

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Queensland Nurses and Midwives' Union of Employees v Workers' Compensation Regulator* [2020] QIRC 075

PARTIES: **Queensland Nurses and Midwives' Union of Employees**
(Appellant)

v

Workers' Compensation Regulator
(Respondent)

CASE NO: WC/2017/94

PROCEEDING: Appeal against decision

DELIVERED ON: 21 May 2020

HEARING DATES: 1, 2, 3, 7 May 2019

HEARD AT: Brisbane

MEMBER: Black IC

ORDER:

- 1. Appeal allowed.**
- 2. The decision of the Workers' Compensation Regulator dated 8 May 2017 is set aside and replaced with a decision that the application for compensation is not one for acceptance.**
- 3. Costs of the appeal to be met by the respondent.**

CATCHWORDS: APPEAL AGAINST DECISION - Psychiatric or psychological injury – whether management action reasonable and taken in a reasonable way – whether direction to participate in mediation reasonable management action.

CASES: *Workers' Compensation and Rehabilitation Act 2003* s 32(1), and s 32(5).

APPEARANCES: Mr P B Rashleigh of Counsel for the Queensland Nurses and Midwives' Union of employees, instructed by Hall Payne Lawyers.

Mr S P Gray of Counsel, for the Workers Compensation Regulator, directly instructed.

Decision

The appeal

- [1] The Queensland Nurses and Midwives' Union of Employees (QNMU) has appealed a decision made by the Review Unit of the Workers' Compensation Regulator on 8 May 2017 which accepted a claim made on 11 July 2016 by Ms Margurite Walker in relation to psychological injuries said to have been sustained during the course of her employment with the QNMU.
- [2] The appellant accepted that Ms Walker had suffered an injury in accordance with the provisions of s 32(1) of the *Workers' Compensation and Rehabilitation Act 2003* (WCR Act). In the circumstances, the issue in dispute is whether the injury is excluded from s 32(1) of the WCR Act by the operation of s 32(5) of the WCR Act which provides:

- (5) Despite subsections (1) and (3), *injury* does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances—
- (a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;
 - (b) the worker's expectation or perception of reasonable management action being taken against the worker;
 - (c) action by the Regulator or an insurer in connection with the worker's application for compensation.

Examples of actions that may be reasonable management actions taken in a reasonable way—

- action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker
- a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment.

- [3] It follows that the appeal proceedings are preoccupied with the identification of the management action which it is claimed caused the psychological injury and the consequential assessment of whether such management action should be considered to be reasonable management action taken in a reasonable way.
- [4] It was accepted that Ms Walker's injury developed over a period of time commencing on 18 April 2016 and ending on 13 June 2016 when Ms Walker stopped work. The injury was associated with disagreements between Ms Walker and another manager, Ms Rogers, which culminated in internal complaints being lodged by both managers.

Introduction

- [5] At the relevant times, Ms Walker had been employed by the QNMU in the capacity of Director of Business Services. Ms Walker had commenced employment with the QNMU in November 2011.

- [6] The QNMU organisation chart is in the evidence as Exhibit 1. The chart shows that the QNMU Secretary, Ms Elizabeth Mohle, was supported by five direct reports *viz* the Assistant Secretary (Ms Sandra Eales); the Director of Campaigning and Communications (Ms Amanda Newman); the Director of Member and Specialist Services; the Director of Business Services (Ms Margurite Walker); and the Employment Relations Manager (Ms Julie Broszczak).
- [7] Ms Mohle gave evidence in the proceedings along with all her direct reports except for the Director of Member and Specialist Services.
- [8] Evidence in the proceedings was also given by three of Ms Walker's direct reports *viz* the Office Manager (Ms Gett); the IT Manager (Mr Kocovski); and the Finance Manager (Ms Connor).
- [9] Ms Rogers, who had worked for the QNMU for about twenty years, was the Growth and Retention Team Leader. Ms Rogers reported to Ms Newman.
- [10] The introduction of a new computer based membership system (IMIS) was the cause of significant workplace tension, stress and some interpersonal conflict across periods of 2015 and 2016. The effect of Ms Eales' evidence was that the transitioning from the old system to the new system involved major organisation-wide changes and the process was the cause of stress for many QNMU teams, including Ms Rogers' team, who were a key user of the system, and Ms Walker's team who, *inter alia*, had responsibility for the implementation of the new system.

The complaints

- [11] On 18 April 2016, a meeting was scheduled to facilitate the education of staff about elements of the new IMIS system. Ms Walker was delivering the training and attendees included Ms Newman and Ms Rogers. It was Ms Walker's evidence that while the majority of attendees understood the issues being addressed, Ms Rogers took some exception to the content and left during the course of the meeting. Ms Walker said that Ms Rogers "got up and stormed out and said "this is bullshit".
- [12] Immediately after the meeting, Ms Walker expressed her concern about Ms Rogers' behaviour to Ms Newman who agreed that the behaviour was inappropriate. Ms Rogers was also unhappy with what had transpired at the meeting and after the meeting she discussed her concerns with Ms Eales who provided the following account of what was said in the discussion:

All right. But she raised those concerns. Did you do anything about that?---So I just listened to her. I talked to her, tried to understand what the – what the actual problems were. To separate the emotional and personal stuff from the – from the other concerns. I talked to her about what she wanted out of it, whether she wanted to raise the issues formally with Margurite. She didn't want to lodge a grievance or go down that path at that point. She just wanted something done about the – her access to the system and the reports.

Did she explain to you how she had been disrespected?---Yeah, she said that she'd just been dismissed and diminished within the – within the group. So - - -

Did she give you an example of how that happened?---She did. I mean, we – she was probably in there talking to me for about an hour. So she did but I don't specifically recall now the exact words or whatever but, basically, her concerns were dismissed.

Okay?---And basically, I think Margurite just kept – put her back in a box.¹

- [13] It was Ms Eales evidence that while she had asked Ms Rogers to put her complaint in writing, Ms Rogers was reluctant to do so:

All right. Now, you said you asked her if she wanted to raise a complaint; is that right?---I mean, she was raising a complaint with me but I – yeah, I ask – I did ask her whether she wanted to sort of lodge a formal grievance about the way she was treated.

And how would that have been done, a formal grievance? Would it be oral or would it have to be in writing?---No, I asked her to put her – the specifics in writing. She said she didn't want to do that and she didn't, like, she wasn't after a interpersonal contest with Margurite. She didn't want – she didn't indicate that she wanted Margurite punished or anything along those lines. She just wanted a resolution of the technical problem that she was trying to get raised up.²

- [14] After Ms Eales' meeting with Ms Rogers ended, Ms Eales took the opportunity to informally engage with Ms Newman and Ms Walker about Ms Rogers' concerns. Ms Eales told Ms Newman and Ms Walker that Ms Rogers had spoken to her and had complained about Ms Walker and about the information that Ms Walker had presented at the meeting:

All right?---When Amanda and I were – as I said, we'd – it was – the office had emptied and Amanda and I were just, actually, in the in hallway, we weren't in the office and Margurite came back. So we'd just, you know, started talking about it so we just brought Margurite into the conversation then about – and floated the idea about getting better access for Paula so that she could play in the data as she was used to doing. And – yeah, Margurite's immediate, sort of, flare up response was that, you know, Paula just – it was just behavioural with her and she just didn't like change and she just needed to be put back in a box.³

- [15] It was Ms Walker's evidence that when Ms Eales told her about Ms Rogers complaint, she told Ms Eales and Ms Newman that she was less than satisfied with Ms Rogers' conduct and behaviour:

All right. Well, what did you say about that?---I expressed a view to both Sandra and Amanda that Paula's behaviour was becoming so disruptive and so inappropriate that I felt if she wouldn't listen to anybody and be a little bit more respectful to everybody else, then it would end up that the business – some of the business services staff would end up putting complaints in against her. And I didn't – I specifically remember saying, I don't want to see that happen to Paula.

All right?---Can somebody please get her to listen. Because she wouldn't listen to me, she wouldn't listen to Amanda.⁴

- [16] Ms Newman had referenced the conversation with Ms Eales and Ms Walker in an email that she had sent to Ms Broszczak on 19 April 2016:

In terms of this issue, I should also raise that Margurite, Sandra and I had a discussion late yesterday evening about matters that arose in the meeting between myself, Margurite and the recruitment team late yesterday evening (Emma Bourne also attended). During this discussion with Sandra and myself Margurite verbally raised that she felt she was being bullied by Paula and that she would pursue this if Paula were to lodge a grievance in relation to the matters.⁵

¹ T1-60.

