

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 5445/19
Applicant: Edward Christopher Lee
Respondent: Illawarra Retirement Trust
Date of Determination: 28 April 2020
Citation: [2020] NSWCC 133

The Commission determines:

1. The applicant suffered psychological injury deemed have occurred on 23 February 2016 in the course of his employment with the respondent.
2. The respondent has not established that the psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to performance appraisal, discipline, dismissal of the applicant or provision of employment benefits to the applicant and the defence pursuant to section 11A of the *Workers Compensation Act 1987* (the 1987 Act) is not made out.
3. The claim pursuant to section 66 of the 1987 Act is remitted to the Registrar for referral to an Approved Medical Specialist to assess whole person impairment, if any, arising from psychological injury deemed have occurred on 23 February 2016.
4. The material is to be supplied to the Approved Medical Specialist should include:
 - (a) Application to Resolve a Dispute and attached documents;
 - (b) Reply and attached documents, and
 - (c) Documents attached to Application Admit Late Documents by the respondent with the exception of report of Dr Bisht dated 31 December 2019.

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

W Dalley
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 WILLIAM DALLEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Edward Christopher Lee (the applicant/Mr Lee) suffered a psychological injury due to a number of events that occurred in the course of his employment with Illawarra Retirement Trust (the respondent/IRT). That injury was deemed have occurred on 23 February 2016.
2. Mr Lee was examined by a psychiatrist, Dr Westmore, for the purposes of a claim for lump-sum compensation pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act). Dr Westmore diagnosed Mr Lee as suffering from an Adjustment Disorder with Depression and Anxiety. He assessed Mr Lee as having 17% whole person impairment.
3. A claim was made in accordance with that assessment which was denied by the insurer deemed to have occurred on 21 November 2014. The insurer denied that Mr Lee's psychological condition resulted from his employment or, in the alternative, asserted that Mr Lee's psychological condition was wholly or predominantly caused by the reasonable actions taken or proposed to be taken by the respondent with respect to performance appraisal, discipline, retrenchment and/or dismissal or the provision of employment benefits.
4. An Application to Resolve a Dispute was filed in the Commission seeking lump sum compensation pursuant to section 66 of the 1987 Act. The respondent, by its reply, maintained the grounds of dispute.

PROCEDURE BEFORE THE COMMISSION

5. 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. The parties were informed of my intention to determine the dispute without holding a conciliation conference or arbitration hearing.
6. Following the conciliation phase the applicant sought leave to amend the deemed date of injury to 23 February 2016. That amendment was not opposed by the respondent, and, in the light of that amendment, the respondent appropriately did not pursue a denial of injury deemed to have occurred on that date.
7. The matter proceeded to hearing on 28 February 2020 and 3 March 2020. The matter was not able to be completed on the latter date and a direction was made for written submissions. The applicant submitted extensive written submissions and the respondent submitted written submissions in reply. Those submissions are available in the electronic file and have been taken into account as noted below.

ISSUES FOR DETERMINATION

8. The parties agree that the issue to be determined in the Commission is whether the psychological injury suffered by the applicant was wholly or predominantly caused by reasonable actions taken by or on behalf of IRT with respect to performance appraisal, discipline, dismissal and/or provision of employment benefits pursuant to section 11A of the 1987 Act.
9. There was no dispute that the injury alleged by the applicant was a "psychological injury" within section 11A(2) of the 1987 Act.

Matters previously notified as disputed

10. The dispute notice issued by the insurer asserted that the applicant's psychological injury was wholly or predominantly caused by the reasonable actions taken or proposed to be taken by the respondent with respect to performance appraisal, discipline, retrenchment and/or dismissal or the provision of employment benefits.
11. Following the first day of the hearing a direction was made for the respondent to particularise the actions which the respondent asserted related to discipline, performance appraisal, dismissal and/or provision of employment benefits.
12. The respondent provided particulars as to the actions relied upon with respect to discipline, dismissal and employment benefits but did not particularise any actions with respect to performance appraisal.

EVIDENCE

Documentary evidence

13. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute and attached documents;
 - (b) Reply and attached documents, and
 - (c) documents attached to the Application to Admit Late Documents by the respondent with the exception of report of Dr Bisht dated 31 December 2019.
14. No application was made for oral evidence to be given or for cross-examination of any witness.
15. The evidence establishes the relevant events occurred in the workplace between April 2014 and the termination of Mr Lee's employment on 23 February 2016. The evidence is extensive but exposes relatively limited areas of dispute as to what occurred.

The applicant.

16. A number of statements by the applicant were in evidence. In his statement dated 15 July 2016 Mr Lee referred to his birth in 1965 and noted he was married with adult children. He had re-partnered and had four step children.
17. Mr Lee said that he commenced employment with IRT on 6 April 2009 as a home care worker. In 2011 he obtained his Certificate III in Aged Care and upgraded his qualification to a Certificate IV in Aged Care in March 2013. He was promoted to a team leader position within IRT.
18. Mr Lee said that he first began experiencing problems with IRT management in April 2014 with respect to the reimbursement of entitlements related to first-aid training and tea breaks. He said that he raised this issue with the Human Resources Manager, Richard Walsh, but no action was taken.
19. Mr Lee then noted that in July 2014 he had been reimbursed the sum of more than \$2,000 in respect of missing entitlements in respect of overtime hours and scheduled breaks.
20. Mr Lee said that he subsequently met with the IRT manager, Debbie Turnbull, with respect to investigation of earlier pay entitlements.

21. Mr Lee next noted that, following this meeting, his rosters made no provision for lunch breaks. He contacted the payroll officer to have this rectified. The manager, Ms Turnbull, contacted him requesting that he deal directly with her in relation to such issues in future. He said that he continued to contact Ms Turnbull without any success in fixing the ongoing rostering problems.
22. Mr Lee noted that in October 2014, he had attended the Fair Work Commission in support of colleague who was involved in a dispute with IRT relating to outstanding entitlements. Mr Lee said that he subsequently received an email from the IRT payroll office stating that Ms Turnbull had provided approval to pay outstanding entitlements. He said that he was relieved that this action. However on about 24 November 2014 he said that Ms Turnbull changed her mind about paying the entitlements. He said that as a result he became overwhelmingly anxious and frustrated. He said "It was at this point my psychological condition began to deteriorate as a result of management's betrayal and the ongoing tactics of bullying and harassment."
23. He said that management had then engaged in systematic harassment and bullying against him so that he was made to feel like "an agitator or troublemaker" by management.
24. Mr Lee said that in December 2014, Ms Turnbull had organised "unrequested meetings" which he declined to attend. He said that Ms Turnbull changed meeting times without consulting him and he was told that the meetings were "non-negotiable".
25. Mr Lee said that he was made aware in early December 2014 of a complaint by an IRT resident who had been the subject of a video featuring Ms Turnbull "interacting with a number of elderly clients in their homes". He said that the resident had complained that before releasing the video, consent had not been obtained from the clients which he felt was a form of elder abuse.
26. Mr Lee said that his colleague, Mr Lyttle, had forwarded the complaint to the team leader, Jenny Allen, by way of text message. He said this was ignored. Mr Lee said that on or about 10 December 2014 Ms Turnbull had deleted the text message sent by Mr Lyttle and had been dismissive of the complaint.
27. Mr Lee said that he was notified on 11 December 2014 of disciplinary action being taken against him for failing to attend prior meetings requested by Ms Turnbull. He said that he felt that he was being targeted for asserting his rights and "doing the right thing".
28. Mr Lee said that on 18 December 2014 he had attended a team meeting at which he had been ridiculed by both management and his peers with regard to his documenting of the video complaint. He said the issue was then referred to the area manager, Ms Cheree Howe.
29. Mr Lee said that following that meeting he was no longer rostered on with the client who had made the original complaint. His belief was that this was done to "punish the client and prevent us from raising issues regarding the video". As a result he felt anxious and felt an increase in his "work-related stress".
30. Mr Lee made a complaint which he described as "a further report of elder abuse" with respect to a different client. He was invited to participate in investigation into this matter. He said that investigation lead to disciplinary action being taken against him leaving him feeling humiliated as a result.
31. On 22 January 2015 Mr Lee said he been exposed to golden staph infection while assisting a client. A client had salivated onto "open wounds" on his arms. He said that, when he found out about the status of the client, he had a panic attack, fearing that he had contracted an infection through contact with the client and his fear that he may have contaminated other elderly residents.

32. Mr Lee said that it was his understanding that IRT had been made aware that the client was infected at an earlier date and had failed to notify him. Mr Lee was tested and was found not to have been infected but he said that “the incident had already severely affected my psychological well-being and continues to do so.” He said that he experienced flashbacks and anxiety attacks when he thinks about it. Mr Lee said that he believed that IRT had sent him into a situation where he was put at risk without warning “as punishment for the issues I had raised previously with regard to missing entitlements and the unauthorised video.” He felt that this represented an escalation of the “bullying and harassment” to which he was being subjected.
33. Mr Lee reported the incident but he says this report was amended by Ms Turnbull who he said had “changed them to falsely represent that I was at low risk of contracting MRSA [golden staph] that I did not have open wounds”. This added to his frustration and anxiety.
34. Mr Lee said that about this time he had started to receive phone calls in the course of his work from colleagues requiring information as to his whereabouts and his activities. He felt that he was not trusted which he found demeaning and he became depressed and lost self-confidence.
35. In March 2015, the team leader Jenny Allen made an allegation that he and Mr Lyttle had been “pumping” a client’s daughter for information “on an earlier issue”. He said that he believed that this claim was fabricated “as retribution for my earlier reports of elder abuse”. He said that by this stage he was experiencing psychological symptoms associated with anxiety and depression and felt that his “every move was being watched with a view to being caught out and disciplined by management”.
36. In April 2015, Mr Lee said that he had reported incorrect pay to the payroll office and had subsequently received backdated entitlements from 6 April 2009.
37. On 4 May 2015, Mr Lee received a text message from his supervisor informing him that he was required to have his lunch at the monthly team meeting as he had not been rostered for a lunch break. Mr Lee said “This again infuriated me due to the continual problems I was having with rostering.” He said that he made many complaints to Ms Turnbull but “issues were continuing to occur”. He said he believed this to be intentional (presumably on Ms Turnbull’s part).
38. On 25 May 2015, Mr Lee attended a meeting which he said was held in relation to a number of issues that he had raised in January 2015. (As noted above, the applicant had recorded reports of elder abuse and failure to adequately guard him against the risk of infection in January 2015). Mr Lee said that only two of his complaints were addressed and he “unfairly received punitive action in the form of a verbal warning, a note on my personnel file, formal counselling and training on positive workplace behaviours.” He said that he again believed he was being targeted for having raised these issues.
39. In team meetings in July 2015, Mr Lee said that he reported a number of incorrect statements recorded in the team meeting minutes. He said that one of these errors was a statement that Ms Turnbull had “given me an apology for earlier conduct”. He said that this was not correct and upset him. He said “despite Ms Turnbull clearly acknowledging that she was wrong, I was not afforded an actual apology because I had been responsible for raising the issues.” He said that he again believed this was a further attempt by management to bully him and make him feel uncomfortable.
40. Mr Lee said that he emailed a grievance complaint to the General Manager, Ms Williams, with regard to the “false apology” on 31 July [2015] “seeking that Ms Turnbull make an apology before the team.” He said that the general manager confirmed that his allegation was being investigated.

41. Mr Lee attended a meeting on 28 August 2015 which he said was held in relation to his grievance against Ms Turnbull's lack of apology. He said "unbeknownst to me, this meeting was in fact a preliminary 'fact-finding' meeting which I had been misled into attending."
42. Mr Lee said he was given a written warning around 15 September 2015 which he regarded as punishment for his request that "the false apology be rectified". He said that the general manager investigated his complaint and concluded that the grievance against Ms Turnbull was unfounded and he was given a warning "with a note being recorded on my personnel file". He said he felt he was being harassed for making a complaint.
43. On 26 October 2015, Mr Lee said that he received a letter "inviting" him to attend a meeting with two of his managers. He said the letter contained three false allegations against him. He declined to attend the meeting and was subsequently ordered to attend.
44. Mr Lee said that about this time he was told that the allegation made against him by Ms Turnbull was that he was bullying and harassing her "by not smiling or acknowledging her in the office". He said that these allegations against him were fabricated "in an attempt to incite further stress and anxiety upon me".
45. On 28 October 2015 Mr Lee submitted a grievance to Mr Walsh against the Area Manager and Ms Turnbull for bullying and harassment "based on the allegations in the letter dated 26 October 2015." He said that he received a letter on or about 27 November 2015 from Mr Walsh stating that the matter had now been resolved. He said that it became clear to him that the grievance had been ignored and he appealed against that outcome.
46. On 16 December 2015, Mr Lee said he received an invitation to attend a meeting with Mr Walsh and Ms Howe. He said he attended the meeting as requested on 18 December 2015 but was unable to have his chosen support person, Mr Lyttle, attend with him. He said that he subsequently received a letter dated 30 December 2015 in which Ms Turnbull expressed a willingness to apologise in January 2016.
47. On 4 January 2016, Mr Lee again found it necessary to complain of unpaid entitlements. He said he took this complaint to the Fair Work Commission "with no outcome". Mr Lee said that he felt that these entitlements had been withheld intentionally "in an attempt to force a reaction" from him "to inflict further psychological harm".
48. Mr Lee said that on 20 January 2016, he received a final warning "for not smiling or acknowledging Ms Turnbull". He said that IRT had described his behaviour as "unprofessional and inappropriate".
49. Mr Lee attended his general practitioner on 21 January 2016. He said that he been diagnosed with "Acute Stress Disorder and Acute Depressive Episode".
50. Mr Lee said that "the first of many media reports" was published on 11 February 2016 "regarding the victimisation of both myself and Mr Lyttle by the IRT." He said that he had provided information to the media "to raise light of the malpractice of IRT personnel and abuse of elders that was occurring." He said that he was motivated by a "need to take action to shed light on the situations which had been ignored by IRT and which concerned the security and well-being of elderly people in IRT's care."
51. Mr Lee received a "show cause letter" from Ms Williams regarding the publication of the article in the media on about or about 15 February 2016. He said that on 17 February 2016 he emailed the IRT Chief Executive Officer, Nieves Murray, "attempting to personally reconcile". He said that Ms Murray declined and insisted that "due process be followed in accordance with IRT's policies and procedures".

52. On or about 23 February 2016, Mr Lee said that he received an email advising him of the termination of his employment on the grounds of serious and wilful misconduct stemming from his involvement in the earlier media publication. He consulted a psychiatrist in late February 2016 and was assessed by the insurer's psychologist, Dr Kaplan, on 29 February 2016.
53. Mr Lee said that a claim for compensation had been denied on the basis of wrong information supplied by IRT management and expressed the view that he had been the victim of bullying and harassment as punishment for questioning the practices of his employer.
54. In a statement dated 25 October 2017, Mr Lee set out his evidence in reply to statements made by John Williams, Debbie Turnbull and Cheree Howe and provided further information.
55. Mr Lee said that Mr Williams was not correct in stating that he had engaged in unprofessional conduct by not speaking to his manager, Debbie Turnbull and failing to follow reasonable directions. He said this was not the case. At no time had he refused to speak to his manager nor ignored her and he said that he did not purposely avoid speaking to her by calling the team phone because he was aware that she was not in possession of that phone. He reiterated his belief that the findings of misconduct made against him in the meeting on 20 January 2016 were as a punishment for raising issues associated with his pay and the actions he had taken to enforce his entitlements.
56. Mr Lee said that he did not believe Mr Williams' explanation that Mr Lyttle had not been permitted as a support person because he was pursuing a claim against IRT in the Fair Work Commission and had caused problems in employee interviews in the past. He said that, in any event, it was unreasonable to exclude Mr Lyttle. He believed that this was done to "belittle and intimidate" him.
57. In reply to a statement by Ms Turnbull, Mr Lee noted that Ms Turnbull alleged that she had noticed a change in his attitude towards her at the time the claim for unpaid entitlements began. Mr Lee said this was not true and his attitude towards Ms Turnbull had not changed. He denied that his interactions with management in relation to his unpaid entitlements were unprofessional or impacted his attitude to work.
58. Mr Lee said that he was treated differently by management following his complaints with regard to the unpaid entitlements.
59. Ms Turnbull alleged that Mr Lee regularly submitted incorrect timesheets which resulted in him being underpaid and that she had to correct these after they were submitted. Mr Lee said that he had never intentionally underpaid himself and, if he had been underpaid in the past, he had to take strenuous steps to have the situation rectified.
60. Mr Lee noted the account of Ms Turnbull's with regard to the pay dispute and the meeting scheduled for 11 December 2014. He agreed that he had not attended that meeting but said that his failure to attend was based on his belief that the meeting was to discuss the repayment entitlements that he felt had already been resolved when "Ms Turnbull agreed to pay those entitlements some days earlier". He said he had been mistaken as to the issues to be discussed and thought he was no longer required to attend.
61. Mr Lee noted Ms Turnbull's explanation that she had deleted the text message from Mr Lyttle to the team mobile phone in relation to the "unauthorised video of an elderly client" because she believed that the message was "mischief making". He said that his view was that Ms Turnbull deleted the message in order to cover up the allegations that were made with respect to elder abuse. He said he felt this was "quite serious" but rather than investigating he said Ms Turnbull had acted to cover up the wrongdoing. He said he had brought this to Ms Turnbull's attention but had been met with "resistance and hostility".

62. With regard to the allegations relating to the notification of staff that an elderly client had tested positive for the golden staph infection (MRSA) Mr Lee said that he did not accept that Ms Turnbull had contacted staff as soon as she was aware of the situation. He believed that the information was withheld in “an attempt to bully” in response to the issue of the unpaid entitlements.
63. Mr Lee said that Ms Turnbull’s statement that she had not tampered with the accident notification form in respect of the possible MRSA contact was untrue as he said Ms Turnbull had added the words “employee has nil broken skin/lesion” which was untrue. He said he believed that Ms Turnbull had altered the document in order to absolve herself from any wrongdoing as well as to portray Mr Lee as a liar and troublemaker.
64. With respect to this statement of Ms Howe, Mr Lee disputed Ms Howe’s claim that there was no evidence of IRT’s mistreatment of him. He said that even if there was no evidence this did not demonstrate that it not occur. He said the records had either not been made or had been removed.
65. Mr Lee noted Ms Howe’s claim that there were no outstanding entitlements owing to him despite his continuing complaints and said that he had in fact been finally reimbursed for outstanding entitlements after taking appropriate steps to recover unpaid entitlements.
66. With respect to the “unauthorised video” issue, Mr Lee disputed Ms Howe’s assertion that the appropriate consent of the elderly client had been obtained. Mr Lee asserted that the elderly client had not consented to dissemination of the video on social media but only to the ABC for broadcast.
67. Mr Lee disputed Ms Howe’s claim that standard protective gloves would have protected him from the MRSA infection. He said that the open wounds that he had at the time would not have been protected. He said that Ms Howe’s comment in this regard “demonstrates the lack of regard for protocol and procedure which was ultimately used by IRT management to bully and harass me”.
68. Mr Lee denied Ms Howe’s assertion that Ms Turnbull had offered him a personal apology or that he had rejected such an offer of an apology.
69. Mr Lee again asserted that the denial of Mr Lyttle as a support person on the basis that Mr Lyttle had outstanding matters with IRT was motivated by desire to intimidate and harass him. He said that Mr Lyttle had raised the same issues with management.
70. Mr Lee disputed Ms Howe’s assertion that the final warning issued to him was fair and reasonable because of the ongoing bullying and harassment to which he had been subjected. He said that he been given a final warning by Ms Howe “for not smiling at my manager Debbie Turnbull”.
71. Mr Lee said that he had always taken great pride in his work at IRT. He said that once he raised the issues of outstanding entitlements he had been viewed as a troublemaker rather than as a model employee and that IRT had commenced using process and protocols to make his job difficult which was what he described as “systematic bullying and harassment”.
72. Mr Lee said that this became worse when he raised the issue of elder abuse and the “unauthorised video”. He said that he had gone to the media because he felt “I was never going to receive acknowledgement of IRT’s wrongdoings in broadcasting the video”.
73. A further statement dated 4 October 2019 was in evidence. Mr Lee referred to his earlier statements and said that this further statement was “intended to combine (but not replace) those earlier statements and provide further information and evidence to support those statements.”

