

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 14/20  
**Applicant:** Sarah Jane Hicks  
**Respondent:** Presbyterian Aged Care  
**Date of Determination:** 11 May 2020  
**Citation:** [2020] NSWCC 147

The Commission determines:

1. The applicant does not suffer from a primary psychological injury arising out of or in the course of her employment with the respondent from the deemed date of injury 14 October 2019.
2. Award for the respondent in respect to the claim for lump sum compensation brought in these proceedings.

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

Josephine Bamber  
**Senior Arbitrator**

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

S Naiker

**Sarojini Naiker**  
**Senior Dispute Services Officer**  
As delegate of the Registrar



## STATEMENT OF REASONS

### BACKGROUND

1. Ms Sarah Hicks commenced employment as a care support worker with the respondent, Presbyterian Aged Care, in May 2017. This involved her attending at the homes of elderly people to assist them with various tasks. Over a period of time, from driving her manual motor vehicle in the course of her employment, she sustained an injury to her left foot. She reported this to her employer on 12 September 2017. Her counsel stated that the date of the injury in relation to the left foot is from July 2017 to 19 September 2017, when she last worked for the respondent.
2. However, the present proceedings are confined to a claim for lump sum compensation for a psychological injury. The dispute requiring determination by the Commission is whether the psychological injury is a primary injury or whether, as contended by the respondent, it developed secondary to the foot injury and its sequelae.
3. The distinction has consequences as to the entitlement of Ms Hicks to lump sum compensation. Section 65A of the *Workers Compensation Act 1987* (the 1987 Act) provides:
  - “(1) No compensation is payable under this Division in respect of permanent impairment that results from a secondary psychological injury.
  - (2) In assessing the degree of permanent impairment that results from a physical injury or primary psychological injury, no regard is to be had to any impairment or symptoms resulting from a secondary psychological injury.”
4. In the Application to Resolve a Dispute (ARD) filed in the Commission on behalf of Ms Hicks it is pleaded that she suffered a primary psychological injury as a result of the nature and conditions of her employment due to bullying and harassment at work.
5. The ARD was amended, by consent, to delete the date of injury “31 October 2017” and to instead insert the deemed date of injury “14 October 2019”, being the date of the lump sum claim.

### PROCEDURE BEFORE THE COMMISSION

6. The parties attended a conciliation conference/arbitration hearing on 10 March 2020. Ms Hicks was in attendance and represented by Mr Stuart Moffet, counsel, instructed by Mr Steve Walker, solicitor. The respondent was represented by Mr Stephen Flett, counsel, instructed by Ms Jenny Nichols, solicitor, and Ms Cherry Huang from icare.
7. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

## EVIDENCE

### Documentary evidence

8. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) ARD and attached documents with the exception of the reports of Dr Thomas Oldtree Clark, excluded by virtue of Regulation 44 of the Workers Compensation Regulation 2016 (425 pages);
  - (b) Reply and attached documents (466 pages), and
  - (c) Application to Admit Late Documents filed by the respondent dated 3 March 2020 (64 pages).

### Oral evidence

9. There was no oral evidence. Both counsel made oral submissions which were sound recorded. A copy of the recording is available to the parties. A written transcript (T) has been made of the sound recording (84 pages).

## FINDINGS AND REASONS

10. The main causative incidents relied upon by Ms Hicks are the employer's conduct regarding the following:
  - (a) Drink driving offence comment;
  - (b) Pressuring Ms Hicks to attend Haigh client;
  - (c) "Buy your own" gloves comment;
  - (d) Response to complaint about malfunction of travel application;
  - (e) Inappropriate allocation of travel; and
  - (f) Inappropriate text message on 3 October 2017.
11. As there are factual issues to resolve about each allegation, it is helpful to firstly summarise the evidence before the Commission and counsels' submissions under these headings.
12. Ms Hicks has provided several statements including dated 22 August 2018<sup>1</sup>, 3 July 2019<sup>2</sup>, 26 September 2019<sup>3</sup>, and 30 October 2019<sup>4</sup>. Also, Ms Hicks has given two statements to the insurance investigator bearing dates typed on the top of the statements of 20 October 2017<sup>5</sup> and 18 January 2019<sup>6</sup>, although they have been signed on 7 August 2019. For reasons which will become apparent later in these reasons, I will refer to these statements by reference to the dates on the top.
13. Ms Anne McDonald is the Community Manager of the employer, she has provided statements dated 22 November 2017<sup>7</sup>, 13 February 2019<sup>8</sup> and 10 September 2019<sup>9</sup>. I have referred to the dates upon which they were signed.

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<sup>1</sup> ARD p 1.

<sup>2</sup> ARD p 3.

<sup>3</sup> ARD p 5.

<sup>4</sup> ARD p 7.

<sup>5</sup> ARD p 9.

<sup>6</sup> ARD p 17.

<sup>7</sup> ARD p 30.

<sup>8</sup> ARD p 36.

<sup>9</sup> Reply p 34.

14. Ms Sharon Tong is responsible for the management of scheduling of the times and location of the home care workers that are employed to look after the elderly clients. She has provided statements dated 23 November 2017<sup>10</sup> and 7 February 2019<sup>11</sup>.
15. Ms Christine Hetherington is the Roster Scheduling officer of the respondent. She has provided statements dated 11 February 2019<sup>12</sup> and 3 March 2020<sup>13</sup>.
16. Ms Hicks describes her psychological symptoms as including insomnia, panic attacks, very severe headaches, constant anger and frustration, social withdrawal, nightmares and trouble sleeping, constant depressed mood, loss of interest in activities and some suicidal thoughts.
17. She also describes the foot symptoms including chronic pain, difficulty driving, inability to run and inability to do activities such as sailing and paddle boarding.
18. Ms Hicks says the insurer advised that the psychological injury is secondary to her foot injury, but Ms Hicks says it is not. She also refers to issues with the workers compensation insurer's case managers.
19. Ms Hicks says in her statement dated 22 August 2018 that she felt the bullying started when she first mentioned her foot injury. However, in later statements she changes this assertion and maintains the bullying commenced before she sustained her foot injury.

#### **Comment referring to drink driving**

20. According to her letter of offer, Ms Hicks started employment with the respondent on 23 May 2017<sup>14</sup>. She spent the first few days working with a "buddy"<sup>15</sup> who attended the clients with her. She started in the roster on 5 June 2017<sup>16</sup>. As is the norm in many jobs, a police check was made by the employer. It is dated 3 June 2017. It refers to the Manly Local Court on 9 March 2015 did not record a conviction, but placed Ms Hicks on a bond to be of good behaviour for two years for the offence Drive with Low Range Prescribed Concentration of Alcohol<sup>17</sup>.
21. It is common ground that a conversation took place between Ms Hicks and Ms McDonald where this police check was mentioned. The date is uncertain when this occurred, but it must have been after 3 June 2017. Both Ms Hicks and Ms McDonald agree that it was the first time they had met.
22. The time and exact place that this conversation took place differs in each persons' account. Also, it is disputed what was said in that conversation.
23. Ms Hicks says this incident pre-dated her foot injury and triggered the commencement of her anxiety condition. She says she only stayed on with her job with the respondent because she did not have to deal with Ms McDonald on a day to day basis.
24. Mr Moffet submits that Ms Hicks must have been interviewed by the respondent's insurer's investigator on or before 16 October 2017, because Ms McDonald participated in a telephone interview with the investigator on 16 October 2017 and responded to Ms Hicks' assertions. However, in the Procure First Factual Report dated 27 October 2017 the investigator states he telephoned Ms Hicks on 16 October 2017 to request a date to conduct

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<sup>10</sup> ARD p 44.

<sup>11</sup> ARD p 49.

<sup>12</sup> ARD p 56.

<sup>13</sup> Late Documents p 43.

<sup>14</sup> Reply p 68.

<sup>15</sup> Late Documents p 44.

<sup>16</sup> Late Documents p 46.

<sup>17</sup> Reply p 71.

an interview and it was conducted at her home at 5pm on 20 October 2017<sup>18</sup>. Ms McDonald's statement was taken by telephone on 16 October 2017 and she told the investigator there were minimal changes to it. She signed it on 22 November 2017.

25. Ms Hicks did not sign her statement until 7 August 2019. One needs to read this statement carefully because the investigator typed it and dated it 20 October 2017 but then Ms Hicks at some point in time has made handwritten corrections and added sentences. I find I cannot infer on the available evidence that these corrections were done in October 2017. The investigator comments in his report that Ms Hicks did not return the statement to him.
26. At [49] of this statement the typed portion is "I received inappropriate comment from Anne McDonald on a Police check that was conducted on my history prior to working with Presbyterian Aged Care Services". The handwriting adds, "stating that my caution for a DUI (illegible) was the same as being labelled as a paedophile, it sticks, you are lucky that we gave you a job"<sup>19</sup>.
27. I mention this because Mr Moffet was critical of Ms McDonald because in her statement she just denied saying something "inappropriate" in the conversation to Ms Hicks. Mr Moffet criticised her for not denying it more forcefully and by not taking umbrage at the paedophile allegation. He cited this as one reason why I should accept Ms Hicks' version of events in preference to that of Ms McDonald.
28. While the dates the investigator conducted the interviews do not make sense, it is clear, as Mr Moffet submits, Ms McDonald is responding to Ms Hicks' allegation. However, I find it is probable that Ms McDonald was only told that the assertion was that she had said something "inappropriate", because that is how Ms Hicks' statement expresses it. The allegation of the paedophile comment is only in the handwritten annotation.
29. This is fairly important in the case because a document recording the paedophile allegation before Ms Hicks sees Dr Lim on 31 October 2017 could possibly strengthen Mr Moffet's submission that when the doctor notes "bullying" in his notes on that day he could be including this event, even though he does not mention it. I will return to consider Dr Lim's notes after considering the rest of the lay evidence about the drink driving conversation.
30. The next mention of this conversation is in Ms Hicks' statement dated 22 August 2018. Ms Hicks cites a meeting, held in public, when she had a conversation with Anne McDonald. She says Ms McDonald made a very offensive comment to her, that still upsets her. Ms Hicks says that comment was that the employer had checked up on her and found she had a drink driving offence. Ms Hicks says that it was irrelevant for Ms McDonald to raise this as she was found not guilty on the drink driving offence with no conviction recorded. She says Ms McDonald said words to the effect that it's the same as someone being labelled a paedophile, it sticks. Ms Hicks states that the likening this to paedophilia caused her to be embarrassed and humiliated.
31. Thereafter, the next reference is in the statement of Ms Hicks taken by the investigator on 18 January 2019. Ms Hicks says she was in a staff meeting at the Roseville offices. She thinks it was in late May 2017 or June 2017.
32. Ms Hicks says she believes it was the first time she had met Ms McDonald. Ms Hicks says toward the *end* of the meeting Ms McDonald said something like "Sarah, you do know you are lucky to be working here, because we ran a check, like we do on all our carers, and we discovered you had a drink driving issue."

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<sup>18</sup> ARD p126.

<sup>19</sup> ARD p15.

