding job – AB 242 and 247. The tendered document contained the manager's notation:

> "Conflict is related to ongoing issue within the office. Conflict has resulted in a number of parties becoming tense and unable to communicate with each other. Communication plan between staff members developed and agreed on. Management team has developed an action plan to address issues within the office and reduce tension between staff." – AB 243.

[200] The situation was significant enough for Mr Costello to note:

> "I have explained how the management team have recognised that we have a tense situation within the office. We have formulated a plan which we hope will alleviate this situation. In regard to Tanya's need to have interaction with this staff member we have agreed that if any issues come up in regard to required paperwork … then she will ask the service manager [Ms Greenhalgh] or myself to assist …
>
> If due to time frames and the unavailability [of] these other staff members … then I as the manager will address this with the other staff member." – see exhibit 2 A15.

[201] Notwithstanding management's intervention, the issue did not improve from Ms Palmer's perspective – AB 244.

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166 There were other management changes about that time which prompted complaints from the RCOs – AB 320-321.

[202] Against all this contentious background, Ms Palmer said that when she found out about Ms Hayes being the subject of a complaint from Ms Johnson she wondered whether she was next – AB 247.

[203] On 5 September 2008 Ms Palmer was assessed as needing ergonomic modifications to her workstation. Ergonomic supports were purchased for Ms Palmer and installed at her desk – AB 246.

2009 Complaints

[204] Ms Palmer was a subject of the 2009 complaints. She was not at any of the Maryborough meetings with senior management, as Ms Hayes was. She was called into the office of a senior manager from Brisbane who told her that allegations had been made against her and that she was stood aside from her position. Despite enquiry the manager would not tell her even the general nature of the allegations or who made them. She was not told any more detail than this until April that year – AB 289. The manager did not tell her for how long she was stood aside. She was told to vacate her usual workplace and go and sit in "the admin pod". There was no evidence that Ms Palmer was reassured in the way Ms Kill believed necessary when told about this move from her substantive position.

[205] Ms Palmer was not allowed to take the ergonomic equipment in her workstation with her – AB 250 – nor was she allowed to take anything else from her desk. Ms Palmer complained about her inability to take her ergonomic equipment, including in writing, by way of WIRF – AB 251.[167]

Picketing

[206] Ms Palmer was in the Maryborough office when the picketing took place. She said that she was "terrified" – AB 250-251. Ms Palmer said that her desk was located very close to where the picketing took place. There was loud chanting. Placards were banged against the windows. The picketers appeared very angry. Those picketing the building were people whom she knew and worked with. On the first morning of the picketing, someone escorted Ms Palmer to her car through the back door of the building and she went home because she was so scared – AB 252-253.

[207] During the picketing the police were not called. Nor were there any security officers present at the premises – AB 255. The picketers were able to enter the foyer of the building but could not enter the workplace because they had no swipe card access. However, Ms Palmer said she had a real concern that the picketers might enter the workplace because Ms Johnson was participating in the picket and she had swipe card access. She said that during the picket Ms Johnson would participate in the picket, and then enter the workplace area, watch the picket from inside and then "run back out to the picketers and tell them what was going on" – AB 255.

[208] Ms Palmer was sent an email at 4.16 pm on the afternoon of Monday, 19 January 2009 which read:

> "Hello Everyone
>
> Just to let you know that AWU members are protesting outside the Maryborough Service Centre in respect of the AS&RS matters we are working through.

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[167] WIRF is an acronym for a Workplace Injury Illness and Incident Report Form – an official Departmental form available to be lodged by employees. The form is designed to be dealt with by the Work Environment Officer (Ms Cuskelly) within three days of receipt.

> It is likely Channel 7 will also be present.
>
> Could you please ensure you refrain from using the front entrance and placing yourselves in a difficult situation. I am sure people will move on when they have had their democratic right to demonstrate their views.
>
> Thank You
>
> Pam [Wareham]"

[209] This email was sent well after Ms Palmer had left the building. Ms Wareham had not been in the building during the morning. Because the email was sent late on the first afternoon of the first day of picketing, it did not give any affected employee any forward notice of the situation. It was admitted on the pleadings that the Department had advance notice of the picket. This is borne out by Ms Cuskelly's evidence. She received a phone call at her home before 19 January from the acting service manager to warn her of the impending pickets – AB 394. There was no explanation in evidence as to why Ms Palmer did not receive such a phone call. Given that she was one of the managers about whom complaint had been made, it seems a remarkable oversight.

[210] Another email was sent to Ms Palmer (and Ms Harris) on 20 January 2009 which said:

> "Folks
>
> You will see from the attached article from the Fraser Coast Chronicle that there will be a peaceful demo by AWU members outside the Maryborough Office between 8.30-10.30 am this morning and again this afternoon. Could I please ask that you avoid direct contact with the members and allow them to demonstrate peacefully.
>
> I am in Hervey Bay at a meeting this morning and will be back in at 10.30 am.
>
> I hope to be able to provide an update to all staff this afternoon.
>
> I understand this is a difficult time for everyone but really appreciate your support and professionalism.
>
> Cheers
>
> Pam"

[211] Ms Wareham's evidence was that she did not consider speaking to the picketers and did not consider calling the police – AB 683-684. Ms Wareham said that she advised people in the workplace that those picketing had a right to demonstrate and she could not stop it – AB 693. Indeed she expressed that view in the emails which she sent on 19 and 20 January. Her attitude must be interpreted as unsupportive of the managers, particularly when the affected managers were not given advance notice of the picket, or time off work during the picket.

[212] On 19 January 2009 Ms Palmer lodged a WIRF saying:

> "While driving to work, I felt quite sick and anxious regarding the allegations that have been made against me. As I'm not permitted to perform the duties of my appointed position I went out to the back table to read some documents, and I found AWU correspondence with my name plastered on it."

When she discovered the AWU document (which expressed no confidence in her) on the back table, Ms Palmer took it to her manager and gave it to him, probably with her WIRF form – AB 259. She received no response to that WIRF – AB 251.

[213] Ms Palmer lodged a WIRF dated 20 January 2009, identifying that she suffered psychological stress from the picket on 20 January. She said that she found the picket "threatening and intimidating". The only outcome of this was that the work environment officer noted "awaiting outcome of investigations" on 2 February 2009. Ms Wareham admitted that she had Ms Palmer's WIRF on either 19 or 20 January 2009, but she took no steps to address the matters raised in it, or to say anything to Ms Palmer about her experiences during the picket – AB 696-697.

Dealings with Management re 2009 Complaints

[214] Ms Palmer received an email on 12 January 2009 from an executive director within the Department. It read:

> "Last week, concerns were raised regarding workplace practices in the Maryborough Service Centre … These concerns are currently being assessed through the appropriate external processes, as Disability Services Queensland treats all such matters raised seriously.
>
> As always, and particularly whilst this assessment is occurring, it is important that all staff employed in the Maryborough Service Centre continue to ensure that their behaviour in the workplace, including their interactions with others, is consistent with the Departmental Code of Conduct. …
>
> Disability Services Queensland is committed to maintaining a safe and supportive workplace for all staff and a high standard of service to clients. All management and staff have a key role in maintaining this type of environment. As part of this, staff are reminded that there are a number of mechanisms for providing input and raising any concerns. For example, via team meetings, specific workgroup forums where they occur, survey processes and Local Consultative Committees. Staff may also raise concerns directly with a line manager, who will follow up accordingly and keep staff informed as appropriate.
>
> It is recognised that in some instances, staff may have concerns that need to be addressed outside of the usual line management structure. In such instances, I have requested that Mr Jim Price, A/Senior Manager for the Northern Zone, be available to speak to staff directly on telephone … Jim will ensure concerns are followed up sensitively, objectively and in a timely manner.
>
> Also at present, I have arranged for Mr Julian Glassock, Senior Consultant, Workplace Health and Safety … to be available to provide advice to staff on any matters relating to how best to deal with any workplace concerns relating to health and safety etc.
>
> Staff should also be aware that at any time, they can avail themselves of the free confidential support and counselling service that is offered by Disability Services Queensland through the Employee Assistance Services (EAS). You may contact EAS if you wish by telephoning …" – see exhibit 2 A22.