74. Mr Lee again said that he commenced employment with IRT on or about 6 April 2009 as a home care worker. He completed his Certificate III in Aged Care in May 2011. He said he had been passionate about his work and had undertaken further study, obtaining his Certificate IV in Aged Care in March 2013.
75. He said that he had been promoted to team leader which had given him greater responsibility and a greater sense of satisfaction.
76. Mr Lee said that his problems with management commenced in early 2014. At that time IRT was failing to reimburse employees for entitlements related to first-aid training and tea breaks. He had raised this issue with the Human Resources Manager, Richard Walsh, but no action was taken. He understood that Mr Lyttle was also pursuing IRT over a similar issue.
77. In addition to the information already provided in his earlier statements, Mr Lee said that around July 2014 he was provided with copies of his roster for the period 26 December 2012 to 30 April 2013 which he had requested, believing there were likely to be other entitlements owing to him.
78. Mr Lee said that he was subsequently informed by Ms Turnbull that it was unreasonable to expect IRT to investigate backdated entitlements. Following this, Mr Lee said that his roster no longer provided for lunch breaks. He said that he contacted the payroll officer to have this corrected. Ms Turnbull contacted him and asked him to deal directly with her with regard to any such issues in the future. He said that his rosters continued to omit lunch and tea breaks but contact with Ms Turnbull did not resolve the problem.
79. After attending Fair Work Commission proceedings as a support person for Mr Lyttle in October 2014, Mr Lee said that he received an email from IRT payroll office stating that Ms Turnbull had provided approval to pay his outstanding entitlements. However he said that Ms Turnbull had subsequently changed her mind which increased his level of anxiety and frustration. He said it was at this point that his psychological condition began to deteriorate. He said that about that time he was made to feel like an agitator or troublemaker.
80. Mr Lee again referred to the meetings in December 2014 which he declined to attend. He said the meeting time had been changed without consulting him but was told that the meeting was "non-negotiable".
81. Mr Lee provided further details relating to the "unauthorised video" issue. He said that a client/resident of IRT had made a complaint to Mr Lyttle after featuring in a video entitled "Good Death" which had shown Ms Turnbull interacting with a number of elderly clients in their homes. The complaint made by the resident related to consent forms not having been signed by the client which he said made them "unauthorised" and, in the opinion of Mr Lee, a form of "elder abuse".
82. Mr Lee annexed a Facebook page which featured the video and a copy of a letter dated 5 December 2014 from the client concerned requesting that she be removed from the Facebook video.
83. Mr Lee also annexed a document that he had composed commenting on the video which he regarded as condescending and a blatant abuse of the dignity and privacy of the client. He said that the video was neither educational nor informative. (Mr Lee did not provide any information as to what was done with that statement and whether it was provided to IRT.)
84. A handwritten progress note dated 5 December 2014 was also annexed. The handwritten note is illegible and was not referred to in submissions.

85. Mr Lee said that the complaint regarding the video had been forwarded by Mr Lyttle to the team leader, Jenny Allen, via text message but the complaint had been ignored. On 10 December 2014 Mr Lee said that Ms Turnbull deleted the original text message as noted above. Mr Lee said this was a clear contradiction of IRT's policies regarding maintenance of records.
86. Mr Lee again set out the circumstances surrounding the notification on 11 December 2014 of disciplinary action for failing to attend prior meetings requested by Ms Turnbull which he said made him feel as if he was being targeted for asserting his rights and doing the right thing.
87. He again referred to the team meeting on 18 December 2014. He said that following the team meeting he was no longer rostered on with the client who had made the complaint. He believed this to be done to punish the client and prevent Mr Lee from raising further issues with regard to the video. He said he again experienced anxiety as a result.
88. He annexed copies of the emails dealing with the complaint and deletion of the text message from the Team Leader Book.
89. Mr Lee said that he had requested copies of his past performance appraisals for the years 2012 to 2014. A copy of the email requesting the appraisals was annexed.
90. Mr Lee made a further complaint on 2 January 2015 relating to an allegation of "elder abuse" concerning a different client of IRT. On 9 January 2015 he was asked to participate in an investigation into the complaints. He was interviewed on 15 January 2015 by an investigator who he said was investigating the dispute between Ms Turnbull and Mr Lyttle. He attached a copy of the transcript of the interview.
91. The investigator records and the transcript of that interview formed part of an investigation for IRT. Mr Lee outlined his position at IRT as a team leader for over 2½ years. He confirmed that he reported to his manager, Debbie Turnbull.
92. The interviewer informed Mr Lee that investigation concerned a "grievance that that [sic] has been lodged by Debbie Turnbull against Mr Lyttle and also some complaints made by Mr Lyttle about Debbie Turnbull".
93. Mr Lee said he was not aware of these complaints. The investigator informed Mr Lee that the interview would be incorporated into the investigation report to be supplied to IRT. He said "the statement you make may also be used if the matter proceeds to disciplinary action."
94. Mr Lee was asked whether he had any issues with Ms Turnbull. Mr Lee referred to proceedings in the Commission (presumably the Fair Work Commission) over missing entitlements. He said that Ms Turnbull had not appreciated his challenging the entitlements. He detailed the difficulties explaining:

"My entitlements were overtime – missing over time, missing tea breaks, yeah those are the two big ones. Actually the thing was for me was I requested an audit because those missing entitlements Phil [the investigator], came to just under \$2000. It's quite a large sum. If it was 50 bucks mate that's (sic) let it go, but it's quite a large sum that I was entitled to and they knew I was entitled to. And they didn't pay it; I had to challenge that one. Yeah that was a tough process for me. I have never done anything like this before. Six years with the Commonwealth Bank my last big corporate company I worked for, not a hiccup. This one here and I think when you start challenging I think you come up against stiff opposition as to - I got those entitlements eventually. That was good."

95. Mr Lee continued to detail the assistance he gave to Mr Lyttle in the Fair Work Commission as a support person. He said he had gone because "I saw something that just didn't gel. It wasn't right." Mr Lee told investigators that he found the process difficult. He said that he had trusted Ms Turnbull who had looked after him but after he had raised concerns she had changed.
96. Mr Lee adverted to problems that he felt other employees had encountered with IRT. He said that he felt he had been bullied by Ms Turnbull regarding his entitlements and her "dictative type attitude". He said that he had become aware of the problem with his entitlements through Mr Lyttle. He outlined the dispute relating to the hours of work which he was contracted to perform and which he felt IRT were obliged to supply as well as issues with overtime and training including being asked to pay forty dollars out of his own pocket to receive his first aid certificate. He said it had taken two years for his entitlements to be reimbursed.
97. Mr Lee was asked by the investigator to explain what he meant by having to fight for his entitlements. Mr Lee referred to the email correspondence and noted that, having finally achieved payment of nearly \$2,000, he felt there were grounds to go back to the start of his employment, he said "They've paid me those, but what about my other years and they won't even go there.."
98. Mr Lee also expressed concern over being required to hand in his work diary. This was a matter of concern to him because he had recorded matters that he did not wish anyone else to see. He said this did not sit well with him. Another thing that concerned him was that Ms Turnbull had asked him and other staff members not to write a character reference for Jules Lynch when she resigned from IRT.
99. Another matter of concern reported to the investigator by Mr Lee was the omission of the complaint notified by Mr Lyttle to Jenny Allen from the team leader book concerning the "unauthorised video". Mr Lee said that Shane Lyttle had enquired whether the complaint had been recorded. He said that nothing in fact had been documented by the team leader and there was no record on the day in question. No entry was made in the book and the message was removed from the team leader's phone. He felt this was a serious betrayal. He did not know who had deleted the message.
100. Mr Lee told the investigator that he believed that Ms Turnbull had never properly instructed him in the preparation of timesheets. He said he had been alerted to his entitlements by Mr Lyttle making reference to entitlements to second tea breaks and entitlements with regard to public holidays. Mr Lee said that the members of the work team would go to Mr Lyttle in preference to Ms Turnbull and provided his reasons for thinking that.
101. Mr Lee was asked whether there was to be an audit of the years prior to 2012. He said that he was pushing for that but it had not yet been confirmed. He said he could not get a clear answer from Ms Turnbull. He believed that he had been threatened by her in the previous October or early November. Mr Lee set out at considerable length his problem with the rosters and meetings. He complained of Ms Turnbull's management of a bequest left by a deceased client to provide a Christmas party for staff.
102. Mr Lee said he felt anger and frustration on behalf of other workers at IRT. Asked whether he had any further comments, he referred to an incident in which a widowed client had obtained a dog. Ms Turnbull had disapproved of the dog as a companion. He said that Ms Turnbull had removed the client in her wheelchair from the hairdressers and "blasted her" for keeping the dog.

103. Mr Lee also referred to the meetings which he declined to attend and his interactions with Ms Howe. He said a meeting had been arranged then cancelled. Mr Lee was asked why he had not attended the meeting. He gave an explanation which did little to clarify the reason. He said he had been told not to make further contact about the entitlements issue until they had been investigated. Mr Lee added further incidents which he felt demonstrated inflexibility on Mr Turnbull's part. These incidents did not involve him but did not "sit well" with him.
104. The interview was completed with the investigator informing Mr Lee that the interview was to be treated as confidential and not to be discussed with others.
105. In his statement dated 4 October 2019 Mr Lee said that the transcript showed that, as at the beginning of 2015, he had "recognised a significant issue with the workplace culture which is characterised by intimidation." He said that he had confirmed with the investigator his grievances regarding deletion of content from the team leader phone and the issue of the resident and her companion dog.
106. Mr Lee then set out his concerns generated by his contact with a client with golden staph. The information provided was in similar terms to that in his earliest statement. He reiterated that he believed that IRT had deliberately exposed him to infection as punishment for his complaints with regard to his entitlements and complaints of "elder abuse".
107. Mr Lee's concerns relating to the addition by Ms Turnbull of observations to his incident report were again noted in similar terms. Mr Lee also said that, following the complaint with regard to the exposure to MRSA and the addition made by Ms Turnbull to the incident report, Ms Turnbull had continued to disrupt his ability to work efficiently. He said that she had failed to arrange a meeting to have his police check renewed in February 2015 which led to him being suspended without pay until this could be processed.
108. Mr Lee supplied further details relating to the meeting on 25 May 2015 following receipt of the letter dated 18 May 2015 which invited him to a meeting "to discuss the outcome of the investigation by Wise Workplace". The minutes of that meeting were attached. The minutes deal with two complaints. The first is: "That as a result of Debbie Turnbull's mismanagement you were not paid the correct allowance for tea breaks."
109. The finding notes that a complaint was lodged to the Fair Work Commission in relation to this matter and it was considered that the matter had been finalised by the judgement in favour of Mr Lee in the Fair Work Commission. It is not established that the non-payment of tea break allowance was deliberate or that Debbie Turnbull had acted in a manner "contrary to the IRT Policy". The recommendation was for no further action.
110. The second complaint is recorded as: "That Debbie Turnbull had an autocratic management style that she bullied a number of former employees who left IRT as a result." The findings were that a number of current and former IRT employees had given contradictory evidence. Mr Lyttle had attempted to rally support for his complaints against Debbie Turnbull and had approached a number of workers suggesting he [Mr Lyttle] should act as their advocate. The conclusion was that there was insufficient evidence to establish that Debbie Turnbull had an autocratic management style and that she bullied number of former employees who left IRT as a result or that she had acted in a manner contrary to the IRT policy. The complaint was not substantiated.
111. The meeting also dealt with "other matters" and noted that Mr Lee had raised a number of issues in regard to what Mr Lee had termed poor management practices and lack of systems. It was observed that Mr Lee's opinion had been "greatly influenced by another staff member". The Chief Operating Officer, Craig Hamer, recorded:

"I note that there have been a number of decisions that you have disagreed with and there appears to be some performance concerns that need to be addressed in a timely and fair manner. It appears that you may disagree with many of the decisions that your manager or the IHC [scil In Home Care] Coordinator makes regarding client care and management but these decisions and actions could reasonably be regarded as a Manager carrying out the role for which she was appointed."

112. Mr Hamer stated that these complaints created an air of negativity which he felt impacted the health and safety of other workers. He recorded that the following actions were reasonable:

"Decisions and actions to be taken

1. You need to be aware IRT has confidence in the ability of Debbie Turnbull and Cheree Howe. Debbie Turnbull and Cheree Howe are required to manage all staff including yourself.
2. IRT has determined that your behaviour and negativity is inappropriate and warrants a verbal warning. There will also be a performance review. Please note that if a further breach relating to any of the above occurs, and if proven, further disciplinary action will be taken. IRT will put in place the following to reinforce the process to date:
 - a) You'll be formally counselled on grievance procedures and following lines of authority when raising matters. You cannot bypass your supervisor and send emails to senior management when you disagree with the decision made by your supervisor when you feel disgruntled with a reasonable reply.
 - b) Training on positive workplace behaviours will be conducted for the entire IHC Shoalhaven Team. Cheree and Debbie will be working with the team to improve teamwork."

The minutes note that Mr Lee responded: "What I say doesn't matter and my opinion is unimportant." He was informed that his opinion was important. Mr Hamer noted that his service towards the clients had been exemplary and he had demonstrated good skills, passion and heart for what he did. Mr Lee was cautioned not to be influenced by other members of the team and that there would be performance appraisal done by Debbie Turnbull. Mr Lee requested that someone other than Ms Turnbull conduct a performance review and Mr Hamer is recorded as saying that he would consider that request.

113. The minutes record that Mr Hamer advised; "as this was a verbal warning there would be nothing in writing or on file." The minutes then provide a space for signature by Mr Lee, Mr Hamer (Chief Operating Officer) and Ms Williams (General Manager – Lifestyle & Care – Southern NSW and ACT). There is then a notation: "(Original signed copy to be placed on the Staff Member's Personnel File)".
114. Mr Lee also referred again to the issue of giving an apology by Ms Turnbull to Mr Lee over what he described as "her earlier falsification of the minutes". He annexed copies of the minutes and asked for a formal apology to be given to him in the presence of the team.
115. The minutes of the team meeting for 31 July 2015 recorded Ms Turnbull and other members of staff as present but Mr Lee was not there. With respect to the previous minutes there is a notation:

"The Previous Minutes held on 23/6/15 were not accepted as a true and accurate record by Mr E Lee. Mr Lee has made comment that No 4-3 MEDICATION INCIDENT was not recorded as mentioned in those minutes.

DT has apologised to Mr Lee and the Shoalhaven South IHC Team. The error was a typographical miss-print (sic) carried over from the May 2015 Meeting.”

116. Mr Lee annexed a copy of his email dated 6 August 2015 to Ms Williams submitting an “official grievance” against Ms Turnbull to the effect that Ms Turnbull had informed the meeting that she had apologised to him but that he had never received that apology. He said that he considered this a breach of IRT policy. He said that he felt intimidated and humiliated and felt this was a form of bullying. He sought a formal apology before the team.
117. In his email, Mr Lee referred to the proceedings before the Fair Work Commission. The transcript is entitled in the matter of Mr Lyttle and IRT but Mr Lee is referred to as the Applicant “in the second matter”. The transcript notes appearances by Mr Lee and Mr Lyttle and the solicitor for IRT was accompanied by Ms Turnbull and Ms Forst.
118. The solicitor for IRT reported that there had been no progress in the matter since 17 July [2015] when the matter had last been before the Commission. The solicitor noted that both applicants had been directed to provide particulars of three areas in which they alleged that the collective agreement had been breached. Those particulars had not been supplied although a number of emails had been sent. There had been discussion with relation to the elderly widowed client who had obtained a dog for companionship. The solicitor indicated that Ms Turnbull was happy to admit that she had been wrong in regards to her attitude to the dog and “the dog appears to have proven to be a worthwhile activity for this particular client”. The solicitor went on to note a number of issues raised by Mr Lyttle.
119. The solicitor noted the assertions by Mr Lyttle and Mr Lee that IRT had sufficient information to enable it to respond to the complaints. The solicitor noted the ongoing dispute with regard to “some claims for underpayment of certain meal allowances last year which IRT thought had been addressed or in the process of being addressed.” The solicitor addressed at some length the absence of any particulars. The solicitor stated “we consider that these matters are here prematurely, that they haven’t been dealt with in accordance with the disputes procedure, because these arise from the outcomes meeting that took place in May.”
120. The respective replies of Mr Lee and Mr Lyttle are recorded and the Commissioner reiterated that there was a need for the complaints to be particularised, identifying which actions were alleged to be breaches of particular provisions of the enterprise agreement. The Commissioner tentatively noted allegations relating to underpayment of Mr Lee for coffee breaks, the “punitive measures”, the “dog event” as an example of how the complaints might be set out. Mr Lyttle addressed the Commissioner in general terms and at some length and the Commissioner again referred to the need for the complaints to be particularised.
121. The Commissioner ultimately stood the matter over for Mr Lyttle and Mr Lee to arrange representation or to formulate a document particularising the various alleged breaches.
122. In his statement dated 14 October 2019, Mr Lee referred to and annexed the letter dated 4 September 2015 sent to him by Christine Williams. Ms Williams noted the complaint with regard to the apology recorded in the minutes as having been given when Mr Lee had not received such an apology.
123. Ms Williams set out findings by IRT that Ms Turnbull had indeed included incorrect detail of the minutes of the team meeting on 23 June 2015 with respect to “medication incidents” and acknowledge **acknowledged?** that this was an error. Ms Turnbull had acknowledged the error, noted that it has been identified by Mr Lee and apologised to him in his absence for the error.
124. At the meeting on 4 September 2015 with Ms Williams, Mr Lee said he was handed a “show cause” letter, a copy of which was annexed to his statement. The letter sets out that IRT was concerned that Mr Lee’s complaint that Ms Turnbull had engaged in “workplace harassment” in relation to the 31 July 2015 team meeting minutes was “without any basis whatsoever” and that Mr Lee had not followed the grievance procedure.