² T1-62.

³ T1-64.

⁴ T4-9.

⁵ Exhibit 11.

[17] Ms Eales' evidence about the prospect of a retaliatory complaint was similar. She said that about two days after the hallway conversation, Ms Walker spoke to her again and said that she would lodge a grievance if Ms Rogers escalated the matter further.

[18] It was Ms Newman's evidence in the proceedings that she had spoken to Ms Rogers the following day (19 April 2016) about the issues that were of a concern to her. Ms Rogers felt that she was being denied access to information that she needed to complete her work, and that decisions were being made that impacted on her work area, without appropriate discussion or consultation with her.

[19] A contemporaneous record of Ms Newman's conversation with Ms Rogers was set out in the 19 April 2016 email that Ms Newman had sent to Ms Broszczak:

Paula went to see Sandra last night to express some concerns about some processes Margurite has put in place in the membership team.

Sandra asked Paula to put her concerns in writing.

This morning Paula advised she had commenced work on a grievance.

I just spoke with Paula where she said in addition to her concerns about decisions being made which impact on her team, she said she felt she was being bullied by Margurite. She said she felt she was being bullied by way of being denied access to information, being excluded from decisions which impact on her and her team, through a lack of consultation regarding change which impacts on her and her team, and also by Margurite lying about information and processes. She said the bullying was repeated.

She also raised concerns about Margurite's behaviour at a meeting yesterday with the (sic) herself, the recruitment team and me. Paula said she felt humiliated and targeted during the meeting, and that she felt like Margurite wanted to embarrass her and humiliate her in front of her team.

I explained to Paula I did not believe Margurite behaved inappropriately at the meeting yesterday.

Paula also accused Margurite of lying during the meeting (which I cannot confirm or deny as both Paula and Margurite had different views and recollections of events and matters).

I said these were very serious allegations and that I would seek advice in relation to the matter.⁶

[20] While Ms Rogers had complained orally to Ms Eales, and while Ms Eales had asked Ms Rogers to put her concerns in writing, Ms Rogers did not ultimately formalise her concerns. It appeared to be generally accepted in the evidence however that Ms Rogers' oral reporting to Ms Eales on 18 April 2016 had constituted a complaint.

[21] Not long after Ms Rogers had complained to Ms Eales, Ms Walker elected to make a complaint against Ms Rogers. On 27 April 2016 she emailed a list of complaints about Ms Rogers to Ms Newman, Ms Broszczak and Ms Eales:

I wish to draw to your attention problems arising in the Business Services team resulting from inappropriate behaviour from Paula Rogers.

⁶ Exhibit 11.

I feel that Paula is constantly questioning and undermining my position and has made false accusations against me and my team.

Examples of Particular Behaviours Causing Issues.

- She has demanded to see evidence of claims I have made around membership workloads and service delivery and I feel she is constantly questioning my honesty and integrity.
- Despite previous requests not to interrupt membership staff she continues to demand their attention on an ad hoc basis while they are trying to deal with members on the phone.
- She has been observed listening to staff calls and attempts to interrupt while they are speaking to members.
- She has frequently been observed riffling through the membership work trays and demanding that forms be processed immediately with no consideration or respect for the current priorities or workloads being managed by the membership manager;
- Last week she was asked to direct all enquiries to Anshul so as not to disturb others. She is now calling Anshul 4 to 5 times a day and shows little respect or appreciation for his time or priorities.
- Paula's manner is considered to be aggressive, demanding and unreasonable and this is having a detrimental impact on the productivity and stress levels of my staff;
- I personally feel that I am constantly being harassed and undermined by Paula and despite doing every (sic) possible to take into account the impact of organisational change no longer feel this situation is sustainable.

I would appreciate your assistance in addressing this issue.⁷

[22] Ms Walker said in her evidence that she made her complaint because despite raising the relevant issues locally, and then at Directors' level, she had not been able to make any headway, and the behaviour complained about still continued:

Firstly, why did you send that email to Ms Newman and Ms Broszczak?---Because there continued to be inappropriate behaviour towards my staff - - -

Yes?--- - - - and despite addressing it with – locally and then at the directors' level, we hadn't been able to make any headway and it still continued, and I was concerned for the safety of my staff.

...

Yes. All right. And – so why did you feel the need that you wanted to send the email to do something about Paula's conduct?---Because despite every attempt – and I had followed the QNU policy – this was the next step in the process that I was required to follow to escalate a matter that hadn't been resolved.

Okay. Prior to sending that email, did you speak with anyone?---Yes. I drafted the email and I – Beth Mohle was on leave. Sandra Eales was the acting secretary. I took it in to Sandra. I was frustrated that I had to do this and I showed it to Sandra and said, look, I have to do – this is what I think I have to do. I was frustrated and upset. Sandra read the email and said, "That's appropriate, send it to – a copy to Julie and Amanda."⁸

[23] Ms Eales denied that the issues had been previously raised at the Director's level,⁹ and there was no evidence that Ms Walker had ever raised matters of concern directly with Ms Rogers. Ms Walker was more specific however when it came to previous reporting to Ms Newman:

⁷ Exhibit 10.

⁸ T4-11.

⁹ T1-73.

All right. And the following – excuse me, Commissioner. Prior to sending this email on the 27th of April, had you spoken to Amanda Newman about Ms Rogers' conduct?---Yes.

And we'll limit it to the period between the implementation of the computer system in November 2015 and – up to April 2016, the 27th of April. On how many occasions had you brought that to Amanda's attention?---At least five separate occasions.

And how would you do that?---In meetings and discussions.¹⁰

- [24] In her evidence, Ms Newman said she that while Ms Walker had raised some concerns with her prior to 18 April 2016, it was not her recollection that those concerns were the same matters that Ms Walker had alluded to in her 27 April 2016 complaint. Relevantly, despite her evidence in the proceedings about the prior reporting of complaints, Ms Walker did not include any similar allegation when she prepared her own complaint on 27 April 2016.¹¹
- [25] Ms Eales did however indicate that Ms Newman had stated on 27 April 2016 that "there were frictions there" and that she was aware that Ms Walker and Ms Rogers did not have much respect for each other.¹²
- [26] While some aspects of Ms Rogers' complaint had been discussed in the 18 April 2016 hallway meeting, Ms Walker said that she had not been provided with the particulars of Ms Rogers' complaint and it was her understanding that neither had Ms Rogers been provided with a copy of her complaint. Ms Walker considered this inappropriate and said that she was entitled to know what Ms Rogers was complaining about.
- [27] The effect of Ms Walker's evidence was that she did not get any response to her complaint until 12 May 2016, although Ms Mohle had introduced the subject during Ms Walker's performance appraisal on 10 May 2016.¹³ In this discussion, Ms Mohle told Ms Walker that it was inappropriate for a "director to lodge a grievance against the staff" and that she was disappointed that Ms Walker had not spoken to her before lodging the grievance.

Response to complaints

- [28] The effect of Ms Eales' evidence was that a two stage response was developed in relation to the problems that they were confronted with. In the first instance a fence was put around Ms Rogers to prevent any interaction between her and Ms Walker or Ms Walker's team. The second step involved the use of an organisational psychologist:

Yes?---And then I thought they actually both needed to do some reflection on their behaviour to both – just how they react to things and to each other. So I thought it would be good to get some facilitation with an organisational psychologist or somebody to actually help them take a step back in a less emotional sort of frame and actually recognise that the other wasn't all evil and that they, you know, needed to work out a way to continue to function going forward.¹⁴

¹⁰ T4-11.

¹¹ T4-28.

¹² T1-76.

¹³ T4-13.

¹⁴ T1-67.