33. Ms Hicks said she was in complete shock and dismayed at this comment made to her in a public forum. She said she responded, "I do not have any drink driving issues". She states she was highly embarrassed and upset that this comment had been made in front of other carers.
34. At [24] she asserts "Anne McDonald then said something similar to, "this is a serious issue it's like paedophilia, *a label that sticks on and it can stay on your record*". The words in italics are handwritten in above the typed sentence<sup>20</sup>.
35. Ms Hicks says she became emotional. She said she was in complete shock that the allegation of drink driving had been raised in front of other staff members and that Ms McDonald had the indecency to state that she considered the alleged issue was as serious as paedophilia. Ms Hicks says she remembers sitting in the meeting room, numb and paralysed by the comments and she walked out of the meeting and drove home crying at the humiliation that she was publicly exposed to. Ms Hicks then relates the circumstances around the driving charge, that she had consumed Christmas cake/ pudding or trifle that had alcohol in the recipe.
36. At [36] she states that she feels the comments were personally degrading and insulting to her and that the comments suggested that she had acted irresponsibly and driven a car while under the influence of alcohol. She says "Anne McDonald, in her comments aligned my alleged behaviour to that of a criminal activity in drink driving. Her comments and actions have bothered me since they were made in June 2017." She says the comments are consistently on her mind and they worry her greatly. She is concerned such comments could be given in a reference by the employer if she applies for another job.
37. Ms McDonald in her statement dated 22 November 2017 says as protocol and procedure she had to raise the result of the police check with Ms Hicks. She does not say when or where this was raised, but she says she told Ms Hicks that as the alleged offence was some time back it would not exclude her from working with the employer<sup>21</sup>.
38. In her statement dated 13 February 2019, Ms McDonald says she refuted the allegation that she had said anything inappropriate about the police check in her statement dated October 2017. She adds that she and Ms Hicks were together *before* the staff meeting and they were having a brief discussion and she thought it was appropriate to mention to her there was a reference in her police check to a drink driving offence. She said she did this for the sole purpose of making Ms Hicks aware so if she ever applied for future roles requiring police checks this was there. This varies to the statement referred to above where she says as "protocol and procedure she had to raise it".
39. Ms McDonald says Ms Hicks, on being told about the drinking driving event being recorded, appeared to be highly embarrassed and apologised on several occasions. She says the conversation ended on a positive note and Ms Hicks was pleasant and thanked her. She says that she and Ms Hicks then moved to the meeting room area for the planned meeting.
40. Ms McDonald denies that she commented on the seriousness of the drink driving matter or that she made the comment about paedophilia.<sup>22</sup>
41. Ms Hicks in her statement dated 3 July 2019 adds that when this conversation occurred Ms McDonald drew her aside from the staff meeting and Ms Hicks asserts this was a completely superficial form of separation, as she was standing about two metres from the staff. She says that Ms McDonald raised her voice and after making the comment about paedophilia, said that Ms Hicks was lucky they gave her a job in the first place.

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<sup>20</sup> ARD p 20.

<sup>21</sup> ARD p 32.

<sup>22</sup> ARD p 39.

42. In her further statement dated 10 September 2019, Ms McDonald says on the day of the team meeting a conversation took place. She does not give the date of this meeting but notes that Ms Hicks says it occurred in late May or early June 2017. She says before the meeting her manager, David Fleming, telephoned her to advise that Ms Hicks' police check had come in which revealed a low range drink driving offence. Ms McDonald says that Mr Fleming requested that she inform Ms Hicks of the result as a matter of courtesy. Ms McDonald says the purpose of this was so that Ms Hicks was aware it came up so if ever she applied for another role, she would be aware that this offence would be revealed.
43. Ms McDonald says she met with Ms Hicks at the Roseville offices of the respondent *prior* to the team meeting. She says this is a large room of approximately 30 ft by 20 ft with three work stations and a kitchenette. She says the conversation with Ms Hicks took place near the kitchenette and there were two other people in the room, one of whom she names as Ms McMullen. She says the other two staff members were at the other end of the room, having a conversation and estimates they were 27ft away from her.
44. Ms McDonald says she raised with Ms Hicks that a low range drink driving offence had come up on the police check and that Ms Hicks responded by saying if she had known this would come up, she would have told the employer about it beforehand. Ms McDonald denies saying that Ms Hicks was lucky to have the job with the respondent. She also says it is completely untrue that she made any reference to the offence being like paedophilia.
45. She says after this conversation they walked to Brice Hall where the staff meeting took place. She says it is in a different building to where the conversation with Ms Hicks took place, and she describes the route to there. Ms McDonald denies the conversation took place in earshot of the meeting. She says she conversed with Ms Hicks in a low voice and she is confident the two others present in the room did not hear. She says she only met Ms Hicks for the first time that day<sup>23</sup>.
46. Ms Sharon Tong says she has no recollection of this matter and she says she has worked with Ms McDonald on numerous occasions and says the tone and language alleged to have been used by Ms McDonald in this allegation is completely out of character for her management and communication skills.<sup>24</sup>
47. Ms Hetherington says she was at this meeting and has no recollection of this allegation<sup>25</sup>.
48. Mr Moffet submitted that the employer had a tactic to shock Ms Hicks at the very least with inappropriate and false disclosures about her criminal history<sup>26</sup> to discourage Ms Hicks from making complaints. I reject this submission, firstly, because the timeline suggested by Mr Moffet is out of kilter with what can be gleaned from all the evidence. The conversation about the drink driving offence occurred early in Ms Hicks' employment. So, to suggest it was disclosed to discourage her from making complaints just cannot be accepted as it occurred before Ms Hicks had completed much work for the respondent.
49. It was appropriate for the employer to have a police check done, as is customary when working with aged persons. Secondly, Mr Moffet several times refers to Ms McDonald speaking erroneously about the offence. The police check is in evidence and it clearly refers to an offence of Drive with Low Range Concentration of Alcohol and that a conviction was not recorded, and Ms Hick was given a bond for good behaviour for two years.<sup>27</sup>

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<sup>23</sup> Reply pp 34-35.

<sup>24</sup> ARD p 51 [33].

<sup>25</sup> ARD p 57 [10].

<sup>26</sup> T28.01.

<sup>27</sup> Reply p 71.

50. When submitting about the drink driving conversation, Mr Flett correctly noted that Mr Moffet in chief did not refer to Ms McDonald's third statement dated 10 September 2019, which challenges where the conversation was conducted. This account by Ms McDonald is very detailed. Ms Hicks' description of the location does stand uneasily with that of Ms McDonald. Ms Hicks says she was drawn aside from the staff meeting, whereas Ms McDonald says the conversation took place before the meeting. Ms Hicks says it was at the end of the meeting. Ms McDonald says it was in another building to the meeting, but she does concede there were two other people in the room, albeit at a distance. However, in Ms Hicks' statement dated 18 January 2019 she says at [22] the conversation happened towards the end of the meeting and she says she walked out of the meeting and drove home crying at the humiliation that she had been publicly exposed to<sup>28</sup>. If Ms McDonald is accepted they walked pleasantly after the conversation together to the staff meeting.
51. Mr Moffet submitted in reply that whether the other people were two metres away or further than that are matters of perception of a real event.
52. Clearly the conversation about the drink driving charge occurred and there were other people in the room. I accept Ms McDonald's account because it is the more detailed about the location of where meetings were conducted. Therefore, I find that the conversation was not held "in public" or as Ms Hicks asserts in front of the whole meeting cohort. However, the aspect of the conversation that seems to have played on Ms Hicks' mind is her allegation that Ms McDonald remarked that it "was like paedophilia, it sticks". Ms McDonald denies she said this, and Ms Hicks is adamant that she did.
53. If it was said, one could accept that it may have played on Ms Hicks' mind as she alleges except for the fact that she does not mention the drink driving conversation to Dr Lim until 24 April 2018, and even then there is no mention of the paedophilia comment.
54. Mr Moffet refers to Ms McDonald's first statement in which she stated that Ms Hicks appeared to be highly embarrassed and apologised on several occasions. (This was actually recorded in the second statement of Ms McDonald.) Mr Moffet said the fact that Ms McDonald noticed this response from Ms Hicks, showed Ms Hicks did not take the conversation in her stride. That may be so, but it could have just been a response to her finding out that her employer had been informed about the drink driving offence. It does not prove that the paedophile comment was made.
55. One thing that is odd about Ms McDonald's account is the reasons she gives for having the conversation with Ms Hicks. In her 2017 statement she says as "protocol and procedure" she *had* to raise the result of this police check with Ms Hicks. However, in her statement dated 13 February 2019, Ms McDonald says "the sole purpose" of making Ms Hicks aware of the result was to assist her if ever she was applying for future jobs. This seems odd to me because this conversation occurred early on in Ms Hicks' employment so it seems incongruous that Ms McDonald would have been thinking about future job applications being made by Ms Hicks. Both these explanations of Ms McDonald seem somewhat self-serving.
56. Mr Moffet says Ms McDonald nominates Ms McMullen as being in the room when this conversation took place, albeit at the other end and she was speaking to someone else. He submits there is no statement from Ms McMullen before me. That is true, but it must be borne in mind that it is Ms Hicks who has the onus of proof. It was open to either party to seek a statement from her and there is no evidence that Ms Hicks had tried but was not able to obtain a statement. So, I will not draw an inference regarding there being no statement from her.

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<sup>28</sup> ARD p 21.



57. Mr Moffet also submitted that I should prefer Ms Hicks' version of the conversation because she is far more emphatic, and Ms McDonald does not take umbrage and just rebuts it in mild terms. I am not convinced by this aspect of Mr Moffet's submission for the reasons noted above, that it is likely she was just told it was alleged she said something "inappropriate", as the paedophile comment is not recorded in the investigator's type statement of 20 October 2017.
58. A significant argument raised by Mr Flett is the absence of complaint about this paedophile comment when Ms Hicks first sees her general practitioner, Dr Lim.
59. Dr Lim's clinical notes from his practice, Newport Medical Dental, are contained in the ARD for the period 19 September 2017 to 12 September 2019<sup>29</sup>. On 19 and 26 September 2017 Dr Lim records details about her left foot injury. There is no reference to any psychological symptoms. There is no reference to any of the allegations about which Ms Hicks now relies.
60. On 5 October 2017 at 18:33:59, Dr Lim records that the Company has not put in claim yet. From the context of Ms Hick's statements it can be inferred that this is a reference to the claim for the foot. There is no suggestion that Ms Hicks made a psychological injury claim at that time. Dr Lim notes the insurance company had been spoken to and a claim number given. He then records:
- "On Friday night was in friends place foot was sore.  
Turned around on hard floor tiles and just fell onto side.  
Fell fracturing the L forearm  
Had surgery on Tuesday had screws and plate
- Can't drive now.  
Has informed work but they were not sympathetic
- Usound and xray no serious problem with foot but needs to do the physio  
awaiting approval<sup>30</sup>".
61. Dr Lim has another entry for 5 October 2017 at 18:46:59 in which he records,
- "had foot pain was at friends house on week end in kitchen, turned and lost  
balance and fell onto marble like floor and fractured L wrist requiring ORIF"
62. Dr Lim lists the medications prescribed including Targin MR, Tramadol, Zofran Zydis Wafer, Tramadol Actavis capsules.
63. On 12 October 2017, there was another surgery consultation and Dr Lim records that a Centrelink medical certificate and prescriptions were issued. The Centrelink certificate is not before the Commission.
64. On 31 October 2017, Dr Lim has two detailed entries. The first note states Ms Hicks has talked to Workcover and WIRO. She says investigation into the car has not been approved. She reported the insurance company was unhelpful and were saying ridiculous things to her on the phone. It is noted the insurance company is over the time limit to deal with her claim. Dr Lim notes she "feels bullied and traumatised." He says she has not had pay from the insurer and Centrelink has not processed anything yet. He records she needs pain relief meds. He lists the prescriptions for Targin MR and Stilnox and he completed a mental health plan and gave Ms Hicks a referral to Lyn Shumack. The referral and Mental Health Plan are not before the Commission. He adds:

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<sup>29</sup> ARD pp 420-397, they go in reverse date order.

<sup>30</sup> ARD p 420.

“Feels bullied. Anxious can’t sleep using Stilnox. Depressed feeling that work are not supporting her RTW and neither is insurer. Feels like they are dragging out case. Fearful as financially going down the drain with no income and payments to meet.