[215] The email of 12 January 2009 is not so clear in its assumption or implication that the managers' behaviour was at fault as the email of 13 January 2009, but in my view it does contain that implication. Ms Palmer's evidence was that this made her feel unsupported and isolated – AB 261. She received the emails of 13 January and 14 January (above). My comments above (adverse to the Department) in relation to the emails of 13 and 14 January apply here too.

[216] On 2 February 2009 Ms Palmer was told to meet with Ms Wareham. She complied. During this conference Ms Wareham said, "How can all those people be wrong?"[168] This statement naturally upset Ms Palmer greatly as it indicated that Ms Wareham had formed an opinion against her interests – AB 262-263. Ms Palmer began to cry. Ms Wareham did nothing to comfort her and the meeting ended.

[217] Ms Palmer read reports of the controversy in the newspapers and saw those articles were put up on the Departmental Media Monitors intranet so that everybody employed by Disability Services Queensland, state-wide, could see the articles – AB 264. Ms Palmer had a role in sorting out rostering problems for the whole State and travelled to different Departmental offices to do so. Ms Palmer was also concerned about the effect of publicity on her local reputation, particularly as she lived in a small town – AB 304.

[218] One of the articles published in the newspaper, 20 January 2009, included the following:

> "The regional executive director [Ms Wareham] is available to meet with all staff who want to provide information or raise concerns. …" – see exhibit 2 A45.

This particularly upset Ms Palmer because she felt it was untrue. In fact Ms Wareham was not prepared to allow her the opportunity to provide information or raise concerns – AB 265. Ms Palmer was upset and incredulous – AB 265. Speaking of her entire relationship with Ms Wareham in 2009, Ms Palmer said that Ms Wareham did not once ask how she was, or how she was coping. She inferred she did not care – AB 292. This does not seem an unreasonable inference on the evidence in all four cases.

[219] After the event, Ms Palmer found out that Ms Wareham had held a meeting with Union representatives at a hotel. She found a flyer "lying around the office", AB 295, most likely exhibit 2, A37, which was a written invitation from Ms Wareham to RCOs to meet with her at a hotel, with she says, the support of the Union. The flyer tells staff (RCOs) who are rostered on at the time of the meeting that they will be relieved of their duty so they can attend. Ms Wareham said that she organised the meeting to try to ascertain the size of the problem which confronted the Department – AB 679. From Ms Palmer's point of view it appeared that Ms Wareham was taking the side of the RCOs and eliciting more complaints from them than already existed – AB 295. Without any communication, explanation, or other support from Ms Wareham, I accept that Ms Palmer's interpretation was a reasonable one for her to make.

No Meaningful Work

[220] Ms Palmer's work was specialised. The person who was placed into her position was not qualified to fill it. Ms Palmer spent some of her day instructing her replacement how to carry out the job she had been removed from – AB 259. She was not given anything to do in her new position, although she was still receiving the same pay – AB 259. She was sitting at what she called the back table or an "admin pod".

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168 The trial judge found that this statement was made by Ms Wareham – [118] of the judgment below.

[221] On 17 February 2009 Ms Palmer was re-allocated her payroll duties, although she was not allowed to do her rostering duties. This was because her replacement could not perform the job from which Ms Palmer had been excluded – AB 268. However, the payroll duty was a relatively minor part of Ms Palmer's work – AB 269, and the situation continued that Ms Palmer was not allocated any other duties, so that she was substantially under-employed.

[222] On 1 June 2009 Ms Palmer complained to Ms Wareham that she had not enough to do and was bored as a result. However, nothing changed in that regard. In July 2009 Ms Palmer was sent to the Hervey Bay office for two weeks but was not given anything meaningful to do – she was told to pack stationery and clean out the storeroom – AB 276.

[223] In November 2009 Ms Palmer was told that the report Ms Simpson had made had been faxed out to all the houses where RCOs worked and that the Department was trying to retrieve the faxed copies – AB 281. This action was never explained, but appears to have been a malicious act taken after the external enquiry into the 2009 complaints had exonerated all the managers. Ms Palmer was so upset she stopped working – AB 281. Ms Palmer did return to work after this but never went back to her substantive role – AB 282. She was offered generic roles which, in her words, were "worlds apart" from the position she was occupying before the 2009 complaints – AB 282. When she queried this she was told that it was not safe for her to resume her previous position. Essentially a stalemate had been reached – AB 282-283.

Ergonomic Supports

[224] Ms Palmer chased up the matter of her ergonomic equipment in writing in February and three times in March – AB 269. In her evidence Ms Wareham said she could see no reason why Ms Palmer should not have her ergonomic supports. She disclaimed knowing about the issue, but then admitted she saw the WIRFs, wrongly transcribed as "works" – AB 711. It was some considerable time before the supports were returned to Ms Palmer. There was really no explanation for this plainly ridiculous situation. It seemed from Ms Wareham's evidence that she did not turn her mind to Ms Palmer's situation in any real way – see eg. AB 716-717 and AB 719-720.

[225] In addition, Ms Palmer had been forbidden from taking any items from her desk to her new workstation. In March she enquired of her replacement as to the whereabouts of some documents (very important to her rostering system) she had stored in her desk, and was told they had been thrown away – AB 270. Ms Palmer was very upset by that and had to leave the office and go home. She then attempted to make an appointment with her General Practitioner and an appointment with someone from the Departmental counselling service.[169] She was unable to do either so in desperation she made an appointment with a GP she did not know. She then completed a workers compensation application which was rejected – AB 271. Ms Wareham rejected it – AB 718-719. I think it was demonstrated by cross-examination that she did so with no real interest in, or understanding of, Ms Palmer's situation.

Ms Johnson in the Workplace

[226] In about July 2009 Ms Johnson returned to the workplace having been away on maternity leave – AB 276. Ms Palmer said that that caused her to be "terrified". She

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169 The evidence was that the counselling service had been overwhelmed by RCOs who were requesting appointments at this time.

said that Ms Johnson was, "like a loaded cannon. You just don't know when she's going to go off. … She's frightening." – AB 276. She worried, "… what else is going to happen to me? What else is she going to do? You never know." – AB 277. When Ms Johnson came back to work Ms Palmer was moved again to the opposite end of the building, near a door, so that she would not be near Ms Johnson and "… for some unknown reason, Julie started using that door all the time to enter the building." – AB 278. The trial judge found that it was reasonable for Ms Palmer to conclude Ms Johnson was acting this way to upset Ms Palmer. Ms Palmer lodged a number of WIRFs about this matter. She asked that when it was raised with Ms Johnson, it be done anonymously. In fact it was not done anonymously. Ms Johnson was told that Ms Palmer had made complaints about her behaviour. The result was that Ms Johnson lodged a WIRF complaining about Ms Palmer.