- [29] Ms Newman said that when she received Ms Walker's complaint, she took steps to reduce the interaction between Ms Rogers and Ms Walker and Ms Walker's team. Ms Newman said that on 29 April 2016 she directed Ms Rogers not to interact directly with Ms Walker or her team and to channel any issues or concerns directly through to her and that she would take responsibility for escalating the matters raised. An email to this effect is in the evidence as Exhibit 12. Ms Newman also said that, to further separate Ms Walker and Ms Rogers, she reassigned Ms Rogers to a different role for a period of time.¹⁵
- [30] Notwithstanding Ms Newman's directive to Ms Rogers, Ms Walker advised Ms Broszczak on 13 May 2016 that further problems had arisen related to Ms Rogers' conduct or behaviour. On the same day, Ms Broszczak emailed Ms Newman with a list of Ms Walker's complaints.¹⁶ Ms Newman's responses to the issues raised are included in the same exhibit. The responses included Ms Newman reinforcing her direction to Ms Rogers that she was not to raise issues directly with Ms Walker and her team but to escalate them via Ms Newman. Ms Newman also directed Ms Rogers not to enter the work area of the membership team which reported to Ms Walker.
- [31] It was Ms Broszczak's evidence that after Ms Walker's complaint had been received, she participated in a meeting with Ms Newman, Ms Eales and Ms Mohle to discuss the issues raised by the complaint and to determine an appropriate response.¹⁷ The effect of Ms Broszczak's evidence was that the meeting proposed to "trial mediation" because it was considered that mediation would be a "less destructive process" for both Ms Walker and Ms Rogers and their respective teams. Ms Broszczak said that it was decided that the mediation would be conducted externally by a registered psychologist who was experienced in the mediation of workplace issues.
- [32] Ms Broszczak also said that the meeting had considered whether a workplace investigation should be conducted, and while this option had not been dismissed, the preference was to try mediation in the first instance.
- [33] It was Ms Newman's evidence that the meeting considered available options and concluded that mediation was the most appropriate option.¹⁸ The effect of her evidence was that the options included the conduct of a formal investigation into the complaints made, and mediation. She said that the preference was to use a mediation process to try to resolve the differences between Ms Walker and Ms Rogers.¹⁹
- [34] It was Ms Mohle's evidence that before she returned for annual leave at the end of April 2016, Ms Eales, Ms Newman and Ms Broszczak had formed the view that the most appropriate way to deal with the complaints was via mediation in the first instance rather than conduct an investigation. This was the recommendation made to Ms Mohle about how to approach the matter when she met with Ms Eales, Ms Newman and Ms Broszczak on her return from leave:

We had given considerable thought to this and had actually determined that it was appropriate to – it was recommended to me and I agreed that it was appropriate to engage an

¹⁵ T2-9.

¹⁶ Exhibit 13.

¹⁷ T2-29.

¹⁸ T2-20.

¹⁹ T2-10.

organisational psychologist to assist us with this because we were concerned in particular for Ms Rogers' state of mind and her health. We thought that what would – and the plan was for the organisation – organisational psychologist to actually conduct separate interviews with both parties, Ms Rogers and Ms Walker, to actually ascertain from them what the issues were, so to tease that out. Then the plan was going to be – if it was thought appropriate by the psychologist – to bring them together to try to work that out. We would act on the recommendations of the psychologist though if they thought it wasn't appropriate to deal with it in that way, that it might be more appropriate to have a formal investigation. We would, of course, be guided by the experts because we were concerned about the psychological safety of – of Ms Rogers.

What about Ms Walker?---At that stage Ms Walker did – did not exhibit any – any – any mental health concerns. She said in that thing that she feels constantly harassed and undermined, but she did not – she wasn't exhibiting the same extreme traits as Ms Rogers. I was aware though that Ms Walk – Ms Walker had disclosed to me in the past that she had experience with depression. She didn't go into the details of that. That was as a result of a previous investigation that Ms Walker had been involved in with our previous employee relations manager that occurred not long after Ms Walker started at the QN – the then QNU.²⁰

[35] Ms Mohle said that the decision to avoid a formal investigation in the first instance had been partially informed by her experience with previous investigations into complaints which had been protracted in their resolution and which had been the cause of considerable stress for all participants. The effect of her evidence was that Ms Walker had been involved in such an investigation and agreed with her perspective.

[36] Without connecting her evidence to any specific meeting or discussion, Ms Eales said that in deciding how to best deal with the complaints she attempted to separate technical aspects from interpersonal aspects:

And what decisions had you made about the best way to manage the situation?---Yeah. So what I thought they should do – well, what I initially did was, yeah, just tried to separate the technical aspects from the interpersonal ones.

Can I stop you there. Were there two issues involved in the – if you like, the dispute. Could you have a look at that exhibit again, please. Now, just refresh your memory. There seems to be a number of points there. Now, I think you've mentioned technical issues rather than personal issues. Were there some personal issues indicated in that email?---There were. Certainly the behavioural stuff that's been called out. But the behavioural issues weren't one sided. They weren't just, you know, the ones that Marguerite's listed here in terms of Paula's behaviour. There were significant difficulties and quirks in dealing with Marguerite as well. And she did – they did rub up against each other. And there wasn't much respect between the two of them. Different ways of operating and different operating systems. And - - -²¹

12 May 2016 meeting

[37] Ms Newman and Ms Broszczac met with Ms Rogers and Ms Walker in separate meetings on 12 May 2018 to discuss their respective complaints and to put forward a recommendation of a mediated resolution of the complaints. It was Ms Newman's evidence that the purpose of the meetings was to "ascertain the willingness of the parties to participate in a mediation process". She also said that both Ms Rogers and Ms Walker were informed that it was proposed that the mediator meet separately with each of the participants before bringing the participants together for a joint

²⁰ T3-13.

²¹ T1-66.

discussion.²² Ms Broszczak gave consistent evidence about the mediation process to be employed:

All right. Now, do you – and what was raised in that meeting, firstly, with Ms Rogers?---So we had just explained that the QNMU were proposing a facilitated mediation, and we just described how that would pan out in terms of being a one-on one discussion with the staff member and the registered psychologist, and then at a later date there would be a facilitated mediation between the two staff members, their support person, and the registered psychologist.²³

[38] As a result of these meetings, Ms Rogers agreed to participate in mediation, but Ms Walker declined to participate in the process. Given the impasse, the meeting ended on the basis that Ms Broszczak and Ms Newman would consult with Ms Eales and Ms Mohle before determining a response.

[39] It was Ms Walker's evidence that she understood that the purpose of the 12 May 2016 meeting was to discuss the grievance that she had lodged. Her recollections about the meeting were recorded at T4-13:

All right. Now, what do you remember being said to you during that meeting?---That they had looked at the grievance. They'd considered it. They felt that there were interpersonal issues between Paula and I that would be best addressed through mediation and that was the course that was being suggested.

All right. Did they explain to you what the interpersonal differences were?---No.²⁴

[40] In her evidence in the proceedings, Ms Walker explained why she did not want to participate in mediation:

And you responded that you didn't have – you didn't feel that you had the physical or emotional capacity to deal with Paula. You didn't have the resilience. Why did you make that statement?---I was – couple of – I was – I was tired. I was – I had so much – I had so much going on that it was just – I didn't have enough left in my head or my heart to take on an ineffective process. I needed a quick resolution to her backing off and leaving my staff alone so they could work productively on what we were trying to achieve. We're under a lot of pressure and me having to mediate with Paula over things that had nothing to do with me was just – it made no sense. It was going to – it wasn't going to resolve any of the issues we're having in terms of workplace behaviour and it wasn't going to help my team be able to feel comfortable so that they could get on and do the work they were trying to do.²⁵

[41] It was Ms Broszczak's recollection that Ms Walker said that she did not want to participate in the mediation because she did not have the emotional or physical capacity to participate in the process; because she believed that her complaint should be dealt with in a formal investigation; and because she did not think that a mediation would assist in correcting certain behaviour involving a failure to comply with particular procedures.

[42] Ms Broszczak also said that the QNMU did not reject any proposition dealing with a formal investigation but had a clear preference for the mediated process to first attempt to resolve the interpersonal conflict.

²² T2-11.

²³ T2-31.

²⁴ T4-13.

²⁵ T4-14.

18 May 2016 meeting

[43] Ms Walker's refusal on 12 May 2016 to participate in mediation required a reconsideration of the issue by Ms Eales and Ms Mohle and possibly other members of the leadership team. The effect of Ms Eales evidence was that the leadership team had come to a collaborative decision that the best way to resolve the complaints was through mediation and that the purpose of the 18 May 2018 meeting was to communicate the final decision to Ms Walker. Ms Eales said that it was her expectation before the meeting that Ms Walker would comply with the request or direction and that she had not mapped out any alternative course of action.