May have to find another job hard cx fractured wrist and foot pain cx immobility”<sup>31</sup>”

65. In the second entry on 31 October 2017 at 12:10:10, Dr Lim writes:

“Feels very bullied at work. Has not had case rejected or accepted by insurer due to work injury. Insurer have been a bit obstructive and wanting to deny claim but not putting in writing. Sending out investigators to try to find fault on clutch etc to not accept responsibility. Blaming on footwear etc. Have not committed to accept or reject claim beyond date and also area manager at work have not been sympathetic to her case and not yet told her if accepting the claim. Cant afford physio.”<sup>32</sup>”

66. Dr Lim’s entries are very detailed so I consider if Ms Hicks had complained about the paedophile comment then he would have recorded it. Therefore, I do not accept that these references to being “bullied” is to that allegation, or indeed to the other allegations Ms Hicks relies on to establish a primary psychological injury.

67. On 14 November 2017, Ms Hicks saw Dr Lim again and the only reference is to her wrist and a referral was given to Dr David Carmody.

68. On 5 December 2017, Dr Lim notes deal with pain in the left foot after driving for 15-minute trips and Stilnox was prescribed<sup>33</sup>.

69. On 11 January 2018, Dr Lim reviews the foot and wrist and notes she can drive for 30 minutes.

70. On 8 February 2018, Dr Lim notes the wrist injury was declined and the case for the foot is being investigated to see if it was due to work. It is noted she has not been paid. Dr Lim records that she needs to complete her statement and she “feels not Tx well by employer and work not suitable.” The balance of the note deals with the wrist and foot. It is noted “feeling very depressed about the employer so not keen to go back into that job. Case manager is also not sympathetic with her cx she believes. Has been advised to change case manager if she has problems.”<sup>34</sup>”

71. On 6 March 2018, a further mental health plan was completed by Dr Lim<sup>35</sup>. A referral was given to Michelle Hopkinson. Unfortunately, the mental health plan and referral are not before the Commission. It is noted that Centrelink was now paying her, and work has sent her a letter accepting the foot injury. It is noted she has been offered three hours per week light duties. Concerns were noted about Centrelink payments. Dr Lim notes:

“Very depressed cx Centrelink won’t pay her. Getting desperate cx no money coming in has mortgage no money for food car running out of registration. Can’t sleep depressed. Centrelink asked her to seek separate legal advice... Has requested change in manager but EML won’t allow. Feels Presbyterian Age care manager and EML manager have it in for her feels depressed cx no sympathy to her cause and are not allowing any wage. Because case manager away nothing will be processed hence she will get no money,”

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<sup>31</sup> ARD p 418-419.

<sup>32</sup> ARD p 418.

<sup>33</sup> ARD p 417-418

<sup>34</sup> ARD p 416 -417.

<sup>35</sup> ARD p 416.

72. Dr Lim seems to use the abbreviation of cx for “complains”. Dr Lim records he did a detailed referral to Michelle Hopkinson.<sup>36</sup> This referral is not before the Commission.
73. Dr Lim answered a questionnaire from Procure dated 6 March 2018<sup>37</sup>. The handwriting is hard to read. Dr Lim is asked questions about the recovery time for Ms Hicks’ foot injury. He replied that she should improve within the next three months providing she does not drive for prolonged periods of time. He estimated at that time Ms Hicks could work three hours per day, two days per week. He was asked, when could she return to her pre-injury hours of 14.85 hours per week? Dr Lim states the expectation is in about three months. Dr Lim is asked about treatment and he notes Ms Hicks has an adjustment disorder and he refers to her concern that she may lose her house because she can’t pay her mortgage and that she has no money as she has not been paid since 12 September 2017, except for a \$215 payment.
74. On 22 March 2018, the clinical entry is about non-payment by Centrelink and the insurer. Dr Lim has provided several certificates of capacity including that of 22 March 2018, in which he refers to Ms Hicks having an adjustment disorder with anxious depressed mood and he gives a description of its relationship to work as follows:
- “Feels employer has been bullying her, had foot injury at work employer unsympathetic, asking her to return to work after she broke her arm via emails not putting pay through since 12/8/2017. To date has only been paid \$215.00 from employer or their insurance company. Feels victimised. WIRO have been helping her and are not getting any answers. She is very distressed. About to lose her house because can’t pay mortgage and bills to run her house.”<sup>38</sup>
75. Similar comments are made by Dr Lim in his other certificates and also that “Patient states foot injury has reduced her capacity so that affects her psychologically<sup>39</sup>”.
76. On 24 April 2018, Dr Lim has a very detailed clinical entry in his notes as follows:
- “case manager has changed  
new case manager richard  
michelle from procure
- case conference
- has had adjustment disorder cert put in cx not paid and very stressed.  
sarah says not leaving house depressed.  
anxious re finance
- reba provider said that relationship with case manager in the past had relationship issues  
centre link issue cx she said emf stopped centrelink payments  
contacted them then cent letter to her saying that eml stopped her center link payments.
- they say that sarah didnt put statement in.
- New manager wanting to move forward.  
Has appt booked with psychiatrist for assessment re adjustment disorder with anxious mood.

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<sup>36</sup> ARD p 415-416

<sup>37</sup> ARD pp263-264.

<sup>38</sup> ARD p 265.

<sup>39</sup> ARD p 280.

New manager says issue around not being paid have been resolved now she is being paid.

Did Employer cx psychological injury?  
or payment issue with EML cx it?  
Was there a deliberate hardship cx by last case manager  
these are the issue.

sarah believes that the only reason EML responded cx WIRO investigated and threaten them with fines

Sarah said employer was not forthcoming with info even to WIRO

and has in a public meeting humiliated her by discussed police checks etc when broke wrist awaiting surgery, employer said to her oh you must be wearing crazy shoes.

New case manager willing to provide short term counselling.

will discussed with patient whether will accept this or separate claim of adjustment disorder.

rehab provider has suggested mediation with employer.

States that car payment and insurance are going to be defaulted and Sarah says that she cant afford to insure her car.

Says cant drive now cx cant pay for car insurance  
Suggest see physio  
Suggest see psychologist.

Employer says that there are suitable duties available

appt with psychiatrist will be assisted by transport.<sup>40</sup>

77. The reason I have reproduced so much of Dr Lim's clinical entries is because the respondent strongly submits that when these are considered carefully one can ascertain that Ms Hicks did not complain about the events she relies on in these proceedings, which she argues gives rise to a primary psychological injury. The conversation about the police checks is for the first time mentioned on 24 April 2018, that is about 10 months after it occurred. The respondent argues in the intervening period from September 2017, Ms Hicks has complained to Dr Lim about many concerns including her foot injury, her wrist injury, her issues with the insurer about those claims, issues with payment from Centrelink as well as her worsening financial situation.
78. On 5 June 2018, it is noted Ms Hicks has the appointment with Lyn Shumack and the insurer is to arrange and IME and that she states she will wait to see if IME decides whether the claim is separate or not.
79. On 28 August 2018, Dr Lim records he has spoke to Carl Nielsen psychologist and he said,  
"to treat it as separate claim cx injury was not related to the foot injury but the behaviour of employer and delay in approving treatment and financial loss resulting in delay and stress. She attributes this to the employer not liking her after she injured herself and behaving badly toward her."<sup>41</sup>

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<sup>40</sup> ARD p 414-415.

<sup>41</sup> ARD p410.

80. Dr Lim recommended Ms Hicks see Dr Cheah.
81. On 1 November 2018, it is recorded that she had a motor vehicle accident on 17 October 2018 when rear ended in a petrol station and the back of the car was badly damaged.<sup>42</sup> Neck and shoulder pain are recorded. On 13 November 2018 it is recorded that someone crashed into the hire car as well. It is also noted “so she has had a lot of walking around and her foot has flared up”.<sup>43</sup>
82. On 17 January 2019 it is noted she was having physiotherapy treatment for the whiplash injury and lower back pain and she has a lot of neck pain. Dr Lim noted that she feels depressed as the MVA and WorkCover problem and issue that she has to have surgery to remove the plates out of her wrist and that convalescence will be a problem, as she will have no one to help look after her. So, the doctor says she has multiple problems and issues with pay and Workcover. He ends the note by recording “Depression and anxiety counselling”. Dr Lim has three entries for this date; one for the “MVA CTP”, one for “Workcover foot physical” and one for “Workcover psychological”. In relation to the latter entry, he notes she saw Dr Dillon Cheah on 24 December 2018 and that she said she had lost weight and was not improving.<sup>44</sup>
83. Thereafter, there are further consultations referring to Ms Hicks’ mental state and distress, as her payments of compensation were declined, and her employment terminated.
84. Dr Lim has provided detailed handwritten answers to EML’s questionnaire dated 15 November 2018. However, Dr Lim answered this on 20 June 2019. His responses are consistent with the events related by Ms Hicks about her employer.<sup>45</sup>
85. Having considered all of the accounts about the drink driving conversation, I acknowledge it is somewhat difficult to determine whose recall is correct. Ms Hicks’ recall about the details of the location are not as precise as that of Ms McDonald and Ms Hicks has not put on a statement to challenge this evidence.
86. The language used by Ms Hicks in her statements are that she was “numb”, “paralysed”, felt “humiliation”, “personally degrading” and “insulting” and the public exposure affected her. These are very strong descriptors and given the detail of her complaints to Dr Lim from September 2017 to 24 April 2018 I find it strains credulity that, if she had felt such a strong reaction to this alleged comment, that she would not have advised Dr Lim of it. It cannot be successfully argued, in my view, that the reference to “bullying” on 31 October 2017 is a reference to this allegation.
87. I consider, and so find, that it is more likely than not on the balance of probabilities this reference to bullying relates to Ms Hicks’ reaction to the problems she says she was having with the insurer dealing with her claim for the foot and wrist, and the financial pressure she felt by not having that claim accepted. I find the context of Dr Lim’s entry on 31 October 2017 does not allow the interpretation pressed by Mr Moffet. Dr Lim has such detailed notes that I do not accept that if Ms Hicks had told him about the paedophilia comment that he would not have recorded it. Also, on 24 April 2018 when the police check is mentioned, it is only a comment about the police check and no reference is recorded about it being likened to “paedophilia, it sticks”.
88. For these reasons, I find that Ms Hicks’ version is not reliable or credible and so I find the more plausible explanation, on the balance of probabilities, is that Ms McDonald did not make this comment to Ms Hicks.

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<sup>42</sup> ARD p 408.

<sup>43</sup> ARD p 407.

<sup>44</sup> ARD pp 405-406.

<sup>45</sup> ARD pp 362-364.