125. It was asserted that, in submitting the grievance, Mr Lee had not acted in good faith and had harassed Ms Turnbull because the grievance contained an allegation that was “offensive in all the circumstances”. He was required to show cause why IRT should not take disciplinary action against him and was directed to attend a meeting with Dearne Bartlett (Human Resources) and Christine Williams. He was invited to bring a support person. (Mr Lee said that Mr Lyttle had attended that meeting as his support person.)
126. Mr Lee said that he regarded the fact that he had submitted a grievance as a basis for taking disciplinary action against him to be a further example of “systematic harassment”. He said that Mr Lyttle had assured him that he had followed correct grievance procedures and the disciplinary action should not have been taken. He annexed an email which he said was sent by Mr Lyttle to Ms Williams expressing Mr Lyttle’s concern over the outcome of the meeting and his interpretation of the grievance policy.
127. In an email dated 14 September 2015, Mr Lee said that he responded to the show cause letter. The email to Ms Williams is headed “Unreasonable ‘Show Cause’”. Mr Lee’s response was: “If you wish to go down this path of ‘Show Cause’ then I would seriously reconsider as it will be evaluated by the Commission with myself arguing adverse action on your behalf.” [I interpret the reference to the Commission as a reference to the Fair Work Commission]. He asserted grounds: “You as being the decision-maker cannot reconfigure what Ms Turnbull printed in the minutes other than what has been meant on face value.” He noted the reference in the minutes to Ms Turnbull having apologised to Mr Lee which was, he maintained, incorrect and which he said falsely gave the impression that an apology had been given at an earlier time to Mr Lee.
128. Mr Lee said that he had followed the grievance policy in going directly to Ms Williams. He acknowledged that Ms Howe was the “next senior manager” but said the policy required that the grievance be addressed to the “next most senior manager” (original emphasis) which would be Ms Williams, the general manager.
129. Mr Lee denied that he had lied in submitting the grievance. He said that he had never claimed that Ms Turnbull had lied and this was an interpretation put on his complaint by Ms Williams. He made several further observations about the conduct of the meeting, the taking of minutes and his own actions. He completed his letter by encouraging Ms Williams to make contact with the IRT Employee Assistance Program in similar terms to the recommendation in the “show cause” letter.
130. Mr Lee said that he had then lodged a grievance against Ms Williams with respect to the way that his complaint against Ms Turnbull had been handled. He said that he received a letter directing him to attend a meeting with Ms Howe and Mr Walsh. He said the letter contained three false allegations against him and two of those allegations were more than two months old. He said he declined to attend the meeting. A copy of the letter was annexed.
131. The letter dated 26 October 2015 alleged bullying and harassing behaviour towards Debbie Turnbull, not informing his manager that he would not be attending a scheduled session on 19 August 2015 and not attending a scheduled meeting with a new team leader on 18 August 2015. Mr Lee said that he had declined to attend the meeting.
132. Mr Lee noted that the investigator appointed by IRT, Wise Workplace, had refused his request to supply a copy of the material upon which their report had been based.
133. Mr Lee said that he had complained to his federal and state members of Parliament regarding the actions of IRT, noting that Mr Lyttle’s employment had been terminated.

134. Mr Lee said that on about 27 November 2015, he had received a letter from Mr Walsh stating that his grievance against Ms Howe and Ms Turnbull had been resolved. Mr Lee said he considered that his grievance had been ignored and appealed. Mr Walsh had then offered to attempt to resolve the issue and Mr Lee was invited to attend a meeting on 16 December 2015 with Mr Walsh and Ms Howe. Mr Lee said he had not been available on that date and had attempted to have the meeting rescheduled. He had been advised that he had to attend. He was also told that he could have a support person but that that person could not be Mr Lyttle.
135. Mr Lee said that he attended the meeting on 18 December 2015 without a support person. He subsequently received a letter from IRT which confirmed the outcome of the meeting. IRT noted that Ms Turnbull would apologise to him personally early in the New Year. A copy of the letter was annexed. The letter notes that Ms Turnbull would apologise for the error in the minutes in the interests of resolving the dispute. Mr Lee's request to have Ms Turnbull apologise in front of the team and in writing and to apologise for "consequential actions that led to show cause in disciplinary action" were declined.
136. The letter goes on to propose a meeting to resolve the dispute over the allegation of non-payment in respect of meal breaks, noting that Mr Lee had declined to attend earlier meetings to discuss this with Ms Turnbull. The letter also dealt with Mr Lee's allegations of bullying and harassment by Ms Turnbull and his alleged failure to attend certain appointments. The letter noted that these matters are yet to be finalised and that Ms Howe would provide an outcome in due course.
137. An email trail dealing with outstanding matters as well as a further claim relating to payment for meal breaks was annexed. On 8 January 2016 Ms Howe invited Mr Lee to attend a "follow-up" meeting on 20 January 2016. She also scheduled a meeting on 15 January 2016 to review the claim for outstanding meal breaks.
138. Mr Lee responded by email dated 18 January 2016 asserting that it was his right to have a support person of his choice and that IRT was not entitled to dictate who that person should be. He said that he would be attending the meeting on 20 January 2016 without a support person under protest. He asked the meeting to be recorded.
139. In January 2016, Mr Lee said he had again had issues over his pay. He said that he participated in a number of discussions with IRT representatives but ultimately had taken the issue to the Fair Work Commission.
140. The email correspondence relating to this was annexed. On 4 January 2016, Mr Lee emailed Richard Walsh outlining the basis of his claim for meal allowance. Mr Walsh replied, notifying Mr Lee that "the broken shift allowance is the appropriate provision within the Enterprise Agreement." Mr Walsh noted that "this area requires policy development and approval to provide employees with a meal allowance."
141. An email from Mr Lee to John Williams copied to Richard Walsh asserts Mr Lee's right to have his grievance taken further. He stated that he had attended the meeting on 18 December 2015 without a support person but not by choice. He said that his preferred support person, Mr Lyttle, had not been available and he had no other person to assist. He set out further responses to the complaints relating to the apology "she had no issue making incorrect statements in my absence, so she can make them before myself and the team regardless with how uncomfortable she feels. That would be the right thing to do". He said the disciplinary action against him was "adverse action" as he had been exercising his rights under section 340 of the *Fair Work Act 2009*.

142. Mr Lee also made further submissions with regard to the disciplinary action taken by Christine Williams. In an email dated 6 January 2016 IRT acknowledged that Mr Lee would be given a voice recording of the proposed meeting on a memory stick.
143. In an email dated 6 January 2016, ("subject: re-meal allowance") Richard Walsh informed Mr Lee that his claim had been reviewed and appropriate payments as per the enterprise agreement had been approved. Mr Walsh sought further information with respect to Mr Lee's employment on 4 January 2016. Mr Lee replied, presenting his arguments as to why meal breaks should be paid.
144. In an email dated 22 February 2016, Richard Walsh notified Mr Lee that he had approved two further payments of \$18.50 with regard to adjustments to the rostered hours.
145. Mr Lee also provided further details with respect to the issue of the "unauthorised video". A copy of his complaint to the Aged Care Complaints Commission (ACCC) was attached. In his notice of complaint Mr Lee claimed to be an advocate for a client of IRT. Asked to "provide details as to why the care recipient is not aware of the complaint", Mr Lee said:

"This complaint is a very complex one. I am currently employed as an In-Home Care Aged Care Worker. It is regarding what I consider Elder Abuse in that my in-home care manager, Debbie Turnbull (last name also referred to as Noble) and her amateur film producer friend Deb Forster filmed elderly people without consent and published a video on the Internet unbeknownst to [LE] and other elderly people and also unbeknownst to the In-Home Care's employer, IRT (Illawarra Retirement Trust). The video is titled 'Good Death'. Here is the link: [https address supplied]. I felt that it was wrong to take advantage of a dying elderly person who passed away just days after the video footage. I also felt it was wrong as there was a suggestion of an exploited relationship between the In-Home Care Manager, Debbie Turnbull, her amateur film producer friend Deb Forster and the trusting clients. No permission was gained from some clients to film them and absolutely no permission to publish it on the Internet, Twitter and Facebook for all the public to see."

Mr Lee claimed that the video was a "self-promotional video regarding the In-Home Care Manager, Debbie Turnbull."

146. Mr Lee said that in January 2016, he had again been informed that a client was suffering from MRSA infection. Ms Turnbull had apologised for the late notice as the status had been known "for some time". He said he felt this was negligent in putting the lives of both the staff and clients at risk.
147. Mr Lee said that he attended the follow-up meeting with Ms Howe on 20 January 2016. He said that he was given a verbal final warning "for not smiling or acknowledging Ms Turnbull" He said his behaviour was described as "unprofessional and inappropriate".
148. Mr Lee said that he had consulted his family doctor the next day and had been diagnosed with Acute Stress Disorder and Acute Depressive Episode.
149. Mr Lee said that on 11 February 2016, what he described as "the first of many media reports" was published regarding "the victimisation of both myself and Mr Lyttle by IRT." Mr Lee said he provided information to the media "to raise light of the malpractice of IRT personnel and abuse of elderly clients which was occurring." He said that he believed he needed to take action to shed light on the situation which had been "ignored by IRT affecting the security and well-being of elderly people in IRT's care."

150. On 15 February 2016 Mr Lee, said he received another “show cause” letter from Ms Williams regarding the publication of the article in the media. The letter, a copy of which was annexed, asserted:

“It is also evident from the article that you have disclosed to the journalist responsible for writing the article confidential communications that IRT had sent you and/separately/Mr Lyttle.

IRT considers that your actions in being involved in the preparation and publication of the article including disclosing confidential communications, have caused serious and imminent risk to IRT’s reputation and amount to serious and wilful misconduct. Your actions are in breach of:

- your duty of fidelity in good faith to IRT; and
- IRT’s code of conduct, specifically with respect to maintaining confidentiality in relation to IRT’s clients and IRT’s business information.”

151. The letter informed Mr Lee that he was required to provide IRT with a written response by close of business on 18 February 2016 and that summary termination of his employment for serious and wilful misconduct was contemplated.

152. Mr Lee sought a meeting with an IRT senior manager who declined a meeting. Mr Lee replied to the show cause letter by email dated 18 February 2016. IRT terminated Mr Lee’s employment by letter dated 23 February 2016. IRT noted that the response contained in the email “did not directly address the matters raised in the Show Cause Letter and in particular did not respond to the possibility of termination of your employment for serious misconduct.”

153. A WorkCover Worker’s Injury Claim Form dated 22 February 2016 was in evidence. That form notes the date of injury as 24 November 2014 and asserts injury to “mental health” as a result of “repeated bullying and harassment when challenging unfair practices at IRT.”

154. Mr Lee annexed the findings of the ACCC with regard to his complaints. The letter setting out the findings is dated 6 May 2016 and could not be considered as having played a causative role with regard to the onset of psychological injury. However, the findings do record information supplied by IRT which is relevant to the issue of causation.

155. With regard to the issue of the video footage the “Resolution Process” document notes that IRT investigated Mr Lee’s concerns and established the following:

“The approved provider’s media policy and procedures were adequate. Specifically, the policy and procedures require staff to ensure that the consent is obtained from each individual that a written explanation is provided to each individual about the intent of the video, where it will be featured in the respective roles of each party. The individual staff member involved did not adhere to the approved provider’s media policy and instead followed informal processes in seeking permission for the video and its release.”

156. The ACCC noted the steps which IRT had then taken to address the issue which included educating the relevant staff member about the correct protocol for responding to media inquiries and ensured that all relevant staff were aware of the approved media provider’s media policies and procedures.

157. With respect to the complaint as to MRSA reported in January 2015, the ACCC found that IRT had addressed the issue to the satisfaction of the Commissioner. In reaching that conclusion the ACCC acted on advice from IRT that the knowledge of MRSA infection had been received by email from another organisation (STACS – Shoalhaven Aged Care Service) at 8.24 am on 22 January 2015. That knowledge was passed on to Mr Lee at 9.15 am Mr Lee had commenced his provision of care to the client at 7.56 am.
158. The ACCC noted that IRT denied that Mr Lee had ever requested copies of the STACS notification. Mr Lee had provided copies of emails requesting this information and the findings note:

“On 6 May 2016, the approved provider [IRT] confirmed that Mr Lee’s emails requesting STACS documentation was not acknowledged by the two noted staff. The approved provider [IRT] has committed to ensuring the relevant staff are spoken to in relation to the breakdown in communication. However the approved provider asserts that Mr Lee requested the STACS documentation as part of the workplace injury matter and not in relation to the provision of care to [the client].”

Dr Bruce Westmore, Psychiatrist

159. Mr Lee was seen by Dr Westmore, Psychiatrist, at the request of Mr Lee’s solicitors on 21 December 2016. Dr Westmore reported that the history noted in the report was as delivered by Mr Lee.
160. Mr Lee said that he had been terminated from his employment with IRT on 23 February 2016 after working there for about seven years. He said the basis of his termination was “I’m a whistle-blower, I went to the media which they say breached a policy”.
161. Dr Westmore recorded that Mr Lee had joined IRT in 2009. Mr Lee told him; “his problems occurred on 24 November 2014.” Asked what the general nature of the workplace difficulties had been Mr Lee said; “there was a lot of heavy handed bullying and I was not getting my entitlements.”
162. Mr Lee described Ms Turnbull, his manager, as “very authoritarian”. He said “when there was a team meeting DT would tell staff not to pursue any past entitlements.” He told Dr Westmore that he made a complaint about; “some activities which were occurring in the workplace and which he felt were inappropriate” in December 2014. Dr Westmore recorded:

“He said at that time DT had made an unauthorised video of patients without their consent. He said there was an investigation and then a second investigation. He said he was then disciplined and given a final warning in January 2016.

Mr Lee said that he feels that the incident involving the elderly patients who were videoed was covered up. The video was of DT doing palliative care work with four particular patients in total. Mr Lee said he was upset because the patients had not given approval and the video was put on the Internet.

One elderly patient, a woman lives alone and she subsequently expressed a fear of being the victim of a home invasion.”

163. Mr Lee said that he had been “consumed with the injustice of it all” and sleep had become a problem. Mr Lee showed Dr Westmore newspaper articles concerning the unauthorised video.
164. Dr Westmore noted the physiological symptoms reported by Mr Lee and his treatment by way of consultations with a psychologist and medication provided by the general practitioner. Dr Westmore diagnosed Mr Lee as suffering and Adjustment Disorder with Depression and Anxiety which he described as “moderate to severe”.

165. Dr Westmore said that Mr Lee had provided a history “he reports that he was bullied and harassed in a previous workplace those events occurred because he had identified some inappropriate behaviour/practices occurring in the workplace.” He assessed Mr Lee in accordance with the Psychological Impairment Rating Scale (PIRS) as having 17% whole person impairment as result of psychological injury.
166. Dr Westmore was of the opinion that “This condition has developed as a result of various accumulative events which occurred in the workplace leading up to his eventual termination from the workplace.” He felt that Mr Lee’s employment was a “substantial contributing factor” to his injury.
167. The newspaper reports referred to by Dr Westmore noted complaints by Mr Lee and Mr Lyttle relating to the unauthorised video, exposure to MRSA, and the statement added to the incident report by Ms Turnbull (17 February 2016).
168. The second article (seemingly 2 March 2016) reports that Mr Lee’s employment had been terminated “because he spoke to the Times”. The article notes that IRT had stated “His employment was terminated with notice following a series of performance and behaviour related matters over a number of months, most recently a serious breach of IRT’s code of conduct.”
169. The third article (22 June 2016) notes some of the Fair Work Commission findings with respect to the unauthorised video which was noted to have been posted by the Australian Broadcasting Commission on “ABC Open”.
170. Dr Westmore provided a further report dated 15 March 2017. Dr Westmore responded to a request by Mr Lee’s solicitors to respond to “the insurer’s allegations that it was the ‘reasonable disciplinary action’ taken by the employer which has been the cause of Mr Lee’s psychological injuries.” Dr Westmore said that:
- “Mr Lee’s history was that he felt he was bullied and harassed in the previous workplace and that the bullying and harassment occurred because it identified some inappropriate behaviours/practices which occurred in the workplace. I advised you that the adjustment disorder had developed as a result of various accumulative events which occurred in the workplace and which led to his eventual termination from that workplace.”
171. Dr Westmore noted the contents of the factual investigation conducted by Lee Kelly Commercial Investigations dated 10 March 2016, a copy of which had been provided to him by Mr Lee’s solicitors. He said that Mr Lee had presented him with a history which included Mr Lee’s version of the “facts”. He noted that the determination of what actually occurred was a matter for court or tribunals. He said: “Based on Mr Lee’s history to me there does appear to be a positive relationship between various events which occurred in the workplace, subsequent actions towards him by others in the workplace, and the onset of his psychiatric problems.” He acknowledged that whether these actions constituted “reasonable disciplinary action” was a matter outside his area of expertise.
172. In a further report dated 28 March 2017, Dr Westmore responded to a request to provide an opinion as to “the specific events which led to Mr Lee’s psychological injury”. He recorded:
- “When originally examined on 7 December 2016 Mr Lee provided me with the following history ‘there was a lot of heavy handed bullying and I was not getting my entitlements. DT was very authoritarian...’ He said he made some complaints about various activities which were occurring in the workplace that he felt those activities were inappropriate. That was in December 2014. He reported that DT had made an unauthorised video of a patient/patients without their consent and there were various investigations leading up to him being disciplined and then given a final warning in January 2016.”

173. Dr Westmore said that the specific history was that Mr Lee was:

“upset because the patients had not given approval and the video was put on the Internet..... One elderly patient expressed a fear of being the victim of a home invasion.... He equates these areas events to how he would feel if his own mother had been treated in such a way... I became consumed with the injustice of it all and sleep is a problem... It’s anxiety and I’m a bit short and I can’t talk. I can’t express myself properly. Just talking about it now, it upsets me. The whole thought of the injustice...”

174. Dr Westmore said that it was the “specific events which predated the disciplinary action in him being given a final warning in January 2016” which were the events which caused him to develop the adjustment disorder. His opinion was that the injuries arose prior to any disciplinary action but he agreed that disciplinary action would have aggravated the already existing adjustment disorder as would the termination. He concluded: “As noted it would be reasonable to conclude that his already developed Adjustment Disorder with Depression and Anxiety would have been aggravated by the disciplinary action of the employer whether or not that was reasonable or not.”

175. In his reports, Dr Westmore refers to documents that were supplied to him with regard to his assessment of Mr Lee. At one point he notes that he has supplied a list of those documents but that list was not in evidence. He did receive the Lee Kelly Investigation report.

Ulladulla Medical Clinic

176. The clinical notes of Dr Tan and other general practitioners at the Ulladulla Medical Clinic were in evidence. The notes cover a period from 17 June 1999 to 25 November 2016. There is a long interval between his attendance in July 2002 and the next attendance in September 2008 with a general health issue.

177. A general practitioner, Dr Tait saw Mr Lee again on 17 June 2010 in connection with a minor sporting injury. He was next seen by Dr Gowally on 23 January 2015 when the general practitioner recorded:

“AGED CARE WORKER

Was doing up client’s shoes yesterday, client dribbled on his left forearm – noticed skin lesions today – he is upset as the client had MRSA but Eddie wasn’t informed – alert – looks well – afebrile – multiple superficial small (3mm) ulcers left forearm”.

178. On 29 October 2015, Mr Lee was seen by Dr Tan who recorded: “Stressed from alleged work bullying – paperwork shown – insomnia, increased anxiety and low moods – nil suicidal intent – nil substance abused – Loves job but difficult now as paperwork given to him which he felt bullied by them (sic)”.

179. The next recorded attendance at the medical practice is on 21 January 2016 when Dr Tan recorded:

“Alleged workplace bully – alleged harassment by manager Debbie Turnbull – unable to work now. Very stressed and low dysthymic due to it. Likes job, says seen illegal work down at current workplace was asked not to reveal it to the public. Has done whistle-blower work and am paying the price for it now as per patient - does look low in mood.”

180. Subsequent consultations note Mr Lee’s mental state, including observations as to his emotional condition following a skateboarding accident to his daughter which led to her being placed in an induced coma in St George hospital in February 2016.

