SUPREME COURT OF QUEENSLAND

CITATION:	*Potter v Gympie Regional Council* [2022] QSC 9
PARTIES:	**RONALD POTTER** (plaintiff) v **GYMPIE REGIONAL COUNCIL** (defendant)
FILE NO/S:	BS 12923 of 2017
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	10 February 2022
DELIVERED AT:	Brisbane
HEARING DATE:	15, 16, 17, 18, 19 and 23 February 2021
JUDGE:	Brown J
ORDER:	**The order of the Court is that:** **1. The Claim should be dismissed.** **2. That the parties provide submissions as to costs within seven days.**
CATCHWORDS:	TORTS – NEGLIGENCE – DUTY OF CARE: EXISTENCE – where the plaintiff seeks damages for breach of contract and negligence – where the plaintiff was suspended from work pending an investigation – where the plaintiff was cleared of allegations of serious misconduct, but findings of misconduct and poor management were made – where the plaintiff alleges he suffered a psychiatric injury as a result of negligent conduct in relation to the suspension – whether the defendant owed the plaintiff a relevant duty of care TORTS – NEGLIGENCE – STANDARD OF CARE, SCOPE OF DUTY AND SUBSEQUENT BREACH – GENERALLY – whether a duty of care is excluded – whether any duty of care is extended to include a duty to provide adequate support, lifting the suspension post investigation and keeping the plaintiff informed of the investigation – whether the defendant owed the plaintiff a duty to only suspend the plaintiff's employment if to do so

was a lawful and reasonable direction and the criteria in the defendant's discipline procedure were met – whether the defendant was obliged to comply with its procedure as it was a lawful and reasonable direction – whether the defendant owed the plaintiff a duty of care during investigation and suspension including a duty to provide a safe system of work

TORTS – NEGLIGENCE – DAMAGE AND CAUSATION – whether it was reasonably foreseeable that the plaintiff would suffer a psychiatric injury – whether the plaintiff's psychiatric injury was the result of a breach of a duty of care by the defendant

Enterprise Bargaining Agreement for the Cooloola Shire Council
Gympie Regional Council Certified Agreement 2018

Local Government Act 2009 (Qld) s 197
Local Government Industry Award 2010
Local Government Regulations 2012 (Qld) ss 279, 282, 283
Public Sector Ethics Act 1994
Queensland Local Government Officers' Award 1998
Work Health and Safety Act 2011 (Qld) s 19, 247
Workers' Compensation and Rehabilitation Act 2003 (Qld) ss 305B, 305C, 305D, 305E

Australian Telecommunications Commission v Hart (1982) 43 ALR 165, cited
Avenia v Railway and Transport Health Fund Limited [2017] FCA 859, considered
Barber v Somerset County Council (2004) 1 WLR 1089
Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem (2009) 239 CLR 420, cited
Commonwealth Bank of Australia v Barker (2014) 253 CLR 169, considered
Czatyrko v Edith Cowan University (2005) 214 ALR 349, cited
Eaton v Tricare (Country) Pty Ltd [2016] QCA 139, cited
Erickson v Bagley [2015] VSCA 220, cited
Downe v Sydney West Area Health Service (No. 2) (2008) 71 NSWLR 633, considered
Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269, cited
Gogay v Hertfordshire County Council [2000] IRLR 703, considered
Goldman Sachs JBWere Services Pty Ltd v Nikolich (2007) 163 FCR 62, cited
Govier v Uniting Church in Australia Property Trust [2017] QCA 12, considered
Hayes v State of Queensland [2017] 1 Qd R 337, considered
Hegarty v Queensland Ambulance Service (2007) Aust Torts Reports 81-919, cited

Hunkin v Siebert (1934) 51 CLR 538, cited
Keegan v Sussan Corporation (Aust) Pty Ltd [2014] QSC 64, cited
Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44, considered
Lewis v Heffer [1978] 1 WLR 1061, cited
McCabe v Cornwall County Council & Ors [2004] UKHL 35, cited
Meandarra Aerial Springs Spraying Pty Ltd v GEJ and MA Geldard Pty Ltd [2013] 1 Qd R 319, cited
Moshirian v University of New South Wales [2002] FCA 179, cited
Nationwide News Pty Ltd v Naidu; ISS Security Pty Ltd v Naidu (2007) 71 NSWLR 471
Peebles v Work Cover Queensland [2020] QSC 106, considered
Promnitz v Gympie Regional Council [2015] ICQ 11, cited
R v Darling Island Steverdoring and Lighterage Co Ltd ex parte Halliday and Sullivan (1938) 60 CLR 601, cited
Robertson v State of Queensland [2021] QCA 92, considered
Romero v Farstad Shipping (Indian Pacific) Pty Ltd (2014) 231 FCR 403, cited
Rucker v Stewart [2014] QCA 32, cited
State of New South Wales v Paige [2002] NSWCA 235, considered
Strong v Woolworths Limited (2012) 246 CLR 182, cited
Sullivan v Moody (2001) 207 CLR 562, cited
Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd (2002) 211 CLR 317, cited
The Corporation of the Synod of the Diocese of Brisbane v Greenway [2017] QCA 103
Universal Music Australia Pty Ltd v Sharman Licence Holdings Ltd (2005) 222 FCR 465, cited
Waddell v Mathematics.com.au Pty Ltd [2013] NSWSC 142, cited
Walters v Hanson [2020] QSC 216, cited
Woolworths Limited v Perrin [2016] 2 Qd R 276, cited
Wyong Shire Council v Shirt (1980) 146 CLR 40, cited
Yapp v Foreign and Commonwealth Office [2013] EWHC 1098, considered

COUNSEL: J Kimmins for the plaintiff
R Morton for the defendant

SOLICITORS: Shine Lawyers for the plaintiff
Jensen McConaghy Lawyers for the defendant

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Introduction

[1] The plaintiff, Mr Ronald Potter worked for the Gympie Regional Council ("**the Council**") since May 2008. In 2014 he was a manager at the Council in the Local Laws Team. In mid-2014 issues were raised as to his performance as a manger arising out of a 2013 internal survey of staff. Some three weeks after a meeting as to his work performance he was suspended following a complaint being made by a staff member which the Council determined should be investigated by an external investigator. As a result of that investigation, Mr Potter was exonerated in relation to allegations of serious misconduct, but some findings of lesser misconduct or poor management were made. A further allegation was raised as a result of contact Mr Potter made with an ex-employee of the Council after he was informed of the investigation and given certain directions. Prior to Mr Potter being informed of the outcome of the investigation he suffered work stress and anxiety and could not return to work. Mr Potter claims that as a result of negligence of the Council in dealing with work performance issues and suspending him from his employment he has suffered a psychiatric injury. It is not disputed that Mr Potter has suffered a psychiatric injury. However, the Council deny that the injury was the result of any negligence of the Council. The Court must determine whether or not the Council is liable in negligence for damages suffered as a result of Mr Potter suffering a psychiatric injury.

[2] The claim of Mr Potter fails principally because while Mr Potter has suffered a significant psychiatric injury, the earliest date on which I have found that there was a foreseeable risk that Mr Potter might suffer a psychiatric injury did not arise until 14 August 2014 or to frame it in terms that the parties have, it was not until 14 August 2014 that there was a not insignificant risk of psychiatric injury to Mr Potter that the Council knew or ought to have known of. To the extent that a duty of care arose after that date I am not satisfied that either it has been relevantly breached or was causative of the psychiatric injury.

Outline of issues

[3] The disputes between the parties are far and wide involving a number of legal and factual issues. The principal issues for the Court to determine are[1]:

(a) Whether any meetings took place in 2014 prior to 30 June 2014 with Mr Potter to discuss the results of a survey carried out of Council staff in late 2013;

(b) What happened at the meeting of 30 June 2014;[2]

(c) What happened at the meeting of 21 July 2014;

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[1] The summary is derived from the joint list of issues in dispute provided by the parties taking account that the parties subsequently indicated that some issues no longer were required to be determined. There are a number of subsidiary issues which I have not set out. Given findings I have made it has not been necessary to address all issues.

[2] There is a dispute as to whether the meeting occurred on 30 June 2014 or 1 July 2014.

(d) Whether allegations in relation to the meeting of 22 January 2015 in [16] of the SOC are made out;

(e) Whether there was ever a not insignificant risk of psychiatric injury to the plaintiff that the defendant knew of, or ought reasonably to have known of;

(f) If the Council owed a duty of care to Mr Potter to take reasonable care to avoid a risk of Mr Potter suffering psychiatric harm what was the content of any such duty in respect of:

(i) The conduct of a meeting by Council employees on 30 June 2014

(ii) In the suspension of Mr Potter or giving a direction that the plaintiff need not perform work on full pay on 21 July 2014;

(iii) The delivery of the investigation report to the Council on 9 or 11 August 2014;

(iv) providing adequate support during the suspension and investigation and to keep Mr Potter informed of the progress of the investigation.

(g) Did the Council breach any duty of care as pleaded in [12], [13], [14] and [15] of the SOC;

(h) Did any breach of duty cause Mr Potter to suffer psychiatric harm;

(i) Whether the plaintiff has proved that any breach of duty by the defendant was a necessary condition of the injury suffered by the plaintiff;

(j) If the suspension of Mr Potter's employment had been lifted on or about 9 August 2014 and/or 11 August 2014 and/or if Mr Potter had been told of the results of the Aitken Report on or about 9 August 2014 or 11 August 2014, would Mr Potter have made a recovery from and/or improvement of any psychiatric condition or symptoms which he suffered as at 9 August 2014; and

(k) What is the extent of any psychiatric injury suffered and, in particular:

(i) What was the percentage of impairment resulting from the psychiatric conditions suffered by Mr Potter;

(ii) What is the extent of the plaintiff's likely special damages which will be incurred in the future, as a result of his injury;

(iii) What is the quantification of the plaintiff's past economic loss;

(iv) What is the impairment of the plaintiff's earning capacity as a result of his aforesaid psychiatric injuries and whether Mr Potter has any residuary earning capacity; and

(v) What is the general quantification of the plaintiff's damages.

[4] In consideration of whether the defendant owed any duty of care to the plaintiff there are a number of legal issues which are in dispute between the parties which include::

(a) Whether the principles of *State of New South Wales v Paige (**Paige**)*[3] and *Govier v Uniting Church in Australia Property Trust (**Govier**)*[4] apply so as to exclude a duty of care in relation to the conduct of the meeting on 30 June 2014 and/or the suspension of Mr Potter on 21 July 2014;

(b) Whether the Council could lawfully suspend Mr Potter or direct him not to attend work on 21 July 2014;

(c) Whether certain Council procedures imposed a duty upon the Council or bestowed a right upon Mr Potter; and

(d) Whether the decision of *Hayes & Ors v State of Queensland* (***Hayes***)[5] applies to extend any duty of care to include a duty to provide adequate support to Mr Potter by providing a support person, lifting the suspension post investigation and keep him informed of the progress of the investigation. The defendant contends that *Hayes* was wrongly decided at law, and reserves its position given that this Court, of course, is bound by a Court of Appeal decision. Given I am bound by the decision of *Hayes*, I will not address the arguments raised in the defendant's submissions as to why it was wrongly decided when discussing the applicable legal principles.

Background Facts

People Involved

[5] Mr Potter was born on 15 May 1971. Mr Potter was employed by the defendant, the Council, since 2008.[6] In 2013 Mr Potter was working as the Coordinator for Local Laws as well as the Local Disaster Coordinator.

[6] The Director of Finance and Community Services Directorate was Craig Young. Mike Hartley was the Director of Planning and Development until approximately one to two months prior to June 2014.

[7] In January 2014 Mr Potter's role was split and he remained as Coordinator of Local Laws. His immediate manager was Ian Wolff who was the Manager of Environment and Local Laws. Mark Stanton subsequently took over as Acting Director in about March 2014, in place of Mr Hartley.

[8] The CEO of the Council in 2014 was Bernard Smith. Kylie McCrohon was the Manager of People and Organisation Development (which, for convenience, I will refer to as HR). Rowena Johnston was the Council Industrial Relations Officer.

[9] Sharon Smith and a person to whom I will refer to as RS were Local Laws officers and members of Mr Potter's team. Some of the matters relevant to the present case relate to the alleged disclosure of confidential information to RS, the disclosure of which the

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3 [2002] NSWCA 235.
4 [2017] QCA 12.
5 [2017] 1 Qd R 337.
6 Although he was employed with a smaller Council, which became part of the wider Gympie Regional Council, since 2003.

Defendant submits could have prejudicial effect. I have therefore anonymised him for the purpose of the judgement.[7]

[10] Heather Kelly worked with Mr Potter in the Community Services Directorate and was the Coordinator of Community Development and Facilities.

[11] Michael Grant was a former director of Community Services until approximately 2013 and had the role of manager of Mr Potter. He and Mr Potter were also friends.

[12] David Wilkinson is a solicitor who, in 2014, was working for Aitken Legal, the firm engaged to carrying out an investigation of the complaints against Mr Potter.

[13] To the extent the allegations relate to the conduct of Mr Smith, Mr Stanton, Ms McCrohon or Mr Wolff there is not issue that the Council is vicariously liable for their conduct.

Employment

[14] Mr Potter was employed pursuant to a letter of 12 May 2008 as Coordinator Compliance and Local Disaster Co-ordination Service in the Community Services Directorate of the Council.

[15] The pleading refers to the 12 May 2008 letter being the relevant letter setting out the terms of employment, which was admitted by the Council. It was also one of the issues identified in the issues not in dispute by the parties.[8] The letter dated 12 May 2008 was not actually in evidence. Rather, the 2003 letter from the Cooloola Shire Council was admitted.[9]

[16] In the list of issues not in dispute, it was also admitted that from 2010 the entitlements of the plaintiff in his employment were governed by the *Local Government Industry Award 2010*. Only the Enterprise Bargaining Agreement for the Cooloola Shire Council dated 2001,[10] and the Queensland Local Government Officers' Award 1998,[11] were the subject of evidence.[12]

[17] I have therefore assumed that the *Local Government Industry Award 2010* and the letter dated 12 May 2008 do not contain any matters relevant to Mr Potter's employment, further to the matters that have been admitted.