89. Furthermore, Ms Hicks has been keen to assert that this incident triggered the commencement of her anxiety condition. I just cannot accept that proposition because when she commenced to express to Dr Lim how stressed she was, it was not the paedophile comment that was spoken of by her, but the other matters to which the respondent referred including her foot injury, her wrist injury, her issues with the insurer about those claims, issues with payment from Centrelink as well as her worsening financial situation.
90. In coming to this factual finding about this event I have not referred to the other treating medical evidence, because it is not as contemporaneous as that of Dr Lim. However, Mr Nielsen, treating psychologist, in report dated 19 September 2018 does not refer to the conversation about the drink driving or the alleged paedophilia comment at all<sup>46</sup>. Nor does Dr Lim when recording his conversation with Mr Nielsen on 28 August 2018, referred to above.
91. Furthermore, Mr Nielsen states that “Ms Hicks articulated bullying and harassment commenced around the same time as she initially verbally notified management of her foot injury.” Counsel submitted that the foot injury was notified in September 2017. So, this report from Mr Nielsen reinforces the view I reached, having considered the lay evidence and that of Dr Lim, about this allegation. Again, I find if it had been said and had the effect on Ms Hicks as she claims, it defies credulity that she would not have mentioned it to Mr Nielsen.
92. Dr Cheah, the treating psychiatrist, reported to Dr Lim on 15 October 2018 after his first consultation with Ms Hicks<sup>47</sup>. In his history he refers to Ms Hicks “being humiliated publicly with private details about her health being disclosed in front of her co-workers”. It is not clear which event to which the doctor is referring. Ms Hicks in her statement dated 22 August 2018 refers to being ridiculed in public meetings after she injured her foot<sup>48</sup>. It seems unlikely that this reference by the doctor refers to the conversation about the drink driving charge, but certainly there is no mention of the paedophilia comment.
93. In this report, Dr Cheah informs Dr Lim that “given the severity and duration of Sarah's symptoms I feel that she is suffering from a Major Depressive Disorder with Associated Anxiety. I think that Sarah potentially has an emerging Panic Disorder as well.”
94. He added that “The physical injury to her foot, precipitated by the extensive driving, required in her previous job and the response from Management to her concerns, seem to be the main precipitants to her current psychological state of distress.”<sup>49</sup>
95. I find it is significant that the doctor does not mention this allegation as being a cause of her psychological condition in this report.
96. These additional reasons reinforce the view I formed about the improbability that Ms McDonald made the comment about paedophilia.
97. The later medical evidence depends on the doctors accepting or taking at face value that such a comment was made to Ms Hicks. Therefore, I do not accept the later expressed views of Dr Cheah, Gail Robertson, Dr Rastogi and Dr Young who all at times proceeded on the basis that this comment was made to Ms Hicks. I have found on the balance of probabilities that it was not.

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<sup>46</sup> ARD pp 358-360.

<sup>47</sup> ARD p 375.

<sup>48</sup> ARD p 1.

<sup>49</sup> ARD p 377.

## Haigh client

98. In her statement dated 26 September 2019, Ms Hicks said she requested that Christine Hetherington take her off the roster to attend on a Mr Haigh. Ms Hicks says she was told there was no one else who could do the shifts. She states this was said to her on a number of occasions and she says she then received multiple phone calls from Chantelle asking her to attend on Mr Haigh.
99. Ms Hicks says she did not answer of these co-workers' personal calls to her private phone in an attempt to avoid further distress. She says Helen Tong declined to go back to this address. However, Ms Helen Tong does not say anything about Mr Haigh in her statement.
100. In her statement dated 30 October 2019, Ms Hicks states she had visited Mr Haigh once with a co-worker and that after the visit she stated on the phone and in two emails that she did not want to attend on him again. She says on three following occasions management tried to list this address on her roster.
101. She said the reasons she made the request was she felt distressed as the gentleman reminded her of someone she had cared for, who had died. She also states that Mr Haigh was blind and in pain and kept saying he wanted to die. She said she had to bath him, but there was no hot running water or a bath in the house and she had to boil water on an old Kookaburra stove, which she felt was dangerous to light with matches. She also said there were no adequate mobility rails in the house to aid when moving him, and she says she was required to change his urinary catheter and she had no training to do this.
102. In addition, she says she was asked to attend at this client at 7-8 am for one hour and then return in rush hour traffic for another one hour. She said from her home this would mean four hours of driving backwards and forwards for two hours paid work for \$42.
103. She says despite refusing this job she was still asked to go there, and she felt pressured by the employer. She states this made her feel very stressed and depressed.
104. Ms Christine Hetherington, in her statement dated 3 March 2020, notes that Ms Hicks attended Mr Haigh on 29 May 2017 in the initial week of her employment<sup>50</sup>. She phoned to say she did not want to attend on him again. Ms Hetherington says the records show that she was rostered on to attend on him again on 8 August 2017 by another roster scheduler and then Ms Hicks emailed on 9 August 2017 to say she was unable to attend.
105. Ms Hetherington says that as a casual employee, Ms Hicks could accept or reject whatever jobs she was given. Ms Hetherington denies Ms Hicks was repeatedly told by the employer's staff to attend on Mr Haigh or was pressured.
106. When submitting about the client Haigh, Mr Moffet says despite Ms Hicks asking not to attend upon him the employer kept sending her there, "over and over they ignored her complaints". I do not accept this categorization of the factual situation.
107. The evidence from Ms Hetherington refers to one further instance when Ms Hicks was rostered on to go to Mr Haigh after she had initially refused, she says after this instance Ms Hicks was not asked to go there again. I accept this evidence from Ms Hetherington because the contents of this statement was given after her consultation with the records. Therefore, I find this is more likely than not on the balance of probabilities to be the more reliable evidence than that of Ms Hicks.

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<sup>50</sup> Late Documents p 43.

108. As noted above Ms Hicks says she felt “very stressed and depressed” at being asked to go back to this client on multiple occasions. I find this assertion to lack credibility. While I accept as a matter of fact that she was asked to attend on Mr Haigh once after she had asked not to go, I do not accept that the medical evidence supports that this event made her very stressed and depressed.
109. The reason for this finding by is that the Haigh matter does not feature highly in Ms Hicks’ accounts to doctors. There is not a scintilla of reference to it in the clinical notes of Dr Lim in the passages I have reproduced above. Nor did she complain about this to Mr Nielsen or to Dr Cheah. Dr Rastogi does not have a history of this event.
110. Indeed, Ms Hicks does not even mention it in her statements dated 22 August 2018 and 3 July 2019. Nor in her statement to the investigators dated 20 October 2017 and 18 January 2019.
111. There is reference in Gail Robertson’s report dated 13 June 2019 to this matter. Ms Robertson says she started seeing Ms Hicks on 9 April 2019. The history states that she was “allocated to assist a blind client who was bedridden and she felt completely outside her competence. At other times, there was no hot water for washing the client...”. However, Ms Robertson does not note that Ms Hicks only attended on Mr Haigh once and that was in the company of a co-worker. Also, the only complaint about no hot water was in relation to Mr Haigh. It was not another event.
112. Ms Robertson forms the opinion that Ms Hicks has a primary psychological injury because of mistreatment by the employer prior to receiving her foot injury. She says the foot injury and, the difficulties with that claim, the increased harassment from the employer and ongoing financial pressure could be seen as secondary psychological injury, but she opines they are exacerbations of the primary injury.
113. Ms Robertson sets out in her history the events which she seems to equate to the employer mistreating Ms Hicks. She finds one of the major issues was the drink driving conversation and the comment about paedophilia. The second matter is this Haigh matter. The third matter is being told to buy your own gloves. The fourth matter was difficulty finding clients homes and being concerned about being late. The fifth matter is raising the difficulty with the location app and being told to get out of the car and look around. The sixth matter is the scheduling of the location of jobs and lack of time between them. The seventh matter is receiving the email when she was in hospital after she had broken her wrist asking when she would return to work.
114. Ms Robertson has taken Ms Hicks at face value in relation to each of these complaints. However, she does not seem to be aware that Ms Hicks did not complain to Dr Lim about bullying in relation to any of these events until well after the foot injury. Furthermore, when Dr Lim does record “bullying” on 31 October 2017, it is not in relation to these seven matters. I find it is in relation to the foot claim, her perception of her treatment by the insurer and her financial difficulties created by her inability to work due to her wrist injury and foot injury.
115. Mr Cipriani has produced a very comprehensive report. At [18.6], he states that his review of the documents indicates that Ms Hicks’ decline in mood and depression was attributable to the impact of chronic foot pain and other stressors including litigation stress, claims issues, two motor vehicle accidents in 2018, wrist surgery in 2019, increasing pain and disability focus, and increasing financial difficulties.



116. At [19.8.1] Mr Cipriani finds:

“She has blamed diagnosed psychiatric conditions on perceived bullying. However, close examination of causation indicated that foot pain, wrist fracture, inability to work, increasing financial difficulties and litigation stress appear to have had the greatest impact on her coping resulting in a chronic Adjustment Disorder with Anxiety and Depressed Mood, which is secondary to the original foot injury.”

117. This conclusion is consistent with my review of the evidence. Mr Flett relied upon this opinion in his submissions and pointed to the length of time of the appointment being four and half hours. He submitted that it afforded Mr Cipriani time and opportunity to express a considered view taking into account all of the evidence and the psychometric testing. Furthermore, Mr Flett submits that the report was sent to Dr Young who then does not hesitate to find that there was no primary psychological injury and he opines that Ms Hicks’ presentation relates to feeling aggrieved with her employer and the ongoing compensation process<sup>51</sup>. Mr Moffet made no submissions about Mr Cipriani’s opinion or report at all.

118. Therefore, I accept Mr Cipriani’s opinion and prefer that to Gail Robertson both in relation to the Haigh complaint and the other matters listed, to which I will now turn and then I will relate Mr Moffet’s further submissions.

### **“Buy your own gloves”**

119. Ms Hicks notified the employer in the email of 17 August 2017 that as a result of the cleaning at client’s homes she has developed eczema on her hands and neck. She also lists the types of care that she states she was initially employed to do and says over the prior three months she has been requested to do mostly cleaning. In this email she says she wore the employer’s supplied gloves, which tear easily, or leak and she advises that she is unable to be available for any jobs involving domestic cleaning and using chemical cleaning products.

120. At [50] of Ms Hicks’ statement to the investigator dated 20 October 2017 she says after making complaints about the chemicals used or the cleaning gloves provided my workplace shifts have been removed or significantly reduced<sup>52</sup>. It is remarkable that Ms Hicks does not refer to the “buy your own gloves” comment in this statement, if it was said. It is only much later that she says was the employer’s response.

121. In her statement dated 22 August 2018, she does even mention the gloves or the eczema<sup>53</sup>.

122. In the statement to the investigator dated 18 January 2019, again the gloves or eczema are not mentioned<sup>54</sup>.

123. In her statement dated 3 July 2019, she says she had been given more cleaning work than she expected, and she contracted a skin reaction on her hands. She says she asked for the employer to pay for some suitable gloves and she was told “buy your own”. She says this had a further negative impact on her mental well-being<sup>55</sup>.

124. Ms Hicks’ statements dated 26 September 2019 and 30 October 2019 do not deal with this allegation.

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<sup>51</sup> T 74-75.

<sup>52</sup> ARD p 15.

<sup>53</sup> ARD pp 1-2.

<sup>54</sup> ARD pp 17-27.

<sup>55</sup> ARD pp 3-4.

125. Ms McDonald, in her statement dated 22 November 2017, acknowledges the abovementioned email and says at a staff meeting on 18 August she spoke to Ms Hicks and the main issue on her mind was the dermatitis outbreak on her hands from the gloves she was issued with for cleaning. At [32] of this statement Ms McDonald says she resolved the glove issue by sourcing new gloves and issuing them to all of the employer's aged care workers.<sup>56</sup>  
Ms McDonald had referred to this in her email to EML on 6 October 2017 and Ms McDonald says she took the gloves to North Sydney from Newcastle for Sarah's use.<sup>57</sup>
126. In his submissions Mr Moffet stated that Ms Hicks does not concede she received the gloves. Mr Flett responded that evidence cannot be adduced in this way. He is correct.
127. I find on the balance of probabilities that Ms Hicks was not told to buy her own gloves. The fact that Ms McDonald spoke to her the day after her email about her hand condition is not contradicted by Ms Hicks. Furthermore, the email to EML in which Ms McDonald relates she sourced new gloves, to my mind, provides corroboration that Ms McDonald did obtain new gloves for the care workers and that this is not a recent invention. It is documented almost two years before Ms Hicks' statement of 3 July 2019 where she raises it. Furthermore, Ms Hicks does not state when the comment was allegedly made to her and by whom. If it was that an important event one would have expected these details would have been advised by Ms Hicks to the investigator when her two statements were taken.
128. In view of these factors and noting, once more this allegation does not appear in Dr Lim's records for the lengthy period I have summarised above, together with it not being mentioned to Mr Nielsen to my mind are reasons why a finding should be made that Ms Hicks' allegation should not be accepted. Furthermore, the lack of reference of it to Dr Lim in the consultation on 31 October 2017 reinforces my earlier expressed view that the reference there to "bullying" more likely than not is not a reference to any event to do with cleaning in the course of employment with the respondent.