Duty

[227] The trial judge concluded that no duty of care could be owed by the respondent to Ms Palmer. He followed that finding by saying that, "In case a different view should be adopted elsewhere, I should say something about whether, if there was a duty to provide support in the context of the investigation and Ms Palmer's being moved out of her ordinary rostering job pending the investigation, I consider that there was a breach of that duty." – [125] of the judgment below. The judgment below contains no consideration of whether or not on the factual circumstances proved by Ms Palmer, a duty to take reasonable care to prevent psychiatric injury to her arose, or when it arose. Once again, it is necessary to consider the factual matters as to this in some detail.

[228] My comments about the notices of appeal and contention made at [167] and [168] apply here too. That is, the factual issues as to duty were in issue on the appeal.

[229] Although the respondent was aware through 2008 that Ms Johnson's behaviour was a source of stress to Ms Palmer in the workplace, I do not think it was reasonably foreseeable before January 2009 that Ms Palmer might suffer psychiatric illness (as opposed to stress or upset) because of this continued unhappiness. However, my view is that shortly after the 2009 complaints were made a duty did arise. My reasons are similar to those given in relation to Ms Hayes. The Department understood the magnitude of the 2009 complaints. It was obvious to the Department almost immediately that an external investigation would have to be undertaken, and it must have been obvious to the Department at that point that the investigation process would take a considerable time. It was determined almost immediately by Ms Kill that Ms Palmer was to be removed from her substantive position. It must have been obvious that Ms Palmer could not be returned to her position for some significant time, pending the outcome of the investigation. The fact that Ms Palmer's role was so specialised was relevant, for it would be difficult to find suitable replacement work for her.

[230] That Ms Palmer had been so concerned during 2008 about similar matters that she had lodged written complaints and WIRFs was something within the knowledge of the Department and bore on how it might reasonably foresee that news of this large body of complaints; an investigation, and a move from her substantive position, would affect Ms Palmer. The Department can be taken to have known that Ms Johnson, a source of unhappiness to Ms Palmer throughout the majority of 2008, would remain working in the vicinity of Ms Palmer in circumstance where tensions must be considerably heightened by the fact that Ms Johnson assumed a prominent role as a complainant in the 2009 complaints. In my view, then, a duty to take reasonable care to see that

Ms Palmer did not suffer psychiatric injury arose once the size and significance of the 2009 complaints were known to the respondent – early January 2009. At that time I think it was reasonably foreseeable that if support were not offered to Ms Palmer she might be at risk of psychiatric illness, not just upset, stress and distress.

Breach

[231] As with the appeal by Ms Hayes, the notice of contention in Ms Palmer's case clearly raises the question as to whether or not there was any breach of duty so far as Ms Palmer was concerned. The trial judge made an obiter finding of breach of duty. However, for the reasons explained in relation to Ms Hayes, above [174], that finding is not sustainable.

[232] The injury pleaded by Ms Palmer was said to have occurred on 19 March 2009. This coincides with the date when she was so upset about events in the workplace she ceased work for some time, sought medical assistance and attempted to claim workers compensation benefits. As has been seen, there are matters of complaint made by Ms Palmer about her treatment in the workplace after that date: (1) being sent to Hervey Bay to perform menial work in July 2009, and (2) being subject to Ms Johnson's aggressive behaviour in July 2009. In my view, it is fair on the conduct of the case below to have regard to those two matters as being breaches even though they are not pleaded. No objection was taken to them in circumstances where at other parts of the trial objection was taken to matters on the basis that they were not pleaded as breaches.

[233] In my view, Ms Palmer proved breach. Central was Ms Palmer's removal from her substantive position without any of the explanation or support which Ms Kill regarded as necessary. Perhaps even more damaging was the humiliating circumstances which then ensued in the workplace: Ms Palmer had no substantive work to perform, or after February 2009 some substantive work, but nothing like a proper workload. Moreover, she had been replaced by someone who could not manage requirements of the position from which Ms Palmer had been removed, so that Ms Palmer was constantly assisting that new employee. There was no evidence that the Department made reasonable efforts to provide Ms Palmer with any work equivalent to that which she performed in her substantive role.

[234] Apart from written notification that the confidential counselling service was available to her, Ms Palmer received no support from management in the workplace. The emails of 12, 13 and 14 January offered no support and, to the contrary, undermined Ms Palmer's position in the workplace: they seemingly supported the RCOs; impliedly reprimanded management, and quite unreasonably and unnecessarily isolated and segregated Ms Palmer from both her workplace friends and her Union, by directing her not to discuss events with them. This lack of support was reinforced by Ms Wareham's comment to the effect that all the RCOs could not be wrong, and Ms Wareham's having met with the Union apparently to elicit more complaints from RCOs than already existed. The unreasonable and unnecessary difficulties Ms Palmer had in moving her ergonomic supports and retrieving items from her desk highlight just how unsupported she was in her workplace. So did the lack of warning of the pickets and the failure to make any sensible arrangement for Ms Palmer not to be present during the pickets in circumstances where the Department had advance notice of the pickets and warned other employees. Allowing Ms Johnson to behave the way she did in July 2009 was a breach of duty. Some arrangement ought to have been made to prevent it – either by controlling Ms Johnson or moving Ms Palmer.

Causation

[235] My comments as to causation being in issue on the appeal apply here too.

[236] The factual basis for Dr Byth's report of 3 August 2011 is substantially different from the factual breaches proved at trial. To Dr Byth Ms Palmer complained of:

(a) Being targeted by staff with Julie Johnson as the ringleader.

(b) Being upset that complaints were made against her and not being told what the allegations were at first.

(c) Being upset that she was stood aside from her position, and while still being paid, was "trying to find work to do". She thought this was devaluing.

(d) Being shattered and dumbfounded when, in April 2009, she was told what the allegations against her were, including allegations bearing on her assumed (wrongly) sexual orientation and of racial discrimination. That is she was upset by the nature and number of the allegations made against her and her team.

(e) Being upset because Ms Wareham made it clear she thought Ms Palmer was guilty and that Ms Wareham solicited more complaints from the support workers than were originally made.

(f) Being upset because of the vote of no confidence taken by the Union; press reports accusing her of bullying in the local paper, and fear for her reputation both within the small town in which she lived and within the Department state-wide where she had a senior rostering position.

(g) Being distressed when, in May 2009, her claim for WorkCover was rejected.

(h) Being upset when Julie Johnson began coming near her in the office so that she again felt targeted by her.

(i) Being upset that in November 2009 she was only given "basic administrative jobs" and her request to return to her usual work was refused, even though the allegations against her had been dismissed.

[237] It seems the last matter in this list was particularly significant for Ms Palmer for she eventually left work on workers compensation in April 2010. She said that she thought that had she been allowed to return to her original job her psychiatric issues would not have been so severe – AB 283. While one can understand her position in this regard – having endured everything up to the point where the claims against her were dismissed, she found that she was still not able to return to her substantive position – it was not pleaded as a breach and is considerably outside the timeframe of the alleged injury in the pleading and was not advanced as something which went to breach in evidence. I do not think it is fair to regard it as a breach having regard to the conduct of the case.

[238] Examination by the trial judge on Day 5 of the trial reinforced that aspects of the investigation (non-justiciable) contributed significantly to Ms Palmer's psychiatric condition: just having the allegations made against her was stressful; being told the allegations were serious, but not being given the details of them, and the delay between being notified of the allegations and the substantive part of the external investigation – AB 350. Dr Byth told the trial judge that this would have been very distressing to Ms Palmer, causing anxiety, poor sleep and agitation – AB 350. Dr Byth told the trial judge that he thought that contributed to her condition and its severity – AB 350 – and added to her depression and anxiety escalating.