Aged Care Complaints Commissioner

181. Documents produced by what was then known as the Aged Care Complaints Commissioner (ACCC) (now the Aged Care Quality and Safety Commission) record Mr Lee's complaint with respect to the unauthorised video, the companion dog incident and the MRSA incident. The notes record that the dog incident having occurred four years previously it could not be investigated by the ACCC.
182. The determination of the ACCC has been included in the annexures to Mr Lee's statement. The substantial balance of the ACC documents have been redacted. Not redacted is an email on 3 May 2016 by the Complaints Manager in which Mr Lee is notified that the Manager has reviewed a document from STACS which confirms that IRT was notified of the MRSA infection on 22 January 2015.
183. The Detailed Resolution Report with respect to the unauthorised video notes that two clients of IRT were involved, one of whom had since died. The remaining client advised that she wished to assume conduct of the complaint herself. It was noted that an employee of IRT had not adhered to the media policy and instead had followed "informal processes" in releasing the video.
184. The report also notes the "breakdown of communication" which occurred with respect to Mr Lee's request for information confirming when IRT was first informed of the MRSA status of the client. It was noted that IRT had denied that Mr Lee had requested the relevant documentation but upon Mr Lee establishing that he had in fact sent emails requesting the documentation, IRT agreed that these emails had not been answered.
185. Also in evidence was a copy of a Mr Lee's complaint on 4 April 2016 relating to an allegation of risk of exposure to MRSA on a subsequent occasion (8 January 2016).

Fair Work Commission.

186. An extensive schedule was in evidence setting out IRT's response to the claims by Mr Lee and Mr Lyttle. The majority of the responses request further information.
187. Transcript of proceedings before the Fair Work Commission on 14 March 2016 notes the termination of the employment of both Mr Lee and Mr Lyttle. The matters before the Fair Work Commission related to alleged breaches of the earlier enterprise agreement by IRT. The Commissioner noted that the matter had lain dormant for some months but had been restored as a complaint had been made by one of the parties.
188. The Commissioner noted that the employment of both Mr Lee and Mr Lyttle had been terminated and that the respective applications could no longer be maintained. The proceedings were then adjourned to permit the applicants to consider discontinuance rather than have the claims dismissed.
189. In respect of the MRSA issue, copies of photographs of what are presumably Mr Lee's arms are of no assistance as any detail has been lost in the copying process.
190. Mr Lee's General Protections Application Involving Dismissal was in evidence. In that document Mr Lee alleged that his dismissal was "a result of challenging a series of unscrupulous behaviours within IRT management". He identifies the following areas:
 - (a) "Incorrect team meeting minutes" relating to the requested personal apology from Ms Turnbull.
 - (b) "*Lied* concept" challenging the conclusion that Mr Lee was accusing Ms Turnbull of having lied in recording in the minutes that she had apologised to Mr Lee (original emphasis).

- (c) "Adverse Actions" noting that a complaint had been made against him of bullying and harassing behaviour towards Debbie Turnbull, failing to inform Ms Turnbull that he would not be attending a scheduled hydrotherapy pool session with a client and failing to attend a scheduled meeting with a new team leader on 18 August 2015.
- (d) "Termination" noting that he had been dismissed while on "stress leave" for raising valid concerns as to the unauthorised video.

Dr Robert Kaplan, Psychiatrist

- 191. A number of reports from Dr Robert Kaplan, Psychiatrist, were in evidence. Dr Kaplan examined Mr Lee at the request of the insurer on 29 February 2016. He noted the date of injury as 29 October 2015.
- 192. Dr Kaplan noted that Mr Lee had been working for IRT for eight years caring for elderly clients in their respective homes. Mr Lee reported that his problems started with bullying and harassment from Ms Turnbull after November 2014. He said:

"The dispute arose regarding payment of entitlements. She stated that this would be done but then changed her mind when the matter was checked and he was found to be correct. The costs involved weekend work and mileage. Although he was later reimbursed to some extent, the dispute became 'ugly'. Two years of bullying affected his work and mental state. She constantly checked his work and was critical of minor problems."
- 193. Dr Kaplan noted the situation with regard to a client who obtained a dog and the potential exposure to MRSA. A verbal warning had been issued in May 2015 which was followed by an investigation in the course of which Dr Kaplan noted that "forty three of his claims were found to be valid".
- 194. Dr Kaplan also noted the "Internet comment by Ms Turnbull regarding an elderly patient" and the failure to take action with regard to his complaints in this regard. Dr Kaplan recorded that Mr Lee had felt he had been unfairly punished when he had made an appropriate complaint about Ms Turnbull.
- 195. Dr Kaplan noted that Mr Lee had consulted his general practitioner in October 2015 "when he found it difficult to tolerate the situation". He noted that Mr Lee was depressed, sleeping badly, was losing his temper with his family, grinding his teeth and rising early to walk around.
- 196. At that point Dr Kaplan had available to him the medical certificates from Dr Tran and a document from Richard Walsh at IRT noting actions taken by IRT with respect to certain complaints by Mr Lee.
- 197. Dr Kaplan noted the complexity of the history which he felt would be clarified by factual investigation. He diagnosed "adjustment disorder with anxiety and depression".
- 198. Dr Kaplan was subsequently supplied with additional documentation including the "Lee Kelly Investigation (10/3/16)" which recorded the denials of Debbie Turnbull that she had engaged in bullying or harassment, which view was supported by Ms Howe who had noted that there had been "two years of problems with disciplinary issues involving Mr Lee involving a number of staff and considerable resources." IRT denied that there was any abuse that had attracted media attention.

199. Dr Kaplan also considered the various newspaper articles, file notes of the general practitioner and observations made by Lee Kelly. He concluded “the documents above provided a contrary view of Mr Lee’s account, notably a two year history of performance problems, culminating in his termination after what was viewed as a serious conduct breach.” Dr Kaplan said that he could not find that the employers had behaved unreasonably. He felt that while Mr Lee had an adjustment disorder it was not a work injury and that section 11A would apply.
200. Dr Kaplan reviewed Mr Lee on 27 November 2017. He noted that Mr Lee “remains intensely preoccupied with the circumstances of his termination from work, inability to find employment and the consequences of being a ‘whistle-blower’”. Dr Kaplan noted Mr Lee’s ongoing symptoms.
201. Dr Kaplan noted that Mr Lee’s symptoms appeared to have worsened and he diagnosed a Major Depressive Disorder. He said “I have nothing to add to the statement that his psychological injury was wholly or predominantly caused by the action taken by his employers with regard to dismissal”.
202. In a supplementary report dated 22 January 2018, Dr Kaplan noted that there was inconsistency between the history presented by Mr Lee and the information in the factual investigation by Lee Kelly and Associates. He said: “Mr Lee’s condition was wholly or predominantly caused by the actions of the insured with respect to performance appraisal and discipline. This arose from the action taken by his employers with regard to dismissal.”

Performance management document

203. An unsigned and undated document attributed in the index to the Reply as a document entitled “Edward Lee – Performance Management – grievance complaints” was in evidence. The document states that it represents “a selected number of events leading up to this latest discussion with him (20 Jan 2016)”.
204. The document notes that on 6 August 2015 Mr Lee had submitted a grievance concerning “workplace harassment” by his manager. On 4 September 2015 he had been advised that the investigation into his grievance had been completed and it had not been substantiated.
205. On 15 September 2015 Mr Lee had been required to attend a meeting to show cause why disciplinary action should not be taken against him. He provided written submission as well as an oral submission and had been issued with a first warning for inappropriate conduct.
206. The document records: “Separate to the above was a number of ongoing grievances concerning pay and other matters” in the action taken with respect to those matters. It was noted that Mr Lee had rejected the advice on all matters by email to Mr Walsh on 11 January 2016 and had requested the meeting arranged for 20 January 2016 be put on hold.
207. It was noted that the purpose of the meeting on 20 January 2016 “was to convey the outcome of an investigation into a grievance against him for harassment and two performance/conduct related matters that concerned him not attending workplace meetings.” The result was recorded:

“He was advised that the outcomes were that in relation to the harassment issues it was deemed to be unprofessional and inappropriate conduct. This was also the case for the other matters in addition to not following reasonable directions. The conclusion was to issue EL with a final warning regarding his conduct.”

It was noted that Mr Lee had not accepted these findings.

Lee Kelly Investigations Report

208. A copy of the investigation by David Mewett of Lee Kelly Commercial Investigations dated 10 March 2016 was in evidence. (The covering letter is dated 10 March 2015 but this is clearly a typographical error). Mr Lee is described in the investigation as the “claimant”. Statements were obtained from IRT’s in-home care manager, Ms Turnbull, the area manager Ms Howe and John Williams, the “People and Culture Business Partner – HR”.
209. The report notes that Mr Lee at that time was attributing his psychological condition to “ongoing unresolved workplace disputes, workplace bullying and harassment he suffered whilst employed with the insured.” It records that he ceased work on 21 January 2016 and that his employment was terminated on 23 February 2016 for disciplinary reasons. The report notes that Mr Lee commenced employment in 2009 and held a Certificate III in Aged Care.
210. Mr Lee was described as competent in his aptitude but his attitude was said to be unsatisfactory relating to his ability to follow directions.
211. The investigator recorded that Mr Lee alleged that his workplace issues began on 24 November 2014 and had been ongoing. Both Ms Turnbull and Ms Howe had denied bullying and/or harassment and noted that IRT had devoted considerable time and resources to meeting his complaints. The investigator noted that Ms Turnbull had acknowledged that until mid-2014 Mr Lee have been regarded as a “valuable and competent employee with no concerns about his conduct or performance since his commencement in 2009.” The report summarises the payroll issues, the allegation of unauthorised video, incident of the client obtaining a dog (alleged elder abuse), exposure to MRSA and the grievance against Ms Turnbull with regards to the apology.
212. The report notes the course of the investigation into Mr Lee’s behaviour and his ultimate termination. A statement by Mr Lee (unsigned) closely follows the statements by Mr Lee detailed above. The issues noted by Mr Lee as giving rise to his psychological state were said to have commenced on 24 November 2014. Mr Lee said that having challenged IRT’s refusal to reimburse training expenses in regard to his first aid course, he had to take action in the Fair Work Commission in October 2014. The following month he again noted that he was missing entitlements. He said that he was still owed 1 hour 20 minutes in total for tea breaks and team leader hand over time.
213. Mr Lee noted that in August 2014 Ms Turnbull had emailed him stating “I do find it surprising that you can research your previous rosters backdated to 2012 and discover missing entitlements.” His account of what followed is in accordance with the statements noted above.
214. A copy of the minutes of the Shoalhaven South In-Home Care team on 23 June 2015 were in evidence. They bear a handwritten notation “These minutes are not true and accurate. 4.3 medication incidents were never discussed.10.7.15 el (?)” (Original emphasis).
215. A handwritten note dated 31 August 2015 was in evidence. The note refers to the team meeting on 31 July 2015 when the minutes recorded that Ms Turnbull had apologised to Mr Lee. Mr Lee states “I just wanted it to be known that Debbie Turnbull did not apologise to me personally.”
216. Minutes of the team meeting dated 31 August 2015 record under “Previous Minutes”:
- “Last month’s minutes were not accepted as true and correct, this matter is being managed independently by this office. JC (J Cummings) stated that AG (Angela Gumley) had not run a meeting before.

AG stated that she has not been trained in writing minutes and what do her very best to ensure accuracy.

EL interjected made a verbal statement, regarding minutes from July's meeting. DL supplied AG with a handwritten, unsigned statement which he read from."

217. A handwritten notation appears on the minutes "the minutes of the team meeting are not accepted as a true and accurate record. 14/9/15 el (sic)". An arrow is drawn to connect that comment to the paragraph commencing "EL interjected..."
218. A "Safety Message" was recorded; "Don't fix the blame, fix the problem."

Debbie Turnbull

219. A statement dated 8 March 2016 by Debbie Turnbull was in evidence. Ms Turnbull at that time was employed by IRT as the In-Home Care Manager of the Southern Shoalhaven Area. She said that she had been that position for 16 years and employed by IRT for 30 years.
220. Ms Turnbull noted the role performed within IRT by Mr Lee. She described him as having been "originally a competent, a valuable employee and always displayed integrity and exemplary performance within his role." She said that she had had no concern about his performance or conduct for a number of years and his performance reviews were of a high standard.
221. Ms Turnbull said that she had noted a significant change in Mr Lee's demeanour midway through 2014 which she regarded as "significant". Ms Turnbull said that in July 2014, Mr Lee had submitted a request "for a review of alleged missing entitlements such as unpaid tea breaks and unmet contracted hours et cetera". She investigated together with other IRT personnel. He said the request was received on 10 July 2014 and payment was made on 15 July 2014.
222. Ms Turnbull said that Mr Lee had "never submitted a correct time sheet" so that it had always taken her a long time to work out his entitlement. She said that Mr Lee had "underpaid himself" and this had occurred the "majority of the time". Ms Turnbull said she spoke to Mr Lee about this but Mr Lee for most of his employment had never complained to Ms Turnbull about not receiving entitlements.
223. Ms Turnbull said that shortfalls were the result of incorrect timesheets and not the fault of the payroll system. Later in 2014, Mr Lee again raised the issue of non-payment of entitlements. Ms Turnbull said she rostered time for him to meet with her in late 2014 on three days to review the staff "plan roster" and "demonstrate that all rostered entitlements were correct". She said that Mr Lee had declined to attend three consecutive meetings appointed for this purpose without giving notice. Ms Turnbull denied that the meetings were unnecessary because they represented an attempt to resolve Mr Lee's payroll issues.
224. Ms Turnbull denied that there was a problem with the reliability of the IRT payroll system which would contribute to Mr Lee's issues.
225. With respect to the issue relating to the police check Ms Turnbull acknowledged that Mr Lee had been suspended for not having completed his police check. She said that the necessary paperwork had been mailed to Mr Lee's home. She had spoken to him in the IHC office inviting him to make time to come to the office and process the papers. She said that he had offered no reply and had subsequently contacted the acting regional manager and complained that he been bullied and harassed. Ms Turnbull said it had been Mr Lee's choice not to complete and submit the required documentation and had been appropriately deemed "overdue and must not be working".

226. With regard to the unauthorised video issue, Ms Turnbull noted the issue raised by Mr Lee and said that she had deleted the message on the team leader phone and she felt that it was “mischief making exercise and would only cause concern and distress for other members of the phone [sic] using the team leader phone.”
227. Ms Turnbull explained that an elderly female client of IRT had featured on a short ABC video. She denied that there had been unauthorised video and said that she still had access to the signed permission forms which were “in accordance with IRT policies on such privacy matters”. Ms Turnbull denied that this constituted elder abuse and said that the client had been enthusiastic about IRT’s involvement.
228. Ms Turnbull said the issue had been investigated by Ruben Sakey from IRT and an investigator from Wise Workplace Investigations.
229. Ms Turnbull addressed the issue of the client’s dog noting the allegations made by Mr Lee with respect to an incident which Mr Lee said had occurred in January 2015. Mr Lee denied that she had been accompanied by Ms Howe when she went to the home of the client who owned the dog (as alleged by Mr Lee) but she confirmed that she had spoken to the client and her daughter and that they had requested that Mr Lee no longer be rostered to attend any service for her as the “client no longer trusted Eddie”. She said this had occurred in 2011 and not 2015.
230. Ms Turnbull agreed she had spoken to the client at the hairdressers as alleged by Mr Lee she said “I tried to reason with [the client] about the issues relating to the care of the dog and the responsibilities involved in keeping the dog.” Ms Turnbull said she had acted professionally and this had been within her role as a manager. Her concern was that no risk assessment or benefit analysis had been conducted with regard to the ownership of the dog. She acknowledged that the client and the dog continued to reside together happily.
231. Ms Turnbull said that subsequently in March 2015, both Mr Lyttle and Mr Lee had gone to the client’s home and had questioned the client’s daughter about IRT’s concerns over the introduction of the dog into the household. She said the daughter had replied; “no, not that I’m aware of. It was an emotional time for mom. Charlie has been the best thing for mum.” She said the daughter felt that Mr Lyttle was acting as a witness and stated that she “felt setup” and did not want to continue the conversation. Ms Turnbull denied that Mr Lee had been removed from the care of the client as a form of punishment.
232. With respect to the allegations of exposure to MRSA, Ms Turnbull said that she had been notified of the client’s status by email at 9.00 am and had sent an SMS message to all IRT staff at 9.10 am. By midday personal protective equipment have been delivered to the client’s home. Ms Turnbull said that she had acted promptly when notified of the client’s status.
233. With respect to the issue of the words added to Mr Lee’s incident report in relation to possible exposure to MRSA by adding the words “employee has nil broken skin/lesion”, Ms Turnbull said that she had not “tampered with his form”. She said it was her role to document this on the incident form. She said she was not able to recall what she had written but said that another manager had observed Mr Lee not to have any broken skin. She believed that Mr Lee would have been tested appropriately.
234. With respect to the grievance submitted by Mr Lee in August 2015, Ms Turnbull set out the relevant parts of Mr Lee’s statement which included the inclusion of an incorrect entry relating to medication in the minutes of a meeting and the mention at the subsequent meeting of an apology to Mr Lee which he maintained had never been communicated to him. Ms Turnbull noted that Christine Williams had investigated Mr Lee’s complaint and found it to have been “unsubstantiated”. Ms Turnbull said that “what was recorded in the minutes was an acknowledgement to the team to mean ‘yes I agree I made an error by omitting to discuss item 4.3 and I hereby offer my apologies to Eddie and the team’.”

235. Ms Turnbull said she had been deeply offended, shocked and dismayed by the allegations made by Mr Lee. She said that her actions in noting the error in the minutes and apologising to the team had resolved the matter. She felt it was unfair that Mr Lee had “taken his workplace issues to the local media”.
236. Ms Turnbull attached a timeline of issues related to Mr Lee and emails relating to the various issues. In that timeline Ms Turnbull noted that Mr Lee had been appointed as a Team Leader in 2011 and had been considered the most valuable staff member at that time. She said that Mr Lee had always displayed respect, integrity and exemplary performance within his role. She believed that he had been in collusion with Shane Lyttle and his recent performance had been a bitter disappointment to her. The timeline references the documents attached to Ms Turnbull’s statement made on 25 February 2016.
237. The timeline sets out the request for review of missing entitlements submitted by Mr Lee on 10 July 2014. The outcome of that request is noted in the statement. Ms Turnbull said it was her belief that Shane Lyttle had assisted Mr Lee in his review of missing entitlements. An email dated 10 July 2014 from Donna Charlesworth (IRT Payroll Officer) asking Ms Turnbull to follow-up on a request by Mr Lee for his rosters from 26 December 2012 to 30 April 2013 was attached marked “A”.
238. Attachment “A” to this entry includes emails from Mr Lee dated 10 July 2014 sent to Donna Charlesworth which noted that work performed on 19 November 2013 should have been paid as overtime and a further email on that date to Donna Charlesworth requesting supply of rosters commencing on 26 December 2012 through to 30 April 2013. The attachment labelled “A” also included an earlier email, 27 June 2014, to Mr Lee from Donna Charlesworth providing the rosters and timesheets from January 2013 to June 2014.
239. Other events noted in the timeline are on 29 August 2015 (probably 29 August 2014) when Mr Turnbull recorded that Mr Lee has “rarely submitted a correct time sheet”. She said she had sent a handwritten IRT memo explaining the amount of time that it took to correct his timesheets. The attached copy (“B”) dated 29 August 2014 expresses surprise that Mr Lee could research the backdated rosters. The note includes “a general reminder that employees’ timesheets are a confidential document between the employer and employee.”
240. The timeline notes that on 16 November 2014 a request had been received from Mr Lee for an audit to be conducted of further possible missing entitlements dating back to 2008. Ms Turnbull noted “IRT is currently working through this process.” The payroll officer was collating the timesheets by the electronic database but it would be necessary to access the archives. Ms Turnbull referred to attachment “C” to her timeline. That is an email from Mr Lee to Richard Walsh regarding missing entitlements dated 9 June 2014 and notes 62 missing tea breaks going back to 5 June 2013 as well as a claim in respect of overtime.
241. Part of attachment “C” (appearing after attachment “D”) is part of a memo from Richard Walsh noting the request for the audit back to April 2008. Mr Walsh notes that “the statute of limitation is six years therefore we can only go back six years from 16 November 2014.” Mr Walsh observed “this task will obviously involve a lot of work but also require approval from you Debbie prior to any entitlements being paid.” He suggests a telephone conference. Part of the exchange of emails that follows is illegible.
242. The earliest email legible in attachment “C” is from Mr Lee to Ms Turnbull dated 22 November 2014. Mr Lee says that before there is a meeting as proposed by Richard [Walsh] he wished Ms Turnbull to note that certain specified dates had not been authorised for payment and requesting an explanation. He said “can you please explain the reason for non-payment of these dates (below) so I can be well-informed”. On 25 November Ms Turnbull replied attaching an explanation. That explanation is illegible on the copy attached.