[44] Ms Eales said that she convened the 18 May 2018 meeting and that it was attended by herself, Ms Broszczak and Ms Walker. She said that during the meeting Ms Walker expressed disappointment that Ms Rogers was not being disciplined and that the leadership team was not supporting her position. For her part, Ms Eales said that she told Ms Walker that she was disappointed in how Ms Walker had managed the differences between herself and Ms Rogers:

All right?---She had made a judgment, you know, that she was all right and Paula was all wrong and I don't – and yeah, she felt that we weren't supporting her as a director. I was really quite disappointed and I did express to her that I felt she had sort of abdicated her role and responsibility in the way she had managed it. That it was well within her means and – because we had had this discussion at the executive level prior to this anyway, as part of an organisational cultural shift, that there has been – had been a tendency for people to get into camps in any dispute, go early to a, you know – everybody's – one – you know, black and white – sort of – somebody's right and somebody's wrong and that, in my experience, didn't actually deliver good results for us. So – and we had discussed that, that we needed to have more interest based problem solving and a better people approach to resolving conflict and I felt that she was just reverting to this, you know, somebody's going to be a winner and somebody's going to be a loser sort of - -²⁶

[45] Prior to this meeting, Ms Broszczak had prepared discussion points to guide her contributions to the meeting (Exhibit 22). While Ms Broszczak said that not all the points were raised in the meeting, the discussion points provide a contemporaneous summary of the differences in thinking or approach between the QNMU and Ms Walker at that point in time. The discussion points suggest that as at 18 May 2016:

- The QNMU had considered Ms Walker's complaint but had not determined with finality how to best respond to the complaint;
- In circumstances where it was critical to the operations of the QNMU that Ms Walker and Ms Rogers repair their working relationship and work professionally together, the QNMU had decided to pursue an externally mediated option;
- This option allowed for the conduct of an investigation into both complaints at a future date if mediation was not successful;
- The priority for the QNMU was to try to de-escalate the situation and see whether a facilitated mediation could resolve the current issues and provide

²⁶ T1-69.

strategies that would assist in maintaining a professional relationship going forward;

- It was the expectation of the QNMU that senior employees of the organisation would attempt in the first instance to resolve their differences in a professional manner.

[46] It was Ms Walker's evidence that during the 18 May 2016 meeting, she was informed by Ms Broszczac and Ms Eales that she would be required to undertake mediation. Ms Walker said that she did not want to participate in that process:

Right. And, well again, you were told that you were going to have to undertake mediation. How did you feel about being directed that that was going to occur?---By this time I was having panic – I was starting to have panic attacks. I was – by this time, the tone of this meeting was legalistic, brutal, cold. And I hadn't had that sort of relationship with these people in the past. So I felt very isolated and intimidated. They – it wasn't a long meeting. They put forward their views that they've sought legal advice and that I was – I would have to participate in this process. I again offered to step away during the process so that there could be no conflict with me being involved - - -

Yes?--- - - - if that served their purpose. They advised me that that would – I could not do that because I wouldn't be able to perform the fundamental requirements of my role and I'd have to resign if I did that.

All right?---So it felt very much like I was trapped in a corner and given a choice.²⁷

[47] Ms Walker rejected the proposition put forward by Ms Broszczak and Ms Eales that the problem was, or included, an interpersonal issue between herself and Ms Rogers. Ms Walker agreed that she told Ms Eales and Ms Broszczac that there were no interpersonal issues that existed between herself and Ms Rogers. Ms Walker was clear in her opinion that bullying, humiliating or harassing were not to be characterised as interpersonal issues. Ms Walker said that she disputed Ms Eales' conclusion about interpersonal issues and wanted to know how the conclusion had been arrived at:²⁸

... The question I asked was again, how had they come to that conclusion and who they'd, you know, spoken to and, you know, what process they'd gone through to come to that conclusion. And Sandra Eales comment was "I reflected on it."

[48] It was Ms Eales' evidence that while Ms Walker wanted a workplace investigation, she did not believe that such a course of action was appropriate because of the stress and tension within the organisation attributable to problems associated with the implementation of the new IMIS system:

Did she want any other sort of investigation rather than a mediation? Had she expressed a desire for an alternative process?---Yeah. She wanted a workplace investigation and to have all her team interviewed about Paula's interactions with them. I didn't think that was appropriate because as I said, there were a lot of stress with the system across the organisation. It wasn't limited to that – to Paula. So many members of my team had also had issues that they had raised up. And there was high levels of tension, and at a time when – so there was – as I mentioned before, we had already put in places some guards to protect the – Marguerite's team. So the IT team who were trying to get the system developed and stabilised. And all the frustrations in, for example, the organising team, who couldn't interact with it. They couldn't update. They couldn't get any accurate information about their members. And they'd go to do a site visit

²⁷ T4-17.

²⁸ T4-16.

and pull up a membership list and they couldn't make head nor tail of it because it was – instead of the names being alphabetical, they were – all came under M. You know, Mrs was – so there were multiple just daily frictions and quite a lot of crankiness in the organisation.²⁹

- [49] The day after the 18 May 2016 meeting, Ms Walker commenced a period of sick leave and was away from work between 19 May 2016 and 24 May 2016.

Psychological frailties

- [50] The mediation proposal was pressed notwithstanding some concerns about the less than robust mental state of Ms Rogers in particular. In her evidence, Ms Newman said that Ms Rogers' mental condition had been fragile for a period of approximately three months. Her condition had necessitated a request from the QNMU that Ms Rogers get a medical certificate certifying her as fit for work.³⁰ Ms Broszczak's evidence was to the effect that significant concerns were held about Ms Rogers' mental health a few days before the 12 May 2016 meeting.

- [51] Ms Newman said that, despite Ms Rogers' fragile condition, mediation remained the preferred course of action because mediation provided the "best opportunity or approach to restore relationships" between Ms Walker and Ms Rogers. Ms Walker also stated that the leadership group considered that, while systems issues required ongoing consideration, a distinction was to be made between systems issues and personal issues.

- [52] The effect of Ms Newman's evidence was that Ms Rogers' condition was a factor in the decision to prefer a mediated resolution facilitated by a psychologist:

MR RASHLEIGH: Now, can I ask you this: you worked out a path to move forward with respect to mediation, was there anything that happened later that caused you to reconsider that or reinforce the need for mediation, rather than a formal investigation?---We remained concern for the wellbeing of everyone involved. So in an effort to restore effective professional relationships, we thought that mediation was the best process.

All right. And did anything happen that reinforced your view about that?---Ms Rogers did come to see me and she was in a – she was incredibly vulnerable; and I was concerned for her welfare.³¹

- [53] Ms Walker had also exhibited signs of stress associated with the complaints process. Ms Broszczak said that Ms Walker became distressed in the 18 May 2016 meeting, while Ms Walker said in the 12 May 2016 meeting, that she did not have the emotional or physical capacity to deal with a mediated process. Further, in a phone call to Ms Newman on 27 April 2016, Ms Walker had alluded to the stressful effects of the complaints process. Despite these concerns, Ms Walker acknowledged that she did not accept an offer from Ms Mohle on 13 May 2016 to take some leave.³²

- [54] Ms Newman had referenced the 27 April 2016 telephone conversation with Ms Walker in an email that she sent to Ms Broszczak on 28 April 2016:

Margurite said that she had been feeling sick all weekend over Paula's behaviour and she had to do something as it couldn't continue for her or her staff.

²⁹ T1-68.

³⁰ T2-24.

³¹ T2-13.

³² T4-35.

She said she still felt sick about it when she was speaking to me.

Margarite said that this had been going on 'for years' but she had to take steps to stop it continuing.

I said I was going to seek some advice from you regarding how to progress this matter, which Margarite was fine with.³³

- [55] Ms Broszczac stated in her evidence that the mediation decision was made in circumstances where it was known that both Ms Rogers and Ms Walker were not in a robust psychological frame of mind:

Thank you. You were asked some questions about the fragility of these two individuals and you were questioned, well, the mediation was going to go ahead. What was put in place to ensure that they were safe when this mediation was occurring?---So once they'd spoken to the external psychologist at their one on one, we of course would have gotten a report back and had that external psychologist said this was not an appropriate way to proceed, then of course we would have taken that into account.