### **Employer's response regarding her complaints about malfunctioning location system**

129. In Ms Hicks' statement dated 20 October 2017 to the investigator she does not actually complain about the malfunctions that could occur with the mobile app carers were to use to see their roster, locations and the route times and suchlike information for their appointments with clients.
130. This statement was taken to investigate her foot injury claim. She says in the statement she was engaged to work up to three days per week and she had to use her car to drive to clients on the northern beaches. I note Ms Hicks lived at Newport. She says she was to be paid a kilometre allowance to go between jobs but not from her home to the first job or from her last job to her home. She was not to be paid petrol money or road tolls and she was to receive \$21 per hour. She says she was provided with the use of a company mobile phone. She understood from her interview she was to work on the northern beaches.
131. In Ms Hicks's email sent on 17 August 2017 she does not complain about the app malfunctioning. She does complain about being sent beyond the confines of the northern beaches, but ironically when she says she is unavailable for such appointments she says she still will continue to attend Mrs Kimber and Mrs Upton, who from the rosters and Ms Hetherington's statement dated 3 March 2020, can be ascertained to live at Cremorne Point and Neutral Bay.

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<sup>56</sup> ARD p 34.

<sup>57</sup> Reply p 77

132. In Ms Hicks' statement dated 22 August 2018, she refers to the fact that she has to do a lot of driving and she was not aware of this situation when she started<sup>58</sup>. She explains in this statement that before 12 September 2017 she told the employer she was getting pain in her left foot. She said she told the person who organises the roster. She mentions taking two weeks off work because it was so painful. She also mentions her claim was refused and after she contacted the WIRO she started to receive payments. At the time of making the statement she was receiving weekly payments.
133. In this statement, she says that the other aspect is there has been bullying from the employer. She says she feels it started when she first mentioned her foot. She states, "I felt like they ridiculed me in public meetings."
134. Ms Hicks states that management did not sympathise with her and made work extremely difficult for her. She gives the example of the work system (the mobile phone location app) sending carers to the wrong address for a client, and she says when she pointed this out she says the overall manager said "Sarah, sometimes you have to get out of your car and actually have a look".
135. In her statement dated 3 July 2019, she elaborates on this issue. She says she was anxious about being sent to the wrong address, because she was worried for the clients who would need her help and she was concerned that they would become anxious. She said the situation was made worse because her employer had her driving from one end to the other of the peninsula to see clients.
136. Ms Hicks says the meeting where she raised this issue was attended by all staff and she says she was ashamed when the new Chief Financial Officer suggested loudly and bluntly that maybe she was to blame by suggesting laziness on her behalf, with the comment about getting out of the car to look for the address. She said Anne McDonald was at that meeting and nodded "during this shockingly unfair attack." Ms Hicks says she was "horrified", as she was trying to help by pointing out issues with the software system. She says she has been "unable to forget" what happened at that meeting.
137. Ms McDonald says she cannot recall any conversation about the travel location mobile phone application being defective and she does not recall the remark referred to above.<sup>59</sup>
138. Ms Sharon Tong has no recollection of this comment having been made at any meeting she attended<sup>60</sup>.
139. Ms Hetherington says occasionally the mapping app on the mobile phones can misrepresent the geographical location of a client. She says when this occurs they are reported to the IT teams for an upgrade and repair. She says she has no recollection of the allegation by Ms Hicks, presumably she is referring to the alleged comment about having to get out of the car.<sup>61</sup>
140. Mr Moffet submitted in chief that Ms Helen Tong supported Ms Hicks that there were malfunctions on the mobile app and that could involve going to the wrong address for a client and that Ms Hicks raised this in a meeting. I find that caution needs to be adopted placing weight on Ms Helen Tong's statement dated 30 July 2019 because it is not signed by her. Her statement says she recalls Ms Hicks raising issues at staff meetings that were not well received and once Anne McDonald raised her voice at Ms Hicks, but Ms Tong cannot remember the details<sup>62</sup>. Ms McDonald says Brice Hall is large with high ceilings and sound echoes. She says she may raise her voice, but it was not directed at Ms Hicks.

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<sup>58</sup> ARD p 1

<sup>59</sup> ARD p 40.

<sup>60</sup> ARD p 52 [19].

<sup>61</sup> ARD p 59.

<sup>62</sup> ARD p 28.

141. However, Ms Hetherington does acknowledge that the mapping mobile phone app can sometimes misrepresent the geographical location of a client.
142. The respondent's counsel relies upon the statements of Ms Hetherington, Ms McDonald and Ms Sharon Tong who have no recollection of the comment which Ms Hicks says was made to her in the meeting by the new Chief Financial Officer, that she should get out of her car and have a look when she complained she could not find a location.
143. Mr Moffet submits that the highest rebuttal about this comment is that these witnesses have no recollection of it. He submits this was a real event which occurred. I accept this submission, because there is no statement from the Chief Financial Officer denying that he said this remark to Ms Hicks.
144. On the balance of probabilities, I accept that Ms Hicks did speak up at a meeting about her issue with this app and that such a comment was made to her. It is understandable in my view that she may have recall of such a comment, but other persons present may not recall it as it was directed to her and not them.
145. In her statement to the investigator dated 18 January 2019, she says by this remark she felt belittled, disrespected and ridiculed publicly in front of her co-workers. She said she became emotionally upset and at this point in the meeting she closed her conversation and made no further remarks.
146. Again, Ms Hicks uses strong language to convey the effect this comment had on her. She has said it was a "shocking unfair attack", she felt "ashamed", "ridiculed". "horrified", "belittled", "disrespected", "emotionally upset" and she has been "unable to forget" the comment. It is not for me to consider whether such reaction was reasonable or not.
147. In *Attorney General's Department v K*<sup>63</sup> Roche DP, in considering the issue of establishing psychological injury in circumstances of the worker's perception of real events at work, provided the following summary of the relevant authorities on this issue:
- (a) employers take their employees as they find them. There is an 'egg-shell psyche' principle which is the equivalent of the 'egg-shell skull' principle (Spigelman CJ in *Chemler* at [40]);
  - (b) a perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in *Chemler* at [54]);
  - (c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in *Chemler* at [69]);
  - (d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in *Sheridan*);
  - (e) there is no requirement at law that the worker's perception of the events must have been one that passed some qualitative test based on an 'objective measure of reasonableness' (Von Doussa J in *Wiegand* at [31]), and
  - (f) it is not necessary that the worker's reaction to the events must have been 'rational, reasonable and proportionate' before compensation can be recovered." (at [52])

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<sup>63</sup> [2010] NSWCCPD 76; 2010 DDCR 120, *K's case*.

148. However, it is very difficult to accept the veracity of Ms Hicks' assertions as to the effect the employer's response to raising an issue with app had on her. Ms Hicks did not go to a doctor to report she had such a reaction. She informed Dr Young she did not have a regular general practitioner. But what is surprising and telling, and seems to have affected Dr Young's final opinion, is that when she did go to see Dr Lim she did not tell him about it. The first two consultations in September 2017 have no mention whatsoever of psychological symptoms or a discussion of these allegations. Then when she reported bullying on 31 October 2017 it was not these events that she related. It was the sequelae of the foot injury, not in terms so much of pain but because she was not getting paid by the insurer, Centrelink and that placed her in financial pressures. Plus, she was reacting to the claims process.
149. Therefore, while I have found such a comment was said to her in public I do not accept it was causative in developing a primary psychological condition.

### **Inappropriate allocation of travel**

150. When one closely considers the complaints made by Ms Hicks about the travel allocation, it can be discerned that they are without foundation. She complains about having to travel outside the northern beaches, being only allocated 30 minutes to go from Neutral Bay to Palm Beach, some of the routes were erratic in the sense of back tracking and driving six hours per day.
151. Ms Hicks says she was employed to work on the northern beaches, but she was often given jobs at Mosman, Willoughby, Cremorne and to drive from Bayview to Narrabeen. She said she raised this with Christine and said some of the rosters were erratic in the routes she had to travel in a day.
152. Ms Hicks said she contacted Ms Hetherington to question time frames allocated to jobs relating to the travel time between them, such as from Neutral Bay to Palm Beach. She says she was told to email them about delays in the day so the system could be amended, and clients notified. She said often clients were not notified and that made her worried and contributed to her anxiety and eventually depression. She says that Ms Hetherington had said to her that she would not want to be doing that amount of driving backwards and forwards or want Ms Hicks' job.
153. In the statement given to the investigator on 20 October 2017, Ms Hicks says she raised at one of the staff meetings with Christine that she was travelling more than she was working and the erratic nature of her shifts<sup>64</sup>. She says she presented some rosters and states that Christine said she would look into it and get back to her, but nothing happened. In her statement this is related before she refers to foot pain developing in July 2017.
154. In the statement to the investigator, Ms Hicks said the employer's app also gave inaccurate times for travel between destinations in peak hour. She also says she was directed to drive from Neutral Bay to Palm Beach in 30 minutes and this was not achievable. Ms Hicks says this caused her to run late and she says be subject to abuse and dissatisfaction from clients.<sup>65</sup>
155. Ms McDonald, in her statement dated 13 February 2019, denies there were inadequate travel times allowed, she says the "travel allowance is more than adequate with significant margins being included in the anticipated time travel that is issued to the carers."<sup>66</sup> She cites three examples of Ms Hicks' travel from Neutral Bay to Palm Beach where Ms Hicks was allocated 60 minutes for the trip. Ms McDonald says Ms Hicks completed two trips in 60 minutes and the third in 59 minutes.

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<sup>64</sup> ARD p 13[26].

<sup>65</sup> ARD p 24.

<sup>66</sup> ARD p 41 [30].

156. From Ms Hetherington's employee schedule report, it shows the times of these appointments<sup>67</sup>. Ms Hicks went from Newport to Neutral Bay for an appointment lasting from 8.30 am to 9.30 am, then she drove to Palm Beach for an appointment from 11 am to 12.30 pm, and then back to Manly Vale for an appointment commencing at 1.00 pm to 2.30 pm.
157. Ms Hicks had complained in her statements of been only allowed time to travel from Neutral Bay to Palm Beach of 30 minutes. The employee schedule report in the Late Documents has been closely examined by me and there is no such example. The time between appointments is longer than that. Mr Moffet in his submissions did not identify an example to support Ms Hicks contention. I find this is another instance of Ms Hicks being an unreliable witness. I prefer the documentary evidence to her uncorroborated assertion.
158. At [43] of this statement, Ms McDonald says Ms Hicks did not present or express any issues relating to her time travel allowance, however that seems inconsistent with the email sent by Ms Hicks referred to below.
159. In an email sent on 17 August 2017<sup>68</sup> to various persons at the employer, Ms Hicks raises that at her job interview she was employed to work on the northern beaches and her experience over the prior three months has been different. Ms McDonald, in her statement dated 22 November 2017, says she cannot comment on what Ms Hicks was told in her interview as it was conducted with Sharon Tong. In relation to the complaint about the roster and inadequate time to complete all the allocated jobs, Ms McDonald says she told Ms Hicks that she would discuss this with the Care Support Manager and that she did speak to Christine Hetherington and Sharon Tong.
160. Ms Sharon Tong denies the allegation about Ms Hicks being required to travel the distance in 30 minutes from Neutral Bay to Palm Beach<sup>69</sup>. The rosters confirm Ms Tong's contention.
161. Ms Hetherington refutes the allegation that the times allowed for travel are restrictive and inflexible. She says a number of times Ms Hicks had communicated with her about delays and she says she always advised Ms Hicks to take her time and the client was notified of the delay<sup>70</sup>.
162. Ms Hetherington says after the email of 17 August 2017, when Ms Hicks complained about the travel requirements outside the northern beaches, Ms Hicks was predominantly rostered to provide care in the northern beaches with the exception of attending Mrs Kimber in Neutral Bay and Mrs Upton in Cremorne Point. However, she says, on occasions, as she was also in the lower north shore, Ms Hicks would be rostered to go to Wollstonecraft, Greenwich and Artamon.
163. In the ARD and the Reply, there are copies of Ms Hicks' travel time and kilometres for June to 17 August 2017 and for those after her email of 17 August 2017, dealing with the rest of August and September 2017. Also, Ms Hetherington's printout shows the location of the jobs.
164. On 5 June 2017, Ms Hicks went from Newport to Neutral Bay and then Neutral Bay to Narrabeen and then Narrabeen to Mona Vale and then Mona Vale to Newport. After the email of 17 August 2017, as an example Ms Hicks on 5 September 2017 went from Newport to Neutral Bay, Neutral Bay to Palm Beach, Palm Beach to Manly Vale and Manly Vale to Newport<sup>71</sup>. So at first blush this looks like backtracking, but, ironically in the email of 17 August 2017, Ms Hicks complains about travelling outside the northern beaches, yet she

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<sup>67</sup> Late Documents pp 46-64.