243. On 7 December 2014 Mr Lee emailed Debbie Turnbull submitting that the enterprise agreement authorised payment. Mr Lee pointed to the fact that he had been paid “just under \$2000 worth of entitlements” as a result of his own work. He said:

“until Angela has completed the above then I see it unnecessary to have any immediate all whereby subjectivity comes into the equation on the officer’s behalf without any factual reasoning.

For example, if there appears to be time when a break could have been taken then that does not negate the absence of that break is more information be required to validate that concept which is all purely theoretical. I put my trust in the office and all of its staff and if it entitlements such as a tea break was missing from my roster that was not taken as at the time I did not know that I was entitled to it and worked as per the roster.”

244. On 8 December 2014, Donna Charlesworth emailed to Ms Turnbull:

“After reading Eddie’s email it appears he is not wanting to meet with you until after the full audit has been undertaken. I was off [sic] the impression you wanted to meet with him in the first instance about his original claim whether one hour 20 minutes he claimed was withheld from payment.”

245. Ms Turnbull replied: “I thought when we had the teleconference, it was your suggestion, to put it all back to him. His request for audit, his work. Have I missed something?” Ms Charlesworth replied “No problems, I will have Maggie collate them all in the first instance. I have not spoken with Eddie about the review but will confirm with Richard if this is something Eddie will need to undertake or if it is the site’s responsibility.”

246. Ms Turnbull replied:

“No, please hold off until all timesheets are collated and forward to Eddie a complete package. Easier to keep track of, I think. Has Eddie been notified that he will be doing the audit of the timesheets? My perception, from Eddie’s email, that I sent this morning; suggests he feels Angela will be doing the audit and creating a spreadsheet.”

247. Ms Charlesworth replied that Maggie Hay had already spent considerable time collating the timesheets and had been able to copy the timesheets from 27 June 2012 to 25 November 2014. She noted that the timesheets prior to 27 June 2012 were stored off-site and it would take some time to locate and copy these. She was asked if she should hold the documents until they had all been collated to 6 April 2009 which was apparently Mr Lee’s date of commencement. Alternatively she said she could forward them to Mr Lee for review.

248. The next email in the trail attached to the timeline is from Cheree Howe to Ms Turnbull with copies to Richard Walsh and Donna Charlesworth. Ms Howe suggested discussion of the matter at a meeting that day.

249. The next email is from Ms Turnbull but it is unclear to whom it was addressed. She said: “Good Morning – Where you want me to go with this (please remain polite)? Staffplan clearly indicates that Eddie is not correct with the missing entitlements. By showing Eddie the actual staff plan roster will hopefully resolve this issue.”

250. Ms Turnbull referred to attachment “D” which comprises what appears to be a time sheet or pay claim and nine illegible sheets.

251. On 3 December 2015, (probably 3 December 2014) Ms Turnbull recorded that Mr Lee made another "current 'missing entitlements' claim of six missing tea breaks from 25 July 2014 to 23 September 2014". She said that the rosters indicated this was not correct. Ms Turnbull referred to attachment "E" which comprises an email to Mr Lee on 4 December 2014 asking him to contact Angela to reschedule a time "to look at Staffplan and entitlements". The following pages constituting attachment "F" are illegible for the most part but include the emails referred to above between Ms Turnbull and Mr Lee.
252. Attachment "G" is completely illegible. Attachment "H" again notes the email requesting Mr Lee to contact Angela to reschedule the proposed meeting following an email from Mr Lee asking to cancel the meeting as he did not believe that there had been enough preparation. This followed a request by Ms Turnbull for Mr Lee to attend a meeting with Angela to go through the roster at a half hour meeting.
253. The next entry on the timeline concerns 10 December 2014. Ms Turnbull noted an entry by Mr Lee into the Team Leader diary. The attached diary entry (attachment "I") is largely illegible but Ms Turnbull notes that it records a call received from Shane Lyttle with a: "three-quarter page entry about checking if his (Shane's) text message dated 5 December 2014 had been actioned: 'Maisie not happy with Debbie Turnbull' et cetera". Ms Turnbull said:
- "the cited text message from Shane had been reported to Area Manager (Cheree Howe) and Acting General Manager (Margaret Thornton). In my opinion, the diary entry was a collusion between Eddie and Shane, to bring the issue to other Team Leaders attention and to discredit myself. Eddie has never before made a similar entry into the Team Leader diary. Team Leaders are very aware of reporting sensitive issues and would communicate issues of concern, to me, verbally."
254. The timeline next records that on 11 December 2014, prior to Ms Turnbull's annual leave, she sent Mr Lee notification that she was "surprised and disappointed in his performance over the past 10 business days". She proposed a meeting in January 2015 to discuss the events. She informed Mr Lee that a note would be placed on his file. The file note is attachment "J".
255. The timeline then refers to 18 December 2014 when Ms Turnbull said she received an email from Mr Lee entitled "Good Will Hunting". She said she found the content of the email to be vexatious, demoralising and undermining of her position and right to manage. She said it was an inappropriate use of email. The email from Mr Lee was attachment "K".
256. In the email Mr Lee noted that he received two communications from Ms Turnbull, a Christmas card and the letter referred to above. He said there was "no goodwill" at that time of year. He noted that Mr Lee had felt "surprised and disappointed" as to his performance the last 10 days he said: "What a statement that is, especially in light of your poor 'Managerial' (?) Aspects of In-Home Care with regard to missing entitlements of just short of \$2000 not paid spanning the last six years. **No good will** there". (Original emphasis)
257. Mr Lee said that he had rightly declined to attend the proposed 30 minute meetings with Angela and that Ms Turnbull did not have the right to register a "note for file". He said that his performance over the last 10 business days had been exemplary.
258. Mr Lee said that he had given sound reasons why he had declined the previous two meetings and was now threatened with a "not negotiable" attitude. He said that Ms Turnbull had taken away his right and ignored his request for a full audit dating back to 2008.

259. Mr Lee then listed his issues relating to payment. He said these entitlements had not been highlighted until Shane Lyttle had taken the matter to the Fair Work Commission and had been reimbursed for unpaid entitlements. He said that he believed that an audit would disclose further entitlements. He noted that Richard Walsh in his email dated 17 November 2014 appear to be agreeable to an audit.
260. Mr Lee said that he was at a loss to understand how Ms Turnbull had come to a conclusion regarding his performance considering that:
- “you firstly booked a time with Angela to discuss that one hour 20 minutes (approximately \$30 worth) source of entitlements, with me cancelling it, as that line of investigation was heavily floored (sic) in light of other missing entitlements that necessarily need to be part of the whole enquiry. **No goodwill** there.”
261. Mr Lee said that he had written to Ms Turnbull on 7 December 2014 “highlighting evidence of how these missing entitlements could be found” but this had been disregarded and a further appointment with the roster clerk had been appointed.
262. Mr Lee queried whether Ms Howe had been copied into the correspondence and said:
- “In knowing of my position prior to making the last booking I cannot help but feel being set up for punitive action with the outcome already being known to you, thus bullying, such as this letter highlighting that it will be going into my file which has been reasonable over my six years here. **No good will** there.”
263. Mr Lee said that he would be discussing this with more senior management as a complaint. He concluded “Remember, Debbie, this is the path that you are choosing to go down, not me. I am interested in facts and fairness.”
264. On the same date Ms Turnbull said that there had been an email to Margaret Thornton (Acting General Manager) which she found to be vexatious, demoralising and undermining of her position in the right to manage.
265. At the end of the timeline Ms Turnbull recorded:
- “Possible Outcomes:
- To return to a harmonious working environment
 - Edward Lee to receive one-on-one education about IRT code of conduct
 - ensure Edward Lee has an awareness about a manager’s ‘right to manage’
 - Edward Lee to be denied future email access to Debbie Turnbull
 - In future, if Edward Lee, has issues of concern or situations that cannot be resolved. With IHC manager, Debbie Turnbull, he is to seek resolution with Area Manager, Cheree Howe, as per the IRT ‘Chain of Command’ process.”
266. There is a further email which is labelled attachment “L” dated 18 December 2014 from Mr Lee to Margaret Thornton and Christine Williams. That email is not referred to in the timeline but forms an attachment to Ms Turnbull’s statement made on 25 February 2016 as do the other attachments noted above.

267. In the email, Mr Lee expresses his concerns over the deletion of information from the Team Leaders book. He said “this practice does not sit well with me and I hope it’s the last because we cannot ‘pick and choose’ what to delete and omit any messages or information ‘sensitive’ or not.”
268. The attachment includes a further email apparently addressed to Ms Turnbull from Mr Lee which is noted as having been “received 7.12.14” at 11.11. Mr Lee said: “I’m not sure if you fully understand where I’m coming from. I’ve requested to have an audit going back to 2008 (when I first started). This is going to be very time-consuming and could not be done in half hour or even an hour.” Mr Lee then discusses the points at which he believes there may be errors.
269. Mr Lee reminded Ms Turnbull that almost \$2,000 worth of entitlements had been located which he said should have been obvious to those who roster and process the timesheets. He said: “So, until Angela has completed the above I see it unnecessary to have any meeting at all whereby subjectivity comes into the equation on the office’s behalf without any factual reasoning.” He said that in the past he had been assured that shortfalls in his pay could be made up in the following fortnight. Mr Lee concluded by saying that a meeting would be appropriate when Angela has finished the audit and he has the resulting spreadsheet.
270. Attachment “M” comprises a number of emails and a transcript of the meeting with a client of IRT, GR, and her daughter (the dog incident). The emails relating to the proposed meetings in December 2014 are reproduced and formed part of the material discussed above. The meeting relates to Mr Lee’s allegations relating to bullying of GR by Ms Turnbull. The minutes of the meeting record that GR did not wish to make a complaint against IRT and that she had been asked about the incident of her dog ownership which GR said had not been a problem.
271. GR and her daughter outlined problems that they perceived with the actions of Mr Lee in the provision of care to GR and agreement was reached that Mr Lee would no longer perform caring functions for her.

Cheree Howe

272. A statement by IRT’s area manager, Cheree Howe, dated 24 February 2016 was in evidence. Ms Howe noted that Mr Lee was currently employed by IRT as a home care worker on a part-time basis and had been in that position for approximately eight years. She confirmed that Mr Lee’s manager was Debbie Turnbull, the manager of IRT Southern Shoalhaven In-Home Care. She noted that Mr Lee attended the needs of elderly clients residing in their own homes in accordance with the roster.
273. Ms Howe noted the assertion by Mr Lee that his psychological condition was as a result of a number of workplace issues involving disputes and behaviours from his manager, the area manager, general manager and Chief Operating Officer which Mr Lee considered “bullying and harassment”.
274. Ms Howe said there was no evidence of Mr Lee having been mistreated, targeted or the victim of any inappropriate behaviour, bullying and harassment in the course of his employment with IRT. She said that Mr Lee in the last two years had ongoing performance and disciplinary issues. These had been “intense” over the past 15 months. She said the company had spent considerable time and resources on Mr Lee and his colleague Mr Lyttle over the past two years.

275. Ms Howe said that in October 2015 he had sent Mr Lee an email requesting his attendance at a meeting set for 28 October 2015 concerning “a number of performance issues”. She said that Mr Lee had acknowledged the request and commented that “Debbie had not acted in good faith”. She said “the aim of the fact-finding was to discuss his unresolved concerns, and it was only put on hold, as Eddie had outstanding matters with the HR consultant time.” She said at that time there was no evidence that Mr Lee had acted inappropriately.
276. Ms Howe subsequently sent a further letter inviting Mr Lee to a further meeting and he had finally attended a meeting on 18 December 2015. She had waited until after Christmas and sent him a letter on 30 December 2015 and followed up with the outcome meeting in January 2016.
277. Ms Howe said that Mr Lee had been given the outcome of her investigation of the concerns about his behaviour. She noted that he then went to his treating doctor and was issued a WorkCover certificate the day after the outcome meeting.
278. With respect to the payroll issues Ms Howe said that she believed the payroll issues originally started with the Employment Agreement at the time. She said “it was not defined to all managers the correct pay sequence for staff with breaks whilst they were rostered. It was not just an issue highlighted with Eddie, but highlighted across the organisation.”
279. She noted that IRT had taken steps to resolve the issue, developing a new enterprise agreement. She said that Mr Lee kept insisting there were still outstanding entitlements owed and IRT had reviewed what he questioned and he “could not see this”. She said that Mr Lee had refused to attend meetings with Ms Turnbull to sit with the roster clerk and identify where the anomalies were. Mr Lee had asked that “every one of his timesheets since the beginning of his employment be reviewed by someone else”. She noted that he did not wish to do this himself.
280. Ms Howe said that she felt that Ms Turnbull had dealt with the matter appropriately and was “fair and reasonable in the circumstances”. She said that IRT management had made every attempt to resolve his payroll issues and pay unpaid entitlements.
281. With respect to the unauthorised video issue, Ms Howe said that this incident had not involved elder abuse and that the client and her family were well aware that the client would be featuring. She said that there had been meetings when it was explained to Mr Lee on more than one occasion that the client had consented to being in the video and that it was not a matter of elder abuse.
282. Ms Howe said that IRT had hired Wise Workplace Investigations to investigate the complaint independently and that Ms Turnbull’s actions had been found to be appropriate after these two investigations and not an example of elder abuse.
283. Ms Howe commented with regard to the MRSA issue. She said that Ms Turnbull had advised staff members as soon as she became aware of the possible infection. She said that Mr Lee’s arm had been viewed by a nurse who had found the skin was “in tact with broken areas” (sic).
284. Ms Howe noted that Mr Lee alleged that IRT had not responded to his request for further information about when they were first notified and said this was not true. Ms Howe also denied that Ms Turnbull had “tampered with” Mr Lee’s report of the incident noting that all Ms Turnbull had done was “put down her observations”.
285. Ms Howe noted Mr Lee’s complaints about mismanagement by Ms Turnbull and the In-Home Care Service. She noted that Mr Lee alleged that he had raised 43 points with “Phil the investigator” but only two of those had been dealt with at the subsequent meeting in May 2015 at which he was given a verbal warning.

286. Ms Howe said she didn't have a copy of the outcome from the investigation but had been interviewed. She also had not been at the outcome meeting. She said "if the evidence substantiated it, then a verbal warning would be reasonable." This verbal warning was in relation to allegations against Mr Lee and not against Ms Turnbull. She said an independent investigator had been engaged because Mr Lee and Mr Lyttle did not accept IRT's findings.
287. With respect to the grievance lodged by Mr Lee with respect to the inaccurate minutes and the notation regarding the apology, Ms Howe ascribed the incorrect record in the minutes as to medication to be due to a mistake not affecting client care. She noted that Ms Turnbull had explained the mistake at the next team meeting and apologised to the group. She said after this Mr Lee continued to demand a written and public verbal apology in front of all the staff. She said she thought this was unnecessary as the matter had already been resolved in the absence of Mr Lee. She noted that the mistake was not a breach of IRT code of conduct or policy or procedures and was not related to workplace safety and client care.
288. With regard to the meeting with Christine Williams on 15 September 2015, Ms Howe said that she was not familiar with the matter although it had been raised at a later meeting with her on 18 December 2015. She said that Ms Williams had investigated the matter and found that Mr Lee had not called Ms Turnbull a liar but that she had alleged that Mr Lee had said that she was "untruthful".
289. Ms Howe said she had attended a meeting with Mr Lee and Richard Walsh on 18 December 2015 to discuss a number of outstanding issues. These included the team meeting on 23 June 2016, the investigation outcome, the grievance relating to Ms Williams, the investigation outcome, the meal breaks and outcome on the allegations that Mr Lee wanted to correspond by email only. She said: "At that meeting on 18 December 2015 his issues of bullying and harassing behaviour towards Debbie Turnbull and not being compliant with reasonable directions on two occasions (sic) [? were discussed]."
290. Ms Howe said that this meeting was:
- "IRT's response to a number of Eddie's issues he had previously raised, and the start of investigation of his behaviour towards Eddie Lee [? Debbie Turnbull]... This was IRT's attempt to resolve Eddie's ongoing issues, which had already been resolved, and also bring to his attention the issues around his behaviour."
291. Ms Howe said the meeting was held within IRT policies and procedures. She said she collected two other witness statements from IHC that "confirmed that he did not acknowledge Debbie or speak to Debbie in the team office." She said there had been no finding of bullying or harassment but rather that the behaviour was inappropriate and unprofessional towards Ms Turnbull. Mr Lee had not accepted this.
292. With respect to the refusal to allow Shane Lyttle to appear as a support person for Mr Lee, Ms Howe said that Shane Lyttle had a "prior history of interrupting when attending meetings and interviews as the support person" which had led to difficulties.
293. Ms Howe noted that Mr Lee alleged that the intent of the meeting was to "work through the issues" and that the transcript of the recorded meeting was to be sent to him afterwards. She noted that Mr Lee alleged that Ms Howe had lied in the meeting, informing him that the proposed outcome meeting would be to discuss issues and the meeting was not a disciplinary meeting.
294. Ms Howe denied that she had lied and confirmed that this was not a disciplinary meeting as IRT was still requesting responses to him to the allegations. She said that Mr Lee had been provided with a transcript of the meeting and this was part of providing Mr Lee with "due process and the opportunity to respond".

295. With respect to Mr Lee's allegations as to what occurred following the meeting on 18 December 2015 and the meeting on 20 January 2016 when Mr Lee had received a final warning, Ms Howe said that at the meeting on 20 January 2016 Mr Lee had been informed that "we had found that he had not followed reasonable directions and inappropriate behaviour, but not bullying and harassment. In the circumstances, our decision to issue him with a formal final warning was fair and reasonable."
296. Ms Howe denied any suggestion that the investigation into Mr Lee's conduct was related to his prior grievances about other IRT staff. She said the other grievances had already been resolved and the results communicated to him previously.
297. With regard to the show cause letter sent to Mr Lee in February 2016 Ms Howe said this had been sent after obtaining independent legal advice. She said that Mr Lee had not followed IRT policies and procedures and had divulged confidential information and paperwork to the media.