Given that their fragility, why did you think that their psychologist should be the one to conduct the mediation rather than somebody else?---Well, we felt given the mental health conditions and the circumstances, that that would be the most appropriate profession.³⁴

25 May 2016 meeting with Ms Mohle

- [56] On her return to work, Ms Walker sought clarification from Ms Mohle about her position in respect to the proposal for external mediation. In response, Ms Mohle told Ms Walker that she supported the decision to conduct mediation. In these circumstances, Ms Walker requested that the QNMU communicate its position on the issue in writing. Ms Walker said that she made this request because "by that time", she was "feeling very intimidated" and that she felt that she needed to get the QNMU position in writing.
- [57] Ms Mohle complied with Ms Walker's request and emailed correspondence to Ms Walker on 26 May 2016.³⁵ The effect of the communication was that the QNMU directed Ms Walker to participate in a mediation process. On 30 May 2016, Ms Walker emailed Ms Mohle and informed her that she was prepared to participate in the mediation.³⁶
- [58] In her evidence in the proceedings,³⁷ Ms Walker said that while she agreed to participate in mediation, she did so under duress. She said that she agreed because she felt compelled to participate in the mediation and because she was fearful of losing her job.

After direction to participate in mediation

- [59] On 2 June 2016, Ms Broszczac emailed Ms Walker and told her that a registered psychologist had been engaged to facilitate the mediation and that her first meeting

³³ Exhibit 14.

³⁴ T2-63.

³⁵ Exhibit 16.

³⁶ Exhibit 17.

³⁷ T4-42.

with the facilitator was scheduled for 1.00 pm on 16 June 2016.³⁸ Ms Broszczak stated that the process would commence with a one on one consultation with the psychologist where "you will have an opportunity to talk through your issues and perspectives with a view to identifying the ideal outcome".

[60] Prior to this communication, and in the 26 May 2016 correspondence when Ms Mohle formally directed Ms Walker's participation in mediation, Ms Walker was advised that:

1. the course of action proposed to you at the Meeting was appropriate;
2. a mediation is to be conducted, in the first instance, between yourself and Ms Rogers;
3. the mediation is to be facilitated by Guidelight Psychology, an Organisational Psychology Practice; and
4. the mediation will be conducted during work hours at an appropriate off site location.³⁹

[61] In her evidence, Ms Walker took issue with what she said were differences in the communication sent to her on 25 May 2016, and the email that she had subsequently received from Ms Broszczak on 2 June 2016. The effect of Ms Walker's evidence was that when she agreed to participate in mediation, she did so on the basis of the conditions outlined in Ms Mohle's 26 May 2016 correspondence, and which conditions did not include any requirement that she undergo a psychological assessment:

It was to be a structured mediation. That is, firstly between yourself and Ms Rogers – Paula; correct? Separately?--- Yes, this was the first one I would have received.

But there was a subsequent one that suggested a different course of the mediation, where the – both Paula and I would be subject to a one-hour individual assessment by a psychologist before the meeting – before we began a mediation.⁴⁰

[62] Ms Walker claimed that the 2 June 2016 email "was the first time I had been advised that there would be an independent psychological assessment as well". She said that this made her "more distressed, because, by that time, I was under a – seeing my own doctor and under a mental health plan to try and get"⁴¹ Ms Walker said that prior to 2 June 2016 she was not aware that the mediation was going to include an individual session between herself and the psychologist.

[63] I think Ms Walker may have been mischievous in suggesting that the mediation was to start with a psychological assessment. She had known since 12 May 2016 that the mediation was to be facilitated by a qualified psychologist, but I am not aware of any evidence in the proceedings that suggested the mediation would involve a psychological or psychiatric assessment. Ms Mohle in her 26 May 2016 correspondence had described the process as a "facilitated mediation". Ms Broszczak said in her evidence that she told Ms Rogers and Ms Walker on 12 May 2018 that the QNMU was proposing a facilitated mediation and that the mediation would involve in the first instance a "one on one" discussion between each participant and the psychologist.⁴² In her notes prepared for the 18 May 2016 meeting, Ms Broszczak wrote that the process will involve "an initial one on one discussion with

³⁸ Exhibit 18.

³⁹ Exhibit 16.

⁴⁰ T4-41.

⁴¹ T4-45.

⁴² T2-31.

an organisational psychologist where you will have the opportunity to raise your concerns".⁴³

- [64] All these communications preceded the 2 June 2016 email in which Ms Broszczac told Ms Walker that the "process will commence with a one on one consultation between yourself and Peter where you will have the opportunity to talk through your issues and perspectives with a view to identifying the ideal outcome".
- [65] It seems to me that if Ms Walker ever considered that what was being proposed was that she subject herself to a psychological assessment, she had ample opportunity to clarify what was being proposed before she fell ill on 13 June 2016. In particular, she could have responded to Ms Broszczac's email and sought clarification around what was being proposed.
- [66] Ultimately, Ms Walker did not participate in the scheduled mediation session. She said that she did not participate because she became unwell and was hospitalised between 13 June 2016 and 1 July 2016.

Management action

- [67] The appeal is a hearing *de novo* and involves a fresh trial of Ms Walker's claim for compensation. It is for Ms Walker to establish how she sustained her injury and that the injury satisfies the statutory association with her employment. In circumstances where the association between the injury and the employment has been conceded and where the injury is a psychological injury, the appeal turns on whether the injury was caused by management action which was not reasonable or not taken in a reasonable way. It is for Ms Walker to identify the management action which caused the injury and establish that the management action was unreasonable.
- [68] In submissions, the respondent identified the management action in question and explained why the management action should be found to be unreasonable or unreasonably taken:
- (a) the QNMU did not take any reasonable steps to properly identify the substance and nature of the allegations made by Ms Walker about Ms Rogers;
 - (b) the QNMU's attempt to address the dispute by attempting to mediate "interpersonal issues" was not reasonable because of the failure to properly identify the substance and nature of the allegations made by Ms Walker;
 - (c) the QNMU failed to make any reasonable enquiries with the staff supervised by Ms Walker to ascertain the nature of the complaints and allegations made by Ms Walker;
 - (d) the QNMU failed to provide Ms Walker with adequate particulars of the complaint which had been made by Ms Rogers about her;
 - (e) there was a fundamental dispute between Ms Walker and the QNMU about the nature and cause of the conflict between Ms Walker and Ms Rogers, which the QNMU had not satisfactorily resolved prior to directing Ms Walker to participate in mediation;
 - (f) the QNMU unreasonably directed Ms Walker to participate in mediation when:
 - (i) Ms Walker had repeatedly stated that she thought the direction was unfair; and
 - (ii) Ms Walker had told the QNMU that she felt she did not have the physical or emotional capacity to deal with mediation; and
 - (g) by dealing with the complaint in the manner in which it did, the QNMU did not afford Ms Walker procedural fairness.

⁴³ Exhibit 22.

The substance and nature of Ms Walker's allegations

[69] The effect of the respondent's position was that the QNMU proceeded on a flawed premise when it decided that mediation was the appropriate option to resolve the complaints. The QNMU erred because it had wrongly characterised the core matters in issue as interpersonal in nature when on any reasonable examination of Ms Walker's complaint it should have been evident that Ms Walker's complaint was predominantly concerned with the conduct and behaviour of Ms Rogers arising from a frustration with the IMIS system's failure to produce necessary data and information, and with Ms Rogers' conduct and behaviour in persistently interfering in the day to day functioning of a number of Ms Walker's subordinates.

[70] It followed in the respondent's view that the QNMU focus should have been on fixing the systems issues and in making enquiries with Ms Walker's team to ascertain their perspective on the matters raised in Ms Walker's complaint. Had the QNMU done this it would have become apparent that the most appropriate resolution of Ms Walker's complaint was through a workplace investigation into Ms Rogers behaviour and problems caused by system deficiencies.

[71] Ms Walker's understanding of what was being proposed by the QNMU, and her perspective on what was being proposed, are disclosed in her evidence about what transpired during the 18 May 2016 meeting with Ms Eales and Ms Broszczac:

- She was told that the mediation was between herself and Ms Rogers about interpersonal issues;
- She said that there were no interpersonal issues between herself and Ms Rogers;
- She had been informed by Ms Eales that the QNMU had reflected on the situation and previous discussions and had determined to proceed with mediation;
- She saw no value in mediation and wanted the leadership team to investigate the complaint and deal with Ms Rogers' behaviour;
- She considered that mediation was not an effective way of resolving issues in circumstances where the parties that had been subject to Ms Rogers' behaviour were not party to the mediation;
- She said that she was not willing to undertake mediation with Ms Rogers;
- She said that she was being harassed and undermined by Ms Rogers and that it was not appropriate workplace behaviour for Ms Rogers to call her a liar and to try to discredit her; and
- She had been told that neither party had received the concerns of the other party and that at that stage the QNMU were not seeking a response from Ms Rogers or herself.⁴⁴

Were interpersonal issues a cause of the dispute?