[239] Dr Byth told the trial judge that he thought having been removed from the serious and important work of rostering to undertake menial tasks added to Ms Palmer's "decompensation" – AB 351. He saw that this affected her self-esteem and her self-image and that this contributed to the severity of her condition – AB 351.

[240] Dr Byth confirmed that the perceived pre-judgment by Ms Wareham contributed to Ms Palmer's condition – AB 352. So did the arrangement which allowed Ms Johnson to deliberately walk past Ms Palmer – AB 352.

[241] It can be seen that matters at paragraph [236](a), (b), and (d) augmented by the evidence summarised at [238], are matters which related to either the investigation or the fact of the complaints. These matters could not be relied upon as breaches of the respondent's duty. Further, for reasons explained above, the matter at [236](i) cannot be regarded as a breach on the pleaded case. The matter at [236](g) was not part of the pleaded case. And the matters at [236](f) were not matters which could be regarded as breaches of duty by the respondent.

[242] The trial judge said at [111] of the judgment below, "For practical purposes the evidence of causation depends on the evidence of Dr Byth. I accept his evidence, and accept that the matters referred to by him caused Ms Palmer's psychiatric condition." He did not advert to the very significant difference between what was assumed by Dr Byth and what could properly be regarded as breaches proved by Ms Palmer. His finding as to causation cannot stand.

[243] I do not think it is possible to say that the matters which I think amounted to a breach of the respondent's duty caused the appellant's psychiatric injury. As noted in relation to Ms Hayes' case, there was simply no attempt to put the case established by Ms Palmer to Dr Byth. Further, I think it clear from Dr Byth's long answer at ll 5-25, AB 353 that he could not say that Ms Palmer would not have suffered psychiatric injury even had she received support in the workplace. When asked directly about this he thought that, had she received support, time off and earlier treatment for her psychiatric condition, then "all those things could've probably curtailed her anxiety and depression building up so severely and, in the end, affecting her confidence so much" (my underlining). I do not think the evidence allows a finding even that the matters proved as breaches of duty were a substantial cause of the appellant's suffering psychiatric injury.

HARRIS

[244] Ms Harris had lived in Maryborough all her life. She began working at Disability Services Queensland in 1995 as an RCO. From the middle of 2008 she had worked as a team leader and still did so at the time of trial. That is, she held the same position as Ms Johnson. The job of a team leader was to supervise the day-to-day activities of several RCOs.

[245] Ms Harris sat close to Ms Johnson at the Maryborough office. She got on well with her until Ms Johnson put in a complaint that the workload of all the team leaders was too high and asked Ms Harris to support her in this. Ms Harris did not support her. After this Ms Johnson was rude, domineering and overbearing to Ms Harris – AB 313. Ms Harris complained to Mr Costello that Ms Johnson was hard to work with; she was angry and over-powering; did not want to get on with anyone, and would not follow procedures and practices. Mr Costello offered reassurance but the situation did not change. To Ms Harris' observations Mr Costello did nothing to address Ms Johnson's behaviour – AB 314. In fact, Ms Harris believed that Ms Johnson's behaviour got worse – AB 314.

2008 Complaint

[246] In the middle of 2008 Ms Harris was interviewed by Ms Simpson, although Ms Harris was not aware why. She found out later in the year when she noticed Ms Hayes crying at work, and Ms Hayes told her that she had been found guilty by Ms Simpson. Ms Harris found out later that the decision of Ms Simpson had been overturned – AB 313.

[247] Ms Harris had the view that Ms Johnson was "up to something" at the end of 2008 for she would spend a lot of time out of the office at the houses where the RCOs worked and would spend a lot of time in the office typing on her laptop; she would not let people see what she was doing – AB 314. Ms Harris found a document at work one weekend which seemed to support her suppositions – AB 315. She told Mr Costello about it. He instructed her to fax it to head office and she heard no more about it.

2009 Complaints

[248] Ms Harris was on leave between 12 and 26 January 2009 – AB 316. She heard second-hand of the media attention around 16 January. Ms Harris spoke to Ms Palmer and Ms Greenhalgh about what went on during the picketing of the Maryborough office. She also saw pictures in the newspapers – AB 324. She telephoned Mr Costello who told her that it did not involve her. Ms Wareham gave her the same assurance – AB 316.

[249] After Ms Harris returned from holidays she heard from another team leader that one of the RCOs had said that, "now they're going to get Edith" – AB 316. Ms Harris reported this to Ms Wareham, who said that she had not seen Ms Harris' name anywhere, and that she should not worry. There were numerous other similar exchanges between Ms Harris and Ms Wareham. Ms Wareham tried to reassure Ms Harris by telling her that her information was only rumour. In March of 2009, at a time before she had been formally told there were complaints against her, but when she suspected there were, Ms Harris took a week of stress leave because she could not cope with what was going on. She filed a WIRF in relation to this – AB 327.

[250] In fact Ms Harris was the subject of complaint. From the evidence in the case it appears that Ms Wareham made no effort to make enquiries about the truth of the matter in circumstances where she had not read all the complaints, although they would have been available to her had she asked – AB 725-726. It was admitted on the pleadings that Ms Wareham knew of at least the main complaints against Ms Harris from 19 January 2009, although this admission was not explored in evidence. Accepting the version Ms Wareham gave in evidence, not checking whether Ms Harris was the subject of complaints was a fairly remarkable oversight in circumstances where Ms Wareham justified the removal of other staff (about whom complaint had been made) from their positions on the basis that it was not safe for them to continue to work with the RCOs. Further, Ms Harris was not asked to move from her job after April 2009 when Ms Wareham discovered that she was the subject of complaints: she continued to work supervising people who had made allegations against her.

[251] In April Ms Wareham told Ms Harris that she was the subject of complaint and that there was an investigation pending. Ms Harris was given a letter dated 15 April 2009 from the Misconduct Prevention Unit within Disability Services Queensland. That letter alleged that Ms Harris had falsified or destroyed documents; acted in a racially discriminatory way; bullied and harassed staff and mismanaged her work. She was

invited to attend an interview on 29 April 2009. It advised that the Department's internal counselling service was available to her. Ms Harris was upset upon receipt of the letter, particularly about the claim of racial discrimination because her husband and children are Aborigines. She raised some question as to this point but received no substantive reply – AB 319.

[252] Ms Harris thought that after April 2009 Ms Wareham stopped being supportive of her and friendly to her in the workplace – AB 330. Very similar evidence was given by Ms Cuskelly, who, like Ms Harris, was not discovered by Ms Wareham to be the subject of complaint until April – AB 401. Ms Harris heard, second-hand, that Ms Wareham had said something along the lines of "all those allegations can't be wrong" – AB 330.

[253] In April 2009 Ms Harris spoke to Ms Wareham about complaints or problems she was experiencing in the workplace. "A lot of it" was about the way Ms Johnson was behaving in the workplace – AB 320. Ms Harris said it upset her very much to have this conversation with Ms Wareham – AB 322. Ms Harris said that as she told Ms Wareham, Ms Wareham typed up a note of the conversation. Ms Wareham then came to Ms Harris and told her that she had lost the document which she typed and asked Ms Harris to type a new document, which she did. That was dated 29 April 2009. The document is three pages long; one-and-a-half pages relate to Ms Johnson. It records that Ms Harris had been to see Brendan Costello "many times over the last 6-8 months". Ms Harris described Ms Johnson as making her work "terrible". She recorded her perception that Mr Costello was favouring Ms Johnson over everybody else.