Staff Survey 2013

[18] An anonymous staff survey was undertaken by the defendant in late 2013,[13] directed at the internal operations of each Directorate.

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7 Subject to any further raising of this issue with the parties.
8 Paragraph 2A of the SOC.
9 Exhibit 2. Although the defendant referred to exhibit 2 as being the 2008 letter.
10 Exhibit 63.
11 Exhibit 3.
12 The Gympie Regional Council Certified Agreement 2018 was also placed in evidence (Exhibit 58).
13 Exhibit 29.

[19] It included a review of the performance of the staff members' particular manager. Some of the Local Laws staff which Mr Potter managed expressed some dissatisfaction with middle management of the Local Laws team. Mr Potter was a part of middle management. It was an anonymous survey, where staff merely ticked an appropriate box in response to a particular question.

[20] It is admitted that the team managed by the plaintiff did not score well in the survey. There is some dispute, at least by Mr Potter, as to whether the dissatisfaction was internal within the team or related to his management as well. It is likely it was a combination of both. There were questions which potentially raised questions as to management, where there was significant staff dissatisfaction.

[21] Mr Potter gave some evidence as to the survey. Mr Potter stated that he was very busy in his dual roles particularly after the floods in the Gympie area in 2011, 2012 and 2013. His role was to co-ordinate all the local government bodies to make sure that they were informed as to what was happening as a whole.

[22] At the time of the survey, Mr Potter was managing two roles. He considered his time was dominated by the disaster management role and he attributed the staff survey results for the Local Laws team to reflect the fact that he had not been able to spend adequate time managing that team. He suggested that view was supported by his then manager Craig Young, with whom he informally discussed the survey results.

[23] Mr Potter was dismissive of the relevance of the survey given the circumstances at the time and the fact it was anonymously completed.

[24] In January 2014, Mr Potter had a meeting with Mr Young and Mr Smith as a result of which it was determined that his roles would be split and he would only undertake the role of Coordinator of Local Laws. Mr Potter considered that was because the two roles were too busy for him to continue in both roles. Mr Smith agreed that Mr Potter's role in disaster management was a busy one. Mr Smith could not recall the meeting, but accepted that he could have had such a discussion. He did not recall any particular issues with Mr Potter's performance at the time the roles were split.

[25] As a result of the restructure, Ian Wolff became Mr Potter's manager and Mike Hartley became Mr Potter's director.

[26] Mr Wolff was not aware whether the decision to split Mr Potter's role so that he only did Local Laws, as opposed to disaster management, was in response to the survey. He stated that such a decision would have been made at a higher level of management. Mr Wolff did not recall any specific incidents that necessitated any discussion with Mr Potter about his work performance after Mr Wolff took over his supervision in 2014, prior to Mr Stanton commencing his role.

[27] According to Mr Potter there were meetings between himself, Mr Wolff, Mr Young and Mr Hartley about the restructure. He did not accept that there were any meetings about survey results because, in his view, it was a non-issue.

[28] There was evidence of internal staff issues in the Local Laws team in 2014, including from Ms Kelly. According to Ms Kelly, some staff commented to her that they considered that Mr Potter was treating staff differently. There was a lot of backstabbing and infighting amongst the team observed by Ms Kelly. While Mr Potter did not accept

there were any issues that arose in relation to his management, he did accept there were a number of issues that arose between the staff itself, which he stated that he was trying to address in 2014.

Meeting of 25 March 2014

[29] The defendant allege that there were two meetings with Mr Potter in 2014 prior to the meeting of 30 June 2014. Mr Potter disagreed.

[30] Mr Potter could not recall a meeting on 25 March 2014 which discussed the survey with Mr Wolff and Mr Hartley in Mr Hartley's room. He stated there was a meeting which included Mr Young, which discussed the transition of moving the Community Service Directorate to the Planning and Development Directorate, but he could recall no discussion about the survey at such a meeting. He could only recall a discussion with Mr Young about ways to get the staff back on track.

[31] Mr Potter could recall a meeting on 27 March 2014, which was the Regulatory Services team meeting, which they called the team huddle. He said that it did not include a discussion about future performance, but rather its purpose was to clear the air with the staff. He recalled Mr Wolff was present at the meeting, as were other members of the Local Laws area.

[32] According to Mr Potter, the meeting on 27 March 2014 was to discuss with staff the issues that existed in his team and to try and work out ways to move forward.

[33] Mr Wolff was Mr Potter's manager after the separation of Mr Potter's roles when Mr Potter continued in Local Laws and no longer continued with Disaster Management. Mr Wolff gave evidence that he maintained a daily work diary. He referred to the diary to refresh his memory. He had some recollection of the events in 2014, although it was in some respects limited and he largely relied on his diary entries which recorded what had occurred. I accepted the evidence he gave but noted that it had limitations.

[34] Mr Wolff had a journal entry recording the meeting of 25 March 2014 where the attendees were himself, Mr Hartley and Mr Potter. He did not recall anyone else being present. His recollection was that the meeting took place in Mr Hartley's room. He stated that, to the best of his recollection, the meeting related to the 2013 organisational survey results, particularly the results relating to the Local Laws area. Mr Wolff could not recall the precise date when the survey would have been available to him but considers it would have been after the organisational restructure which took place in early 2014.

[35] Mr Wolff's recollection of the meeting on 25 March 2014 was that Mr Hartley raised the results from the survey with Mr Potter and there was a general discussion surrounding the results. He recalled that Mr Hartley advised Mr Potter to take some time and consider what he would be proposing to address some of the issues raised within the survey results. He could not recall a further meeting with Mr Hartley and Mr Potter to discuss those results.

[36] Mr Wolff accepted that in the meeting of 25 March 2014, when the results of the survey were discussed, it could have been discussed that Mr Potter had had difficulty covering two roles at the time of the survey.

[37] Mr Wolff recalled that the outcome of the meeting of 25 March 2014 was an acknowledgement by Mr Potter that a change was necessary to potentially address some of the results from the survey and that with not carrying out the role with Disaster Management, Mr Potter's focus could be upon the supervision of the Local Laws area. He said Mr Hartley left it to Mr Potter to contemplate what he was going to do and how he was going to address the issues.

[38] Mr Wolff stated that he did not go down the path of using counselling forms with Mr Potter.

[39] I accept that a meeting occurred on 25 March 2014 between Mr Hartley, Mr Wolff and Mr Potter. Although Mr Potter did not have a recollection of the meeting, the fact that Mr Wolff was assisted by contemporaneous notes of the meeting in his diary supports the fact that such a meeting occurred. The fact that Mr Potter agreed that the team huddle on 27 March 2014 was to address issues that existed within his team gives some support to the fact that the issue had been discussed at the 25 March 2014 meeting, as does the contemporaneous reference to such a meeting having occurred in the letter of 30 June 2014. I accept Mr Wolff's evidence that the meeting discussed the survey results and that it was left to Mr Potter to consider how he was going to address issues arising out of the staff survey. Mr Potter's lack of recollection is explained not only due to the effluxion of time but his regarding the staff survey as a "non-issue" at least from his point of view. It was evident that Mr Potter did not regard the results as having any legitimacy.

[40] Mr Hartley was suspended in March 2014, following which Mark Stanton became the Acting Director.

Meeting of 18 June 2014

[41] Mr Potter did not recall a meeting taking place on 18 June 2014 with Mr Wolff and Mr Stanton to discuss the results of the survey.

[42] Mr Stanton recalled a meeting with Mr Wolff and Mr Potter to go through the results of the survey, but not the date. Since the events of 2014, Mr Stanton had suffered a major medical event which significantly impaired his memory.

[43] Mr Wolff had made notes of such a meeting in his diary to which he referred. He recollected that the meeting was to discuss the results of the survey.

[44] On 18 June 2014, Mr Wolff had a journal entry of a meeting which was between Mr Potter, Mr Stanton and himself. His recollection was that there was a discussion held in the Planning Director's office, that is Mr Stanton's office, where Mr Stanton addressed Mr Potter in relation to the results of the survey and discussed a plan to move forward and address some of the issues that had been identified from the survey. He recalls that the discussion points were to be put in writing by Mr Stanton and Mr Potter.

[45] Mr Wolff agreed that the meeting of 18 June 2014 was convened because of concerns Mr Stanton had with the staff survey. He could not recall that the meeting discussed other aspects of Mr Potter's work performance and stated that the meeting was predominantly focused on the results of the survey. He did not consider it was a formal meeting as to performance management of Mr Potter. That accords with the terms of the letter of 30 June 2014.

[46] Mr Stanton could recall seeing the results of the survey carried out in 2013.[14] He guessed that he would have seen it in the first few months that he was at the Council. He read the survey and recalled that there were issues in the Local Laws department that needed to be addressed. Based on what he saw in the survey results, he considered he should speak to Mr Potter about his work performance.

[47] He stated that he had some recollection of the meeting on 18 June 2014 with Mr Wolff and Mr Potter. He stated his recollection was that on 18 June 2014 they went through some of the issues resulting from the survey which involved Mr Potter. He stated the concerns generally related to the management of the team.

[48] The fact that a meeting of 18 June 2014 occurred is also supported by the letter of 30 June 2014 from Mark Stanton to Mr Potter. The opening paragraph stated:

> "I wish to confirm my advice to you at our meeting held 18 June 2014 with Ian Wolff, Manager Health and Environmental & Regulatory Services concerning the results of the Organisational Survey in relation to the Local Laws Branch which was a follow up to a meeting held in March 2014 with yourself, Mike Hartley, Director - Planning and Development and Ian Wolff."[15]

[49] I accept that a meeting occurred on 18 June 2014 between Mr Stanton, Mr Wolff and Mr Potter which appeared to follow Mr Stanton's taking over from Mr Hartley. I accept that the meeting was to discuss the results of the survey and to develop a plan on how to address some of the issues in the survey.

[50] I do not accept, therefore, that the first meeting in 2014 to discuss the survey results was the meeting of 30 June 2014.[16]

Meeting of 30 June 2014

[51] Mr Potter did recall the meeting of 30 June 2014 with Mr Wolff and Mr Stanton which he was asked to attend. According to Mr Potter, the meeting came out of the blue and he did not understand why they were seeking to do a performance review in relation to his management as a result of the survey.

[52] Mr Potter was only given a couple of hours' notice for the meeting and was not told that he could bring a support person with him to the meeting. He was not told in advance what the meeting was about.

[53] Mr Potter described the meeting as follows:

> "I walk in to Mark Stanton's office. Mr Wolff was to my left sitting at the meeting table. Mr Stanton was at his desk as I walked in and I asked "What's this about?" And Mr Stanton stood up and had an envelope in his hand and said as he was walking over, "I'm going to performance manage you, Ron." And with his two fingers he threw the letter down in front of me,

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14 Exhibit 29.

15 Exhibit 6.

16 Mr Wolff's diary entry stated the meeting occurred on 1 July 2014 although the letter is dated 30 June 2014. Little turns on the date although I consider Mr Wolff's entry in his diary is more reliable.

> and then he sat down and he interlocked his fingers and crossed his legs, and he said, "I'm going on a fishing expedition," if you will, "with the – with your staff. I'm going to interview them individually to find out what's wrong with regards to your management." And I – I didn't know what to say. I was – I didn't think I was doing anything wrong. And the letter that he gave to me outlined things that I'm already doing anyway, and I couldn't understand why – what is different that I'm doing already, and I couldn't understand that. And through that meeting, Mr Stanton said to me that he can be my best friend or his – or his worst enemy. And I went, "Okay." So I didn't know where I stood; whether he was coming after me, wanted to manage me out. I had no idea. I was just – I was just baffled to find out, you know, what's going on. What – what's – what am I doing wrong? Because up until Mr Stanton arrived, I was receiving accolades from the CEO, from the mayor, saying good work that I've done and the way I've managed the disasters and – so I couldn't understand what was going on…."

[54] Mr Potter stated that he was blown away by what Mr Stanton had said to him. Mr Potter stated that Mr Stanton's statement that he was going on a "fishing expedition" in regard to Mr Potter's management played over and over in his head and still does. He did not read the letter that was provided to him, other than to glance over it. He stated that neither Mr Wolff nor Mr Stanton went through the letter with him. He found the environment very aggressive. He considered Mr Stanton was assertive and rigid. The meeting left him feeling very threatened and confused.

[55] Mr Potter had resolved to make his own investigations to find out what was wrong as a result of the meeting. He stated that as a result of that meeting, he felt very upset, threatened, confused and a bit angry because they were going to performance manage him and did not follow due process. When he had performance managed a staff member in the past, he had completed a counselling form and had to record how the performance issue was going to be managed.[17] Mr Potter felt the same way when he got home and spoke to his wife and told her what Mark Stanton had said.

[56] It is uncontentious that no counselling forms under the Disciplinary Action Procedure were used in relation to Mr Potter.[18]

[57] Mr Potter was cross-examined about the meeting of 30 June 2014. While he reiterated his evidence as to his recollection of what occurred, his answers were often not responsive and were framed in terms of the wrong done to him, such as to emphasise the effect of Mr Stanton's behaviour upon him and his characterisation of Mr Stanton's conduct as bullying and intimidating and the fact that procedure was not followed, rather than responding to the substance of what he was asked. Even though he accepted he had complained about his staff to Mr Wolff, he did not consider it was appropriate for Mr Stanton to engage in a process to find out what was wrong with his staff. While he agreed that he himself had spoken about discontent and conflicts amongst his staff, he rejected any suggestion that Mr Stanton had indicated to him on 30 June 2014 that he was seeking to interview the staff in the Local Laws - "He wanted to interview to – he was blaming me." This was in contrast to his having agreed that he may have told Mr Wilkinson that Mr Stanton was going on a "fishing expedition" to find out why there

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17 Exhibit 5.