[72] In advocating for a conclusion that there were no interpersonal issues between Ms Rogers and Ms Walker, the respondent submitted that:

⁴⁴ T4-36.

- (i) Most of the conduct described in Ms Walker's complaint related to conduct which was injurious to the productivity and safe working of Ms Walker's team, not Ms Walker;
- (ii) When Ms Walker expressed the view that she felt she was being constantly harassed and undermined by Ms Rogers, she was not raising an interpersonal issue, she was drawing attention to unacceptable conduct which was caused by Ms Rogers' serious and unfounded allegations of improper conduct on Ms Walker's part;
- (iii) In circumstances where the new IMIS system was functioning as it had been designed, but was nevertheless incapable of performing functions that the management team anticipated that it would, any resulting frustration or dissatisfaction should not be characterised as an interpersonal issue;
- (iv) The appellant's evidence supported a conclusion that critical issues that had arisen between Ms Walker and Ms Rogers were related to system deficiencies; and
- (v) In circumstances where Ms Rogers did not give evidence in the proceedings and where there was no evidence to the effect that Ms Rogers considered that her relationship with Ms Walker was in disrepair or required mediation, there was no evidential foundation for any proposition that mediation was necessary to address interpersonal issues.

[73] These propositions are evaluated in a context where, in her evidence, Ms Walker simply denied that interpersonal issues were a feature of her relationship with Ms Rogers, and did not adequately resolve the apparent inconsistency in her denial and some of the statements that she made in her 27 April 2016 complaint.

[74] Ms Walker's complaint is in the evidence as Exhibit 10. In the complaint, Ms Walker complained about Ms Rogers behaviour. Some of the behaviour directly affected Ms Walker's team, while other behaviour was directed at Ms Walker. The complaint complained about the following behaviours:

- Ms Rogers was constantly questioning and undermining Ms Walker's position;
- Ms Rogers had made false accusations against Ms Walker and her team;
- Ms Rogers was demanding to see evidence supporting views expressed by Ms Walker about membership workloads and service delivery;
- Ms Rogers was constantly questioning Ms Walker's honesty and integrity;
- Ms Rogers had been monitoring, observing, interrupting, harassing, or annoying Ms Walker's team members while they were trying to work;
- Ms Rogers manner in interacting with Ms Walker's team was aggressive, demanding and unreasonable and was having a detrimental impact on productivity and stress levels of the team; and
- Ms Rogers was constantly harassing and undermining Ms Walker.

[75] It is clear to me, on a plain reading of the complaint, that the behaviour complained about goes significantly beyond a consideration of Ms Rogers' treatment of Ms Walker's team and additionally describes symptoms of a dysfunctional relationship between Ms Rogers and Ms Walker. Ms Walker was not simply an interested

bystander drawing attention to inappropriate conduct when she accused Ms Rogers of undermining her standing in the organisation and of questioning her honesty and integrity. Rather, she was identifying behaviour which was directed at her personally, and which implied ill-will, enmity, antagonism and unfriendliness. Such behaviours in my view, could not be said to be consistent with a positive and professional working relationship.

- [76] Ms Walker's denial of interpersonal conflict is inconsistent with the evidence in the proceedings which disclosed that she could not communicate with Ms Rogers and was unable to resolve her differences with Ms Rogers. While the evidence around the day to day interactions between Ms Rogers and Ms Walker was limited, what is known is that the capacity for the two managers to work together had deteriorated to the extent that Ms Newman had to instruct Ms Rogers not to interact at all with Ms Walker, and had to install herself as an intermediary in all dealings between Ms Rogers and Ms Walker. What is clear is that by the time mediation was proposed on 12 May 2016, Ms Rogers and Ms Walker were incapable of communicating with each other.
- [77] In addition to a failure of communication, evidence of antipathy between the two was demonstrated by Ms Rogers' conduct in the 18 April 2016 meeting, by her accusations that Ms Walker was producing reports which were false or misleading, and that Ms Walker was less than honest in her dealings with Ms Rogers or in relation to functions performed in Ms Rogers' work unit. For her part, Ms Walker did not appear to be in any doubt that Ms Rogers did not hold her performance in high regard and that Ms Rogers was motivated to bring her into disrepute within the organisation. Ms Walker said that Ms Rogers was falsely accusing her of disreputable conduct, was questioning her honesty and integrity, was harassing her and was trying to undermine her standing in the organisation.
- [78] Ms Rogers' absence from the witness list does not preclude a finding that Ms Rogers' working relationship with Ms Walker was not functional or was significantly impaired. Such a conclusion is able to be inferred from the evidence adduced in the proceedings including the fact that both Ms Walker and Ms Rogers had made complaints about each other; the contents of Ms Walker's written complaint; Ms Rogers' conduct in the 18 April 2016 training session; the contemporaneous emails in the evidence as Exhibit 11, Exhibit 13 and Exhibit 14; and the fact that Ms Rogers had agreed to a mediation around interpersonal issues.
- [79] I do not think that the QNMU's understanding of the substance and nature of Ms Walker's allegations was misguided. Apart from what they understood on a reading of Ms Walker's complaint, the leadership team were able to rely on their own experiences and interactions with Ms Rogers and Ms Walker in forming a view about the state of their relationship.
- [80] I accept that it was reasonably open to the leadership team in these circumstances, and having regard to the state of mind of the participants, to conclude that there were interpersonal issues, that these issues should be addressed, if possible, before the specific allegations in the complaints were considered, and that the most appropriate vehicle to achieve a resolution of these issues was through external mediation.
- [81] It was part of the respondent's case that any differences between Ms Walker and Ms

Rogers were a product of system failures and should not be seen as a failure of Ms Rogers and Ms Walker to maintain a professional working relationship. The respondent drew support for this proposition from the evidence of Ms Mohle where, on the respondent's reading, Ms Mohle acknowledged that the critical issues impacting on the relationship between Ms Walker and Ms Rogers were systems' issues:

... We were now trying to get to the bottom of the source of the distress, so to speak, the systems issues and to solve them once and for all.

The source for Ms Rogers was that she couldn't access the data that she had wanted to get access to?---That was a big significant part of the stress, yes.

So that's not resolved by mediation, that's a system issue, isn't it?---That is resolved by being heard. Her issues being heard and then being responded to. It was about setting up a process for that to occur in a safe manner.⁴⁵

[82] While Ms Mohle was acknowledging that problems associated with the implementation of the new IMIS system contributed to frustration and tension within the workplace, she was not saying that interpersonal issues were not present in the relationship between Ms Walker and Ms Rogers. Such a proposition would be inconsistent with Ms Mohle's evidence overall and also the contemporaneous evidence including Ms Broszcsac's notes⁴⁶ and Ms Mohle's letter to Ms Walker dated 26 May 2016.⁴⁷ In Ms Mohle's letter, she specifically rejected Ms Walker's assertion that there were no interpersonal issues between herself and Ms Rogers.

[83] While it was common ground that technical issues associated with the new system were a major problem across the organisation at the relevant time, and while these issues may have been a cause of the interpersonal conflict between Ms Rogers and Ms Walker, these considerations do not disturb the fundamental factual position in which there were interpersonal issues; that, as a matter of degree, the interpersonal issues were significant or severe; and that it was not tenable for the QNMU to allow the conflict to continue indefinitely.

Workplace issues - failure to make enquiries of Ms Walker's subordinates

[84] The respondent's claim that the QNMU failed to respond appropriately to, or failed to appreciate the importance of, Ms Walker's complaints relating to Ms Rogers' interference in her team, cannot be sustained. While senior management did not interview Ms Walker's subordinates, I doubt that there were any reasons to do so in circumstances where the veracity of those elements of the complaint alleging interference by Ms Rogers in the activities of Ms Walker's team, had effectively been conceded and acted on by Ms Newman. There was, in these circumstances, no need to conduct an investigation other than to the extent that an investigation may have been necessary to support a disciplinary finding or the imposition of a disciplinary penalty. But these matters were discretionary to the QNMU and were not matters about which Ms Walker could claim any involvement.

[85] Ms Newman had sided with Ms Walker in responding to Ms Rogers' behaviour in the 18 April 2016 meeting and had told Ms Rogers that her behaviour was

⁴⁵ T3-49.