[254] In evidence-in-chief Ms Harris agreed that "all of this" – the history up until giving her statement in May 2009 – had made her very upset. She was then asked to say what it was "that had upset you". She said it was the fact of the complaints against her:

> "That people just outright lied and said things about me that weren't true, and I'm not that type of a person. And it said that – in the report that we got back that people just outright lied and the ferocity of the way they spoke and all that stuff, and they were just trying to discredit my history as a person and as a public servant." – AB 325.

[255] Ms Harris said that during the time she was under investigation she thought that one outcome might be that she would lose her job – AB 326. She was upset because nobody told her what the complaint was about, and nobody spoke to her with the aim of resolving the complaint – AB 326. She felt that Ms Wareham did not support her or tell her truthfully what was happening.

[256] In June 2009 Ms Harris took time off work and claimed on WorkCover for stress. The period of her time on WorkCover was between June and October 2009. She had trouble going to the houses where the RCOs worked when she returned to work – she found it too difficult to see the people who had made allegations against her – AB 328. In relation to that issue Ms Harris described her employers as supportive of her – AB 328.

[257] Ms Harris says that her workplace offered her something called "PsyCare", but when she went to one of their meetings she found several RCOs there and the aim of the meeting seemed to her to be to pacify the RCOs and not offer anything to her. Nothing substantive seems to have occurred with "PsyCare" until 23 October 2009 – AB 2425. Further, Ms Stokes, who provided this care, said that the counselling was not to assist Ms Harris personally, but to assist in achieving a functional workplace. It is also clear that Ms Stokes did not consider that her intervention in the workplace was successful.

[258] Ms Harris saw a GP because of work-related stress or distress on 28 January 2009. The GP noted that she was "very emotional and upset" – AB 375. She went back to the GP on 16 March 2009 and 14 May 2009 complaining of the same things. There is no evidence that Ms Harris told her employer of these appointments.

Duty

[259] The trial judge took the view that *Paige* prevented a duty of care arising to support Ms Harris in the workplace – [153] of the judgment below. He then seems to have made a distinction about Ms Harris' case because the duty was alleged to have arisen in circumstances where the respondent, by Ms Wareham, had refused to tell Ms Harris about the complaints made against her. The trial judge considered three of the circumstances which were pleaded as breaches. He concluded that no duty arose to take reasonable care to prevent psychiatric illness because it was not reasonably foreseeable that these events would cause psychiatric injury, only stress – [154]-[156] of the judgment below.

[260] There is no basis to distinguish the application of the principles in *Paige* in Ms Harris' case: the principles apply to the facts in her case as they do to the facts in the other three cases. Further, factual questions as to a duty arising must be considered separately from questions as to whether the duty has been breached.

[261] The notice of appeal contained the paragraph which is extracted at [167] above. The notice of contention asserted that the trial judge was correct to find that no relevant duty arose because there was no foreseeable risk of injury, or at least not one obliging the respondent to take steps to guard against it. It is necessary for this Court to revisit the factual issues as to duty.

[262] I cannot see that there is any factual circumstance which meant that the respondent owed Ms Harris a duty before the 2009 complaints were made. When the 2009 complaints were made the respondent knew, or ought to have known, that complaints were made against Ms Harris. The respondent ought to have turned its mind to Ms Harris' substantive position. On the basis of the evidence in the other three cases, it seems to me that the respondent ought to have removed Ms Harris from her substantive position from January 2009. This was not explored at trial, but in circumstances where managers, such as Ms Hayes, Ms Greenhalgh and Ms Palmer, were to be removed from their positions, there was a very strong case that Ms Harris also ought to have been removed from her position. As noted, Ms Wareham justified the removal of other managers on safety grounds. Safety concerns were more significant in Ms Harris' case for she worked directly with the RCOs who had made complaints against her, whereas the other three ladies either worked indirectly with RCOs or spent much less of their time directly working with RCOs than Ms Harris did. On all the evidence, I accept that it was sensible to be concerned about the physical safety of the managers were they still to work with the RCOs. It was also the case, in my view, that leaving managers to work with antagonistic RCOs was foreseeably dangerous to their psychiatric health.

[263] As I have already outlined in Ms Hayes' case, the respondent ought to have appreciated from the beginning of January that the 2009 complaints were of such a magnitude that several months would pass before any investigation could be finalised, and should have understood that the complaints would be prosecuted very aggressively by the Union. The Department knew that the complaints were similar to that made

in 2008 in that Ms Johnson was involved as a moving force and that the nature of the complaints – bullying and harassment – were similar. It knew how upset Ms Hayes and Ms Greenhalgh had been in 2008 when dealing with Ms Johnson's complaints against them, even though Ms Harris herself had had little contentious history with Ms Johnson. The Department knew that Ms Harris sat near to Ms Johnson in the office and worked every day with the RCOs who were prosecuting their complaints, to use Ms Harris' term, with "ferocity". I think in these circumstances, it was reasonably foreseeable to an employer in the position of the respondent that, if it did not support Ms Harris in the workplace, she might suffer psychiatric harm.

Breach

[264] The issue of breach was in contention on the appeal – see Ground 2 of the notice of contention.

[265] The statement of claim in Ms Harris' case asserts that injury arose on 18 January 2009, notwithstanding that Ms Harris was on holiday at that time and that the matters pleaded as breach by and large post-date 18 January 2009. Having regard to the way the case was run below, it appears that Ms Harris' case really was that she suffered injury in or about June 2009 when she left work on WorkCover. I think it is fair to regard that case as having been accepted by the conduct of the respondent during the trial. On the other hand, in evidence Ms Harris made complaint about incidents between November 2009 and November 2010 – AB 332. These incidents were so far removed from those in the pleading, both in terms of time and substance, that I do not think it is appropriate to regard them as part of the claim made, notwithstanding that no objection was taken to this evidence being led. No objection being taken is consistent with counsel for the defendant regarding the matters as going to quantum only.

[266] The trial judge made an obiter finding of breach of duty. However, for the reasons explained in Hayes, above [174], that finding is not sustainable.

[267] I think that the respondent breached its duty to Ms Harris. The respondent took no steps to identify that she was the subject of complaints by the RCOs, notwithstanding she brought her fears to Ms Wareham's attention on numerous occasions. The decision not to tell Ms Harris that a complaint had been made against her was not something that was done deliberately as a strategic part of the investigation, or for some other reason. It was simply carelessness on the part of the respondent. For all the time she was under investigation it left her in the difficult position of having to work directly every day with the RCOs. She was so stressed that she had to take a week off work because Ms Wareham would not take her numerous requests about being the subject of complaint seriously. Once Ms Wareham did discover that Ms Harris was the subject of complaints she did not remove her from her position so that she could be protected from working with the RCOs every day. Nor was any other support offered to her, except the written information about the Department's own counselling service.

[268] As with Ms Palmer, what took place in the office was in some ways the opposite of supportive. Ms Wareham made comments which were reported to Ms Harris which indicated she had pre-judged her as being blameworthy, and her change in demeanour to Ms Harris in the office from April 2009 reflected that same attitude. Despite Ms Harris obviously being upset and having great difficulty with Ms Johnson in the workplace, no attempts were made to address this situation by moving either Ms Harris or Ms Johnson or somehow insulating Ms Harris from Ms Johnson's conduct in the workplace.