18 Exhibit 5.

were factions in the Local Laws Team. Mr Potter accepted that the tape of the meeting between Mr Potter and Mr Wilkinson demonstrated that when Mr Wilkinson stated that he had been told Mr Stanton was interviewing staff one on one to see what was causing the factions, Mr Potter had agreed and stated Mr Stanton was trying to get to the bottom of the problem and to determine what the "boggle" was.[19]

[58] Mr Potter confirmed in cross-examination that he did not accept that there was any reason to question his management.

[59] Mr Potter stated he was confused about what to do as a result of the meeting. He claimed that he could not speak to Mr Wolff as his line manager to clarify what was required because he had been at the meeting and Mr Potter did not think he could trust him and felt he was part of the problem.

[60] Mr Potter stated that as this was the first time his management had ever been questioned, it hit him like a freight train.

[61] Mr Wolff gave evidence that on 1 July 2014 there was a meeting where the letter of 30 June 2014 was passed from Mr Stanton to Mr Potter. He could recall a general discussion in relation to the letter, predominantly between Mr Stanton and Mr Potter. He said he offered Mr Potter his full support to assist in achieving work expectations. His recollection was the meeting ended fairly cordially. He believed Mr Stanton handed the letter to Mr Potter. He had no recollection of Mr Stanton throwing a letter across the table at Mr Potter. He considers that if that had occurred, he would have recollected it. His recollection was that Mr Stanton was professional in his dealings. He could not recall raised voices or inappropriate language. He could not recall other details of the meeting.

[62] While Mr Wolff agreed in cross-examination that he had to refer to his notes for the purposes of accuracy, he did not recall Mr Stanton in the 30 June 2014 meeting, being anything other than professional. He stated that he recalled being in the meeting and agreed it occurred in Mr Stanton's office. Mr Wolff agreed he was seated at the table separate from Mr Stanton's desk when Mr Potter entered. He could not recall that Mr Stanton was seated at his work desk. He recalls that Mr Potter sat down at the table where Mr Wolff was seated when he entered. He stated that he could not recall Mr Stanton having the letter of 30 June 2014 at the meeting, nor could he recall in the level of detail discussed in relation to the contents of the letter. He later clarified in re-examination that there was a letter for the 30 June 2014 meeting, but not the 18 June 2014 meeting.

[63] Mr Wolff could not recall Mr Stanton saying to Mr Potter that he was going to performance manage him, that he was going on a "fishing expedition" with regards to the management of the staff and was going to staff individually to find out about the problems, nor could he recall Mr Stanton saying to Mr Potter "I can be your best friend or your worst enemy". He stated that those words may have been used, but he could not recall that level of detail.

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[19] T2-38-T2-39.

[64] Mr Wolff disagreed that the meeting was a performance management type meeting. Rather, he said it was a discussion regarding the results of an organisational survey as they related to the Local Laws area.

[65] Mr Wolff stated that Mr Potter was an extroverted and enthusiastic individual before he was disciplined. He agreed that after Mr Potter was handed the letter of 30 June 2014, his demeanour changed, such that he was potentially "down in the dumps". Mr Wolff agreed that Mr Potter's concerns about his performance would have been a contributing factor.

[66] Mr Stanton could recall a meeting where he gave Mr Potter the letter of 30 June 2014. He stated it would have been normal practice for Mr Potter to be requested to attend the meeting. He agreed that the meeting occurred in his office, that Mr Wolff was sitting at the informal table. He stated he was sitting at the table with him. He stated that it was not his habit to have meetings with staff with him sitting at his desk. He accepted that prior to the commencement of the meeting he could have gotten up from his desk and walked over to the informal table. He stated that he would have been holding on to the letter and he would have placed the letter on the table, and moved it across to Mr Potter. Mr Stanton did not have a specific recollection of this and based it on how he normally operated. He did not recall throwing the letter on a table.

[67] As to the meeting to discuss the 30 June 2014 letter, Mr Stanton only remembered parts of the conversation but stated that:

(a) As to whether he told Mr Potter that it was a performance management issue, Mr Stanton agreed that he said to Mr Potter the words "I am going to performance manage you Ron" at some point during the meeting. Mr Stanton stated that he was trying to explain to Mr Potter that the 30 June 2014 letter was the commencement of the performance management process;

(b) He did not recall using the words "fishing expedition" at the meeting, but thought he had used the phrase at another meeting. He commented that it was an inappropriate phrase to use. He stated that he was trying to convey that he was chasing all of the available information. He recalled he stated that he intended to interview all staff;

(c) He did recall having a conversation along the lines of the fact that he could be Mr Potter's best friend or his worst enemy. He stated that he explained to Mr Potter he could be his best friend by providing guidance and assistance, but if that was not going well, he would end up being somebody who was prepared to take action. Given that his impression of the Council was that they did not have a strong track record in performance management of employees, he wanted Mr Potter to understand that he was used to being in a position where he would take action to ensure work performance was delivered;

(d) Mr Stanton did not accept that he had his fingers in front of him interlocked because that was not his habit. Rather, he considers they would have been in his lap, one over the other. Nor was it Mr Stanton's habit to place his hands over his stomach.

[68] Mr Stanton said that he considered that performance management was necessary not only on the basis of the staff survey, but from comments from other staff which reinforced there was validity in what was being reported in the staff survey. He did not

agree that it was inappropriate to rely on survey results which were at least six months old. He said the results were not likely to have changed significantly, although he accepted he had not been at the Council for that six month period.

Findings

[69] It is alleged that at the meeting Mr Stanton exhibited the following behaviour described as "intimidating, threatening, overbearing and/or bullying":[20]

(a) Mr Stanton threw the letter of 30 June 2014 from himself to the plaintiff on the table in front of the plaintiff;

(b) He said words to the effect of "I'm going to performance manage you Ron and I'm going on a fishing expedition with regard to your management of staff" and "I can be your best friend or your worst enemy and I'm going to interview each of the seven staff individually to find out the problems";

(c) Mr Stanton had his fingers locked together in front of his sternum while speaking to the plaintiff;

(d) Mr Stanton had been sitting at his desk about a metre to the plaintiff's right; and

(e) Mr Stanton spoke with an assertive tone and did not engage in "small talk".

[70] The plaintiff submits that Mr Potter is the only one who has a clear recollection of what occurred at the meeting, as opposed to Mr Wolff and Mr Stanton and his version should be accepted.

[71] There is common ground in relation to a number of matters that were said by Mr Stanton, at least between Mr Stanton and Mr Potter, which Mr Wolff could not recall but accepted that they were said. However, there are a number of points of demarcation. Generally, I preferred the evidence of Mr Wolff and Mr Stanton where the versions deviated. Their versions had some support from extraneous evidence, such as the terms of the letter of 30 June 2014 which was a contemporaneous document. I find that Mr Potter, while generally honest, had a coloured recollection infected by his rejection of the survey results raising any legitimate issue about his management of his staff. Mr Potter's evidence demonstrated that he saw the whole meeting of 30 June 2014 as being unjustified and unjust and that it indicated management were out to get him, a belief which appears to have only escalated over time. The distortion of his recollection is demonstrated by his evidence that Mr Stanton's reference to the fishing expedition was not in the context of him saying he would get to the bottom of things, whereas he stated that was what he understood when he spoke to Mr Wilkinson. It is further demonstrated by his evidence that this was the first time the survey results were discussed as raising issues with his management.

[72] I am not satisfied that Mr Stanton threw the letter of 30 June 2014 across the table at Mr Potter but rather pushed it across the table. Mr Wolff does not recall that occurring. Further, contrary to his description in Court, the tape of Mr Potter's meeting with Mr Wilkinson reveals that Mr Potter had told Mr Wilkinson that Mr Stanton had handed him

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20 [7] of the SOC.

the letter. Given its proximity in time to the actual events, I consider it is the more accurate version of what occurred.[21]

[73] I accept that it is likely that Mr Stanton did say he was going to "performance manage" Mr Potter. While Mr Wolff did not recollect those words being used, Mr Stanton accepts it is likely he would have used such words.[22]

[74] Although Mr Stanton stated he did not use the words "fishing expedition" in relation to that particular meeting, he accepted he did use the words in other meetings, which he stated was an inappropriate turn of phrase to refer to the fact that he would chase all the relevant information. I find it is likely that in the meeting of 30 June 2014 he did say he was going on a "fishing expedition" with Mr Potter's staff to interview them individually to find out what was wrong, but not that he said that it was "…to find out what is wrong with regards to your management". Mr Stanton stated he would have advised Mr Potter that it was his intention to interview all the staff. As I stated above, Mr Stanton's recollection of events is significantly impaired. However, his recollection is consistent with what Mr Potter relayed to Mr Aitken. That is also given some support by the fact that there is evidence Mr Stanton did interview staff members, such as Ms Smith. It also is consistent with the letter written by Mr Stanton of 30 June 2014 which stated:

> "I confirm that the results of the survey are unsatisfactory and do not demonstrate a standard of management and leadership that is acceptable to Council. I acknowledge however that you are not solely responsible for the outcomes of the survey and that there is a need for further action with the Local Laws Branch both individually and as a team."[23]

[75] I also find that Mr Stanton did say to Mr Potter that he could be his "best friend or his worst enemy." However, I find that Mr Stanton said those words in the context that Mr Stanton explained that they were used. Mr Stanton accepted that he would have used those words to emphasise that he was going to take action, to indicate that he could be Mr Potter's best friend by providing guidance and assistance but if it was not going well, he could end up being somebody who would be prepared to take action. While I consider the use of such words were ill-chosen and inappropriate and could be regarded as intimidating by Mr Potter, I do not consider, in the context of the overall meeting, that they were bullying or aggressive.

[76] I am not satisfied that Mr Stanton sat with his fingers interlocked across his chest. While I have taken into account that Mr Stanton has suffered a significant medical episode since 2014, I accept Mr Stanton's evidence in that regard that it was not his habit to have his fingers interlocked across his chest. I accept Mr Stanton did not engage in small talk. I find however, that while Mr Stanton was firm and direct in what he said to Mr Potter, he was professional. That accords with Mr Wolff's recollection. It is given some further support by the fact that Ms Kelly found him to be a reasonable man and quite personable in her interactions with him, although given the difference in context her experience is of limited weight. The terms of the letter of 30 June 2014 prepared by Mr Stanton were firm but no attacking in stating that: [24]

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21 T4-2-T4-3; Exhibit 64.
22 T4-84; T5-52.
23 Exhibit 6.
24 Exhibit 6.

> "The matters that have been raised in this letter are serious and a significant improvement from yourself is required to meet the expected standards of performance. Council is committed to working with you to achieve a successful outcome".

[77] Given Mr Potter's refusal to accept that the survey results could reflect on his management and could require steps to be taken to address those matters, it is likely he perceived any criticism made against him in that respect, or the raising of issues as to his management, to be ill-founded and unfair. It is likely that he perceived this approach to be bullying, even when in fact that was not the case. That is particularly so when it is being raised by someone he did not know, who had only recently come into the position and where there was no evidence that prior to 2014 his performance had been questioned.

[78] I accept that Mr Stanton may have been at his desk when Mr Potter walked in and then walked across to the meeting table.

[79] Overall, I do not find that the allegations in [7] of the SOC are established or that Mr Stanton's behaviour was threatening, overbearing or bullying.

Post 30 June 2014 Meeting

[80] Mr Potter stated that after the 30 June 2014 meeting, he was confused and stressed in the following weeks as to what he should do. He stated that he requested weekly meetings with Mr Wolff and Mr Stanton, to see how they could work through the issues to help him deliver what they were asking of him, which did not occur. He expressed concern to the psychiatrists this did not occur because he felt he needed guidance. He completed an action plan which he emailed to Mr Stanton and Mr Wolff.

[81] He stated that he had a team meeting with his staff and Mr Wolff a couple of weeks after that, to discuss operational matters, but did not recall having further contact with Mr Stanton until 21 July 2014 as far as he could recall.

[82] Mr Potter's confusion as to what he should do appears to stem from the shock that his management was being challenged which had not been done before, based on a survey which he did not regard as being of great significance or importance, which had been completed sometime before. His confusion appears to arise from his lack of understanding rather than a lack of explanation of what was expected. The letter of 30 June 2014 sets out very clear expectations in relation to his performance, as well as "initiatives and actions" to be undertaken to assist him to successfully meet expectations. There were initiatives outlined which were directed to staff in his team as well, including "the development and implementation of performance plans for each member of the Local Laws Branch". That is supported by the evidence of Ms Kelly. She stated that Mr Potter did not understand where the allegations in the letter of 30 June 2014 came from. Mr Potter stated that he also showed her the letter of 30 June 2014 to Ms Kelly who was two rooms away from him and with whom he had a good working relationship. Ms Kelly stated that Mr Potter came into her office quite confused and that he did not see it coming. She agreed that before he got the letter he considered that he had been doing a good job. As to the letter of 30 June 2014 and the issues it raised , she did consider that his consistency was an issue in relation to his treatment of staff, because of differential treatment. She accepted there were lots of issues in his department. She agreed there

were problems in Mr Potter's team which had been allowed to drift along prior to Mr Stanton's intervention, and that there was dysfunction in the team.

[83] Ms Kelly agreed that in mid-2014 there was dysfunction in the Local Laws Team and staff members would come to her to complain and to seek advice. She agreed there was a lot of backstabbing and infighting. She considered that something had to be done about the situation, both amongst the team and from a management point of view.

[84] She advised him to read the letter very carefully to determine what he should do. According to Ms Kelly, Mr Potter did become very withdrawn at work after receiving the letter of 30 June 2014.