⁴⁶ Exhibit 22.

⁴⁷ Exhibit 16.

inappropriate. Immediately after Ms Walker's complaint had been filed, Ms Newman moved to isolate Ms Rogers from Ms Walker and her team. When Ms Rogers breached the directions given on or about 13 May 2016, Ms Newman reinforced and strengthened her directions. It was obvious that Ms Newman was reacting to Ms Walker's complaint in imposing constraints on Ms Rogers' workplace activities and movements. It was in these circumstances that Ms Mohle contended that Ms Walker's complaint about interference with her team had been resolved:

Sorry, Ms Mohle, my question was, you could have asked those staff that Ms Walker managed and she was saying were feeling stress, you could have easily asked those staff?---We were – yeah, we could have but we were aware that there was an insistent behaviour undertaken by Ms Rogers, so that wasn't the question. We had dealt with that by instructing her not to have further contact with those staff, so it should not – that stress should have been removed from them ...⁴⁸

[86] It follows that when the QNMU directed Ms Walker to participate in mediation on 18 May 2016, a significant part of Ms Walker's complaint had already been resolved, at least temporarily, or pending the outcome of the mediation. In these circumstances, the remaining issues requiring resolution were the technical issues that had a bearing on the conflict, and what the QNMU perceived to be the failure of Ms Walker and Ms Rogers to develop a functioning and professional working relationship built on mutual respect and courtesy.

[87] The technical issues however were not priority issues in the complaints handling process. These issues were long standing in nature and were the subject of separate investigation and remedy by the IT Team. The outstanding issue in the complaints process was the identification of ways and means that would contribute to a resolution of the interpersonal conflict between Ms Walker and Ms Rogers. There was nothing unreasonable in the manner in which the QNMU arrived at this conclusion.

Access to Ms Rogers' complaint and procedural fairness

[88] The respondent submitted that while Ms Walker had repeatedly expressed the view that there were no interpersonal issues between herself and Ms Rogers, the QNMU had determined otherwise and had done so without explaining to Ms Walker how and why that conclusion had been arrived at.

[89] I do not think that this state of affairs gives rise to breaches of procedural fairness and I prefer the appellant's evidence around the state of the relationship between Ms Walker and Ms Rogers. Many indicators were available to the QNMU to support its conclusion that the relationship was not functional. Ms Walker's implausible denial does not diminish the validity of the QNMU position.

[90] Ms Rogers' complaint was never reduced to writing, and the QNMU had elected not to provide details of the complaint to Ms Walker before the mediation process commenced. Similarly, Ms Walker's complaint had not been discussed or provided to Ms Rogers.

[91] It was the respondent's view that Ms Walker should have been provided with full details of Ms Rogers' complaint before proposing or directing mediation and that she

⁴⁸T3-49.

should have been given the opportunity to respond to any allegations before mediation was proposed or directed. In my view the respondent's position is misconceived for two reasons.

[92] Firstly, the QNMU had in effect delegated the complaint resolution process to the external facilitator and most likely did not want to impinge on the facilitator's method of dispute resolution. That is, it was for the facilitator to decide if, when, and how the substance of each participant's complaint was shared. Secondly, the respondent's complaint is only about timing. The QNMU never stated that Ms Walker might never know what it was that Ms Walker was complaining about. What the QNMU determined was that, in the first instance, they wanted the relationship repaired, if possible, through a process of mediation. This decision was made reasonably quickly after Ms Walker had formalised her complaint against Ms Rogers. Mediation was not intended to be a trial of each person's complaint with winners and losers. It was a process focussed on the participants finding common ground on matters in issue, and on restoring the relationship.

[93] It was inevitable, in my view, that details of the complaints would have been shared during the mediation process. Ms Broszczac said that it was her expectation that mediation would provide both parties with the opportunity to air their grievances and would facilitate the identification of the main issues in dispute. From there, it was a matter of trying to find common ground and settling a way forward:

And with respect to the principles of natural justice, that is, procedural fairness: how was that going to be observed?---That both parties had equal opportunity to – to raise those concerns and that that would be taken into account when the mediation unfolded.

Were the parties to be provided with each other's grievances by the independent psychologist?---No, I don't believe that was - - -

How was that going to proceed? How were they going to be able to – in your mind, how were they going to – that to be achieved in the process that was involved?---So once the – each staff member had – had their one-on-one with the registered psychologist, I – in my mind, he would br – the psychologist would bring both staff members together and, I suppose, find the – some common ground and also have a look to the – the main trends, or the main issues that both parties had – had spoken about to try and find a way forward.⁴⁹

[94] There was nothing inequitable or inconsistent in the manner in which the QNMU raised the mediation proposal with both participants. The management response to the complaints had been considered and consistent, and there was no differentiation in the treatment afforded to the parties. Both participants had been given the same information about the process and both were aware of the QNMU objectives in commissioning the process. Prior to mediation, no findings had been made, nor conclusions drawn, about the veracity of the complaints made, other than to the extent that some of Ms Walker's complaints were seen to have been accepted in the directions to isolate Ms Rogers.

[95] In trying to secure a resolution of the complaints externally, any potential conflict of interest within the leadership team was addressed, and the leadership team was removed from involvement in the process to the extent that they would rely on, or be guided by, the facilitator's recommendations as the process unfolded.

⁴⁹ T2-36.

Failure to agree the terms of mediation

[96] The effect of the respondent's submissions was that the QNMU should have ensured, prior to any commitment being made about mediation:

- (i) that the dispute over the nature and cause of the conflict was resolved; and
- (ii) that the mediation process itself was well settled and that Ms Walker fully understood the process to be followed.

[97] While the respondent maintained that the dispute about whether interpersonal issues was a cause of the conflict should have been settled before mediation was directed, the difficulty was that despite Ms Walker's position on this matter being clearly communicated to, and understood by, the QNMU, she had not been able to persuade the QNMU to accept her reasons. Having regard to the amount of discussion generated within the leadership team on the subject, it is not my view that Ms Walker's position was dismissed without undue consideration. In these circumstances nothing turns on the respondent's proposition unless it can be shown that in some way or other the QNMU acted unreasonably in not acceding to Ms Walker's request.

[98] In my view the QNMU did not act unreasonably for the following reasons:

- Ms Walker's reason for not wanting mediation was insufficient to warrant the QNMU changing its mind, and she was wrong in claiming that there were no interpersonal issues;
- Ms Walker provided no other reason for consideration. She rejected mediation outright and did not advance any compromise proposition. It was always open to her to agree to mediation subject to specific conditions being imposed, but no such offer was made;
- Ms Walker was the only member of the leadership team who considered that she had a functioning relationship with Ms Rogers;
- The QNMU's reasons for wanting the complaints resolved through mediation were sound and defensible;
- The QNMU accepted that, if mediation were not successful, it would be prepared to consider the conduct of a workplace investigation; and
- It was not tenable for the QNMU to not address the interpersonal conflict and, in these circumstances, it was a conventional HR initiative to seek to resolve the conflict with the assistance of an external mediator.

[99] The respondent also argued that it was unreasonable to expect Ms Walker to participate in a mediation process which had not been thought through, where procedures had not been settled, and where very limited information was provided. This uncertainty, according to the respondent, would have exacerbated Ms Walker's doubt about whether she had the physical or emotional resilience to participate in the process.

[100] The respondent submitted that the QNMU had no clear understanding of how the

mediation process would be conducted or evolve. This state of affairs was said to be apparent in the evidence of Ms Broszczak and Ms Mohle where:

- Ms Broszczak said that she really did not know how the mediation would be undertaken; she was simply "supposing" what approach might be adopted;
- Ms Broszczak did not anticipate that Ms Walker and Ms Rogers would be provided with each others grievance. In circumstances where neither party knew the full extent of the other party's grievances, neither Ms Rogers nor Ms Walker could be expected to sensibly participate in a mediation aimed at resolving personal issues;
- Ms Mohle said, in effect, that the psychologist would act as a circuit breaker and that the QNMU intended to rely on the psychologist to "make recommendations going forward". Ms Mohle's evidence was that she expected that recommendations could be made to the effect that some issues may not be considered appropriate to be investigated, while other matters were deemed suitable to progress through a structured mediation process. In this process, the respondent questioned whether the psychologist should be making factual determination about the validity of particular complaints, and whether a mediation would even proceed; and
- For the respondent there was an obvious inconsistency in Ms Mohle's determination to focus on the resolution of interpersonal issues in mediation, and her evidence that the systems issues were a source of distress and needed to be fixed once and for all.