Causation

[269] As explained causation was in issue on the appeal. In relation to this the trial judge said, "Again for practical purposes the evidence of causation depends on the evidence of Dr Byth. I accept his evidence, and accept that the matters referred to by him caused Ms Harris' psychiatric condition" – [150]. He went on to say:

> "The effect of his evidence is that there were a number of matters referred to in paragraph 5 which together, and together with some other things, caused the injury: the allegations by the various people against Ms Harris (w-y), the fact that Ms Steele-Wareham had initially told Ms Harris that there were no complaints against her, which was not true (q-s), and the effects of the picket (cc). Again the effect of Dr Byth's evidence was that it was the combined effect of all the matters which resulted in her developing the psychiatric condition she came to develop so that each of them was a cause of that condition; the analysis is the same as with Ms Palmer." – [150] of the judgment below.

[270] Dr Byth's main report was dated 9 April 2011. The substance of the report is introduced by the sentence, "Edith Harris complained of adverse effects from stress in her work as team leader in 2009-2010." Immediately one is alert to the fact that Dr Byth was basing his report on a wider factual basis than could be proved as breaches of the respondent's duty.

[271] To Dr Byth Ms Harris complained of matters relating to Ms Johnson from the end of 2008 – she was "having difficulty coping with Julie". She was also having trouble with another employee – FB. There was no evidence given as to this and it did not form part of Ms Harris' claim against the respondent. It is clear that this other employee did significantly affect Ms Harris: he made a statement against her as part of the 2009 complaints. She reported to Dr Byth that she was thinking a lot about both Ms Johnson and FB: "all the time" – paragraph 3.5 of his report, and see AB 776: Ms Harris would wake up thinking of Ms Johnson and FB. By the time Ms Harris saw Dr Byth she reported ongoing difficulties because FB was still working in the same building as her and was intimidating towards her and trying to scare her to the point where she had been told (presumably by the respondent) that she did not have to work in the same building as FB.

[272] Further it is clear, as it was clear in her evidence, that one of the most significant things to Ms Harris was the devastation she felt in April 2009 when she was told of the details of the complaints against her, including the complaint of racial discrimination (for understandable reasons). These complaints on Ms Harris' part were outside the scope of the case run against the respondent. Further, cross-examination on Day 10 of the trial by counsel for the respondent elicited that a very upsetting thing for Ms Harris was being investigated at all and being questioned at the investigation. She said she was "always going to be angry" about that and was not able to forgive the complainants for making a complaint against her – AB 777. This accords with Ms Harris' evidence-in-chief that it was the fact of the investigation and its conduct which upset her very much – AB 220, AB 223 and AB 226.

[273] On Day 5 of the trial, the trial judge elicited from Dr Byth that the perceived lack of natural justice in the investigation – long delay before the details of the complaints were given – contributed to the severity of Ms Harris' condition and Dr Byth gave considerable evidence about how the fact that the complaints were made, their

concerted nature and the seeming conspiracy of RCOs to make complaints was something which Ms Harris found sinister and threatening and caused her to feel anxious, depressed and suspicious – AB 355.

[274] Dr Byth thought it was very difficult for Ms Harris to keep working with the RCOs after she found out, in April 2009, what complaints they had made against her, especially in circumstances where there was no communication to her as to how long that situation would endure – AB 355.

[275] The trial judge asked whether or not support in the workplace would have made a difference to Ms Harris. The question was a very general one, for support was nowhere defined, and there was no timeframe specified. Dr Byth's answer was that had the approach of the respondent been different (he does not say how) Ms Harris "probably would have felt more secure and not – not developed so much anxiety and depression" – AB 358. This is a long way short of an opinion that the lack of support proved to be in breach of duty, caused or significantly contributed to the illness which Ms Harris suffered.

[276] As to causation Dr Byth said in his report:

> "Following a series of stressful events in her work in 2009-2010, Edith Harris has been suffering from adjustment disorder with anxiety and depressed mood.
>
> This psychiatric condition was caused by her difficulty coping with allegations of harassment, falsifying documents and racial discrimination at work, and with a difficulty coping with a subsequent investigation. She thought that the allegations were very unfair and she felt hurt that they were made by some of her previous friends at work. She then felt very anxious about returning to work, and about being upset by working alongside staff who had complained against her. She was also sensitive to the reminders of being under investigation, and she had difficulty sitting through meetings at work."

[277] There was no attempt during evidence at the trial to address with Dr Byth whether or not the matters which were proved as breaches, and which were justiciable between these parties, were sufficient to have caused, or have significantly contributed to, Ms Harris' psychiatric condition. There must be real questions as to this, having regard to: (1) her history to Dr Byth about FB, and (2) the emphasis to Dr Byth, and also in her evidence, that the matters which upset her most of all were matters which were not justiciable – the making of the complaints and the subsequent investigation. Dr Byth's evidence as to the effect of more support (whatever he understood by that) in the workplace does not inspire confidence that, had support been provided to Ms Harris in the workplace, she would not have suffered the injury she suffered. I cannot see that Ms Harris proved that the respondent's breaches of duty caused her illness.

GREENHALGH

[278] In 1994 Ms Greenhalgh began work in the Department as an RCO – AB 135. Over the years, she worked as a Resource Officer, an Acting Unit Manager, an Acting Service Manager (in 2008) and finally, in 2009 and currently, as a Specialist Response Officer – AB 135.

2008 Complaint

[279] In the middle of 2008 Ms Greenhalgh was aware of the issues between Ms Johnson and Ms Hayes – AB 136-137. Ms Greenhalgh had been told of Ms Simpson's telling Ms Hayes that the 2008 complaint was upheld, and knew how upset Ms Hayes was that day. In September 2008 Mr Costello asked Ms Greenhalgh to be the line manager for Ms Johnson (replacing Ms Hayes). Ms Greenhalgh told Mr Costello that she was concerned because she felt that Ms Johnson was unpleasant and difficult to work with, and she was worried that Ms Johnson might make allegations against her – AB 138-139. They decided that Ms Greenhalgh, Mr Costello and Ms Johnson would have weekly meetings to discuss work-related issues and manage Ms Johnson – AB 138. Ms Greenhalgh asked Mr Costello to be present at these meetings because she was concerned that Ms Johnson might make false allegations against her.

[280] At the first of these meetings, after Mr Costello left, Ms Johnson put her hand on Ms Greenhalgh's shoulder and said, "don't worry Pam, I'm not after you" – AB 139. Ms Greenhalgh was alarmed by these comments – AB 202-203. Having regard to the dispute between Ms Johnson and Ms Hayes, she thought Ms Johnson was a dangerous person. Ms Greenhalgh reported the incident to Mr Costello that afternoon. There is no evidence to suggest that Mr Costello did anything specific in response to her complaint; the weekly reviews of Ms Johnson continued as planned. Ms Greenhalgh also spoke to the Workplace Health and Safety officer (Ms Cuskelly) about the incident, and had a telephone conversation with the confidential Departmental counselling service. On 8 October 2008, around two weeks after the incident, she saw a counsellor from that service – AB 140 and AB 206. There was no evidence that the respondent knew about this contact with the counselling service.

[281] In September or October 2008, Ms Johnson made a complaint against Ms Greenhalgh to the AWU. Ms Johnson was pregnant and there were potentially issues involving her safety, and the safety of other RCOs, because of the behaviour of some of the residents. Ms Johnson had kept the pregnancy secret, at least from management. Ms Greenhalgh quite properly reported the RCOs' concerns about the safety of having a pregnant woman in their workplace. Ms Johnson complained about this. This allegation was not pleaded to be a breach of duty, and I cannot see how it could have been. Nonetheless, objection was taken to the evidence if it amounted to anything more than background – AB 142.