John Williams

298. A statement dated 22 February 2016 by John Williams, IRT's People and Culture Business Partner for the Southern Areas was in evidence. Mr Williams said that he reported to Richard Walsh, the People and Culture Operations Manager. Mr William said he had been in the position since October 2015 and had only known Mr Lee since that time.
299. With respect to the meeting on 30 December 2015 Mr Williams said he had not been in attendance at that meeting but understood that it had been recorded and a copy of the audio recording had been provided to Mr Lee.
300. Mr Williams said his involvement had been limited to investigating a complaint against Mr Lee for bullying and harassment and to matters involving Mr Lee's conduct. These related to Mr Lee's alleged failure to follow reasonable management directions. Mr William said he attended the outcome meeting on 20 January 2016 together with Ms Howe. He said that he had prepared for the meeting by reviewing transcripts of the interviews and that he had spoken to Ms Turnbull in order to clarify some issues.
301. Mr Williams said that after Ms Turnbull and Mr Lee had been interviewed and the information reviewed by Ms Howe and himself they then "wrote a script for the outcome meeting and came out with an investigation outcome." He said "the allegations involved Eddie not returning phone calls, not speaking to his manager, and going through other staff." Mr Williams said that while these did not constitute bullying they did constitute unwarranted behaviour.
302. Other allegations against Mr Lee were that he did not follow reasonable directions from his manager although this had not affected client care. He said that Mr Lee's conduct was "deceptive and misleading" and he would leave messages on the team phone instead of ringing Ms Turnbull directly. On one occasion he said Ms Turnbull had been waiting with another employee to speak to Mr Lee but he had not turned up. Mr Lee claimed to have left a voice message but there was no voice message found.
303. Mr Williams said that he had reviewed the relevant IRT policies and procedures and had received advice from a solicitor. He noted that IRT had declined to allow Shane Lyttle as a support person at the meeting to be held on 20 January 2016 as there was ongoing litigation with Shane Lyttle at that time. Shane Lyttle had a reputation for interrupting interviews during past IRT meetings and raising unrelated issues. Mr Williams felt that Shane Lyttle brought "potential bias" to the meeting and in "our opinion would not have been an appropriate independent person."

304. Mr Williams acknowledged that it was unusual to decline a particular person as a support person and he felt that “this would probably affect Eddie’s ability to provide his case and affect the fairness to Eddie.” He said IRT had not wanted to disadvantage Mr Lee by refusing to have Shane Lyttle attend as a support person. Mr Williams observed that it was common practice for the investigators or interviewers to leave the room when a support person was speaking as this allowed privacy.
305. At the meeting on 20 January 2016 Mr Williams said that Ms Howe had read out the script titled “Outcome Meeting – Eddie Lee – 20 – 1 – 2016.” He said that the purpose of the meeting was to put to Mr Lee the “conclusions and outcome” and for him to respond to this. He said Mr Lee had made “unusually very brief” responses and had several times said that he rejected everything.
306. Mr Williams said that Mr Lee had said that he wanted to see copies of everything including witness statements but he had been told that these were confidential and not a matter for discussion at this meeting. Mr Lee had said “This is bullying and harassment.” He said that he and Ms Howe had been careful not to use those words.
307. Mr Lee was informed that he would be issued a final warning on the basis that he had received a similar warning for similar conduct issues a month or so before this. Mr Williams said that after the formal part of the meeting was concluded he had advised Mr Lee to return to work and reflect on his attitude. He said that he had predicted that Mr Lee would go off “sick” in the near future, which is what had, in fact, occurred.
308. Mr Williams noted that while on sick leave Mr Lee had gone to the Milton Ulladulla Times who then published an article concerning IRT. As a result of that behaviour Mr Lee was issued with a show cause letter as his behaviour was considered a breach of good faith, fidelity and IRT’s code of conduct “specifically around information around clients and confidential employment matters.”
309. Mr Williams said that IRT’s response by issuing the show cause letter was a “legal and reasonable response” given Mr Lee’s recent actions.

Other documents

310. The various emails in evidence have been noted above. Also in evidence was the letter dated 25 September 2015 headed “Outcome following Show Cause” from Christine Williams to Mr Lee. The letter refers to the grievance submitted by Mr Lee against Ms Turnbull on 6 August 2015 and notes that the complaint had been investigated and it was concluded that the grievance had not been substantiated.
311. The letter noted that Mr Lee had been required to attend a meeting to show cause as to why IRT should not take disciplinary action against him which he had attended on 15 September 2015 with Shane Lyttle as his support person.
312. Ms Williams said that after reading Mr Lee’s written submissions and hearing his comments IRT was “still concerned about aspects of your behaviour surrounding and relating to the grievance.” Ms Williams said these aspects were:
- “specifically:
- the allegation that Ms Turnbull had engaged in ‘workplace harassment’ in relation to the 31 July 2015 team meeting appears to be without any basis whatsoever;
 - in submitting the grievance:
 - you did not act in good faith; and

- you have harassed Ms Turnbull, because the grievance contains an allegation about her to IRT that is offensive in all the circumstances.”

313. The letter notes that following the outcome of the investigation meeting with Craig Hamer in May 2015, Mr Lee had been given a warning and “an opportunity to rebuild your relationship with Ms Turnbull and the IHC team” and concluded that Mr Lee’s behaviour was inappropriate and warranted a “first warning”. Mr Lee was warned that if he was “found to have engaged in further conduct of a similar nature, he would be likely to face further disciplinary action which could include termination of his employment.”
314. Mr Lee was required to attend a compulsory education session relating to Grievance Procedures and Policy and Harassment Workplace Bullying and Workplace Relationships on 29 September 2015 in Ms Howe’s office.
315. Mr Lee was advised that a copy of the letter of 25 September 2015 would be placed on his personnel file. He was told that the matter was confidential and should not be discussed in the workplace.
316. A copy of a letter from Richard Walsh dated 31 December 2015 was in evidence. The letter refers to the meeting on 18 December 2015 held “to discuss a number of outstanding issues”. It was noted that Ms Howe was present and that Mr Lee had chosen to attend the meeting without a support person. A recording of the meeting was attached to the letter.
317. The outstanding matters were identified as the “Team meeting on 23 June 2015” in respect of which it was said that “it was established that Debbie Turnbull, at a meeting held on 31 July 2015, apologised to you for an error in the minutes however, you were not present at the meeting.”
318. The letter notes a series of events leading up to the complaint and records that the original concern related to an “administrative error with the team meeting minutes” and noted that Ms Turnbull was prepared to apologise to Mr Lee in person and in writing. Mr Lee’s concern that these matters had led to him being disciplined unfairly was dismissed.
319. A further issue was identified as “Grievance relating to Chris Williams”. The letter states: “You have raised concerns that Chris Williams has published in a letter to you dated 4 September 2015 that clearly stated that you had said that Debbie Turnbull had lied.” The letter acknowledges that Mr Lee had not made an allegation. The request for a personal and written apology from Christine Williams was declined because “the statement informed that you had considered that Debbie Turnbull was not being truthful.” The formal warning issued on 25 September 2015 was to remain.
320. The third issue raised is that of “Meal Breaks”. It was noted that the Fair Work Commission had directed Mr Lee to provide particulars in relation to his claim with respect to outstanding meal breaks. It was noted that Mr Lee had not attended meetings with Ms Turnbull to discuss details of this claim. The letter notes that:

“It was agreed at the meeting on 18 December 2015 that you, Ms Howe and Angela Gumley would meet as soon as practical in the New Year to review claims related to outstanding meal breaks and resolve in full. Ms Howe would then make a determination and advise the relevant Payroll Officer to action a payment.”

321. The fourth issue raised was identified as “correspondence via email only”. Mr Walsh noted that he had reinforced at the meeting on 18 December 2015 that:

“as your employer IRT can require you to attend a meeting to discuss issues relating to employment. Your agreement is not required; and you are not entitled to dictate how we’ll communicate. Compliance with directions is a contractual obligation that you have as an employee and meeting with you is a reasonable direction, particularly as the intent of the meeting is to work with you to resolve outstanding matters. If you continue to refuse to meet with us that will suggest that you no longer intend to be bound by obligations under your employment contract”.

322. Issue five is identified as “Meeting scheduled for 28 October 2015”. Mr Walsh noted that Mr Lee had been invited to a meeting on 28 October 2015 to discuss allegations that he had bullied and harassed his manager Ms Turnbull. In addition it was noted that there were two further complaints relating to Mr Lee not having attended appointments on 19 August 2015 and 18 August 2015. The letter records Mr Lee’s responses. Mr Lee was advised that Ms Howe had investigated the matter further and would provide an outcome in a separate meeting of which Mr Lee would be advised in due course.

323. The letter dated 8 January 2016 from Ms Howe to Mr Lee was in evidence. The letter notifies Mr Lee that the issues of allegation of bullying and harassment of Ms Turnbull by Mr Lee and his failure to attend meetings on 18 August and 19 August 2015 would be discussed at a meeting on 20 January 2016. The letter notes that Mr Lee had the right to have a support person present, however that support person could not be Shane Lyttle.

324. In an email dated 11 January 2016 to Richard Walsh, Mr Lee set out his responses to the issues raised by Mr Walsh. He asserted the right to have Shane Lyttle present as his support person and in a subsequent email notified IRT that he was attending “under protest”.

325. Notes recording the outcome of the meeting on 20 January 2016 were in evidence. The notes record that the meeting is an “outcome meeting following the fact-finding meeting held on 18 December 2015”. The notes take the form of the script described by John Williams in his statement. Mr Lee was informed that with respect to the allegations of bullying and harassing behaviour towards Ms Turnbull conclusion was that his behaviour had been “inappropriate and unprofessional”.

326. With regard to the complaints related to non-compliance of directives, IRT concluded that Mr Lee had not followed reasonable directions of the manager and these represented further unprofessional and inappropriate behaviour so that a final warning was issued “regarding your ongoing unprofessional and inappropriate behaviour.” The letter confirming that outcome was also in evidence.

327. The show cause letter dated 16 February 2016 relating to the disclosure to the Milton Ulladulla times on 11 February 2016 was in evidence. The letter stated that:

“IRT considers that your actions in being involved in the preparation and publication of the article including disclosing confidential communications, have caused serious and imminent risk to IRT’s reputation and amount to serious and wilful misconduct. Your actions are in breach of:

- your duty of fidelity and good faith to IRT; and
- IRT’s code of conduct, specifically with respect to maintaining confidentiality in relation to IRT’s clients and IRT’s business information.”

328. The letter required Mr Lee to supply a written response to Christine Williams by close of business on Thursday, 18 February 2016. The letter notified Mr Lee that it was possible that IRT would terminate his employment summarily and he was told to address this option in his response.
329. The IRT grievance policy was in evidence. The policy notes that grievances are to be discussed in the first instance with the person that the concern is with. It then details as to how the dispute is then dealt with.
330. In the case of “highly confidential or serious grievance (e.g. allegations of bully [sic] and harassment or sexual harassment)” or if the complainant does not feel able to raise the grievance with the employee concerned then the prescribed processes for an Employee Grievance/Complaint Form (077) to be completed and provided to the relevant manager.
331. The policy provides for escalation of the decision process if the complainant is not satisfied with the resolution. The policy is undated and does not indicate when it took effect. The Policy makes reference to the IRT Enterprise Agreement 2015 and presumably came into effect following the approval of that enterprise agreement.
332. The policy and practice manual relating to “Harassment, Workplace Bullying and Workplace Relationships” was in evidence. The policy was relevantly last reviewed in February 2014. The policy relevantly defines bullying and harassment.
333. The policy document entitled Disciplinary Action was in evidence. The document states that it was approved in September 2015. Also in evidence was the IRT (written in November 2012). “Policy and Practice Manual”.
334. A “desktop investigation” by Lee Kelly Commercial Investigations dated 19 December 2017 was in evidence but does not relate to the current issues.
335. A number of late documents were in evidence tendered by IRT. The record of the investigation outcome on 25 May 2015, the “show cause” letter to Mr Lee dated 4 September 2015 and the letter dealing with the final outcome of Mr Lee’s grievance also dated 4 September 2015 were already in evidence in the applicant’s material, as was the letter to Mr Lee from IRT dated 26 October 2015. Those documents have been referred to in the summary of evidence above.

SUBMISSIONS AND FINDINGS.

336. Mr Lee relied upon a number of interactions with the respondent in the workplace as giving rise to his psychological injury. The applicant submits that his psychological injury resulted from an accumulation of events which occurred in the workplace commencing with the dispute relating to Mr Lee’s historical pay record.
337. The respondent submitted that the psychological injury suffered by the applicant was wholly or predominantly due to the reasonable actions taken by or on behalf of IRT with respect to discipline, performance appraisal, dismissal and/or provision of employment benefits. A direction was made that IRT particularise the actions relied on as constituting each of these heads.
338. IRT supplied written particulars with respect to discipline, dismissal and employment benefits. With respect to “discipline” IRT relied on:
- (a) the emails between Ms Turnbull and Mr Lee in early December 2014,
 - (b) Ms Turnbull’s note dated 11 December 2014;
 - (c) the decision on 30 March 2015 to no longer permit Mr Lee to attend to the care of the client, GR;

- (d) the meeting on 25 May 2015 at which the investigation by Wise investigations was discussed;
- (e) the letters of 4 September 2015 dealing with the outcome of the investigation of Mr Lee's grievance against Ms Turnbull and the concerns about the behaviour of Mr Lee in submitting the grievance meeting to IRT requiring Mr Lee to show cause why disciplinary action should not be taken against him;
- (f) the meeting on 15 September 2015 when Mr Lee attended a meeting to show cause why disciplinary action should not be taken against him;
- (g) the letter from Christine Williams of 25 September 2015 detailing the outcome and notifying Mr Lee that his behaviour was inappropriate and warranted a first warning;
- (h) the letter from Ms Howe notifying Mr Lee of three complaints alleging bullying and harassment towards her his? manager and complaints of non-compliance with directions;
- (i) the meeting with Richard Walsh on 18 December 2015;
- (j) the letter from Richard Walsh to Mr Lee dated 30 December 2015;
- (k) the email from Ms Howe appointing a meeting for 20 January 2016;
- (l) the email from Ms Howe on 8 January 2016 regarding the scheduled meeting;
- (m) the applicant's email to Richard Walsh on 11 January 2016 when Mr Lee demands that the proposed meeting be put on hold;
- (n) the applicant's email to Ms Howe on 18 January 2016;
- (o) the meeting on 20 January 2016 with Ms Howe, Jon Williams and Mr Lee, and
- (p) the outcome of the meeting on 20 January 2016 and final warning.

339. The actions relied upon with respect to "Dismissal" were particularised as follows:

- (a) Show cause letter 15 February, 2016 – refer to enclosed article - First published on line by the Milton Ulladulla Times on 11 Feb 2016, and
- (b) 23 Feb 2016 Letter from Craig Hamer - employment terminated

340. With respect to "Employment benefits" the respondent particularised:

- (a) "Debbie Turnbull rostered the Applicant to work, and set aside time for him to meet with her in late 2014 on 3, 4 and 5 December, 2014: See email 3.12.14 from Debbie Turnbull, See email 4.12.14 from Debbie Turnbull, See email 5.12.14 from Debbie Turnbull.
- (b) Debbie Turnbull invited the Applicant to a 30 minute paid meeting with Angela Gurnley, the acting roster clerk, to review the staff planned roster and demonstrate that all rostered entitlements were correct. The Applicant declined to attend.
- (c) Debbie Turnbull rescheduled the Applicant to a second meeting, which he declined.
- (d) Debbie Turnbull then rescheduled a third meeting and again the Applicant failed to attend, giving no notice.
- (e) 11 Dec 2014 Email from Debbie Turnbull "missing entitlements"
- (f) Cheree Howe sent the Applicant an email in October 2015 requesting his attendance at a meeting scheduled for 28 October, 2016."

341. The submissions of the applicant raised issues as to whether the actions taken by IRT, as particularised, could be said to constitute actions with respect to discipline, particularly with regard to the earlier allegations relating to the refusal to attend meetings and the allegations of bullying and harassment by Mr Lee of Ms Turnbull. The main thrust of the applicant's submissions addressed the issue of whether the actions of the respondent, however classified, were unreasonable in the circumstances.
342. The matter proceeded to hearing on the basis that the applicant's psychological injury was wholly or predominantly caused by the actions of the respondent with respect to discipline, dismissal and the provision of employment benefits. There were areas of dispute as to which actions were to be considered and, in a number of cases, disputes of fact although these were largely incidental.
343. The reports of Dr Westmore attributed the onset of psychological injury to "the specific events which predated the disciplinary action in him being given a final warning in January 2016". He said "Those stressors occurred in December 2014." He said that disciplinary action and determination would have aggravated the condition. Dr Westmore had been provided with a copy of the Lee Kelly Investigation report and presumably based his opinion upon the facts in that report as well as the specific history provided by Mr Lee with respect to the unauthorised video.
344. The report of Dr Kaplan dated 8 February 2017 discloses that he had received material which assisted him to identify the factual basis which led to his conclusion expressed in his report of 22 January 2018 in which he said "Mr Lee's condition was wholly or predominantly caused by the actions of the insured with respect to performance appraisal and discipline. This arose from the action taken by his employers with regard to dismissal."
345. I take this to mean that Dr Kaplan was of the view that, ultimately, Mr Lee's psychological injury resulted from a combination of the actions by the respondent. Although Dr Kaplan included "performance appraisal" as part of the causal chain, this was appropriately not pursued at hearing. I understand Dr Kaplan to be using the term to describe the actions of the respondent in investigating and acting with respect to the performance of the applicant.
346. The opinion expressed by Dr Kaplan as to the reasonableness of the actions of IRT is a matter to be determined by the Commission on the whole of the evidence involving a consideration of the respective demands of fairness to both applicant and respondent.
347. Although Dr Westmore places emphasis on the earlier actions in December 2014 as giving rise to psychological injury, he clearly regards the subsequent actions with respect to discipline and dismissal as aggravating that condition.
348. Dr Kaplan emphasises the role of the dismissal but acknowledges that this flows from actions with respect to performance appraisal and discipline.
349. The applicant submitted that the opinions of Dr Kaplan should be given less weight than the opinion of Dr Westmore. I do not accept that submission. Both doctors are clear that actions by IRT led to the onset of psychological injury although Dr Westmore identifies the onset of injury and an earlier point in time with subsequent aggravation.
350. Neither doctor attempts to identify particular aspects of the evidence so as to categorise them as discipline, performance appraisal, provision of employment benefits and/or dismissal. Both doctors appear to agree that, if impairment is to be assessed then it is the whole of the impairment arising from the psychological injury caused by the accumulation of events in the workplace including the dismissal.
351. Although there is evidence from Mr Lee that he commenced employment with IRT in 2008, I accept the evidence from the various managers at IRT that in fact his date of commencement as an aged care worker was in 2009.

352. The evidence established that IRT maintained an In-Home Care service to elderly clients in the Shoalhaven region. The relevant part of IRT's operations was based in Milton, on the New South Wales South Coast.
353. There is no dispute that up to late 2014 Mr Lee was regarded by IRT as a valued employee who performed well in his role as a carer. He was promoted to Team Leader at some point.
354. I accept that in 2014, Mr Lee was employed pursuant to an Enterprise Agreement. Ms Howe stated that she believed "the payroll issues originally started with the Employment Agreement at the time". That statement appears to be correct and I accept it. Ms Howe said "it was not defined to all managers the correct pay sequence for staff with breaks whilst they were rostered. It was not just an issue highlighted with Eddie, but highlighted across the organisation." Ms Howe said that IRT had taken steps to resolve the issue developing a new enterprise agreement.
355. The evidence of Ms Turnbull is that she had to spend considerable time when coping with Mr Lee's initial claim that he had been underpaid. She was however able to review the claim and effect payment of the shortfall within a two week period.
356. Ms Turnbull denied that there was a problem with the payroll system and said that the problems were due to incorrect timesheets submitted by Mr Lee. She said Mr Lee "never submitted a correct time sheet."
357. Accepting what Ms Howe had to say about the Enterprise Agreement I am satisfied on the balance of probabilities that the assessment of entitlement to be paid for "breaks" was not a straightforward process.
358. I accept that Mr Lee did submit incorrect timesheets on occasions. Mr Lee explained in his statement that he understood that if an error was made it could be corrected by an adjustment in the following fortnight pay period. Over, he said, this had not occurred.
359. I accept that Mr Lee was a worker with a modest education. The shortcomings in his pay, of which he had originally complained in mid-2014, I accept were pointed out to him by Shane Lyttle. In a handwritten note on 29 August 2014 Ms Turnbull expressed surprise that Mr Lee was able to research the backdated rosters. She gave him "a general reminder that employees timesheets are a confidential document between the employer and the employee". The effect of that "reminder" would be that Mr Lee was not entitled to share his pay records with Shane Lyttle who had earlier assisted him.
360. I accept that at a telephone conference between Richard Walsh, Donna Charlesworth and Debbie Turnbull a suggestion was adopted that the way that Mr Lee's claim to have his pay checked going back to the commencement of his employment would be to "put it all back to him. His request for audit, his work"¹
361. Mr Lee asserted that Ms Turnbull had initially agreed to pay him money by way of arrears in November 2014. He said that on 24 November 2014 Ms Turnbull had changed her mind. It is clear from the evidence that, at this point of time, no additional arrears had been identified and/or quantified. It is therefore difficult to accept that Ms Turnbull made any specific statement of intention to make a payment in respect of arrears to Mr Lee other than a general statement of principle that, if money were found to be owing to him it would be paid. I do not accept that there was a change of mind by Ms Turnbull.
362. It is not disputed and I accept that Mr Lee declined to attend meetings in December 2014 with a member of the payroll staff for the purposes of discussing his entitlements.