[101] I am not inclined to attach significant weight to the respondent's criticisms. On my review of the evidence, the QNMU leadership team was prudent in acknowledging the unpredictability of the mediation process and understood that there was no guarantee of success. It was reasonable for the leadership team to essentially delegate the conduct of the mediation to the facilitator who was experienced in mediating workplace conflict and who was qualified to deal with emotional or stressful incidents.

[102] The respondent's submission discloses a significant naiveté around the complexity associated with the resolution of human conflict. The QNMU recognised the complexity and determined to seek expert help to assist in the resolution. It was an exercise of pragmatism to recognise that mediation might not be successful and that, if it were not successful, other possible solutions would need to be discovered.

[103] The QMNU decision making around mediation was not aimless or ill-conceived. The QNMU's objective for mediation was always to restore the working relationship between two senior managers who held key roles in sections of the organisation where significant interdependencies were in play. It was for the facilitator to determine the steps to be taken to provide the best prospect of success. There was no tried and tested formula to be applied. In these circumstances, it was not surprising that the evidence of Ms Mohle and Ms Broszczak was lacking in some precision and demonstrated some uncertainty around how the process would evolve.

Direction to participate in mediation

[104] The respondent submitted that despite telling the QNMU that she did not want to be involved in mediation, and despite informing the QNMU that she did not have the physical or emotional capacity to deal with mediation, Ms Walker was pressured, and ultimately directed, to participate.

[105] The respondent also suggested, erroneously in my view, that because the determination about mediation had not been formalised until 26 May 2016, it was unreasonable for the QNMU to have informed Ms Walker in the meetings on 12 May 2016 and 18 May 2016 that she would be required to participate in mediation. The facts are that Ms Walker was told on 12 May 2016 that mediation was recommended. When Ms Walker rejected the recommendation, she was told that the QNMU would consider its position. On 18 May 2016 Ms Walker was told that the QNMU had considered its position and had decided to proceed with mediation. The only reason that the QNMU position was formalised on 26 May 2016 was because Ms Walker had said she wanted the position reduced to writing. The QNMU position had been well known to Ms Walker since 12 May 2016.

[106] The QNMU's reasons for wanting mediation were consistently expressed in the contemporaneous evidence. In her 26 May 2016 correspondence to Ms Walker, Ms Mohle said *inter alia* that it was "hoped that the mediation will rebuild, in a positive way, the working relationships between yourself and Ms Rogers and will resolve the grievance". In her notes preparatory to the 18 May 2016 meeting, Ms Broszczac wrote that:

Given the absence of any previous facilitated attempt to address your respective concerns regarding your work relationship and given that it is critical for the operations of the QNMU that both yourself and Paula are able to repair your working relationship and work professionally together in the future, the QNU has decided to pursue the external facilitated mediation option.⁵⁰

[107] Finally, in her 2 June 2016 email to Ms Walker, Ms Broszczac stated, *inter alia*:

Thank you for agreeing to participate in a mediation process in an attempt to resolve the interpersonal and workplace issues between yourself and Paula Rogers. Given that the focus of the mediation is on positively rebuilding your working relationship with Paula, we have engaged an experienced Registered Psychologist, Peter Doyle from Guidelight Psychology, to facilitate the mediation.⁵¹

[108] I do not accept that the decision to direct participation in mediation was unreasonable for the following reasons;

- There were interpersonal issues;
- It was not tenable to not address the interpersonal issues;
- It was an operational priority to restore to functionality the working relationship between Ms Rogers and Ms Walker;
- Mediation was an appropriate mechanism to try to resolve interpersonal conflict;
- Ms Rogers had agreed to mediation;

⁵⁰ Exhibit 22.

⁵¹ Exhibit 18.

- Ms Walker's reason or reasons for not participating in mediation were not persuasive; and
- The QNMU was aware of the fragile emotional or psychological state of both participants and had taken adequate steps to protect the welfare of the participants.

[109] While Ms Walker did not support the QNMU's commitment to mediation and did not accept that mediation was appropriate or necessary, ultimately it was the QNMU's decision whether mediation should proceed. In refusing to accept mediation, Ms Walker had declined to defer to the opinion of her supervisor and to her co-workers, all of whom were familiar with the perspectives of both parties and were in a position to bring a more objective mind to the deliberations about the matters in issue.

[110] While the respondent promoted the commencement of a workplace investigation as the most appropriate response to the complaints, I accept the appellant's evidence around this issue and agree that it was preferable to try to resolve the dispute through mediation in the first instance rather than embark on a workplace investigation into the complaints. I accept that a formal investigation into the complaints would have been, on balance, more protracted, more likely to have worsened relationships, and more likely to have exacerbated any stress and anxiety.

[111] A final difficulty for the respondent is that it has prosecuted its case only through the prism of Ms Walker's complaint. However, the QNMU was not dealing only with Ms Walker's complaint but also with the complaint of Ms Rogers. The QNMU was obliged to act fairly to both complainants, not simply to focus on the identification of a solution that might placate Ms Walker.

Conclusion

[112] What was expected by the QNMU in terms of process had been disclosed in the contemporaneous evidence.⁵² These exhibits demonstrate in clear terms why the QNMU wanted to use mediation and what it had hoped would be achieved by mediation. The exhibits also disclose that the mediation was to be conducted on the basis of an initial one on one interview with the facilitator and a subsequent interview with both parties participating. It is also relevant that it would have been a very simple exercise for Ms Walker to raise questions or discuss any reservations that she had about the mediation process with Ms Broszczak. There is no evidence that she did this however. Rather, the evidence suggests that she did not have any interest in the process and was inflexible in expressing her refusal to participate in mediation.

[113] There was nothing precipitous in the processing of Ms Walker's complaint by senior management and I accept that the decision to recommend mediation was a considered position. The complaint had generated a number of meetings and discussions among the leadership team. Mediation was not initially directed, but was recommended. When Ms Walker said she did not want to participate in mediation on 12 May 2016, the proposal was reconsidered by senior management before a final decision made on 18 May 2016. When Ms Walker asked that the direction to participate in mediation be communicated in writing, the QNMU complied and set

⁵² Exhibit 16, Exhibit 18, Exhibit 22.

out its reasons in correspondence sent to Ms Walker on 26 May 2016.

[114] In my view it is clear on the evidence in the proceedings of the appellant's witnesses, that the QNMU leadership team had a good understanding of both what it was that Ms Walker was complaining about and what it was that Ms Walker wanted as a response or solution to her complaint. Ms Walker did not want to participate in a mediation, she did not agree that interpersonal issues were in play, and she wanted Ms Rogers behaviour to be the subject of a workplace investigation. Whatever decisions were made by the QNMU, they were not made in ignorance of Ms Walker's views and preferences.

[115] It is difficult to sustain a case that decision makers were ill-informed or ill-equipped to make a decision about the most appropriate way to respond to the complaints. The decisions made by the QNMU leadership team, which included both Ms Rogers' supervisor and Ms Walker's supervisor, about interpersonal differences and the desirability of mediation, were made in a context where the decision makers' views and perspectives were informed by many years of association and experience in dealing with Ms Walker and Ms Rogers. It would have been a perverse outcome if Ms Newman, Ms Broszczac, Ms Eales and Ms Mohle were of the clear view that interpersonal issues needed to be resolved, if none in fact existed. In this regard, I prefer the appellant's evidence to Ms Walker's subjective opinion.

Decision

[116] The central matter for consideration is the identification of the management action in question and the determination of whether that management action was unreasonable or taken in an unreasonable manner. The question is answered in a context where the respondent was presented with a difficult case of human conflict, where it appeared that both parties did not have any capacity for mature discussion or independent effort to resolve their differences, and where both parties were in a fragile psychological state. There was never any formulaic resolution to the conflict. There was no step by step guide in the HR Manual which, if religiously followed, would produce a resolution to the conflict.

[117] There was nothing unreasonable in the QNMU response to the issues emerging from the complaints of Ms Rogers and Ms Walker. The evidence and submissions in the proceedings do not support a finding of unreasonable management action or unreasonably taken management action.

[118] The appeal is allowed. The decision of the Workers' Compensation Regulator Review Unit dated 8 May 2017 is set aside and replaced with a decision that Ms Walker's claim for compensation is not one for acceptance.

[119] The respondent is to pay the appellant's costs of the appeal.