<sup>68</sup> Reply p 74.

<sup>69</sup> ARD p 53-54.

<sup>70</sup> ARD p 60 [22].

<sup>71</sup> ARD p 424.

says in the same email she is happy to continue to visit the clients Nance Kimber and Jacqueline Upton<sup>72</sup>, who live in Neutral Bay and Cremorne.

165. Mr Moffet submitted that it was a real event that the allocation of jobs involved travel from places that were far apart. He submitted that Ms Hicks had also complained that when she was interviewed she was told her work would be on the northern beaches and it turned out it was not so confined.
166. Looking at the examples to which I refer above, if one was to take the Neutral Bay job out, all the remaining trips would have been in relatively close distance on the northern beaches to each other. Therefore, I find it is disingenuous for Ms Hicks to then complain she had to backtrack and travel outside the northern beaches when she could have declined to visit such clients. And in the email sent on 17 August 2017 she specifically chose to keep these clients who live at Neutral Bay and Cremorne.
167. In her statement dated 26 September 2019, Ms Hicks says the investigator inspected her car parked in the driveway and the EML case manager Courtney Spowart said to her it is not EML's responsibility if she chose to drive a difficult car which caused her foot injury. She adds,
- "it is now over two years since my work place bullying started, and my foot injury due to unexpected up to 6 hours a day driving required for this employment, that was offered to me by PAC as a part time casual position based in my local neighbourhood."
168. In Ms Hetherington's recent statement, she says Ms Hicks alleges being required to spend five or six hours per day driving, but the roster shows her maximum travel time was 3 hours and 36 minutes on 12 July 2017. I have checked this "travel time & KM's spreadsheet" and concur that this is the highest number of hours travelled and that this is well short of the 6 hours per day alleged by Ms Hicks that she travelled. It also must be borne in mind Ms Hicks only worked three days per week.
169. Also, from 5 June to 19 September 2017, Ms Hicks only worked a total of 45 days for the respondent. 24 of these days the kilometres recorded are for two hours or less per day. And only 4 days out of the 45 were for three hours or more.
170. The problem in this case is, it is not until one examines the documents very closely that the reality emerges. Unfortunately, the doctors have not been given the accurate picture on so many issues. For instance, Mr Nielsen answered the insurer's questionnaire on 1 February 2019 in which he lists her symptoms and he refers to her having to drive six hours at times per day, her foot injury and being unfit to work and being verbally abused by the EML case manager.<sup>73</sup>
171. It is a concern that Ms Hicks gave the treating practitioners a history of more than double the driving time she spent on most days. I find she was in error to refer to six hours per day was required by the respondent for her to drive.
172. Ms McDonald said she met Ms Hicks on 18 August and Ms Hicks apologised for sending the email and she wanted to talk about the eczema. Mr Moffet submitted the fact that Ms Hicks apologised shows that Ms Hicks clearly does not enjoy complaining but that she bottles up these issues and she wants to service her clients and keep them happy and he submits that was being made impossible, so she brought matters to the attention of her employer.

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<sup>72</sup> Reply p 74.

<sup>73</sup> Reply p 308.

173. However, Mr Moffet then submits “various managers dismisses her complaints, then retaliates with blame and raising dirt on her when she complains in a way to attempt to silence the applicant...”<sup>74</sup> I reject this submission as hyperbole and if it was to be taken seriously needed to be supported by references to particular evidence. If “raising dirt” is a reference to the drink driving conversation, as I explained earlier that took place well before this email and it do not consider it was raising dirt.

### **Inappropriate text message**

174. Ms Hicks relates that after she reported injuring herself at her friend’s house in September 2017, her employer sent her a text saying that “you have a lot of distressed and upset clients, when are you coming back to work?” She said she found this abrasive. However, this is not exactly how this email is worded.

175. Ms McDonald says she did not send this text and she was advised that Christine Hetherington had politely asked if Ms Hicks could let the support team know when she was ready to return to work mentioning that a number of clients were distraught and worried about her.<sup>75</sup>

176. Ms Sharon Tong has no direct knowledge of this allegation<sup>76</sup>.

177. Ms Hetherington refers to Ms Hicks sending an email to the office on Sunday 1 October 2019 and says she responded by email on Tuesday 3 October 2019. She says her reply was not offensive or abrasive. Ms Hetherington said the communication was focused on the client’s concerns for the welfare of Ms Hicks. A copy of the actual emails are in the Reply<sup>77</sup>. They state:

“From: Sarah Hicks...  
Sent: Sunday 1 October 2017 7:34am  
To: Care Support; Kanako McMullen  
Subject: Unable to work

Hi,  
Unfortunately I am in hospital at the moment after a fall yesterday morning.  
I have broken my arm/wrist.  
Waiting for operation, so not sure when I will be back home or available to work yet.  
:(  
Sarah<sup>78</sup>”

“On Oct 3, 2017, at 10.32Am Care Support...

Hi Sarah

Could you please advise as soon as you know the outcome of your operation and when you will be able to come back to work, we have some distraught clients, who are very worried.  
Thanks  
Christine”

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<sup>74</sup> T27.01.

<sup>75</sup> ARD p 43 [42].

<sup>76</sup> ARD p 55.

<sup>77</sup> Reply p 76.

<sup>78</sup> Reply p76.



"From: Sarah Hicks...  
Sent: Tuesday, 3 October 2017 1:52PM  
To: Care Support...  
Cc: Kanako McMullen  
Subject: Re: unable to work

Hi Christine

At the moment I am still in hospital, on a drip & morphine injections.

Of course I will let you know as soon as I know, when I will be able to come back to work.

Please pass on my apologies to clients.

Regards

Sarah<sup>79</sup>"

178. I find it is significant that Ms Hicks in her response does not respond that the email to her was in appropriate, instead she answers, and the exchange does not have any abrasive comments. It was clearly just an enquiry.
179. On 16 October 2017, Ms McDonald emailed Stephen O'Connell (the Procure investigator) and forwarded the above emails and commented that "I think Sarah has stated regarding Care Support staff not being nice to her. I have no other knowledge of or email of any other situation."<sup>80</sup>
180. In summary, having considered these allegations, I have found on the balance of probabilities the following:
- (a) The paedophile comment was not made;
  - (b) There was no pressuring to attend the Haigh client;
  - (c) That the buy your own gloves comment was not made;
  - (d) Ms Hicks did complain about the mobile app and was told she should get out of the car to look for an address;
  - (e) Ms Hicks did not have to drive six hours per day;
  - (f) Ms Hicks did have to travel outside the northern beaches, but she chose to continue to visit the clients at Neutral Bay and Cremorne;
  - (g) She was not expected to travel from Neutral Bay to Palm Beach in 30 minutes;
  - (h) The email on 3 October 2017 was sent to her to enquire about her return to work and was not abrasive.
181. In relation to these allegations, even though some have been accepted, I have found they did not have the effect on Ms Hicks that she now claims. I have found it is not consistent with her visiting Dr Lim in September and October 2017, when she did not mention any of these allegations, but that other allegations regarding the handling of her foot injury claim and her finances were made.
182. For completeness sake, I will now refer to the other evidence before the Commission.

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<sup>79</sup> Reply p75.

<sup>80</sup> Reply p80.

## **Brooksight Investigations**

183. Brooksight Investigations were engaged by the insurer to conduct internet research about Ms Hicks. Their report is dated 29 October 2018<sup>81</sup>. Several pages have copies from Ms Hicks' Facebook account showing her concern for free range eggs, greyhounds, live sheep exports and to my mind are not of particular relevance to the issue I have to determine.

## **Procure reports**

184. Various reports from Procure are in the ARD including a Workplace Assessment Report dated 13 November 2017, status report 21 December 2017, Status Report dated 30 January 2018, Case Conference Report 9 February 2018, Status Report 5 March 2018, Status Report 19 April 2018, Status Report 24 May 2018, Case Conference Report 6 June 2018, and Status Report 26 June 2018. Procure have also supplied factual investigation reports, which I have read, but do not propose to summarise any further in these reasons as I have referred to the actual witness statements above.
185. In relation to the other Procure reports listed above, it is not necessary to summarise these reports in full in these reasons, as they mainly deal with rehabilitation following the foot injury. Ms Hicks did mention to the author of the first report that she drove on some days up to five hours per day. The author stated a review of Ms Hicks' travel time showed that on average she spent two hours per day travelling between clients, and this time excluded travel to her first job from home and travel from her last job to home.<sup>82</sup> It is stated the majority of time she would start and finish work no more than 30 minutes from her home and locations included Newport, where she lived, Narrabeen and Neutral Bay. It is also noted that Ms Hicks said the recruiter told her the driving would be minimal and only in her local area<sup>83</sup>.
186. It is noted in the report dated 30 January 2018 that Ms Hicks rang Procure on 21 January 2017 [sic, 2018] and reported that she had not been in contact due to severe depression<sup>84</sup>. In the next report she advised that her depression exacerbates each time she attempts to complete her statement<sup>85</sup>. This is the statement that was requested for her foot injury.
187. In the April report, there is reference to Dr Lim's certificate of 22 March 2018 referring to Ms Hicks having adjustment disorder with anxious depressed mood and to the doctor attributing this to bullying by the employer, being unsympathetic after the foot and wrist injury. Also, Ms Hicks had financial pressures because of lack of payment by the insurer and she was about to lose her house as she cannot pay the mortgage and her bills<sup>86</sup>.
188. In June, there was reference to clarification being needed if the depression condition was part of the foot injury claim or a new injury<sup>87</sup>.

## **Dr Dillon Cheah**

189. I have previously referred to Dr Cheah's report Dr Lim dated 15 October 2018<sup>88</sup>. Dr Cheah also reported to Dr Lim on 28 March 2019<sup>89</sup>, to EML dated 1 March 2019<sup>90</sup> and to Ms Hicks' solicitors dated 11 June 2019<sup>91</sup>.

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<sup>81</sup> ARD p158.

<sup>82</sup> ARD p85.

<sup>83</sup> ARD p87.

<sup>84</sup> ARD p96.

<sup>85</sup> ARD p100.

<sup>86</sup> ARD p106.

<sup>87</sup> ARD pp118/199, and 123.

<sup>88</sup> ARD p 375.