[85] Subsequently, Mr Potter's lack of understanding and insight into the issues raised by the 30 June letter is further demonstrated by the fact that he spoke to Sharon Smith as part of his "own investigation" to see where the trouble lay. He asked her whether she had had a meeting with Mr Stanton. Ms Smith confirmed she had. He stated that he showed her the letter of 30 June 2014 and asked her where the problem was and what he could help her with. She told him that the matter of consistency was an issue. Mr Potter stated that he told her at the time that he thought he was being targeted by Mr Stanton, and they wanted to get rid of him. They had a discussion about other staff members. According to Mr Potter, they spoke about RS and Mr Potter said that if he had not given RS a job he would probably be in jail. Mr Potter stated he made that comment in jest.

[86] Mr Potter's response is reflective of the fact he did not consider he had done anything that required any response from him. He agreed that one of his complaints with staff was a lack of co-operation and backstabbing, but didn't agree that one of the complaints made by his staff about him in the organisational survey was his lack of consistency in the way he treated his staff. He also did not agree that Sharon Smith had told him there was an issue with him not treating people consistently. He stated it was a general issue of consistency.

[87] Following Mr Potter's discussion with Ms Smith, Ms Smith apparently told RS the following day about what Mr Potter had said about him. RS became very upset and complained to Mr Wolff about the fact that his private information had been disclosed. That set off a second series of events which resulted in a workplace investigation.

[88] Mr Wolff recalled that RS came to see him with another individual in his office and raised concerns in relation to a matter involving Mr Potter. RS was upset. He stated that he had been informed by a work colleague, who Mr Wolff believed was Ms Smith, that she had had a conversation with Mr Potter the evening before and private information pertaining to RS was disclosed by Mr Potter to Ms Smith. Mr Wolff subsequently took RS to meet with someone in Human Resources. That appeared to be Ms McCrohon.

[89] RS originally told Mr Wolff he did not wish to make a complaint but subsequently changed his mind after discussing it further. RS was sent home that day and told he needed to formalise a complaint against Mr Potter if he was going to make a complaint. RS did subsequently make a complaint, which Mr Wolff forwarded to Human Resources as well as to Mr Stanton.[25]

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[25] Pleaded in 7A of the SOC and admitted.

[90] Ms McCrohon recalled that RS had been brought to see her by Mr Wolff after he had complained that Mr Potter had disclosed confidential information about RS. She stated that RS was very upset, and it took some time to settle him down. Ms McCrohon recalled RS complaining that one of his colleagues had said to him that their manager, who was Mr Potter, had disclosed confidential information that had been shared through the recruitment process relating to RS. She stated that as a result of him coming to her, she took RS through the process that would occur if the matter was investigated. He went home that day and he was offered employment assistance services. He was told if he wanted to make a formal complaint he would need to do so, and they would then track through the process. Given RS was upset and angry, she stated that she considered that it was better to avoid him coming into contact with Mr Potter that day so as to give them some distance. She stated that the group had a history of oversharing information and that there was not a high level of confidentiality within the group.

[91] Following the formal complaint being made, meetings were held with four staff members on or about 14 July 2014. Notes were made of those meetings by both Mr Stanton and Mr Potter.[26] Mr Stanton's notes are headed "Alleged Breach of Privacy (Ron Potter) – RS".[27] Two matters that were noted in the notes have been attributed significance by the plaintiff. Firstly, the reference in Mr Stanton's note about the interview with RS stating that his intent was that there not be a repeat of the situation but that he could continue to work with Mr Potter. Secondly, Ms Smith being recorded in Mr Wolff's notes as saying that Mr Potter had made a comment to her regarding having "rich sisters" and instigating legal action against the Council in the event of him being dismissed from his employment.

[92] Mr Stanton recalled that there were issues in relation to an interaction between Mr Potter and RS which caused RS concern. He stated that the matter was brought to his attention by Mr Wolff. He recalled interviewing all of the Local Laws staff at some point but could not recall whether that was specifically about the matters raised by RS.

[93] Mr Stanton could touch type and recalled that he took notes from conversations with members of staff, which would have been the basis of the document of interviews with staff on 14 July 2014.[28]

[94] Mr Stanton accepted that if he had recorded matters in his notes of interviews on 14 July 2014,[29] he would have been told those matters. That would have included that he was told by Ms Smith that Mr Potter had shown her the letter of 30 June 2014 and indicated "he felt he was being stitched up" and that "he has two rich sisters and would fight it all the way". Mr Stanton also would have been aware from his notes that RS had stated that he was still willing to work with Mr Potter.

[95] Aitken Legal were engaged to carry out an impartial investigation in relation to the complaints of RS and other matters which arose as a result of the meetings with the staff on 14 July 2014. At the time of their engagement, it appears the typed notes of the meetings were not available. Ms McCrohon, however, said that she would have been aware of the content of those discussions at the time they were occurring as it was a

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26 Exhibits 3 and 4 to Report of Mr Wilkinson Exhibit 57.
27 Appendix 3 Exhibit 57.
28 Exhibit 62.
29 Appendix 3 to Exhibit 57.

matter being discussed, although she could not specifically recall that being the case. That is given some support by the follow up email from Ms Johnston on 17 July 2014, who worked in Ms McCrohon's team, to Chris Campbell of Aitken Legal. It identified the three allegations to be investigated against Mr Potter and attached a formal complaint lodged by RS, a performance report written by a Mr Bryson relating to RS, and the written notes prepared by Mr Stanton and Mr Wolff of the meetings of 14 July 2014, even though the notes were dated 17 August.[30] That email requested that Aitken Legal draft the letter to Mr Potter in relation to the formal complaint that was to be made against him and the list of allegations.

[96] Ms McCrohon said that she was responsible for engaging Aitken Legal to investigate. Aitken Legal were part of the Council panel. Ms McCrohon did not think that there was a separate letter of engagement. She stated that the notes on 14 July 2014, which were prepared by Mr Stanton and Mr Wolff and found at Appendix 3 and 4 of the Aitken Report, were matters which she either reviewed or she had been told about at the time.

[97] Aitken Legal were requested to prepare a letter to Mr Potter in relation to the complaints and investigation. That was done however there was no evidence in relation to how it came to be drawn.

Meeting of 21 July 2014

[98] A meeting occurred on 21 July 2014 between Mr Potter, Mr Stanton and Ms McCrohon. Mr Potter was contacted by Ms Johnston requesting that he attend the meeting at approximately 2.00pm – 3.00pm. He was not advised as to the nature of the meeting nor that he could bring a support person. At the meeting Mr Potter was provided with the letter dated 21 July 2014.

[99] The letter of 21 July 2014 was drafted by Aitken Legal. It appears likely to have been drafted by the Partner of Aitken Legal, Mr Campbell, who was first contacted by Ms McCrohon and Ms Johnston, not Mr Wilkinson.[31]

[100] Mr Potter recalled a meeting with Mr Stanton and Ms McCrohon on 21 July 2014.

[101] He stated that he had no notice of what the meeting of 21 July 2014 was about. He attended the meeting in Mr Stanton's office. Mr Stanton and Ms McCrohon were present. Mr Stanton told him they were standing him down. Ms McCrohon added that they were standing him down pending an investigation. When Mr Potter asked what he had done wrong, Ms McCrohon told him that he had disclosed confidential information about RS. He said he responded that he had not, and that only he and Mr Grant knew about that. He asked what the worst-case scenario was, and Ms McCrohon said it could result in his termination. He stated that he could not believe what was happening. He stated was upset and confused as he cradled his head in his hands.

[102] He was told by Ms McCrohon that he should take his personal belongings and could take his work car home and return it the following day, and that his access card would not work after he had left the building.

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30 Exhibit 60.

31 [8(c)(iii)-(vii) SOC].

[103] He was given a letter at the meeting signed by the CEO, Mr Smith.[32] That letter, amongst other things, outlined an investigative process that was to be undertaken by Mr Wilkinson, which was described as an investigation of serious misconduct. The letter also contained a high level summary of the complaints against him.

[104] Mr Potter stated that he did not read the letter through. He stated that Clause 6 of the Disciplinary Action Procedure referred to in the letter was not attached. Mr Potter stated that he felt prejudged and that he had not had the opportunity to provide his side of the story. He felt confused, angry and upset.

[105] As to the 21 July 2014 meeting, Mr Potter was adamant that in response to his questions as to what he had done wrong, Ms McCrohon stated that he had divulged confidential information about RS, rather than there being an allegation to that effect. According to him "It's embedded in my brain".

[106] He stated that notwithstanding the fact that the letter stated there would be an investigation conducted by Mr Wilkinson, he felt that he was prejudged in the matter. He maintained that was so even though when Mr Wilkinson had told him early in his interview of 30 July 2014 that no decision had been reached as to what actually happened, he had responded "That's fine. I sort of realised that.". Mr Potter stated that while he responded that way, that was not what he thought.

[107] Mr Potter agreed in cross-examination that as at 21 July 2014, he knew he could access the Council's employee assistance program and could access a confidential counselling service. He accessed the counselling service at some point in August 2014, although he cannot recall the date.

[108] Mr Stanton could not recall the meeting on 21 July 2014, but agreed he could have told Mr Potter he was standing him down. He could recall that there was some discussion about the complaints of RS and the confidential information.[33] He could recall some discussion about the use of a vehicle by Mr Potter.

[109] Ms McCrohon recalled that the letter of 21 July 2014 was prepared by Aitken Legal. Ms Rowena Johnston would then have prepared it for signing and someone from the human resources team would have spoken to Mr Smith about the letter. She does not recall if it was her or Ms Johnston.

[110] Ms McCrohon stated that at the 21 July 2014 meeting Mr Stanton had explained to Mr Potter that he was being stood down. Ms McCrohon's recollection was that Mr Stanton went through the letter of 21 July 2014 with Mr Potter. She recalled that he said "What've I done?" and something to the effect of "What have I done wrong?". She said that the allegations would be shared with him formally in a letter. She said he asked specifically who and what to which she responded "it has been alleged against you that you have divulged personal information about [RS's] incarceration."[34] She rejected that she said "You've divulged personal information about RS's incarceration". She said she was confident that was the case because she had enough experience with allegations and

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32 Exhibit 7.

33 Mr Stanton in evidence identified what that information was but in the interests of RS' personal information not being disclosed, I have referred to it in this way.

34 In evidence she stated what it was.

investigations to know that until a matter is proven through the process, it is always alleged. She stated that she would not have left out the word "allegation". Ms McCrohon did recall that Mr Potter responded that he did not disclose confidential information of RS and only Mr Grant knew.

[111] Ms McCrohon recalled that Mr Potter asked "Where could this lead?" Based on her usual practice, she believes that she told him there would be an external impartial investigation and said that depending on the findings, there could be no action up to possibly termination or other disciplinary action. Ms McCrohon does not recall that Mr Potter was visibly upset at the time, but that he seemed shocked and seemed to want to get to the bottom of things.

[112] Ms McCrohon stated that she told Mr Potter it was really important not to step outside the process. She could not recall mentioning any specific person who he should not contact, but could recall that she mentioned the team and anyone at the Council or anyone previously employed by the Council. She stated that she emphasised this because there was a history of his team oversharing information and talking about the private information of other people.

[113] Ms McCrohon recalled speaking to Mr Potter via telephone on the evening of 21 July 2014. She remembered reinforcing that he was not to talk to other people and that they had a discussion about the process and how long it may take. She stated the phone call was really to see how he was doing and to emphasise that it was important for him not to speak to people that may be asked to be part of the process. She cannot recall whether she mentioned any specific person but stated she did mention people previously employed by the Council because Mr Potter had strong personal relationships with people outside the Council and had mentioned Mr Grant in relation to the issue with RS.

[114] The decision as to whether a staff member would be suspended had to be made by the CEO, Mr Smith. Ms McCrohon stated that she did not recommend suspension one way or another, but she said that there was consideration of the health and wellbeing of the team given there was infighting, as well as Mr Potter, in light of the complaints made.

[115] Her recollection was that it was Mr Stanton who spoke to Mr Smith, as Mr Smith was Mr Stanton's manager. She stated that the practise was that the CEO, Mr Smith, would be given all material that was relevant. She did not recall if she had given that material to him personally.

[116] Mr Smith signed the letter of 21 July 2014. He has little recollection of what he was told in relation to the letters, and agreed that on its face, the letter of 21 July 2014 appeared to indicate that the reason for Mr Potter being stood down was to give him time to get ready for the interview. He stated, however, that his practice was to ask what the background was, and the issues involved, whether any applicable procedure had been followed and whether legal advice had been obtained. His practice was to ensure proper procedures were followed. He suspects the letter of 21 July 2014 had been prepared by Ms McCrohon.

[117] Mr Smith was directed to different disciplinary procedures at the Council. He had no recollection of what procedure applied in relation to the investigation and suspension of Mr Potter nor could he recall the evidence that was before him when he signed the letter. He could recall that there was a complaint and appreciated the serious nature of the suspension, such that he considered there would have been reasonably strong evidence,

and that there was evidence and information that warranted the action that was taken. He made reference to notes of 14 July 2014 from Mr Stanton and Mr Wolff being in existence but he could not recall whether he had specifically received them or looked at them.

[118] In cross-examination, Mr Smith was asked whether he had considered deploying Mr Potter somewhere else in the Council during the investigation. Mr Smith stated that it was unusual to consider deploying someone such as Mr Potter somewhere else in the Council in he circumstances. He said that redeploying to customer service would not have been viable, given the staff issues that were involved and given that there were reasonable grounds for the suspension. He said that the process had to be played out in order to reach any view on the matter. He speculated that the evidence and the complaint of RS were matters of which he was aware at the time of the suspension and that justified the suspension, but he could not recall if he had been provided with any such information.