[282] Ms Greenhalgh attended her general practitioner on 18 September 2008 regarding stress at work. She had a history of stress and anxiety prior to this – AB 205-206. There is no evidence that either of these things were known to her employer. She spoke to a counsellor from the Departmental service on 22 September 2008. Again there is no evidence her employer knew this.

2009 Complaints

[283] Ms Greenhalgh was at the meeting which Ms Hayes put at 5 January 2009. Ms Greenhalgh was told there were allegations of workplace harassment, bullying, racial vilification and maladministration. She was told the AWU was involved. Ms Greenhalgh was not told who had made the complaints – AB 145. Ms Wareham told those present at the meeting that they were not allowed to talk to each other about the dispute. She received the email from Ms Wareham to the same effect – AB 211.

[284] After the meeting, Ms Greenhalgh had a conversation with Mr Costello about her continuing as an Acting Service Manager – AB 146. She did not express any reservations about remaining in that position, and it was her understanding that Mr Costello conveyed those comments to Ms Wareham – AB 146. Later that day Ms Greenhalgh confirmed what she said in an email to Mr Costello – AB 1026.

[285] Ms Greenhalgh was due to commence a new position on 2 February 2009. However, on 15 January 2009, a manager rang her to say that she was to commence her position two weeks early, on 19 January 2009 – AB 174. She asked why she was being moved earlier, and it became apparent that the move was related to the dispute with the RCOs – AB 148. She interpreted this as a victory to the RCOs and she received some confirmation of this from the manager when she voiced this view – AB 148.

[286] Another complaint was made against Ms Greenhalgh when she was filling in for some RCOs on 14 January 2009, so as to allow those officers to attend the Industrial Relations Commission –AB 156-157. It was alleged that she had written down the names of the officers who had attended the meeting, with a view to making deductions from their pay – AB 156-157. A manager spoke to Ms Greenhalgh about the incident, but he did not disclose who had made the complaint. She was not aware whether any further action was taken – AB 157. Again, this matter was not pleaded and objection was raised to it insofar as it was anything more than background.

Picket

[287] Ms Greenhalgh was in the Maryborough office during the picket. She said picketing took place over three days – 19, 20 and 21 January 2009 – AB 149. She reported feeling "harassed, intimidated and bullied" – AB 150. The picketers slammed their placards on the windows. One of the picketers entered the foyer of the building. Ms Greenhalgh did not see this, but was told by someone else that it had occurred – AB 150. She was working in the back area of the building at the time of the protests. Access to this area was restricted by a swipe card. The RCOs did not have swipe card access to the building – AB 150. On at least one occasion, the protestors yelled at Ms Greenhalgh while she was walking across the street near the Maryborough office – AB 151.

[288] Ms Wareham sent an email to a number of staff members, including Ms Greenhalgh, to warn them of the protests. The email was sent on the morning of 20 January 2009 ie, after the first day of protests. Ms Greenhalgh did not receive a copy of the email of 19 January 2009, as Ms Palmer did, and was not warned prior to 19 January, as Ms Cuskelly was. No arrangements were made for her to stay away from the office during the picket.

[289] On 20 January 2009, Ms Greenhalgh submitted a WIRF saying that she was "suffering headaches from stress, feeling harassed, intimidated and bullied by members regarding the industrial issues and allegations made". Another WIRF was sent the next day in similar terms as the first one: "headache due to stress, arrived to work at 10.00 am due to fear of industrial issues, and lack of support." Ms Greenhalgh sent the WIRFs to Ms Wareham – AB 151.

[290] Around 21 January 2009, Ms Greenhalgh had a meeting with Ms Wareham in her office. Ms Greenhalgh thought the purpose of the meeting was to discuss the WIRF which she had submitted earlier that day. Instead Ms Wareham questioned Ms Greenhalgh about the industrial dispute. According to Ms Greenhalgh, Ms Wareham said: "60-odd RCOs couldn't be wrong" – AB 154. This was denied by Ms Wareham. The trial

judge found that the statement was made – [204] of the judgment below. Ms Greenhalgh felt that Ms Wareham had prematurely formed a view about the dispute by concluding that Ms Greenhalgh, along with the other managers against whom allegations were made, were guilty of the alleged misconduct. The trial judge also found that on two occasions Ms Wareham told Ms Greenhalgh to "suck it up" when she complained – [211] of the judgment below.

[291] At the meeting Ms Wareham also questioned Ms Greenhalgh about a comment she made at a team planning day. Ms Greenhalgh recounted what she said at the time – AB 153. She was told that another employee complained that the comments constituted racial vilification. Ms Greenhalgh was not informed who made the allegations against her, and why her comments might be considered to be inappropriate. There was no evidence at the trial that Ms Greenhalgh had said anything improper. In fact, counsel cross-examining Ms Greenhalgh on this topic made it clear he did not suggest she had done anything wrong – AB 216. Even though the allegations had not been proved, Ms Greenhalgh was told to attend cultural awareness training and she was directed not to contact clients – AB 153. Ms Greenhalgh thought this very unfair – AB 153. Indeed, it seems to have been. Ms Wareham admitted that she did not tell Ms Greenhalgh anything along the lines that she was "presumed innocent" until the investigation was complete, or in any way try to explain or justify why Ms Greenhalgh was being sent to training before investigation into the allegation – AB 707-708. Indeed, Ms Wareham did not seem concerned to think about the effect of her direction at all – she said she was told by the Director-General to have Ms Greenhalgh engage in the training and she did so. Ms Wareham understood that Ms Greenhalgh's undergoing this training was part of an agreement the Director-General made with the AWU – AB 708.[170] There was no evidence Ms Greenhalgh knew anything about that.

[292] During the course of the meeting, Ms Wareham did not speak to Ms Greenhalgh about the picketing – AB 154 and AB 158. Ms Greenhalgh never received any response to her WIRFs – AB 154. Ms Greenhalgh said she felt "no support" from the management team in the building at the time – AB 151. She thought that Ms Wareham had pre-judged matters and offered her no help – AB 154 and AB 188.

[293] On 9 March 2009 Ms Wareham sent an email to Ms Greenhalgh telling her that an independent investigation would take place – AB 183. Ms Greenhalgh was away on training and did not get the email for a week. She was "quite upset" that Ms Wareham had not rung her up to tell her about the investigation – AB 183.

[294] In April 2009 Ms Greenhalgh had a meeting with a manager who supervised her new position. He informed her that on the Director-General's instructions, she was not to have any contact with anyone within her old workplace team; ie, not RCOs and not managers. It seems her evidence was that she was told she was meant to have ceased contact with these people earlier, and there was an issue raised by her manager as to why she was still contacting them. She had been unaware of any earlier directive. She was "very distraught", and left the meeting soon after – AB 187. She felt, correctly,[171] that she could not perform some of the requirements of her new role without contacting some staff from her old section. Ms Greenhalgh was so upset she went home from work. She received an apology from the relevant manager.

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170 It might be fairer to regard her word "agreement" as meaning "arrangement" in light of subsequent debate about it.