<sup>89</sup> ARD p 382.

<sup>90</sup> ARD p 379.

<sup>91</sup> ARD p 384.

190. The history taken by Dr Cheah leading him to form these views is:

“She developed pain in the arch of her left foot (which is still present) that the near-constant driving seemed to precipitate and perpetuate. The situation was compounded by Management apparently being dismissive and unsympathetic towards her concerns. She reported being humiliated publicly with private details about her health being disclosed in front of her co-workers. She felt she was bullied and harassed. She reported that expectations of Management in terms of getting around Sydney were unrealistic and that she was often sent to the wrong address.<sup>92</sup>”

191. Dr Cheah informed the insurer of his diagnosis advising by then, 1 March 2019, he had seen Ms Hicks on 15 October 2018, 19 November 2018 and 24 December 2018. He described her symptoms in detail in point 2 of his report. In point 3 he repeated the above-quoted paragraph about the cause of her illness. At point 4 he stated that he considered that work was the main contributing factor to her current presentation. He refers to the lack of other pre-existing factors that are relevant to her condition. While Dr Cheah in this report does not refer to the earlier car theft incident he was aware of the same as he mentioned it in the earlier report to Dr Lim.

192. In the report to Dr Lim dated 28 March 2019, Dr Cheah says he had seen Ms Hicks again that day. He refers to the effects of various medications and that Ms Hicks had dropped weight to only 46.5 kg. He noted she had begun to see Carl Nielsen, psychologist, fortnightly. Dr Cheah describes her symptoms and says that her condition has deteriorated. He said she is in a worse state than a few months ago. He noted her payments had decreased and that was exacerbating and stalling her recovery.<sup>93</sup>

193. In the report dated 11 June 2019 to Ms Hicks’ solicitors, Dr Cheah expands on his prior accounts of Ms Hicks’ problems with her work, as follows:

“She was required to drive up to six hours a day, which she had not been informed about prior to her commencing the role. She developed pain in the arch of her left foot (which is still present) that the near-constant driving precipitated and perpetuated, as a large amount of time was spent driving her a manual car, where she needed to use her left foot constantly for the clutch. She was told by Management that ‘it was not their fault she drove a difficult car’ and was told she had ‘stupid shoes’ when physical problems, such as the pain, began to arise.

The situation was compounded by Management apparently being dismissive and unsympathetic towards her concerns. She claimed she was frequently sent far North in the Northern Beaches, eg Palm Beach, then down to the Lower North Shore, e.g. Neutral Bay, and then back again up to several times a day, with inadequate time being allocated for both travelling time and to see each client. She had been told the role was Northern Beaches, yet she was sent as far as Ryde. This became highly stressful, and she would have to deal with irate clients who were expecting services in a more timely manner. She reported being humiliated publicly with private details about her health being disclosed in front of her co-workers. At her first staff meeting, a mention of a police caution for a DUI was talked about by her Manager in front of her co-workers, and she was told that, ‘she was lucky to have been given a job, as that was like being a paedophile’. Sarah felt upset and humiliated. At another staff meeting, Sarah raised the issue that workers (herself and others) were sent to wrong addresses, in the wrong suburb in fact. She was bluntly told, ‘She needed to get out of the car to find the

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<sup>92</sup> ARD p 375.

<sup>93</sup> ARD pp 382-383.

entrance'. Cleaning jobs as part of her role caused skin problems due to the cleaning agents, and she was merely told to 'buy her own gloves'. She felt she was bullied and harassed over the 5 months she was there.<sup>94</sup>

194. Dr Cheah said her psychological injury was a primary injury due to Ms Hicks' description of her supervisors being dismissive, invalidation and unreasonable. He said they did not seem to address her concerns nor look after her welfare. He adds that he does not believe the extent of her Major Depression and Anxiety could possibly be due to the pain alone in her foot. Therefore, he does not believe her psychological condition is secondary<sup>95</sup>.
195. However, I do not accept I can place weight on Dr Cheah's opinion as he has accepted all of Ms Hick's complaints at face value. For instance, he refers to her near- constant driving. I do not accept that this is a sound basis for his opinion. I do not accept as a factual matter that Ms Hicks was involved in near constant driving for the reasons explained above. Also, the doctor in coming to his final conclusion excludes the presence of a secondary psychological condition from the sequelae of the foot injury, because he only considers it in terms of pain. As Mr Cipriani makes clear and I have endeavoured to show the foot injury had sequelae apart from pain. It took Ms Hicks out of work, she grappled with Centrelink and the Workers Compensation insurer, and she had significant financial concerns about losing her house. From the close consideration of Dr Lim's early records, I have found that they do not support Ms Hicks case in these proceedings.
196. That does not mean she does not have a psychological injury; however, it is not the injury that was advanced in these proceedings. This was the conclusion reached by Mr Cipriani. I consider his conclusion was very fair to Ms Hicks. Dr Cheah has not had the advantage of seeing all the material that was before Mr Cipriani, nor his report. He also has not had the opportunity of considering in detail the matters I have dealt with.
197. Given I have found that Ms Hicks is not a reliable witness, I find that it would be unsound to place weight on Dr Cheah's opinions as he has taken her assertions at face-value.

### **Dr Rastogi**

198. Dr Rastogi, consultant psychiatrist, was qualified on behalf of Ms Hicks and she has provided two medico-legal reports dated 9 October 2019<sup>96</sup>. The doctor has a history of Ms Hicks having a previous history of trauma in 2016 with her car being stolen and she was threatened by the perpetrator. She said she had counselling and was prescribed medication and made a full recovery.
199. The doctor diagnosed that Ms Hicks was suffering from Major Depressive Disorder Chronic and ongoing and Social Anxiety Disorder with Panic Disorder which she attributed to her being subjected to criticism, denigration, invalidation and humiliation by her manager. She noted that Ms Hicks reported her manager was very judgemental and always put her down and she perceived being mocked and put down over a period of time. She said she felt undermined, undervalued and victimised. Dr Rastogi states that this culminated into anxiety with avoidance, social ineptness and feeling scrutinised and social isolation. She said she displayed poor stress control and developed self-doubts, anhedonia and her confidence plummeted. The doctor said this was the cause of her psychological injury and work events are the main contributing factors<sup>97</sup>.

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<sup>94</sup> ARD pp 384-385.

<sup>95</sup> ARD p 386.

<sup>96</sup> ARD p 234.

<sup>97</sup> ARD p 240.

200. Dr Rastogi is of the opinion Ms Hicks has a primary psychological injury and she lists six factors contributing to this:

- Constant denigration and tarnishment of her reputation by senior manager
- Being humiliated, undervalued made to feel dumb and stupid
- Inappropriate comments been made in front of others and undermined
- Lack of support by employer
- Excessive travel for hours and not providing work as initially discussed at time of job offer
- Lack of empathy and dismissal and constant social scrutiny”

201. Having considered the matters Ms Hicks complains of in detail, I cannot accept the factual basis that Dr Rastogi’s opinion relies on. For instance, I do not accept that the staff of the respondent employer were involved in constant denigration and tarnishment of her reputation.

202. Like Dr Cheah, Dr Rastogi has not had the benefit of considering Dr Lim’s records carefully together with the material that has been considered by me in these reasons. She has not been sent Mr Cipriani’s report and so in my view she has proceeded with an uncritical acceptance of Ms Hicks complaints. Ms Hicks has been at pains to have her psychological injury considered a primary injury and so she has, in my view, most likely raised matters she perceives will achieve that end. Therefore, I find it would not be sound to rely upon Dr Rastogi’s opinions. I prefer the final opinion of Dr Young because he has considered Ms Cipriani’s report which refers to all the evidence and Dr Young has considered Dr Lim’s records.

### **Dr Young**

203. Dr Young is the consultant psychiatrist engaged by the insurer and he has provided medico-legal reports dated 28 June 2018, 26 February 2019, 12 September 2019, 12 December 2019 and 23 February 2020.

204. Dr Young expresses the opinion in his report dated 28 June 2018 that Ms Hicks has a diagnosable psychiatric condition in the form of an adjustment disorder. He states,

“I do not view that the causation of the Adjustment Disorder is solely due to Ms Hicks’ perception of bullying and poor treatment by her employer but is contributed to also by her initial physical injury and ongoing pain and therefore I would describe this as a secondary injury rather than a new injury.<sup>98</sup>”

205. In the second report, headed impairment assessment, dated 26 February 2019 Dr Young finds Ms Hicks has not reached maximum medical improvement due to the lack of reasonable treatment.

206. The main report from the consultation on 25 February 2019 is not in the Reply or ARD. Mr Cipriani had a copy of it, which he summarises and says Dr Young diagnosed a Major Depressive Disorder substantially attributed to alleged bullying and harassment. Mr Cipriani includes a quote from Dr Young’s report as follows<sup>99</sup>:

“From the history described, her current symptoms are more associated with perceived bullying than pain and impairment secondary to the foot injury, although both are present.”

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<sup>98</sup> ARD p 350.

<sup>99</sup> Late Documents p12.

207. In the supplementary report dated 12 September 2019, Dr Young says that the medical and factual evidence now available cast considerable doubt on the veracity of the history related to him by Ms Hicks and the opinions on which his prior reports was based. He says

“In particular there are two non-work-related motor vehicle accidents to which her reported foot pain may be attributable. If this is the case then her self-report can be considered as misattributed.<sup>100</sup>”

208. However, as can be seen from Dr Lim’s clinical notes Ms Hicks was complaining of psychological symptoms before the two motor vehicle accidents. Also, there is no evidence of foot injury in the two motor vehicle accidents. Dr Young, in his later report of 12 December 2019, finds the motor vehicle accident is not a causative factor.

209. Dr Young then says that the statements regarding bullying deny Ms Hicks’ allegations and he says their contents, even if correct, would appear in his view to a reasonable person as innocuous and insufficient to be placed in a category of bullying and harassment. Dr Young adds,

“That Ms Hicks has done so may mean that she is vulnerable to interpreting interactions as hostile and inferring adverse perceptions from others.”

210. When answering the insurer’s question about whether there is any contemporaneous evidence of a psychological injury arising in May or June 2017, Dr Young states there is no objective evidence of a psychological injury arising in May or June 2017.

211. Question 3 and Dr Young’s response are reproduced below:

***“Do you consider that the Applicant’s psychological injury results from chronic pain and concerns related to the Applicant’s financial situation arising from the Applicant’s foot injury of September 2017 or do you consider that the Applicant suffers a primary psychological injury arising from alleged bullying and harassment? Please provide detailed reasons for your answer***

I believe that Ms Hicks’ self-report in these matters, the basis of any clinical assessment, cannot be considered as reliable. This includes the extent or not chronic pain is present, the extent of current symptoms and impairment.

Were Ms Hicks’ primary psychological injury due to bullying and harassment, it would have been expected to have resolved. Therefore chronic pain could be considered a perpetuating factor that has not allowed the primary injury to resolve. However the new information suggests that other causation are possible.

Additional useful information could be obtained by detailed psychometric testing and functional assessment. Psychometric testing including use of a battery of tests incorporating validity scales would likely detect feigned or exaggerated symptoms while functional assessment by a suitably experienced occupational therapist could document actual functioning.”

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<sup>100</sup> ARD p 355.