[119] As to considering alternatives for Mr Potter's employment, Mr Stanton could recall that it was raised with him whether there were any alternative positions Mr Potter could work in within the Council. He thinks that there were some suggestions about his working in the call centre, but he could not recall any details. It had been suggested that he could work in frontline management as a customer contact officer, but Mr Stanton stated that Mr Potter would have required training. He agreed that it was possible in theory that Mr Potter could have been put into other roles in disaster management or the Local Laws area of governance, as well as other roles .

Findings

[120] The material aspects of the meeting of 21 July 2014 that are disputed are:

(a) That Ms McCrohon had said, in response to Mr Potter asking what he had done wrong, words to the effect of "You have divulged personal information about a staff member, namely [RS's] [personal information]. You told a staff member about [RS's] [personal information]";

(b) That Mr Potter had stated "No I didn't, the only persons who know about that are myself and Michael Grant. Where is this leading? What is the worst case scenario here?";

(c) That Ms McCrohon had said words to the effect of "It could end in the termination of your employment";

(d) That Mr Potter had been visibly upset and had his head in his hands.

[121] It is also alleged that the only information which the Council's CEO had in relation to the formal complaint by RS was the formal complaint prepared by RS, pleaded in paragraph 7A of the SOC. Mr Smith could not recall what material he had before him at the time, however given the letter was drafted after the notes of the 14 July 2014 meetings were made, it is likely he was provided with them, given Ms McCrohon's evidence that was the usual practice for all material information to be provided to a CEO.

[122] While Mr Stanton could recall words being spoken about RS's personal information and that there was a discussion about RS's concern. He stated in cross-examination that he believed what Mr Potter had heard to be correct. However, clarification sought of that

statement made it plain that he was basing his evidence upon what he knew to be the general nature of the discussion and what would have occurred, rather than any recollection. I accept Ms McCrohon's evidence that she did not refer to the divulging of personal information about RS as having occurred, but rather referred to it as an allegation that had been made. Ms McCrohon was experienced in HR management, having worked in that field and achieved the position of manager. She stated that would have referred to the matter as what was alleged, because she had dealt with such matters enough times to know that until the matter was proven through the process, it was always alleged. She was emphatic that she would not have left out the word "allegation".

[123] Ms McCrohon's evidence is supported by the terms of the email from Ms Johnston to Mr Campbell which refers to the discussion with Ms McCrohon and that the investigation "is relating to three alleged allegations".[35] Further, the letter of 21 July 2014 emphasised that no findings had been made, that an investigation process was to occur and that "in summary the allegations to be provided to you will be based upon the complaints that have been made by [RS] regarding your behaviour … from Ms Smith regarding the same issue and from the evidence of other colleagues who are aware of those incidents and that the complaint is based upon alleged breaches of confidentiality". I accept given Ms McCrohon's experience and training she referred to the subject of the complaint as allegations.

[124] I also accept that when Mr Potter asked where the investigation could lead, Ms McCrohon explained that they would get an external impartial investigation to track through the process and, based on the findings, a decision could be made ranging from no disciplinary action up to termination. Ms McCrohon was definite that she recalled saying "It could end up in disciplinary action up to and including termination" rather than just stating "It could end in the termination of your employment", as Mr Potter recalled.

[125] Ms McCrohon's evidence accords with what would be expected of someone with her training and position. It also accords with the fact that the letter of 21 July 2014 emphasised that there would be no determinations without appropriate findings, although the letter did foreshadow that whether Mr Potter's employment could continue with the Council would need to be a matter considered if there were findings of serious misconduct. Mr Potter had also acknowledged when speaking to Mr Wilkinson that Mr Wilkinson informed him that no decision had been reached at that point and he responded "That's fine. I sort of realised that" which is consistent with the matters concerned being described as allegations by Ms McCrohon rather than a prejudged conclusion.

[126] Ms McCrohon no longer worked with the Council and was measured in her evidence and gave it impartially I accept Ms McCrohon's evidence as to what occurred.

[127] Notwithstanding the statements he made to the contrary to Mr Wilkinson, and the terms of the letters of 21 and 28 July 2014, Mr Potter continued to assert that he felt a decision had been reached and he had already been judged. That contention lacks credibility. I do not accept his evidence. I consider Mr Potter's evidence as to what occurred is unreliable as it is distorted by his feelings of persecution rather than being a recollection of what objectively happened. The fact that Mr Potter recalls the matters of disclosure

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[35] Exhibit 60.

and termination being stated in more absolute terms is consistent with the fact that he was upset at being stood down and investigated which he considered was unfair and he felt he was being victimised.

[128] I accept that Mr Potter showed in the meeting that he was visibly shocked, as was observed by Ms McCrohon, but not that he cradled his head in his hands and asked "What have I done wrong?".

[129] I also find that Mr Potter was told at the meeting that he could not contact any witnesses or potential witnesses, nor have any contact with the complainant and any other Council employees outside those previously advised. That is consistent with paragraph 4 of the letter of 21 July 2014 and Ms McCrohon's evidence that Mr Potter's team had a history of oversharing information.

After the Meeting of 21 July 2014

[130] Mr Potter stated that when he got home and told his wife he had been stood down, he was very emotional and crying because he felt targeted when he had done nothing wrong. He also rang Mr Grant, who was his friend and ex-director, to see how he should handle it. He had never been stood down before.

[131] Mr Potter stated that later that night Ms McCrohon rang him to see if he was alright, after he had spoken to Mr Grant.

[132] I accept that Ms McCrohon, in a further conversation with Mr Potter that evening, emphasised to him that it was important for him not to step out of the process and not to speak to anyone who was in the team or anyone who had previously been at the Council. Ms McCrohon had good reason as to why she had said that, namely it was important for him to follow the process as there was a history in that team of oversharing and it could affect the investigation.

[133] Ms McCrohon stated that Mr Potter had mentioned in the meeting of 21 July 2014 when the question of the allegation of RS that he said they should speak to Mr Grant in connection with the issue about RS. Mr Potter also stated that he had referred to Mr Grant in that meeting. He also agreed that Ms McCrohon had emphasised a number of times that it was important for him not to talk to anybody about the matters concerned and follow what was contained in the letter. I find that it is likely that Ms McCrohon did refer to Mr Potter not speaking to potential witnesses and did refer to Mr Grant in her discussion with Mr Potter on the evening of 21 July 2014. That is consistent with the fact that Mr Potter mentioned Mr Grant as a relevant person in the meeting of 21 July 2014 and with what was stated in the letter of 22 January 2015,[36] in relation to that conversation which Ms McCrohon and Mr Stanton met with Mr Potter to discuss. If Ms McCrohon considered what it stated was incorrect, I consider it was likely that she would have corrected it, given that founded a further allegation of misconduct against Mr Potter. There was no evidence suggesting that Ms McCrohon had any personal agenda in relation to Mr Potter. The objective evidence suggests she was simply doing her job.

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[36] Exhibit 22.

Letter of Allegations and Meeting with Mr Wilkinson

[134] No specific allegations arise out of the conduct of investigation or its findings. However, allegations are made as to the failure to provide Mr Potter with a support person, keep him updated and provide the report to him by 8 August 2014 which Mr Wilkinson is alleged to have acted as agent of the Council.

[135] Mr Potter received a letter on 28 July 2014.[37] It contained further allegations and particulars of allegations. He stated he received that in the mail the following day. That letter had been prepared by Mr Wilkinson for the Council.

[136] Mr Potter met with Mr Wilkinson on 30 July 2014. Mr Potter agreed that when he met with Mr Wilkinson, he discussed the factions within the staff and the fact that there was a lot of backstabbing going on. Mr Potter said he mentioned a meeting where he had put up on a whiteboard a reference to "no backstabbing" and "team cohesion".

[137] Mr Potter's evidence-in-chief was that his union representative, Jacelyn Mitchell, was present by phone. According to Mr Potter, Ms Mitchell asked about the time of the investigation report, to which Mr Wilkinson had responded that it would be seven days from the conclusion of the interview. Mr Potter stated he said to Mr Wilkinson, "So seven days, today is Wednesday, so it will be next Friday that the finding would be in" and Mr Wilkinson stated "Yeah it should be next Friday".[38]

[138] Mr Potter agreed that at the end of the meeting of 30 July 2014, after Ms Mitchell, his union representative, made an inquiry as to the timeframe for when the matter would be finalised. Mr Potter's evidence was that Mr Wilkinson said:

> "The original timeline was to try and get it finalised within the next seven days. That's probably going to be dependant now upon the information that Ron's going to give me access to following the interview.
>
> Remember that?---Yes. Yes.
>
> And then Ms Mitchell said, "Yep." And Mr Wilkinson said:
>
> And I'm now going to have to try and speak to Michael Grant.
>
> And he asked you whether you could think of someone else that he could speak to. Do you remember that?---Yes.
>
> And you said:
>
> No. Just as I said, I spoke to Ros about the counselling form.
>
> That was the lady from HR?---Yes.
>
> So you could possibly talk to Ros. Michael Grant was about the jail thing.
>
> Mr Wilkinson said:
>
> Michael Grant, I'm going to speak to.
>
> Remember that?---Not in its entirety, no."

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37 Exhibit 8.
38 T1-54/22.

[139] It was also put to Mr Potter that:

> "Mr Wilkinson said to you:
>
> Okay. I've got no more questions, so thanks for your time. I'm going to stop the recording now. I'm thinking for ease, Union – referring to him as Mitchell:
>
> …is it easier if I leave the room and you have a quick word with Ron before I go answer it?
>
> Um, yep. That's fine.
>
> Remember that?---Yes.
>
> And that's what happened, wasn't it?---That's what happened at that time, yes.
>
> Yep?---And he turned the tape off, yes."

[140] Mr Potter, however, stated that it was after the meeting when he walked out the door, Mr Wilkinson confirmed that in seven days there would be a report, and he said that would make it next Friday to which Mr Wilkinson responded that it "should be".

[141] Mr Potter stated in cross-examination that the conversation that the report should be Friday occurred after the tape was turned off. He rejected the suggestion that he only said that the conversation with Mr Wilkinson took place when they were walking out the door, after he was told that there was no reference on the tape to the conversation. Mr Wilkinson was called on behalf of the defendant. Mr Wilkson stated that he could not recall any conversation taking place with Mr Potter at the end of the interview about the timeline for finalisation after he had turned the tape off. Mr Wilkinson could not recall a discussion about when the report might be available or when his investigation might be concluded. Following this, the recording of Mr Wilkinson's interview with Mr Potter was played, where Mr Potter's union representative, Ms Mitchell, raised the expected timeframe. He agreed, however, that he was asked about the timing of the investigation by the union representative who attended the meeting with Mr Potter on 30 July 2014 by telephone. Mr Wilkinson was played the recording. He did not recall any other discussion with Mr Potter about the timeline for finalisation. He did not, however, accept that he had a conversation with Mr Potter where he stated that there was a seven day completion time, although he had indicated that was what he was aiming for. In the record of interview with Mr Potter and Ms Mitchell, however, he noted that he qualified that by saying that he was going to go and interview Mr Grant at the request of Mr Potter.

[142] Mr Wilkinson was extensively cross-examined by the plaintiff's counsel. Mr Wilkinson stated that Aitken Legal were retained to conduct an investigation which involved interviewing witnesses, writing a report and delivering a report to the Council.

[143] Mr Wilkinson did not believe that there was a timeline by which he was to interview Mr Potter within seven days of having interviewed other witnesses and then provide a report within seven days of having interviewed Mr Potter. He did not know where the timeframe of seven days which he had discussed with Mr Potter emanated from.

[144] Mr Potter's recollection that Mr Wilkinson agreed the report should be next Friday after the tape was shut off was inconsistent with this evidence-in-chief, contrary to the SOC which referred to him being told "at the interview" that he would be told of the outcome on 8 August 2014 and, unsupported by Mr Wilkinson's evidence.

[145] Mr Wilkinson stated that the investigation was based on the letter of 21 July 2014 and the instructions which came from the Council, which appeared to be encompassed in an email of 17 July 2014. He then drafted the more detailed allegations on 28 July 2014. Mr Wilkinson stated he had conducted workplace investigations before.

[146] According to Mr Wilkinson, there was no set timeline for carrying out the investigation. His time for the investigation was limited because he worked two days a week at the Gold Coast. He stated that he drafted the letter of 28 July 2014, but not the letter of 21 July 2014.

[147] Ms McCrohon, in her evidence, later confirmed that Aitken Legal had drafted the letter of 21 July 2014. Presumably that must have been Mr Campbell, the Partner of Aitken Legal, who was first contacted. Ms McCrohon also confirmed that no specific timeline was discussed with Aitken Legal for the completion of the investigation. A timeline was provided in the letter of 21 July 2014 as to when the detailed allegations would be provided and when Mr Potter was expected to meet with the investigator.

[148] Mr Wilkinson did not have the role of case manager. Ms Johnston in the Council was nominated to have the role of organising witnesses to attend interviews with him. Mr Wilkinson did not agree that it was standard to have a coordinator of an investigation, or for a coordinator to update an employer or employee as to the progress of an investigation.

[149] Mr Wilkinson stated that the fact he finished his report on 9 August 2014 it was not because he had missed the deadline of 8 August, but rather because he routinely worked on Saturday mornings after returning from the Gold Coast on a Friday.

[150] Mr Wilkinson noted that none of the allegations which he was investigating related to Mr Grant. He did, however, include it in the report. He did have a discussion with Mr Grant at the invitation of Mr Potter.

[151] It was clear from the short excerpt of the recording of the exchange between Mr Potter and Mr Wilkinson at the end of the interview on 30 July 2014 that Mr Potter had wanted Mr Wilkinson to interview Mr Grant. Mr Wilkinson, at page 22 of his report, noted that Mr Grant had spoken with Mr Potter during the course of the investigation and that one of Mr Grant's responses indicated that Mr Potter had disclosed allegations to Mr Grant prior to that time. The report considered that Mr Potter should have identified Mr Grant as a potential witness whom he should not have contacted in accordance with the instructions contained in the suspension letter. That said, the report indicated that it was a minor issue, however it reflected Mr Potter's credibility and abilities as a manager.