¹ email Debbie Turnbull to Donna Charlesworth 8 December 2014 Application to Resolve a Dispute p 112.

363. It is clear from the evidence of both Mr Lee and Ms Turnbull that, by the end of December 2014, both had strongly negative feelings towards the other resulting from the exchange of emails which were in evidence and referred to above.

364. It is against that background of fact that the respective areas relied upon by the respondent pursuant to section 11A are assessed.

365. Section 11A(1) of the 1987 Act provides:

“11A NO COMPENSATION FOR PSYCHOLOGICAL INJURY CAUSED BY REASONABLE ACTIONS OF EMPLOYER

(1) No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.”

366. The test to be applied with regard to whether the actions of IRT were “reasonable” is one of fact. In the often cited decision of *Irwin v Director General of Education*², (*Irwin*) Geraghty J said:

“... The question of reasonableness is one of fact, weighing all the relevant factors. That test is less demanding than the test of necessity, but more demanding than the test of convenience. The test of ‘reasonableness’ is objective and must weigh the rights of employees against the object of the employment. Whether an action is reasonable should be attended, in all the circumstances, by questions of fairness.”

367. In *Northern NSW Local Health Network v Heggie*³ (*Heggie*), Sackville AJA in considering section 11A with respect to “discipline” said at [52]:

“A broad view has been taken of the expression ‘action with respect to discipline’. In *Department of Education and Training v Sinclair*, Spigelman CJ observed (at [35]) that the formulation in s 11A ‘extends to the entire process involved in ... “discipline” including the course of an investigation’. His Honour also noted (at [96]) that actions with respect to discipline usually involve a series of steps which cumulatively can have psychological effects:

‘More often than not it will not be possible to isolate the effect of a single step. In such a context the “whole or predominant cause” is the entirety of the conduct with respect to ... discipline.’”

and at [59]:

“The following propositions are consistent both with the statutory language and the authorities that have construed s 11A(1) of the WC Act:

- (i) A broad view is to be taken of the expression ‘action with respect to discipline’. It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation.
- (ii) Nonetheless, for s 11A(1) to apply, the psychological injury must be wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer.

² NSWCC 14068/97, unreported, 18 June 1998.

³ [2013] NSWCA 255.

- (iii) An employer bears the burden of proving that the action with respect to discipline was reasonable.
- (iv) The test of reasonableness is objective. It is not enough that the employer believed in good faith that the action with respect to discipline that caused psychological injury was reasonable. Nor is it necessarily enough that the employer believed that it was compelled to act as it did in the interests of discipline.
- (v) Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of that action that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury.
- (vi) The assessment of reasonableness should take into account the rights of the employee, but the extent to which these rights are to be given weight in a particular case depends on the circumstances.
- (vii) If an Arbitrator does not apply a wrong test, his or her decision that an action with respect to discipline is or is not reasonable is one of fact.”

368. The reasonableness of the actions of IRT are considered in accordance with the guidance provided by *Irwin and Heggie*.

Provision of employment benefits

369. It is convenient to deal with this aspect first as a substantial part of the interactions between Mr Lee and IRT had their origins in the dispute over Mr Lee’s entitlements.

370. Counsel for the respondent noted the correspondence between IRT and Mr Lee, commencing with the emails on 3 December 2014 and the following two days, in which Mr Lee was invited to a meeting with the acting roster clerk, Angela to review the staff planned roster and demonstrate that all rostered entitlements were correct⁴.

371. I am not satisfied with respect to the provision of employment benefits that the actions of IRT were reasonable for the reasons set out below.

372. As noted above it is clear that Mr Lee, at least from time to time, submitted incorrect timesheets. Ms Turnbull said that he “never” put in correct timesheets. If that was the case then, with respect to a casual worker employed pursuant to an enterprise agreement which Ms Howe noted was not “defined to all managers the correct pay sequence for staff with breaks”, a worker would have struggled to submit accurate timesheets without assistance.

373. Ms Turnbull specifically informed Mr Lee that he was to regard the pay records as confidential and not to discuss them with other people. Ms Turnbull noted that she had accepted the suggestion of Donna Charlesworth from the pay office that the identification of missing entitlements be put back upon Mr Lee himself.

374. In the light of that factual situation, to require the applicant to discuss his entitlements at a meeting with a representative of the pay office was not reasonable. The emails in evidence suggest that the purpose of the meeting was to resolve the situation. That was almost certainly not going to happen. Ms Turnbull’s evidence acknowledges the length and difficulty involved in resolving the issues.

⁴ Particulars, Employment benefits (c)(ii).

375. Mr Lee, after being assisted by Shane Lyttle, made a claim which within a short period of time was found to be correct and Mr Lee was paid a sum slightly less than \$2,000 by way of arrears for a limited back period in July 2014.
376. I am satisfied that this determination cast doubt on the accuracy of the payment of entitlements to Mr Lee over the past years and fairly raised a doubt as to whether Mr Lee had been correctly remunerated in the past.
377. It appears that IRT took no steps to correct the extent to which Mr Lee submitted incorrect timesheets and apparently allowed this practice to go on from year to year. The only attempts to correct this appeared to have been admonitions from Ms Turnbull making Mr Lee aware of the trouble to which she was put by virtue of the incorrect timesheets without putting in place some type of management that would ensure correct timesheets were lodged.
378. In the context of a casual worker of limited education earning close to the minimum wage I do not think that it was reasonable to require Mr Lee to audit his pay records back to the commencement of employment without the assistance of Shane Lyttle or any other person who would be in a position to understand the Enterprise Agreement.
379. I do not think it was reasonable to put the solution to the problem on the shoulders of Mr Lee and to suggest to him that the issues could be resolved by a relatively brief meeting with Angela Gumly from the IRT pay office.
380. I am satisfied on the balance of probabilities that in December 2014 Mr Lee felt himself unable to resolve his pay dispute and was completely unprepared given that he was not permitted to seek assistance because the records were confidential.
381. The submissions of the applicant drew attention to the email chain, noting that Mr Lee had stated his reasons for not attending the meeting in simple terms of being unready.
382. I am satisfied that there were reasonable grounds for Mr Lee to query his remuneration in earlier years. I am satisfied in the context of the then existing Enterprise Agreement, Mr Lee's limited capacity and the decision of representatives of IRT not to undertake the review but to place responsibility upon Mr Lee without assistance was not reasonable. Further it was not reasonable to require him to attend a meeting to resolve this issue when Mr Lee was not in a position to present his case.
383. Although I accept that it was not appropriate for Mr Lee to decline to attend the meetings and explain his position, that does not alter the fact that he had been placed in a difficult situation by the actions of IRT which were unreasonable in the circumstances.
384. It is evident from the behaviour of Mr Lee during 2015 that the handling of the issue of Mr Lee's entitlements, going back to commencement of his employment, had a negative impact on Mr Lee emotionally.
385. To the extent that IRT's actions with respect to the provision of employee benefits contributed to the onset of Mr Lee's ultimate psychological injury, could not be satisfied that those actions were reasonable.

Discipline

386. The respondent relied on a number of disciplinary actions against Mr Lee. These disciplinary actions do not relate to Mr Lee's care of IRT clients but rather relate to Mr Lee's actions with respect to grievances against his managers.
387. The particulars supplied by the respondent identified the actions relied on by or on behalf of IRT with respect to discipline.

388. The respondent noted the requests to Mr Lee in early December 2014 to attend the meetings to discuss his remuneration entitlements in respect of past years.
389. The respondent also noted the actions of IRT with respect to Mr Lee's complaint with respect to the client GR. That complaint related to an incident which had apparently occurred three years earlier. Mr Lee accused Ms Turnbull having bullied GR over her having a pet dog which Ms Turnbull felt was inappropriate at the time. The respondent submitted that there had been no bullying by Ms Turnbull and that the allegation by Mr Lee warranted consideration of the terms of the complaints by Mr Lee of bullying against himself by Ms Turnbull.
390. The letter from the acting Chief Operating Officer, Adrian Lambert, to Mr Lee dated 18 May 2015 records that IRT had engaged Wise Workplace Investigations to conduct an investigation which included "consideration of complaints against Ms Turnbull raised by yourself and Shane Lyttle".
391. The letter informed Mr Lee that the investigation had covered the allegations which he had raised with regard to Ms Turnbull to determine if there had been any breach of standards or policies or systemic problems. The investigation also was said to aim to "determine if further allegations exist and report back on the nature of the allegations and recommendations on how these allegations may be addressed."
392. The letter invited Mr Lee to attend a meeting with the Chief Operating Officer, Craig Hamer, on 25 May 2015. What occurred at that meeting is set out above. Mr Lee was informed that IRT had determined that Mr Lee's behaviour was "inappropriate" and warranted a verbal warning.
393. I am satisfied that that investigation by Wise Workplace was an action on behalf of IRT in respect of discipline and forms part of the series of actions that led to Mr Lee's psychological injury.
394. The next step identified by the respondent as part of the disciplinary process was identified as the letters of 4 September 2015 notifying Mr Lee that his grievance with respect to the issue of the incorrect team meeting minutes and the apology issue had not been substantiated and the further letter requiring him to show cause why disciplinary action should not be taken against him.
395. The process next involved a meeting on 15 September 2015 and an outcome letter dated 25 September 2015 from Christine Williams which set out the results of the meeting. That letter informed Mr Lee that in submitting the grievance he had not acted in good faith and that he had harassed Ms Turnbull "because the grievance contains an allegation about her to IRT that is offensive in all the circumstances."
396. Mr Lee demanded an oral and written apology with the apology to be delivered in the presence of the team.
397. In response to the actions of the respondent to that point, the applicant set out in detail the steps that had led up to the giving of the final warning on 25 September 2015 and submitted that the evidence did not establish that the complaints made by Mr Lee were not made in good faith. It was true to say that no apology had been given to Mr Lee. He had not accused Ms Turnbull of lying. The applicant submitted:

"Whether or not IRT were correct or not in coming to their respective conclusions is irrelevant. They carried out their investigation into the applicant's complaint and they are entitled to find that the complaint that he had made his against Ms Turnbull was unfounded. It is what followed on from that complaint and the dealing with that complaint which was completely unreasonable on the part of IRT."

398. The applicant submitted that it was unreasonable for an employer when faced with the complaint which was in essence factually correct to then proceed against the employee who made the complaint, where the original complaint had not been substantiated as constituting bullying and harassment. For the employer to find the complaint was not substantiated then to immediately take steps to discipline the worker for making a complaint was, it was submitted, unreasonable.
399. The disciplinary process undertaken by IRT in respect of the complaint lodged by Mr Lee in respect of the incorrect minutes and the demand for the apology has to be viewed in the context of events that had gone before.
400. As set out above, I accept that by December 2014 Ms Turnbull and Mr Lee had both developed negative feelings towards the other. Ms Turnbull was “surprised and disappointed” regarding Mr Lee’s failure to attend the meetings which he had arranged. Mr Lee’s reaction appears on the evidence to be substantially more extreme. The incident that occurred in January 2015 with regard to the potential exposure to MRSA illustrates the extent of Mr Lee’s feelings.
401. As noted above Mr Lee concluded that his potential exposure to MRSA was a deliberate attempt to punish him for not attending the meetings arranged in December 2014. I am satisfied on the evidence that Ms Turnbull had acted to notify Mr Lee of the situation with regard to the affected client in a timely manner, having only been informed of the client’s status some minutes before. There was no basis upon which Mr Lee could rationally have concluded that he was deliberately exposed to a risk of harm by Ms Turnbull.
402. I accept that Mr Lee was genuinely concerned about his potential exposure to MRSA. His complaint extended not only to the fact of possible exposure but also to the fact that Ms Turnbull had recorded on his incident report form that Mr Lee did not have any open wounds on the arms. That information apparently came from a nurse working for IRT and was not directly observed by Ms Turnbull.
403. The notes of the general practitioner on 23 January 2015 record that Mr Lee had attended his general practitioner concerned about MRSA exposure on that day. The doctor had noted “multiple superficial small (3 mm) ulcers left forearm”.
404. I accept that the handwritten notation placed by Ms Turnbull on the incident report as to the state of Mr Lee’s arm was incorrect to that extent. There were in fact small lesions present.
405. Mr Lee, being suspicious of the motives of Ms Turnbull, requested a copy of the letter or email received by IRT notifying of the status of the client who was infected with MRSA.
406. Those requests were ignored. It was noted in the report of the Aged Care Complaints Commissioner that IRT had initially denied receiving a request for this information. Upon production of the emails from Mr Lee requesting information, IRT accepted that the information had been requested by him and that a “failure of communication” had followed.
407. Those denials must have served to increase the extent of Mr Lee’s negative feelings towards IRT and Ms Turnbull. The incorrect entry on the incident report by Ms Turnbull that Mr Lee had no skin lesions would also have had a negative impact on his state of mind.
408. It was also in January 2015 that Mr Lee raised the issue of the dog owned by the IRT client GR as an example of bullying by Ms Turnbull. I accept Ms Turnbull’s statement that this occurred in 2011 as uncontradicted. Ms Turnbull said that she subsequently questioned GR who wished to make no complaint about Ms Turnbull’s behaviour and requested that Mr Lee no longer attend to her care.

409. Ms Turnbull's report of what was subsequently said by the client GR is not a satisfactory basis for concluding that there had not been a concern on the part of the client with Ms Turnbull's attitude towards her possession of the dog. Ms Turnbull concedes that she was opposed to the dog being acquired without appropriate investigation as to its suitability beforehand and she accepted that the placement of the dog with the client had proved successful. The only significance of the incident is that it serves to illustrate the negative feelings that Mr Lee had towards Ms Turnbull in raising this matter in his complaint to the Aged Care Complaints Commissioner.
410. Mr Lee's reaction to his removal from the care of GR was to assert that this was further punishment for raising the issue of his entitlements. I do not accept that Mr Lee was removed from the care of GR as a punitive action but I do accept that Mr Lee at that time was of a state of mind whereby he believed this to be true.
411. Mr Lee's reaction with regard to the potential MRSA exposure and his removal from the care of GR is suggestive of an abnormal emotional state in early 2015. That emotional state was directly related to the conflict arising out of the pay entitlements.
412. I accept that Mr Lee was troubled by the deletion of the message relating to the unauthorised video as "mischievous" by Ms Turnbull. Subsequent enquiries following Mr Lee's dismissal established that Ms Turnbull had not followed policy with regard to the video and appropriate steps were taken to rectify the situation. I accept that the action of deleting the message by Ms Turnbull was not a reasonable action with respect to discipline but was part of the incidents leading to the psychological injury.
413. I accept that Ms Turnbull was troubled by the accusations that Mr Lee was making against her in the first half of 2015. It was reasonable for Ms Turnbull to raise this as a problem with IRT management and for IRT to conduct an investigation.
414. The applicant correctly submits that IRT was entitled to arrive at the conclusion that it did although there may have been an explanation for Mr Lee's behaviour. Counsel for the applicant submitted that the actions of IRT that led up to the warning following the meeting on 25 May 2015 were not reasonable when the concerns of the applicant as to his perceived issues with regard to the review of his earlier years of remuneration and the MRSA incident provided a sound basis for him to complain about Ms Turnbull's actions towards him.
415. Counsel for the applicant submitted that the actions of IRT were unreasonable with respect to discipline leading up to the show cause letter and the meeting on 15 September 2015. At that point Mr Lee was notified of the outcome of the investigation into the further grievance he had submitted in respect of the actions of Ms Turnbull and the allegation that he had harassed Ms Turnbull. The reason given was that the grievance contained an allegation about Ms Turnbull that was offensive in all the circumstances.
416. Counsel for the applicant noted that Mr Lee's complaints with regard to the mistake in the minutes with regard to medication and the subsequent recording of a statement regarding an apology to Mr Lee when he had not been present were in point of fact soundly based.
417. IRT had incorrectly interpreted Mr Lee's complaint that the minutes recorded that Ms Turnbull had apologise to him when he had not personally received such an apology, as indicating that Ms Turnbull had lied. IRT subsequently conceded that this was incorrect.
418. IRT noted that, following the meeting on 15 September 2015, Christine Williams had sent a letter to Mr Lee notifying him of the outcome of the meeting and confirming that his behaviour had been found to be inappropriate and warranting a first warning. He was required to undergo training as to appropriate conduct.

419. The applicant submitted that although “the allegation of bullying and harassment was not substantiated as against a worker with a counter allegation suggesting that the worker’s complaint as against the superior was in fact bullying and harassment of the superior is an act of intimidation by an employer.”
420. I am satisfied IRT reasonably came to the conclusion that there had been no harassment by Mr Lee but that there was inappropriate behaviour. In assigning a disciplinary outcome IRT has based its actions on an investigation by an independent investigator. That investigator relied upon evidence from managers at IRT but there does not appear to have been any scrutiny of the actions of Ms Turnbull, particularly in regard to the unauthorised video where subsequent enquiry found that she had not followed policy as well as the deletion of the text message which pointed to the breach of policy by Ms Turnbull. IRT was clearly unaware of the agitation in Mr Lee’s mind over the failure to communicate with him when he sought details of the notice that IRT had received as to the MRSA infection.
421. IRT identified a number of issues that Mr Lee was required to address at the meeting on 15 September 2015. The first of these was the allegation that Mr Lee appeared not to be acting in good faith. That allegation does not appear to have been the subject of any finding of fact by the person conducting an investigation by or on behalf of IRT
422. To the extent that the allegation of absence of “good faith” in making the complaints formed one of the bases of the disciplinary action, Mr Lee had pointed to the factual basis of his grievances. An enquiry into that aspect would in all probability have revealed that there was some factual basis to Mr Lee’s grievances concerning the deletion of the message about the unauthorised video, the addition of the incorrect handwritten note as to the absence of lesions on his arm, the absence of a personal apology and the failure to supply reassuring details as to when the notification as to MRSA infection had been received by IRT.
423. There is no medical evidence which would permit a finding that Mr Lee’s actions at this time resulted from a psychological or psychiatric injury. However I am satisfied that Mr Lee at this time was in an agitated mental state but there was nothing known to IRT at that time which would suggest that he was suffering from a psychological injury which required to be taken into account in assessing his behaviour.
424. Although there was no suggestion of a psychological problem at that time, the allegation of failure to act in good faith in my view required an examination of the basis upon which Mr Lee had made his complaints. The appropriate consideration would have revealed matters that subsequently only became clear following investigation by the ACCC, particularly with respect to the actions of Ms Turnbull’s regard to the video.
425. Proper consideration of the allegation of an absence of good faith on the part of Mr Lee should have revealed the fact that there was at least a grain of truth in his allegations with respect to the unauthorised video and the deletion of the text message by Ms Turnbull, the failure to reassure him as to when notification of the MRSA infection had been received and the incorrect notation placed by Ms Turnbull on the incident report with regard to the MRSA infection.
426. It was also unfair and therefore unreasonable for the investigator acting on behalf of IRT to inform Mr Lee that the investigation about which he was being questioned concerned the actions of Mr Lyttle when Mr Lee’s actions were, in fact, under consideration. I am not satisfied that the actions of IRT or on their behalf with respect to the investigation and the issuing of the warning were reasonable in the circumstances.
427. The next action with respect to discipline relied upon by IRT was the letter from Ms Howe dated 26 October 2015. The letter notified Mr Lee that three complaints had been made against him. These included a complaint of bullying and harassing behaviour towards Ms Turnbull and two complaints alleging that he had failed to attend appointed meetings.