212. In Dr Young's report dated 12 December 2019,<sup>101</sup> the doctor had before him the statements of Ms Hicks, and some of those from Ms McDonald, Sharon Tong and Christine Hetherington as well as the reports of Dr Rastogi, various emails and Dr Lim's clinical notes. Dr Young stated that Ms Hicks exhibited rigidity of thinking in relation to her beliefs of having been bullied and persecuted at work. He said these beliefs were strongly held, but they did not reach the threshold of being delusional. He said she appears to hold these beliefs genuinely, although it would appear on the objective evidence that these beliefs are misplaced. He stated that he believes Ms Hicks' insight and judgement regarding her condition is significantly impaired.
213. Dr Young states that, although he remains somewhat sceptical of the history reported, Ms Hicks does present what appears to be a reasonably convincing history of major depressive illness.<sup>102</sup>
214. Dr Young took a history of the two motor vehicle accidents in October and November 2018 and reported that Ms Hicks said she submitted a CTP claim for the first accident and had neck pain and was treated with physiotherapy and had a full resolution of symptoms. In relation to the second accident she said she was not injured.<sup>103</sup> Dr Young said these did not play a part in her psychological condition. He diagnosed a Major Depressive Disorder, on the basis of accepting her at face value. When asked if the condition was a primary one he responded that Ms Hicks clearly stated she experienced symptoms before the foot injury following her perceived bullying at work. He said this is somewhat plausible and that the symptoms then became somatised causing the foot pain and then with subsequent financial stressors as compounding the situation.<sup>104</sup>
215. Dr Young assessed her at 17% whole person impairment (WPI) and said she explained the lack of contemporaneous record of her symptoms earlier than September 2017 due to her not having a regular general practitioner.
216. Dr Young's final report dated 23 February 2020 was written after the consultations on 25 June 2018, 25 February 2019 and 10 December 2019 and after he was sent Mr Dino Cipriani's report dated 11 February 2020. Dr Young was asked four questions by the respondent's solicitors.
217. Firstly, Dr Young's attention was drawn to the consultations with Dr Lim on 19 and 26 September and 5 and 12 October 2017 and the doctor found these clinical notes were not consistent with Ms Hicks' report to him (Dr Young) regarding her seeking medical attention regarding her psychological injury.
218. Dr Young opined:

"Ms Hick's report of bullying relies on her perception or interpretation of the word used and actions of others. Given the many inconsistencies apparent and including the objective evidence of psychological symptom exaggeration as well as medical evidence indicating lack of apparent organic pathology with regard to her foot, the probability that both conditions are subject to a significant level of malingering is high. Malingering is not a diagnosis but is defined in the DSM-5 as the intentional production of false or grossly exaggerated physical or psychological problems. Motivation for malingering is usually external (e.g., obtaining financial compensation). Malingering may be suspected in any combination of the following factors:

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<sup>101</sup> Reply p 441.

<sup>102</sup> Reply p 446.

<sup>103</sup> Reply p 447.

<sup>104</sup> Reply p 448.

- A) Medicolegal context of presentation.
- B) Marked discrepancy between the person's claimed stress of disability and the objective findings.
- C) Lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen.
- D) The presence of antisocial personality disorder.

In this case at least 1-3 are present. According to Resnick's classification malingering can be divided into three subtypes. In pure malingering, patients fabricate symptoms that do not exist at all, whereas in partial malingering, symptoms that do exist are exaggerated. Lastly, in false imputation, patients attempt to blame real symptoms on an unrelated event.

In my opinion, based on my assessment and the findings from Dr Cipriani, there is likely to be partial malingering with regard to foot symptoms and with regard to psychological symptoms. Hence there is likely to be no or only minor psychological injury, i.e. Adjustment Disorder and the true level of impairment is likely to be non-significant."

219. Dr Young concludes that Ms Hicks has no primary psychological injury and her presentation is related to feeling aggrieved by her employer and the ongoing compensation process. I find Dr Young should be accepted when he considers that Ms Hicks does display marked discrepancy between her claimed stress of disability and the objective findings. In every example considered previously in these reasons Ms Hicks expresses her reaction in exaggerated terms. As I have found, had she had the reactions she claims from alleged comments made to her in the course of her employment, it is extraordinary that she did not inform Dr Lim of them, particularly as she has told him at length about the problems she had with the insurer, Centrelink and her finances.

### **Dino Cipriani**

220. As has been noted above, Mr Cipriani is a consultant clinical psychologist and he has provided a 36-page medico-legal report for the respondent dated 11 February 2020<sup>105</sup>. The interview and testing was conducted over four and a half hours. He refers at [18.16] that Ms Hicks is deliberately exaggerating her pain disability and memory and concentration complaints. He says this is apparently to convince the insurer and examiners as to how disabled she feels and to ameliorate her precarious financial situation. Nonetheless, Mr Cipriani regarded Ms Hicks as unfit to resume her pre-injury duties due to secondary psychological injury because of her high levels of stress associated with reported pain, financial difficulties and litigation<sup>106</sup>.
221. However, despite such comments Mr Cipriani diagnosed that Ms Hicks had an Adjustment Disorder with Mixed Anxiety and Depressed Mood. He said this was predominantly due to the foot injury and its direct consequences being the inability to resume pre-injury duties, severe financial stress and ongoing stress associated with the claims process. He adds "although Ms Hicks has been preoccupied with perceived bullying and harassment in the workplace, her Adjustment Disorder is predominantly due to foot pain and associated stressors and is therefore a secondary psychological injury<sup>107</sup>".

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<sup>105</sup> Late Documents p 1.

<sup>106</sup> Late Documents p 33 [19.8.10].

<sup>107</sup> Late Documents p 32 [19.8.3].



222. Mr Cipriani noted that Ms Hicks continued to work after the alleged comments made to her at the two staff meetings. He also noted that bullying was first recorded by Dr Lim in the consultation on 31 October 2017. But I have found that the reference to “bullying” was not based on the events that she complains of in these proceedings. I have found it was based on how she perceives the insurer has handled her compensation claim for her foot and the resultant financial pressures she has experienced.

### **Dr Con Kafataris**

223. Dr Kafataris issued an Injury Management Consultant report to the insurer dated 25 October 2018. He refers to the mechanism of injury, that Ms Hicks developed left foot pain and that she was driving six hours per day. It was noted she said she developed her foot pain approximately three months after starting work for the respondent. This would date to mid-August 2017. Ms Hicks has stated to others it was in July 2017. Dr Kafataris said he agreed with the diagnosis of an adjustment disorder. He stated given Ms Hicks’ feelings regarding the employer there was little point in exploring return to work there unless a satisfactory mediation could be achieved. He only briefly noted her psychological complaints and that they involved bullying by the employer, but he does not record the allegations in this case.<sup>108</sup>

### **Fastrack Health**

224. There is a report from Cherie Martinez from Fastrack Health dated 16 November 2018. There are only brief references to the psychological issues, which have been documented in other reports.<sup>109</sup>

### **Further consideration of counsels’ submissions**

225. Both counsel made fairly lengthy submissions which have been recorded in the transcript; Mr Moffet from T6-32.18, Mr Flett from T32.24-75.24 and Mr Moffet in reply from T75.27-84.14. A good deal of the submissions are occupied in recounting the evidence which has been summarised above and considered above.

226. Ms Hicks’ case is that the psychological condition from which she suffers is a primary psychological injury. Mr Moffet submits that what is missing in the respondent’s case is orthopaedic evidence about the left foot injury. He argues for the respondent to succeed in an argument that Ms Hicks suffers a secondary psychological condition as a result of the foot injury, evidence is needed to promote a connection between the two. Mr Moffet draws attention to the material supplied to Dr Young, the respondent’s medico-legal psychiatric expert, and he submits he was not given reports from the treating orthopaedic specialist. However, that overlooks the fact that Mr Cipriani appears to have had the orthopaedic specialist’s report from Dr Carmody and that Dr Young considered Mr Cipriani’s report.

227. However, the argument of the respondent that Ms Hicks has a secondary psychological condition is not just dependent on pain being felt in the left foot by Ms Hicks. All the other matters that Mr Cipriani identified are sequelae of the foot injury. The main contributing factor to Ms Hicks contracting a psychological injury I find those matters involving the foot injury and its sequelae.

228. Mr Moffet submits that the only report that could be viewed as coming close to dealing with the physical injury is that of Dr Kafataris which refers to Ms Hicks having pain in the left medial longitudinal arch, primarily with weight bearing. Mr Moffet draws attention to the next paragraph of the report where Dr Kafataris states that, in addition, Ms Hicks complains of psychological symptoms such as depression, extreme anxiety, panic attacks and being very worried, which she attributes to have been bullied by the employer and insurer. However, I

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<sup>108</sup> Reply p 298.

<sup>109</sup> Reply p 304.

place no weight on this assertion because it is made without consideration of the issues determined previously. Dr Kafataris' history of driving six hours per day has not been accepted by me as factually correct. I consider for the reasons already discussed several times in these reasons Dr Lim's contemporaneous notes starting in September 2017 to April 2018 do not support a primary psychological injury having been sustained due to the incidents relied upon by Ms Hicks.

229. Mr Moffet refers to the clinical notes of Dr Lim and he submits there are two trends in the notes which he says are inescapable. He submits there is a dying off about the foot complaints and an increase in the complaints about the psychiatric injury, which has been picked up by Dr Cheah. However, this overlooks Ms Hicks clearly had psychological symptoms on 31 October 2017, but just not stemming from the events relied upon.
230. Mr Moffet acknowledges that Ms Hicks goes to Dr Lim late, in September 2017, which is after the complaints she has made about work. He submits that, at that stage, she is complaining primarily about her left foot and he says this confuses things; however, he submits she does complain in October 2017 about feeling bullied and traumatised. However, I have explained that this reference to bullying, more likely than not on the balance of probabilities, relates to the claims process with the foot claim and she was becoming traumatised by financial concerns. Mr Moffet notes that in November 2017 Ms Hicks was still complaining about foot pain. Mr Moffet submits that the point is that Ms Hicks was complaining about bullying "before her pain is going". Therefore, he submits the bullying is a major thing even though she is in pain. The trouble with workers and counsel using the word "bullying" is that it is meaningless unless one understands the events that fall within that description in a particular case.
231. Mr Moffet submitted that Dr Lim's notes are not perfect because before the 31 October 2017 entry Ms Hicks had seen the respondent's investigator on or earlier than 16 October 2017. He relies on this statement because it refers to the inappropriate comment about the drink driving offence. I have explained why I do not accept such a proposition.
232. Mr Moffet submits that the respondent's approach is to attack the proposition that Ms Hicks has a primary injury by saying the incidents Ms Hicks complained of did not happen. But he submits each event occurred and was a real event. I have explained earlier in these reasons why I do not accept this submission.
233. Mr Flett submitted that it is significant that when Ms Hicks first attends on Dr Lim she does not mention any grievances about work, and that her complaints relate solely to her foot injury. The attendances on 19 and 26 September 2017 do not refer to any psychological symptoms.
234. Mr Flett refers to the entries on 31 October 2017 in Dr Lim's records and submits that there is a complaint about the workers compensation insurer's handling of the foot injury claim. He rightly submitted that any psychological sequelae of the claims process and insurer's conduct does not fall within a primary psychological injury claim from the employer's conduct.
235. Mr Flett also summarises the insurer's conduct, by reference to the documents in the Reply, to show that they have not just been sitting back, but they were trying to manage her claim. Mr Flett submits that this shows how Ms Hicks over-reports her problems to doctors. Whether this is "over-reporting" or an example of a "lack of insight", to use Dr Young's words, is perhaps a moot point.
236. In summary, respondent's case is that many of the events Ms Hicks' complained of were not real events. Furthermore, the respondent contends that any psychological symptoms suffered by Ms Hicks have been caused by the sequelae to the foot injury, including other matters such as but not limited to frustration with the claims process, loss of income and worsening of her financial position. I have accepted this submission.

237. Accordingly, I find that Ms Hicks does not suffer from a primary psychological injury arising out of or in the course of her employment with the respondent from the deemed date of injury 14 October 2019.
238. I order an award for the respondent in respect to the claim for lump sum compensation brought in these proceedings.