[152] Mr Wilkinson was on occasion defensive including when it was suggested he missed the deadline for delivery of the report, taking exception to the suggestion. Generally, however, I found him to be a straightforward and candid witness, although he did have a tendency to become impatient with some of the questioning. I accepted his evidence.

30 July Meeting

[153] The plaintiff alleges that on 30 July 2014 Mr Wilkinson told him that the investigation would be concluded on 8 August 2014, and he would know the findings. It is alleged as a result of being told of the date, Mr Potter waited for the phone call all day. The following day he attended his General Practitioner.

[154] I am not satisfied that Mr Wilkinson gave Mr Potter an assurance that he would have a response in seven days. I find that the only conversation involved Ms Mitchell had raised with Mr Wilkinson what the timeframe was, and that Mr Wilkinson had said that the original timeline to finalise his findings was expected to be seven days, but he then qualified that by the fact he had to talk to Mr Grant. Mr Potter says that the assurance was given after the meeting had finished. Mr Wilkinson rejected that he would have done that after the meeting, although he had very little recollection of what had occurred, apart from what was recorded in his report and in taped interviews. Mr Wilkinson had the benefit of the excerpt of the meeting where timing was discussed with Mr Potter and the union representative which was played. The likelihood is that Mr Potter did not ask that question, given that his union representative had just clarified the timeline. Further, contrary to what is pleaded, even on Mr Potter's version, Mr Wilkinson did not say that it would be provided within seven days but rather that it should be. The defendant submitted Mr Potter was not honest in his evidence in this respect and submits that when it was raised with Mr Potter that the matter was not on the tape as he described, he formed the view that it must have occurred after the interview. I do not consider that Mr Potter was dishonest. I consider he had seven days in his mind and engaged in a process of reconstruction as to how that occurred, which is borne out by the contradiction in his own evidence and how the allegation was pleaded.

[155] I accept Ms McCrohon's evidence that no specific timeline was set in relation to when the report would be provided and the outcome notified to Mr Potter, although indicative time frames were likely to have been requested from the investigator.

Delivery of Investigation Report and Events up Until Letter of 22 January 2015

[156] It is alleged that the Council failed to inform Mr Potter of the outcome of the investigation and cease the suspension on 9 or 11 August 2014.

[157] Mr Wilkinson's report was emailed to the Council on 9 August 2014. There is no evidence it was seen by the Council on that day. Given 9 August fell on the weekend, it is unlikely to have been seen by any employee of the Council until the Monday. The executive summary of the report provided that:

> "1. A grievance has been lodged by [RS] regarding Ron Potter (Potter) which alleges:
>
> > (a) Allegation 1 – That on or about 23 October 2013 Potter demonstrated poor judgment when requesting Rob Bryson, then a temporary employee, to produce a report regarding [RS'] performance at work (the Report).
> >
> > (b) Allegation 2 – That in relation to a matter involving the service of a summons at 84 Duke Street, Potter attempted to exert influence over [RS] by reference to information that [RS] had shared with him regarding an earlier criminal matter.

These allegations if proven, potentially amount to serious misconduct.

In addition as part of the investigation into the above, further issues were identified that would also if proven, potentially amount to serious misconduct by Potter. As a consequence, these issues were investigated and the following additional allegations were put:

> (c) Allegation 3 – That on 11 July 2014 Potter showed to Sharon Smith the letter dated 30 June 2014 sent to him by Mark Stanton (Stanton), Acting Director Planning and Development, regarding issues of personal improvement, demonstrating a lack of confidentiality in the discussions between Potter's line management and him.
>
> (d) Allegation 4 – That on 11 July 2014 Potter attempted to divulge to Sharon Smith the information that [RS] had shared with him regarding the earlier criminal matter.
>
> (e) Allegation 5 – That on 21 July 2014 Potter invited Sharon Smith to telephone him in direct contravention of the express instruction at numbered paragraph 4 of the letter provided to him at the time of his stand down.

2. In our view, on the balance of probabilities:

> (a) there is insufficient evidence to substantiate findings of serious misconduct in relation to Allegations 1 to 5;
>
> (b) there is sufficient evidence to substantiate a finding of misconduct in relation to Allegation 4;
>
> (c) the evidence generally however supports findings of inadequate performance in a number of areas. In particular that:
>
> - in relation to Allegation 1, that Potter did request Robert Bryson to produce the Bryson Report and while this is not considered to amount to serious misconduct, it does demonstrate poor judgment on his part as a manager;
>
> - in relation to Allegation 3, that Potter did divulge to Sharon Smith the content of the letter of 30 June 2014 which is demonstrable of poor decision making on his part as a manager
>
> - in relation to Allegation 4, that Potter's remarks (as accepted on his account) in all of the circumstances were reckless, inappropriate and further evidence of poor judgment on his part as a manager;
>
> - generally, it should be noted that during this investigation, it became apparent that Potter had spoken with Michael Grant (Grant) regarding the investigation and allegations after he was suspended, and after it should have been apparent that Grant was likely to be a witness to the investigation. This again demonstrates poor judgment on Potter's part. Council may wish

to put this allegation to Potter as part of the raising of issues generally in respect of his performance.

3. In our view the finding of misconduct in allegation 4 is sufficient for disciplinary action to be taken against Potter. A sanction up to written warning would be appropriate.

4. We would also recommend that the Potter's performance as a manager be reviewed and performance management be considered. The issues identified clear suggest failings as a manager."[39]

[158] On 9 August 2014, Mr Potter forwarded a medical certificate to the Council following his visit to Dr Blake. Her report of this examination revealed that:

"Surgery consultation recorded by Dr Julie Blake on 09/08/2014

PC: stressed/ angry/ work issues

recently stood down from work, on pay

feels treated like a criminal

has worked at Council for 11 years

lost weight

not eating or sleeping properly

getting angrier the more he talks about it as he feels he hasn't done anything wrong

feels someone has been sabotaging him at work

has been drinking more etoh than usual

denies TOSH but if he saw the man who he's blaming for the complaints, he can't make any guarantees as he says he's very angry about it

r/v Wednesday - long appt

will try and find out if he can access EAP which is counselling subsidised through work

no personal history of anxiety or depression

has been going running a lot to distract himself from his thoughts

going to help his son do his gutters today, play touch footy this afternoon

Examination: dressed in running jacket/ jeans

threw his keys onto consulting room desk

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39 Exhibit 57.

says he doesn't know where to start

mood - angry, upset

affect - controlled

no FTD / perceptual disturbance

Reason for visit: Work problems

Actions: Medical Certificate given from 09/08/2014 until 17/08/2014.

Smoking history updated."[40]

[159] Dr Blake's certificate stated that Mr Potter was suffering a medical condition and would be unfit for duty from 9 August 2014 to 17 August 2014.

[160] On 13 August 2014, Mr Potter emailed a medical certificate to Ms McCrohon. That certificate identified that he was suffering from work-related stress and anxiety that required further management and would be unfit for duty up to 30 August 2014. Dr Blake recorded that:

"Surgery consultation recorded by Dr Julie Blake on 13/08/2014

talked to counsellor/ psychologist on phone from EAP program (phone call consultation) they told him he was "off the chart" on questionnaire

for MHCP today

K10 30/50

"I feel like I've been treated like a criminal when if anything I've cared too much"

he will give Cameron Covey a call to book in an appt

fax referral over there

drinking too much etoh

again reiterated avoiding excess etoh

says he doesn't want to take drugs but happy to drink ...

Reason for visit:

Mental health care plan

Anxiety

Work problems

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40 Exhibit 30.

Actions:

Letter written re. Jb csmc mhcp.

Letter printed.

Medical Certificate given from 13/08/2014 until 30/08/2014.

Letter written re. Medical certificate.

Letter written to Cameron Covey re. AAA JB referral letter.

Letter to Cameron Covey printed."[41]

[161] He was placed on a mental health plan and referred to a psychologist, Mr Coveny.

[162] On 14 August 2014, Ms McCrohon sent an email to Mr Potter stating that: "Re confirming we are in a position to advise you of the outcome of the investigation, please confirm when you are available to attend work to participate in a meeting. We will await to hear back from you".

[163] Mr Potter responded the next day saying he hoped to be in a position to discuss on Monday and wishing Ms McCrohon a good weekend, to which she responded that was great to hear, to take care and she would speak to him soon. Later that same day, Mr Potter wrote:

> "I know you were probably right to want to get this over and done with, it's just that I'm not in a good place right now if you understand my side of the situation, I will contact you Monday if that's OK Kylie."

Ms McCrohon in response stated:

> "I understand. You take all the time you need to ensure you are okay.
>
> No rush, when you are doing okay."

[164] After receiving the report from Mr Wilkinson, Ms McCrohon stated that she wanted to deliver the outcome to Mr Potter in person because it was a complex investigation and it was the practice to meet with employees to step them through the process, face to face, and to discuss what the outcome means for the employee. The decision as to the finding recommendation lay with the CEO not with Ms McCrohon. She stated the Council delayed in telling Mr Potter and arranging a meeting with him as a result of his emails, where he requested that they respect his need for that time. Ms McCrohon believes that at the time she initially emailed Mr Potter, they had the results of the investigation on 14 August 2014 and that there would have been a draft letter from Aitken Legal which the Council would place on their letterhead.

[165] On 27 August 2014, a follow up email was sent by Ms McCrohon to check in with Mr Potter, reminding him of the employee assistance programme that was available and asking whether there was anything else that they could do to support him. Mr Potter responded that "Just coping. I'm gathering I'm still suspended and you're waiting for

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[41] Exhibit 30.

my return to discuss the next step in the process or give the ass, I've been seeing doctors. I will advise you in due course the advice from my doctor on the management of my health. Thank you for checking on me." He later apologised for the email on 27 August stating "I was a bit short towards you and I meant nothing by it."

[166] On 29 August 2014, a further medical certificate was sent by Mr Potter. Ms McCrohon responded and thanked him and confirmed that the investigation was concluded, and they were in a position to communicate the outcome as soon as he was well enough to return to work and wished him all the best with his continuing treatment. A follow up email was sent by Ms McCrohon on 22 September 2014 checking in on how Mr Potter was feeling and reminding him that the Council could discuss the outcome as soon as he was well enough to return to work. On 26 September 2014, a Workers' Compensation medical certificate was sent by Mr Potter. Ms McCrohon then sent an email stating that she had passed it to Les Latemore, the Rehabilitation Case Manager, who would contact him in due course. Ms McCrohon also informed Mr Potter that Ms Johnston, at that stage, was his contact in relation to the investigation.

[167] On advice of Mr Potter's psychologist, Mr Potter approached the Council to discuss the report as a way of moving forward. Mr Potter sent an email on 13 January 2015,[42] asking to arrange a meeting in relation to the allegations and stating that his union delegate, Ms Mitchell, would be able to attend by teleconference if a meeting could be arranged for the next week. He requested the number of attendances to be kept down to a minimum, stating "Perhaps yourself and Mark or Bernard would be okay".

[168] On 16 January 2015, Ms McCrohon sent an email nominating a time for a meeting and asking whether that was suitable to Mr Potter and Ms Mitchell.

[169] On 20 January 2015, sent an email to Mr Potter stating, "I'm conscious of making sure that you are well enough to discuss the outcomes of the investigation and how Council proposes to proceed moving forward." She requested that he get a clearance for his return to work from his treating doctor, given he had a medical certificate stating he was unfit to return to work until 2 February 2014. She stated that she needed a letter from his doctor confirming that it is recommended that he meet with the Council. Subsequently, a letter was provided by Dr Legg dated 21 January 2015 indicating that Mr Potter had undergone major psychological distress as a result of problems at work and that he is receiving psychological treatment. It further stated "At present he is at a stage at which he would benefit by having limited contact with Council staff. In order to progress and move on he needs to address the current conflict in a logical manner."

[170] As a result, a meeting was arranged at the Gympie Showgrounds. A letter of 22 January 2015 was provided to Mr Potter, informing him of the outcome of the investigation. The only allegation which the investigator found there was misconduct, not serious misconduct, was in relation to allegation 4, in relation to comments Mr Potter made to Ms Smith about RS. In relation to other issues, the investigator found that there was not misconduct but that there was poor judgment and decision making in Mr Potter's role as manager. The letter invited his response to the findings by 29 January 2015, stating no decision had been made as to what, if any, disciplinary action was to be taken.

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[42] Exhibit 33.

[171] The letter of 22 January 2015 further raised an allegation of misconduct in relation to Mr Potter contacting Mr Grant, contrary to a direction given to him not to contact potential witnesses both in the letter of 21 July 2014 and in a later conversation with Ms McCrohon that day, which was described as "a further verbal direction that you not discuss the above allegations with potential witnesses, including Michael Grant, your former supervisor" which Mr Potter is said to have acknowledged. The letter identified the conduct as potentially serious misconduct if established, but stated no findings had been made and invited Mr Potter to provide a response to the allegations.

[172] Mr Potter alleges that the allegation in relation to Mr Grant should have been the subject of a separate investigation and that the Council had no basis to raise any further allegation in relation to Mr Grant. Although the alleged breaches are not said to be causative of loss, the plaintiff contends it is relevant to the lifting of the suspension.

[173] Mr Stanton did recall a meeting with Ms McCrohon and Mr Potter at the Gympie Showgrounds in the afternoon. He did not recall what was discussed, but stated that it would have been in relation to the content of the letter of 22 January 2015. He thought Ms McCrohon went through the letter. He stated that the only conversation he would have had in relation to the letter of 21 January 2015 would have been at the showgrounds, which would have been about the matters outlined in the letter.