428. It is undisputed that the actions with respect to those complaints lead to a meeting on 18 December 2015 with Richard Walsh and Ms Howe which was described as a “fact finding meeting”. Mr Lee was not permitted to bring Shane Lyttle to the meeting as his support person. Following that meeting Richard Walsh wrote to Mr Lee summarising the actions up to that point with respect to the issues between Ms Turnbull and Mr Lee.
429. The letter notes that Mr Lee had declined to attend the meeting which had been appointed for 28 October 2015 to discuss the allegations of bullying and harassment by Mr Lee against Ms Turnbull and the complaints of failure to attend arranged appointments.
430. Mr Lee was informed that the results of the investigations into these matters would be given by Ms Howe at the meeting in the new year. Ms Howe subsequently wrote appointing a meeting on 20 January 2016 at 2.00 pm. Mr Lee was informed that he was entitled to bring a support person but that person was not to be Shane Lyttle. Mr Lee attended the meeting under protest and was issued a final warning.
431. The respondent submitted and I accept that the actions taken by IRT “must be looked at collectively rather than individually”⁵. Considered overall, I am satisfied that IRT has not established that its actions with respect to discipline were reasonable.
432. Counsel for the applicant provided detailed submissions with respect to each step of the discipline process, submitting overall that it was not reasonable for the respondent to take action against Mr Lee for submitting grievances which were not without foundation.
433. The respondent in reply noted that it was the way in which the complaints were framed as well as the fact of the making of the complaints some of which at least were unfounded that led to the disciplinary steps. Counsel for the respondent pointed to the unreasonable nature of the demand by Mr Lee for an apology in front of the team in respect of the error in the minutes and the unfounded complaints in relation to the client, GR, as well as Mr Lee’s demands with respect to the issue of his entitlements for earlier years. These had been expressed in intemperate tones.
434. The respective submissions of the parties acknowledge that there is some crossover between the issues of employment benefits and discipline. Mr Lee’s demands with respect to the possibility of there being arrears of remuneration owing to him going back to the commencement of his employment and his refusal to attend meetings formed part of the discipline matrix as well as the provision of employment benefits.
435. The final report of Dr Kaplan notes: “Mr Lee’s condition was wholly or predominantly caused by the actions of the insured with respect to performance appraisal and discipline. This arose from the action taken by his employers with regard to dismissal.”
436. Dr Kaplan makes that assessment having been supplied with the extensive information contained in the Lee Kelly Investigations report of 10 March 2016 as well as the other material detailed in his report of 8 February 2017. I infer that when Dr Kaplan refers to “discipline” he is referring to the whole of the actions of IRT detailed in the Lee Kelly Investigations report which lead up to initially a verbal warning and then subsequent written warnings leading to a final warning on 20 January 2016.
437. The statement of Ms Howe which formed part of the material addressed by the Lee Kelly Investigations report contains substantial details with respect to the unauthorised video. Ms Howe said “it would be in the minutes of meeting that Eddie had with senior management and HR representatives where it was explained to Eddie, on more than one occasion that ME [the client] consented to being in the video and it was not a matter of elder abuse.”

⁵ submissions in reply; paragraph 31.

438. The findings of the Aged Care Complaints Commissioner in evidence⁶ noted that Ms Turnbull had not in fact adhered to IRT's media policy and "instead followed informal processes and seeking permission for the video and its release". The report notes that Ms Turnbull had received "education with respect to the media inquiries."
439. In weighing the opinions of Dr Westmore and Dr Kaplan, I think the view of Dr Kaplan can be accepted. The actions of IRT with respect to what he termed "performance appraisal and discipline" which in turn led to dismissal gave rise to the psychological injury deemed to have occurred on 23 February 2016. Dr Westmore is of the opinion that events in December 2014 gave rise to psychological injury with subsequent aggravations caused by the disciplinary process and dismissal.
440. The evidence establishes that Mr Lee was able to continue his work satisfactorily with regard to client care until January 2016 and did not consult his general practitioner with regard to his mental state until October 2015. I think this is inconsistent with the onset of a psychological injury in December 2014.
441. In considering the issue of causation it is not easy to assess the weight to be given to each individual incident. Although the applicant queries the basis upon which Dr Kaplan came to his conclusion, raising submissions based on *Makita (Australia) Pty Ltd v Sprowles*⁷, there was no dispute that the actions of IRT or actions taken on its behalf caused psychological injury to Mr Lee.
442. The respective reports of Dr Westmore and Dr Kaplan do not address this issue in any detail. It is necessary to consider the whole of the material in evidence to arrive at a conclusion as to what actions gave rise to the injury and then consider whether those actions were actions with respect to provision of employment benefits, discipline and dismissal.
443. The statements of the applicant in evidence detail the number of matters which he describes as stressful. In addition to his dismissal, these matters include:
- (a) the investigation relating to possible arrears of remuneration going back to the commencement of employment;
 - (b) the actions taken by IRT with respect to his complaints against Ms Turnbull in respect of
 - (i) his failure to attend meetings,
 - (ii) the complaint relating to the GR's dog;
 - (iii) his potential exposure to MRSA;
 - (iv) the issue of the "error" in the minutes relating to apology by Ms Turnbull;
 - (v) the rejection of his complaint against Ms Turnbull and his complaint against Ms Williams;
 - (c) the perception of elder abuse relating to the video involving the client, ME.
444. I accept that, with the exception of the complaint relating to GR's dog, each of these incidents had a negative effect upon Mr Lee's mental state and formed part of the causal matrix leading to his psychological injury.

⁶ Application to Resolve a Dispute page 354.

⁷ (2001) 52 NSWLR 705 (Makita).

445. I am not satisfied on the balance of probabilities that there was a complaint of bullying made by GR against Ms Turnbull in respect of the ownership of the dog. I accept Ms Turnbull's explanation that this was an event that occurred in 2011 and I am not satisfied that either GR or her daughter raised a complaint with Mr Lee such as to have a negative effect upon his psychological state.
446. I am satisfied that potential exposure to MRSA did have a negative effect upon Mr Lee's mental state. He consulted his family doctor the following day expressing his concern. A separate stressor arising from this incident is the failure by IRT to deal with his request for particulars as to when IRT had been notified of the status of the affected client. Although initially maintaining that Mr Lee had not sought this information, IRT acknowledged to the Aged Care Complaints Commissioner that there had been a failure of communication in this respect⁸.
447. The respondent made reference to the interpretation of the concept of "discipline" by Neilson J in *Kushwaha v Queanbeyan Council*⁹. Neilson J in that case gave a broad meaning to the word as including learning by instruction, and the maintenance of that learning by training, exercise or repetition with the narrower sense of punishment or chastisement as secondary to the broader concept¹⁰. Similarly, in *Heggie*, Sackville AJA held that a broad view is to be taken of the expression "action with respect to discipline". It is nevertheless clear from the decision in *Heggie* that regard must be had to the entire process and not just the outcome.
448. I accept that a broad view is to be taken and that the actions particularised by the respondent with respect to discipline are appropriately so described.
449. Viewed in that light the evidence identifies various points in the process which were unfair to Mr Lee and hence unreasonable. The earliest of these was to require attendance at meetings in December 2014 which, on the evidence, the applicant felt he was unprepared to face in the light of the decision by IRT to place the burden of demonstrating shortfalls in his remuneration going back to the commencement of his employment for the reasons set out above with respect to the issue of provision of employment benefits.
450. The investigator, Mr O'Brien from Wise Workplace Investigations, in the course of the interview with Mr Lee, told Mr Lee that he was "conducting investigation into a grievance that has been lodged by Debbie Turnbull against Shane Lyttle and also some complaints that have been made by Shane Lyttle about Debbie Turnbull".
451. The subsequent evidence discloses that the investigation being conducted by Mr O'Brien was also into the conduct of Mr Lee. It was unreasonable to inform Mr Lee that he was being interviewed with respect to the conduct of Ms Turnbull and Mr Lyttle when his own conduct was also being investigated. It is clear that Mr O'Brien in making that representation was acting on behalf of IRT.
452. When considering Mr Lee's actions towards Ms Turnbull arising from his allegations relating to the exposure to MRSA it was unreasonable to fail to reassure Mr Lee as to when notification of the infection had been received by IRT which was the effect of neglecting to answer his emails seeking this information and subsequently denying that any such communication had been received until this was acknowledged during the course of the enquiry by the Aged Care Complaints Commissioner where it was noted as a breakdown of communications. The effect of that failure would have been to add to Mr Lee's clearly expressed suspicion that exposure had been deliberate or at least careless of his safety.

⁸ Application to Resolve a Dispute page 357.

⁹ [2002] NSWCC 25.

¹⁰ At [151 and 152].

453. With respect to the complaints by Ms Turnbull against Mr Lee of “bullying and harassment” it appears that Mr Lee had to rely on being verbally informed by an unidentified person that this related to failing to smile at or acknowledge Ms Turnbull. The failure to provide particulars of what was said to constitute the bullying and harassment was unreasonable in the circumstances.
454. As noted by counsel for the applicant, for IRT to commence or continue disciplinary proceedings against Mr Lee for not smiling or acknowledging Ms Turnbull, was in the circumstances of the pre-existing issues between them, not reasonable.
455. Ms Turnbull had made clear her dissatisfaction with the actions of Mr Lee as evidenced by the handwritten note that she placed on the file in December 2014. The failure to respond to Mr Lee’s request for information as to when IRT had been made aware of the MRSA status of the client would have added to that level of tension. The admonition noted in the minutes of the team meeting on 31 August 2015; “Don’t fix the blame, fix the problem” was unfortunately not applied.
456. The allegation by Ms Williams that Mr Lee had lied about Ms Turnbull with respect to the issue of the apology was, on the facts, incorrect as was subsequently acknowledged. To make that allegation in the circumstances of the pre-existing issues between Mr Lee and Ms Williams was not reasonable.
457. Counsel for the applicant submitted there was no evidence that disciplinary action was taken in respect of Mr Lee’s failure to attend the scheduled meeting on 8 August 2015. I do not accept that submission. The letter sent on 26 October 2015 by Ms Howe to Mr Lee squarely raised this allegation as well as the allegations relating to the non-attendance at the aqua therapy risk assessment on 19 August 2015.
458. However, in considering the whole course of the interactions between Mr Lee and Ms Turnbull it must have appeared to Mr Lee as harassment for IRT to raise issues in October 2015 that had occurred in August 2015 which had not been raised with respect to the course of events that commenced with the show cause letter 4 September 2015.
459. That letter dismissed Mr Lee’s grievance as “without any basis whatsoever”. That grievance concerned the wording in the minutes relating to the apology to Mr Lee. Ms Turnbull acknowledged that the apology had not been given personally to Ms Turnbull and to that extent his grievance was not entirely baseless. The evidence establishes that there was a basis to Mr Lee’s grievance as to the apology which was indicative of the unfortunate relationship between Mr Lee and Ms Turnbull. To institute disciplinary proceedings against the employee for submitting a grievance in the circumstances was not reasonable.
460. To raise issues relating to his behaviour towards Ms Turnbull on 4 September 2015 to which Mr Lee responded and then to raise further issues which had occurred at an earlier point of time in October 2015 could not be considered reasonable as having the appearance of IRT managers seeking to find fault with Mr Lee rather than putting in place some form of performance management.
461. Following the meeting on 18 December 2015 Ms Howe wrote to Mr Lee on 8 January 2016 requiring him to attend a meeting to discuss the outcome of the meeting on 18 December 2015 with regard to the complaint of “bullying and harassing behaviour” towards Ms Turnbull by Mr Lee and his failure to attend a scheduled meetings on 19 August 2015 and 18 August 2015. Following that meeting a final warning was issued against Mr Lee.
462. Counsel for the applicant submitted that the refusal of IRT to allow Mr Lyttle to attend the later meetings was unreasonable. I do not accept that submission. Although it is not the subject of direct evidence. There is sufficient evidence to show that IRT and Mr Lyttle were in conflict and it was reasonable that IRT may feel that the presence of Mr Lyttle as a support person was likely to be disruptive.

463. Mr Lee said that he was affronted when IRT representatives left the room when he spoke with Mr Lyttle at an earlier meeting, but I accept the explanation that this was standard practice when a worker was speaking to his or her support person to allow confidentiality.
464. Having regard to the role of the support person I do not think in all the circumstances that it was inappropriate for IRT to require Mr Lee to have an alternative support person. Mrs Lee had previously filled this role at an earlier meeting.
465. The actions with respect to the unauthorised video also contained an element of unfairness in that IRT appears to have made no attempt to that point to investigate whether the appropriate policies had been followed by Ms Turnbull with regard to the appearance of ME in that video. As subsequently acknowledged to the Aged Care Complaints Commissioner, Ms Turnbull had not in fact followed the appropriate procedures.
466. I am satisfied that the actions of IRT with regard to the unauthorised video fall within the broad concept of discipline. I am satisfied that it was not reasonable to omit to consider Mr Lee's complaint in this regard by an investigation of the actions of Ms Turnbull in the light of the appropriate IRT policies. That task appears to have only been undertaken when the matter was raised with the Aged Care Complaints Commissioner. It was only then recognised that Ms Turnbull had not acted in accordance with the appropriate policy and appropriate remedial action was then taken.
467. I take into account the problems that IRT was experiencing with the conduct of both Mr Lyttle and Mr Lee. It is clear from the evidence that IRT believed that Mr Lee was acting in furtherance of Mr Lyttle's complaints. The transcript of proceedings in the Fair Work Commission suggests that Mr Lee and Mr Lyttle were making common cause with respect to complaints against IRT. There are number of references in the evidence to Mr Lyttle having informed Mr Lee of circumstances which subsequently became the subject of complaints lodged by Mr Lee. The deletion of the message on the team leader's diary and the complaint with regard to GR's dog appear to fall into this category.
468. Taking into account that IRT needed to maintain a safe workplace for all its staff and that Ms Turnbull was genuinely troubled by the actions of Mr Lee, I am nevertheless satisfied that the actions of IRT with respect to discipline in its broad sense were not reasonable as noted above.
469. Counsel for the applicant made a number of submissions relating to the opinion of Dr Kaplan as failing to meet the test in *Makita*. The applicant noted that Dr Westmore reported:
- "Based on his history the specific events which predated the disciplinary action in him being given a final warning in January 2016 were the events which caused him to develop the adjustment disorder. Those stressors occurred in December 2014."
470. Dr Westmore went on to say that although Mr Lee's injuries arose prior to any disciplinary action he agreed that disciplinary action would have aggravated "the already existing adjustment disorder".
471. The opinion of Dr Kaplan is noted above. Dr Westmore believes that it was the stressful events which occurred in December 2014 which led to the adjustment disorder which predated the disciplinary action. It is unclear on what basis Dr Westmore diagnosed Mr Lee as having suffered adjustment disorder in December 2014. Mr Lee continued to satisfactorily perform his duties with regard to clients although it is clear that his attitude towards management and his mental state altered at that time. Mr Lee did not consult his general practitioner until 29 October 2015 when he complained to Dr Tan of stress from alleged work bullying.

472. From that point on Mr Lee continued to perform his duties as a home care worker up to 21 January 2016 when he consulted Dr Tan who recorded:

“Alleged workplace bully – alleged harassment by manager Debbie Turnbull – unable to work now. Very stressed and low dysthymic due to it. Likes job, says seen illegal work down at current workplace was asked not to reveal it to the public. Has done whistle-blower work and am paying the price for it now as per patient. Does look low in mood.”

473. Those attendances appear to me to be more supportive of Dr Kaplan’s view that he felt that Mr Lee’s condition “was wholly or predominantly caused by the actions of the insured with respect to performance appraisal and discipline.” He said, somewhat confusingly, “this arose from the action taken by his employers with regard to dismissal.”

474. I interpret Dr Kaplan to mean that performance appraisal and discipline were a substantial factor in the chain of causation which led to the psychological injury. I take Dr Kaplan to mean that his diagnosis in February 2016 of adjustment disorder with anxiety and depression resulted from a combination of actions with regard to performance appraisal, discipline and finally dismissal. I accept that opinion.

Dismissal

475. With respect to dismissal, counsel for IRT submitted that the actions taken by IRT with respect to his dismissal were reasonable in all the circumstances of the case. Counsel for the respondent noted the various warnings that had been given to Mr Lee. Counsel for IRT submitted: “The leaking of information by the applicant to the Milton Ulladulla Times was seen by the employer as serious and wilful misconduct and it was for that reason that the employer then served him a show cause letter”.

476. The show cause letter was sent on 16 February 2016. At that time Mr Lee was off work with WorkCover certificates issued by Dr Tan on 21 January 2016, 28 January 2016 and 5 February 2016. The letter informed Mr Lee that IRT regarded his actions as having caused serious and imminent risk to IRT’s reputation and amounted to serious and wilful misconduct.

477. Mr Lee was required to respond to allegations that his actions were in breach of his duty of fidelity in good faith to IRT and in breach of IRT’s code of conduct “specifically with respect to maintaining confidentiality in relation to IRT’s clients and IRT’s business information.” The response was to be provided by close of business on 18 February 2016.

478. To the extent that this was action with respect to dismissal, a requirement to provide a response within 48 hours was unreasonable. Mr John Williams in his statement acknowledged that Mr Lee had performed the actions complained of “while on sick leave”¹¹. The evidence of the general practitioner’s notes establishes that this was for psychological reasons and a WorkCover medical certificate was issued.

479. It does not appear that IRT took into account Mr Lee’s ability to cope with this requirement within the time limit specified and this requirement was, in the circumstances, unreasonable.

480. I am satisfied that the dismissal played a substantial role in contributing to the psychological injury diagnosed by Dr Kaplan in February 2016.

481. It is not clear what Dr Kaplan intended to include in his description of “performance appraisal”. Overall I take him to be referring to the actions of IRT with respect to the performance in the workplace of Mr Lee. The parties approached the matter on the basis that these actions related to the provision of employment benefits, discipline and dismissal.

¹¹ Reply P.87, paragraph 25 and 26.

482. I am satisfied that Mr Lee's psychological injury was caused wholly or substantially by these actions. For the reasons stated above I am not satisfied that the actions of the respondent were, in the difficult circumstances of the case, reasonable and the defence pursuant to section 11A is not made out.
483. There is no dispute that Mr Lee suffered psychological injury deemed to have occurred on 23 February 2016. The appropriate order is that the dispute as to the extent of impairment arising from that injury be remitted to the Registrar for referral to an Approved Medical Specialist for determination of all person impairment, if any, arising from the injury.