171 AB 710.

[295] On one other day Ms Greenhalgh had to leave work because she was so upset about what she saw as Ms Wareham's failure to accord her a hearing on the allegations made by the RCOs – AB 188. Indeed, it is clear that one thing which very much upset and distressed Ms Greenhalgh was that she felt she had been denied natural justice by Ms Wareham. She felt that if she had been allowed to give a version of events at the time the allegations were first made, much of the subsequent investigation would have been unnecessary – AB 224. That is, some significant amount of her distress was caused by the way the Department chose to investigate the 2009 complaints, and was not justiciable.

Duty

[296] The trial judge found that *Paige* applied to prevent a duty arising in this case – [203] of the judgment below – but then continued to say, in relation to three specific allegations of breach, that he did not think that, even though those breaches had occurred, they cast a duty upon the defendant. Further, at [205]-[215] of the judgment below the trial judge examined matters which were particularised as breaches in further and better particulars of the statement of claim. He said that even though he found the conduct occurred, he did not think it was reasonably foreseeable on the part of the respondent that Ms Greenhalgh would suffer psychiatric injury. As explained, I think that the pleading of these various matters was to be interpreted as a pleading of breach rather than matters which went to duty. The appellants in this Court relied upon these statements by the trial judge as being incorrect factual determinations as to duty – see, for example, paragraphs 24 and 30 of the amended outline of argument. As I hope will be clear, these arguments cannot succeed: the matters were not pleaded as going to duty, but as particulars of breach.

[297] The notice of appeal contained a paragraph in the same terms as that set out at [167]. The notice of contention was to the effect that no duty to take reasonable care to avoid psychiatric harm arose because that risk was not foreseeable. That is, the existence of a duty was in issue on appeal.

[298] It was pleaded that Ms Greenhalgh suffered injury in May 2010. It is not apparent from the pleading why that date was chosen. Nor is it apparent to me from the evidence. I think the pleaded date must be an error. The breaches pleaded are in January 2009. Ms Greenhalgh's being sent to her new position early (January), and her being restricted in her contact with administrative staff from her old section (April) are not mentioned in the statement of claim or particulars, but I think that from the conduct of the case it is appropriate to regard this evidence as part of the appellant's case on breach. It is impossible to be more precise about when the injury is alleged to have occurred, or when the duty is alleged to have arisen.

[299] I cannot see that anything which occurred before early January 2009 could support a duty of care arising to prevent psychiatric harm. Ms Greenhalgh had an unhappy working relationship with Ms Johnson and certainly by September or October of 2008 the Department was aware that Ms Johnson had created significant problems for Ms Hayes, although it did not know and in my view could not reasonably foresee that this amounted to anything more than stress on the part of Ms Hayes. The Department did not know of Ms Greenhalgh's prior medical history regarding stress and anxiety or that Ms Greenhalgh had consulted her general practitioner and the confidential counselling service.

[300] At the beginning of January 2009 the respondent knew that Ms Greenhalgh was one of the managers about whom a very large number of complaints had been made and

that the complaints were being vigorously and publicly pursued with Union support. It had decided that there would be an investigation into the complaints and must have anticipated that matters would not be resolved for some significant time. Ms Greenhalgh was almost due to be moved to a position which she had sought and obtained. To move her to it early was a much less disruptive solution than would be necessary for Ms Palmer and Ms Hayes. Her new job had the advantage (so far as the dispute and investigation were concerned) that she did not need to deal with the RCOs – AB 225. The respondent could have foreseen stress to Ms Greenhalgh if she had to endure the pickets. It knew from the WIRFs that Ms Greenhalgh was in fact stressed by them. It was foreseeable that if Ms Greenhalgh was restricted in her new role that would be frustrating and stressful. The respondent knew that Ms Greenhalgh took two days off work because of stress.

[301] It is difficult to see that in all the circumstances it was reasonably foreseeable that Ms Greenhalgh would suffer psychiatric illness, rather than just unhappiness, a sense of injustice and stress in the workplace if support were not provided to her. My view is that no such duty arose and her appeal must be dismissed. I think the significant distinction between her case and the cases of Ms Hayes and Ms Palmer is that she did not lose her substantive position while the investigation was carried out. In fact she was moved to a new role which she had sought and was thus somewhat insulated from the workplace conflict. In that respect her case also contrasts with that of Ms Harris who, because she was not moved, spent a considerable time working in stressful circumstances with those who had lodged serious complaints against her.

CLAIMS IN CONTRACT

[302] It is necessary to deal with one further discrete point raised on appeal. The statements of claim each pleaded that:

> "At all material times it was an implied term of the contract of employment between the plaintiff and the defendant, and/or the defendant owed the plaintiff a duty to:
>
> (a) provide and maintain a safe workplace;
>
> (b) take all reasonable precautions for the safety of the plaintiff whilst she was engaged in employment;
>
> (c) not expose the plaintiff to any risk of damage or injury of which it knew or ought to have known;
>
> (d) take all reasonable precautions to ensure the plaintiff was not subjected to abuse within the workplace."

[303] Part of the "Particulars of Negligence and Breach of Contract" in each case included paragraphs to the effect that the respondent:

> "11. Failed to comply with the Risk Management Code of Practice 2007;
>
> 12. Failed to comply with the Prevention of Workplace Harassment code of Practice 2004;
>
> 13. Failed to comply with DSQ's policies and procedures, in particular their policy regarding zero tolerance for workplace bullying and harassment;
>
> …"

[304] There was no pleading that these codes and the policy formed part of the contract of employment between the appellants and the respondent. The pleading was that the contract contained an implied term to take reasonable precautions for the employees' safety. It was in identical terms to the tortious duty. No other contractual terms were identified. It is apparent from the defences that the statements of claim were not interpreted in this way. Particulars were given of these allegations in a separate document in each case, and there was no indication that they were relied upon as terms of the employment contracts. Evidence about the codes was relatively contentious – see AB 57 ff – but in argument it was never suggested that the various codes were terms of the employment contracts. Trial counsel for the appellants seemed to rely upon the codes as relevant to breach – that is a measure of reasonable conduct – AB 69 ff, AB 168 and AB 179 ff.

[305] During argument about the codes the trial judge suggested that the *Public Sector Ethics Act* 1994 (Qld) might explain the nature and purpose of them. That Act provides that various codes and standards which have been officially approved must be complied with by public service employees. It provides for disciplinary sanctions for behaviour in breach of the codes. There is no authority directly on the *Public Sector Ethics Act* of which I am aware, or to which the appellants referred the Court. Generally, however, questions of whether or not civil causes of action arise as a result of statutory specifications are well known.[172] It was not pleaded that there was any statutory cause of action arising in the present case. Nor was it pleaded that the statute was the basis of any term – express or implied – in the employment contract.

[306] Without arguing the point in any detailed way at all, the appellants contended at paragraph 20 of the amended outline of argument in this Court, that the documents formed part of the contract of employment by virtue of the *Public Sector Ethics Act*. I do not consider that argument open on appeal when it was never raised either on the pleadings. It was raised in addresses and objection was taken that it was not pleaded.[173] The foundation for such an argument, that the codes were approved under the Act, was not laid at trial. There was no attempt to prove what the terms of the contracts of employment were. I do not see that this point is raised in the notices of appeal. There is authority in Western Australia close to the point which is against the argument the appellants wish to make.[174]

Disposition

[307] In my view, all four appeals must be dismissed. It seems that the appellants ought pay the respondent's costs.

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172 *O'Brien v TF Woollam & Son Pty Ltd* [2001] QSC 217 [7] ff and the authorities cited there.

173 Page 24 ll 40-45 of the transcript of 14 August 2014.

174 *Director General Department of Justice v Civil Service Association of Western Australia Inc* [2005] WASCA 244 [145].