[174] Ms McCrohon recalled that there was a meeting at the Gympie Showgrounds with Mr Potter. She specifically recalled the union representative of Mr Potter being contacted on the day of the meeting (22 January 2015) because there were problems in getting her on the phone. Ms McCrohon stated that she had been contacted by the union representative on the morning of the meeting, and the representative told her she could not travel to Gympie. Ms McCrohon said she dialled the union representative on her phone.

[175] Ms McCrohon believed Mr Stanton stepped through the letter, but could not remember clearly, and she believed that the meeting went for about an hour. She agreed Mr Potter was very upset and did not look well. She asked him if he was okay and wanted to keep going. She recalls that Mr Potter stated during the meeting that he did not understand certain things and asked for clarification, which was given.

[176] There is little factual dispute as to what occurred at the meeting of 22 January 2015 which necessitates any detailed factual findings. I find however, that:

(a) While Mr Potter was not told he could bring a support person but that he had stated his union representative, Ms Mitchell would attend. I accept Ms McCrohon's evidence that Ms Mitchell informed her that she could not attend the meeting on the morning of 22 January and she dialled her in by her mobile phone;

(b) Mr Potter was handed two letters, the second one marked 'without prejudice';

(c) That Mr Potter was taken through the letter by Ms McCrohon or Mr Stanton and asked questions;

(d) Mr Potter was very upset and looked unwell and was asked by Ms McCrohon or Mr Stanton whether he could continue and said it was normal for him now. It was uncontroversial that Mr Potter was shaking.

[177] Ms McCrohon stated that they managed contact with Mr Potter according to the medical certificates which indicated that he was not well enough to contact. It was suggested that Ms McCrohon should have told him the outcome in response to Mr Potter's email. Ms McCrohon stated that she did not consider it prudent to inform him that none of the serious misconduct findings had been made out, in circumstances where he was not well enough to have the conversation until he was medically cleared. Ms McCrohon stated while she knew the outcome of the investigation, she personally did not have authority to communicate the outcome. The decision lay with the CEO as to what action to take on the outcome of an investigation. Although she would go through the report and share the outcome with the CEO so they would make an informed decision.

[178] Mr Potter responded to the letter of 22 January 2015 both in relation to the findings of the investigation and the further allegation raised in relation to Mr Grant by letter dated 2 February 2015. He responded to the first letter of 22 January 2015 with the assistance of his solicitor.[43] The letter acknowledged that there were better ways he could have dealt with matters. His response stated that he was devastated by the finding and he would be happy to attend any training the Council deemed appropriate.

[179] In relation to the allegations in respect of contacting Mr Grant, the letter stated that Mr Potter could not recall exactly when he contacted Mr Grant but thought it was after 21 July 2014, but before the letter of 28 July 2014. The letter stated that Mr Potter thought, however, it was correct that he contacted Mr Grant on 21 July 2014. He stated he did not know that Mr Grant was a potential witness at the time, as he had not received the letter containing the allegations against him. He stated it was, therefore, an innocent mistake and any finding of serious misconduct would be unreasonable. He further stated that he loved his job and wished to return to the Council to work, and that he would never intentionally breach the Council's policy and procedure or directives.

[180] Mr Smith did not consider that the complaint in relation to Mr Grant required the commencement of a new investigation process because it was not stand alone, having arisen in the context of the investigation of the other complaint. He considered it would have been regarded as part of the ongoing operation. He stated he would have seen the report of Mr Wilkinson but again, he could not recall.

[181] Mr Potter said that the allegation about Mr Grant had come out of the blue without any notice. He said he was shaky in the meeting and told Ms McCrohon that "This is normal now for me" when she inquired if he was alright. He stated that he felt that the allegation was a continuation of him being targeted by the Council and that they were looking for an excuse to terminate his position. He stated he felt attacked. He stated he didn't say anything and around that time, he retained solicitors. Mr Potter became very emotional when evidence in trial about the meeting.

[182] Mr Potter claimed that he did not have the conversation with Ms McCrohon until after he had spoken to Mr Grant. There is however, evidence to the contrary given the letter of 22 January 2015 referred to the investigator having received information which suggested he contacted Mr Grant on the evening of 21 June 2014, and subsequent to a telephone conversation with Ms McCrohon.

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[43] Exhibit 24.

[183] The investigation report identified Mr Potter's contact with Mr Grant at 8.30pm on 21 July 2014 as a possible breach of his suspension, as he should have been aware Mr Grant was a potential witness to the investigation. I consider it is likely that Ms McCrohon did tell Mr Potter not to speak to Mr Grant, given that was referred to in the letter of 22 January 2015 which was closer in time to the relevant events, that Ms McCrohon had some recollection to Mr Grant being mentioned and was concerned Mr Potter not contact potential witnesses. Mr Potter had spoken about Mr Grant knowing the situation with RS in the meeting on 21 July 2014. Insofar as it is suggested that the allegation in the letter of 22 January 2015 was negligent because it was untrue and the defendant failed to take reasonable precautions to ensure the accuracy of the allegations made,[44] I do not find that allegation established.

[184] A letter was sent to Mr Potter by the Council on 12 February 2015 informed Mr Potter that the Council, specifically Mr Smith, was satisfied that he did contact Mr Grant, despite a direction that he should not do so. The letter noted that the finding about contact with Mr Grant, and other findings, amounted to conduct that fell well below the standard expected of Senior Council Manager. Mr Smith stated he did not have confidence that Mr Potter could continue in the leadership role. Mr Smith stated that his preliminary decision was that Mr Potter not return to that role, although he was allowing Mr Potter to respond to the preliminary decision, but they were going to investigate reasonable redeployment opportunities in the Council.[45]

[185] In June 2016, the Council approached Mr Potter about recommencing a role with the Council in a different Directorate.[46] He contacted the Council workplace health and safety officer and stated he did not think he was ready at that time to commence such a role. Ultimately, the Council then terminated his employment on 12 August 2016.

Evidence as to Mr Potter's Mental State Post 21 July 2014

Mr Potter's Evidence

[186] As set out above, prior to the 2014 events the evidence supports the fact he was an extroverted individual who loved his work and was actively involved in family and the community. After 30 June 2014, the evidence supports that he suffered a loss of confidence and became somewhat withdrawn.

[187] As to the 21 July 2014 meeting he stated that he was not told how long his suspension was to last, nor could he understand from the letter what the allegations were that had been made against him. No time was nominated in the letter.

[188] After the meeting of 21 July 2014, Mr Potter stated that he felt that he was being targeted unfairly and unjustly. He became very emotional and depressed.

[189] Mr Potter stated that he went downhill between 21 July and 8 August 2014. He stated he felt prejudged and targeted and could not believe it was happening. He stated "once I read the allegations…this is all a misunderstanding. And is it really serious misconduct?

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44 [16(f) and (g) of SOC].
45 Exhibit 34.
46 Exhibit 27.

That's what I wondered, and I ...that's when I felt targeted, that they're coming after me with high school antics".

[190] Mr Potter stated that he anxiously waited by the phone on 8 August 2014, which was the day he states Mr Wilkinson had nominated as to when the investigation would be finalised, and received no phone call. While he may have understood that to be the case, I have found that was not the result of any representation by Mr Wilkinson. Mr Potter said he cried a few times, but his expectation was that the Council would tell him his suspension was lifted and he could come back to work. He stated that when he didn't get the phone call, he fell apart.

[191] Mr Potter said he became more distraught and distressed and attended a General Practitioner on 9 August 2014, shaking and crying. He felt torn as he loved his job but was angry about the way he was being treated. As a result, he provided a medical certificate to the Council that he could not attend work, which he sent by email to Ms McCrohon.[47] Dr Blake's notes reflect Mr Potter's anger and "getting angrier the more he talks as he doesn't feel he has done anything wrong".

[192] A further medical certificate was sent on 13 August 2014 stating he was suffering work-related stress and anxiety. Mr Potter was given a mental health plan. Dr Blake also referred Mr Potter to a psychologist, Mr Covey.[48]

[193] Mr Potter did not hear anything from the Council until he received an email from Ms McCrohon on 14 August 2014.[49] That email stated that the Council was in a position to advise him of the outcome of the investigation and asked him to confirm when he would be available to participate in a meeting. An email exchange occurred, as outlined above.

[194] At the time that the emails were exchanged, Mr Potter said he was very distressed, down and confused and in disarray about what was happening. He stated it was a mixture of many feelings and he was just trying to keep it together.

[195] According to Mr Potter, he did want to know the outcome of the investigation in the period after 9 August 2014 because he was concerned that he was still suspended. There is no evidence that was communicated to the Council.

[196] The "List of Issues not in Dispute" sets out the exchanges that took place between Ms McCrohon and Mr Potter by email and the medical certificates provided. This indicates that Mr Potter signed a worker's compensation form on 1 October 2014, which stated he was suffering anxiety and depression which was attributed to bad management actions.[50]

[197] In the reports of the General Practitioners after August 2014, reference was made to Mr Potter increasing his alcohol intake.

[198] Mr Potter saw Mr Covey after August 2014. In August 2014 he reported anger and symptoms including anxiety.[51] By 20 May 2015, he was reporting being referred to

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47 Exhibit 9, 11.
48 Exhibit 10.
49 Exhibit 12.
50 Exhibit 20.
51 Exhibit 32.

being stood down as a traumatic experience and his anger towards certain people at the Council,[52] as well as experiencing symptoms with respect to anxiety.

[199] Mr Potter stated that from January 2015 he suffered serious depression, extreme anxiety, adjustment disorder and uncontrollable anger. He described having gone into a downward spiral in terms of his mental health, drinking to excess, becoming angry and abusive towards his family and withdrawing from the activities he previously engaged in, such a football. According to Mr Potter, this was in contrast to his earlier life where he was extroverted, enjoyed life and loved his job.

[200] In February 2015, he commenced seeing a psychiatrist, Dr Martin.

[201] Mr Potter stated that he was admitted to Buderim Private Hospital in approximately September 2015, following which he stopped drinking for some eight to nine months. He stated that he tried to get his life back on track and apply for jobs, but found that when he went into interviews, his anxiety came to the forefront and he would start shaking and stuttering and knew he wouldn't get the job. He knew if he didn't get well, he would wreck any chance of getting back to a normal life. He again spiralled mentally into a depression and started drinking again. He felt worthless and nearly pushed his wife away. He described having violent episodes and psychotic episodes on occasion. He took anti-depressants, anti-psychotic and a stabiliser. He is still taking medication an anti-depressant and anti-psychotic, to treat his condition.

[202] Mr Potter saw Mr Covey, a psychologist, weekly from August 2014 until the end of 2017, after which time he began seeing Amy White, who he sees monthly. He saw Dr Martin, his psychiatrist, weekly until he stabilised. At the time of the hearing, he stated he was seeing Dr Martin every couple of months.

[203] At the time of giving evidence, Mr Potter stated he has reduced his drinking considerably and seems to have stabilised somewhat. He stated it had reduced from 18 beers a day to a six pack in the afternoon. He was happy with how it had progressed.

[204] He plays touch football twice per week and referees one night per week. He did have issues for a couple of years with angry outbursts and he was told to stay home, but he still went.

[205] He is now coaching a bootcamp, which began in November or December 2020 when he was asked to train some ladies by a friend. He gets paid for on a per head basis. He was getting paid $25.00 per person. The numbers vary from two to four to six on one occasion. He has incurred expenses in running the bootcamp in terms of travel and equipment.

[206] He stated that he otherwise spends his time staying at home watching TV, other than when he spends time with his next-door neighbour who is elderly and he checks on most days. He has low days when he does not want to talk to anyone or do anything. He does not leave the house, other than for touch football or bootcamp or if he has to go and buy groceries. He is concerned about running into Council personnel. His wife and his family try and pull him out to dinner and social functions.

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[52] Exhibit 35.

Mr Potter as a Witness

[207] Mr Potter was generally an honest witness; however, I find that he was prone to exaggeration, particularly in describing Mr Stanton's conduct, of which he had convinced himself in all likelihood was the truth. Mr Potter generally gave his evidence as best he could. However, I did not find him a reliable witness in a number of respects because, while he believed that the version of events that he presented was accurate, it was beset by exaggeration and a degree of reconstruction blinkered by his feeling of injustice as to what had occurred. In particular he saw the events of 2014 as all being an attack against him, regardless of what he was told about the process put in place. He has therefore seen the events in that prism and his evidence was skewed and not always reliable of what objectively had occurred.

[208] Mr Potter was very defensive in cross-examination, which perhaps may, in part, be due to his mental health difficulties and the emotional trauma he suffered as a result of the disciplinary process. While understandable, it did affect the reliability of his evidence, given he was not prepared to engage with questioning that did not accord with how he saw the relevant events and he was not prepared to make any concessions. He could not readily accept any personal criticism or even that issues could be raised about his management that may needed to be addressed.

[209] For example, Mr Potter showed a single mindedness and lack of insight in relation to the significance of the results of the survey, stating he did not think it gave any reason for there to be any concern about his management. He stated that the results suggesting dissatisfaction with his management was the result of his not being there to provide leadership to his staff due to his dual roles. When asked about meetings with Mr Wolff and Mr Hartley or Mr Stanton in 2014 to discuss the survey results prior to 30 June 2014 and that he was left to revert to someone about the matters raised by the survey, he stated that there was nothing to discuss. He felt he had already discussed it with Mr Young, his former director. While no doubt Mr Potter's view that the survey results were due to his having dual roles and internal staff issues was a valid point of view, that did not mean that the results did not raise potential issues that may needed to be considered and addressed in relation to his management. In that respect, he became very entrenched and almost obstinate in cross-examination, notwithstanding what the survey results stated. For instance, Mr Morton asked:

> "You see, the next one:
>
> *My immediate manager/supervisor is fair in his or her dealings with me.*
>
> Do you see that?---Again, I treated every staff member the same. It's their perception that they think they didn't.
>
> Mr Potter, would it be true to say that you have difficulty appreciating any shortcomings you might have?---No.
>
> You don't think so?---No. I did my job to the best of my ability and treated my staff fairly, to all…..
>
> You see there.
>
> *My immediate manager is straightforward in his or her dealings with staff.*
>
> And the results are 33 per cent favourable, 17 neutral and 50 per cent thought otherwise.

Do you see that?---Yes.

Do you see how that would raise a question about your management, Mr Potter?---Again, Mr Craig Young - - -

No, no. I didn't ask about Mr Young; I asked you whether you could see how that would raise a question with your management?---No - - -

You don't think so?---Because they already knew why the reason was. It's their perception of me and – whether they want to get me in trouble then rake me over coals, so they falsified an anonymous survey, then - - -

You didn't see you've had any problems with your management of your department?---I can't see any shortcomings, no. We all make mistakes, granted, that's human, that's human error, that's life. But I treated everyone with respect, and equally, above all.

……

But if we go to – sorry. Bear with me a moment. If we go to page 25:

At Council, good ideas are recognised and rewarded.

Eighty per cent thought otherwise. You see that?---They probably wanted a pay rise.

Well, don't you think that would - - -?---There's no – there's the rewards to give on doing their job and there's ideas that they bring to me and we discuss through them and if they're going to work or not and do the pros and cons of how – how it will assist the officers in their duties.

Well, can you see how that sort of answer might give concern to your senior managers about the way things are being run?---No, because the questions are all double-standard questions, I – I believe.

You won't agree with me, will you, ever - - -?---No.

- - - that this would give concern to people senior to you in the organisation?---No, because you don't know my staff, and they – if they want to make it destructive, they can. I've got no control over it. That's why anonymous surveys, to me, are insequential…."

[210] Mr Potter, similarly, notwithstanding the fact that he spoke to Mr Grant who Mr Potter himself nominated as a potential witness, regarded even raising the allegation as being unfair, even though his letter of 12 February 2015 stated his contact was the result of a misunderstanding. Mr Potter said that as a result of the meeting of 22 January 2015, and in particular the raising of further allegations about his contact with Mr Grant, he could not believe that there was a further allegation and that they did not follow the process in dealing with a further allegation to start with. He questioned why, if there was to be a further allegation, they did not go back to the beginning. He said he was more shocked and hurt that they would continue to treat him in the way that they were treating him and he did not really absorb what the letter said, in terms of inviting response, nor that it stated it was an allegation. While again Mr Potter had no doubt valid points to raise in terms of process and whether it was an issue that was properly raised, his evidence demonstrates an inability to even recognise it was an issue that could be raised with him.

[211] Mr Potter has held significant anger in relation to the events of 2014, particularly in relation to Council staff. Mr Potter seemed to take exception to the raising of issues about the survey results or about complaints made by his staff against him. While there is no doubt the raising of such issues is difficult for anyone and Mr Potter was vindicated in relation to a number of allegations, his resentment that he had to answer to any criticism or allegation affected the reliability of the evidence he gave.

[212] Mr Potter agreed that he felt that his meeting with the Council did not progress things as he thought that it should, given the additional allegation was raised. He agreed that he saw Dr Legg on 29 January 2015, and that he told Dr Legg that the meeting with the Council was a waste of time.

[213] Mr Potter stated that when he told Dr Blake that he was very angry with the man he was blaming for complaints, he was mainly referring to Mr Stanton. He also agreed that he told Dr Blake on 13 August 2014 that he didn't want to take drugs but was happy to drink, even though she had advised him to avoid drinking excessive alcohol, which he agreed he was doing at the time.

[214] Mr Potter agreed that when he saw Mr Covey on 14 August 2014 he was very angry, and not in a state to return to work. Mr Potter's assessments with Mr Covey also reflected his anger with staff.

[215] The reliability of Mr Potter's evidence was also brought into question by the fact that Mr Potter's evidence did not, in certain respects, accord with his actions. Mr Potter had stated Mr Stanton was bullying and intimidating towards him in the meetings of 30 June 2014 and 21 July 2014. When Mr Potter was further cross-examined in relation to the meeting of 22 January 2015, he agreed however that he had actually proposed Mr Stanton as one of the people who could attend that meeting, after asking Ms McCrohon to limit the number to two. He stated that was because he "knew he'd probably – I knew he'd come anyway." That was not a credible response, particularly given he had instigated the meeting and provided a doctor's letter with respect to the parameters of the meeting.

[216] Mr Potter confirmed that, following the meeting of 21 July 2014, he was suspicious that the Council intended to terminate his employment and he considered being stood down was very unfair. He made that clear to Dr Jetnikoff and stated that he felt upset and angry as a result. He agreed he may have told Dr Jetnikoff that he had no intention of returning to work at the Council, unless all of the staff in the Local Laws team were gone as, at the time, he was angry, upset and confused.

[217] Mr Potter agreed that he had seen Mr Covey and he was being assessed every month. He was shown a document dated 20 May 2015, which he confirmed was in his handwriting, where he had stated that he wanted to hurt certain people, which referred to certain staff at work. He stated there was no one in particular that he was referring to. It was management and the way they conduct their process that hurt him. He said he felt it was not right, and his emotions and feelings at the time was that he wanted to hurt certain staff at work because they had treated him with injustice which he did not deserve. He had stated he could still not get over being stood down from work on 21 July 2014.

[218] Mr Potter also stated that the fact that he perceived Mr Stanton's behaviour towards him to be bullying, leading to him being stood down, was not something Mr Potter could get

over and it was fuelling his anger and his being upset, although he referred to an array of things which were unidentified.

[219] I also consider there was some exaggeration of what Mr Potter is capable of doing and how he has been affected by his condition. In cross-examination Mr Potter agreed he had been able to continue with some activities beyond what he described in his evidence-in-chief. In December 2015, he was still tending to the five-acre property by working in the garden and cleaning. He reduced social contact to some degree, but was still going to some social functions which he stated was as a result of being advised it was good for him to go out. He stated he was still attending touch football, which he has continued over the years. He agreed he had upgraded his referee certificate and had helped referee in Bundaberg and Hervey Bay. He also shared driving with his wife on a trip to see his mother in Proserpine. His description of what he was able to do in these respects was more aligned with what he told Dr Jetnikoff rather than Dr Byth.

[220] Although Mr Potter has not resumed full time employment, he has recommenced work insofar as in October 2018, he undertook physical training of a girls' touch football team. He agreed he refereed at the touch football tournament in Bundaberg in February 2019 and February 2020. That included attending a dinner with them in December 2018. In March 2019, he told his psychologist that training the team was good for his confidence.

[221] I consider that as a result of the events in 2014 he feels that the Council treated him unjustly, he has become fixated on this case and fixated on the concept that the Council is to blame for the downward spiral in his life.

Evidence of Mr Potter's Wife

[222] Mr Potter's wife gave evidence as to her observations pre and post Mr Potter being stood down. She and Mr Potter have been married for 26 years. She described his personality before his present state as outgoing, happy, eager to help anyone, loved life, always on the go, loving, understanding, liked living life freely. She stated that he liked playing touch football, that he was into all sorts of things, particularly going to sports with his children. She stated that he would help at home to clean up. She stated he was very social. While she agreed he did drink before the 2014 events, she stated that he used to buy a carton of XXXX Gold once a week and sometimes it would last longer than a week, up to two weeks.

[223] From her observations he loved his job and would do things outside of work with the Council as well.

[224] She stated his disposition changed when he came home and said he had to do weekly and monthly reports, and then he got stood down. After that, he was on edge and nervous and did not sleep very well.

[225] She stated that the day he was suspended, he was really upset and came home. He was crying and it took some time to get him to explain what had happened. She said that following the suspension he clamped up, stopped eating, stopped sleeping and would not discuss anything. She stated that throughout 2014, he just got worse and worse as time went on. She said that when she left him to do jobs during the day, he would just do nothing. She said he spent time staring into the air or sitting down at the table and not moving for hours. She stated that he would mow the lawn, but he needed a lot of motivation and prompting to get him to do that. She said that he did not have much to do

with his children after he developed symptoms and they did not go out like they used to. She said that on a couple of occasions, he exploded and after that the kids did not like to come over that much. She said he did not have the rage attacks before he was stood down or suspended, but after he was stood down he had a number to the extent that the police had to be called.

[226] Mrs Potter stated that after Mr Potter was suspended, he drank more and more until he ended up in hospital. She stated that after he got out of hospital, he got a little better but then matters came back up and he just went backwards. She stated that even when he went to touch football, some of the people requested that she keep him away because he had started fights on the field with them. She stated that he now does not talk very much and keeps to himself and appeared to be depressed. She stated that he was okay for one week but then not for the next week. He was very withdrawn and has difficulty sleeping.

[227] She stated that he now buys a six pack of beer each night and will have a little bit more if he is down. She stated that he will mow the lawn now and then but other than that, will not do anything else around the home. He goes to a fitness class and will only go out if she drags him. She stated that sometimes he does not shower. She stated that his concentration has been affected, so she does not let him drive. She does not consider that he can hold down a job, as he is too up and down.

[228] In cross-examination, Mrs Potter agreed that the present litigation was always on Mr Potter's mind. She agreed that he seemed preoccupied with the injustice done to him by the Council. She said he misses his job. She said he screams about the injustice when he is having rage attacks on occasions. She stated that he has the rage attacks when he is sober, as well as when he has been drinking, but conceded that he was harder to calm down when he had been drinking.

[229] She stated that he had been a heavy drinker at times and agreed that he does not appreciate that his alcohol consumption is problematic for him. She stated, however, he had cut back on his drinking. Notwithstanding her earlier evidence-in-chief, she said he did not drink a six pack every night and had nights without drinking a six pack.

[230] Mrs Potter stated she had worked fulltime since Mr Potter stopped working with the Council. According to Mrs Potter, Mr Potter usually does not eat during the day, shower or get dressed. She said she makes his breakfast, which they have together, but then he does not eat until she gets home and gets dinner.

[231] She agreed that he was training a female touch football team in 2017 and 2018 and derived pleasure from that, as he did from personal training activities. She said it improved his mood until something happened, and then there would be a meltdown.

[232] While I accept that Mrs Potter gave the evidence to the best of her ability, I found that her evidence had become clouded by her loyalty to and care for Mr Potter. She was clearly affected by the down times that Mr Potter suffered. When cross-examined she was somewhat exaggerated in comparison to her evidence-in-chief. She gave evidence that his drinking had become heavy and he now reduced to a six pack a night. When that was put to her, she then said that on some occasions he only drank one beer if he was happy. Her evidence appeared to exaggerate Mr Potter's limitations when compared to his description of his daily activities and his lack of ability to drive when he had shared the driving to Proserpine.

[233] I accept Mr Potter has been depressed, withdrawn and angry since he was stood down by the Council, but do not accept he has been debilitated to the full extent described by Mrs Potter.

[234] I accept Mrs Potter's evidence that Mr Potter enjoyed his job at the Council, which was supported by the evidence of Mr Smith and Ms Kelly.

Ms Kelly's Evidence

[235] Ms Kelly was called by the plaintiff to give evidence. She no longer works with the Council. She believed that she first got to know Mr Potter when he was working in the Community Services Directorate. She knew him for most of the 14 years she was with the Council. She did not work in the same section as Mr Potter, but had known Mr Potter ever since she had started with the Council in 2006, until he had left. She described him as a happy go lucky and self-confident personality. She stated that after he received the letter of 30 June 2014 from Mr Stanton, he lost his confidence and began to worry about things and question himself. In her opinion, Mr Potter questioned everything about himself and how he worked.

[236] Mr Stanton was Ms Kelly's direct line manager and she had found him to be quite relaxed and collaborative as a leader and she had never observed any aggressive or bullying behaviour by him. Ms Kelly found Mr Stanton to be reasonable.

[237] Ms Kelly was a very measured witness who, despite her friendship with and loyalty to Mr Potter, made proper concessions. I accept her evidence.

Findings as to Credibility and Reliability

[238] I have addressed these matters in my discussion above to some extent.

[239] Mr Wolff was an honest and generally reliable witness, but his evidence was limited by his reliance on his notes made in his work diary which he referred to, in order to refresh his memory. Given the contemporaneous nature of the notes I found his evidence was of considerable weight.

[240] Ms McCrohon was an honest witness. Her evidence was straight forward and given impartially. I found her to be professional in her approach and considered. She did not try and give answers which may have been to her advantage if she did not recall the matter. While some of her recollection was patchy, when she did recall a matter, she was clear in relation to her recollection and often had good reasons as to why she recalled it. She also made fair concessions in cross-examination. Ms McCrohon's evidence was reflective of somebody who was experienced in HR management and conscious of the interests of the Council and the individuals involved.

[241] Mr Stanton also gave evidence. He is now retired. He was appointed as an Acting Director of Planning in 2014 and reported to the CEO. Mr Potter reported to Mr Wolff, who reported to Mr Stanton. Prior to that, Mr Stanton had been working in Sydney. He suffered a heart attack in June 2020, which caused a mild to moderate brain injury, and clearly affected his memory. He gave his evidence to the best of his ability but the reliability of his recollection was limited. On a number of occasions, he agreed with propositions put to him as "reasonable in the circumstances." He later clarified that he did not, in fact, have any actual recollection of those matters. I have accepted his

evidence where it was evident that he did have an actual recollection of events, such as his use of the phrase 'fishing expedition' or 'best friend or worst enemy' or where his recollection albeit vague, was supported by the evidence of other witnesses or contemporary documents.

[242] While the plaintiff's counsel submitted that the Court should exercise caution in considering Mr Stanton's evidence in considering his demeanour, as opposed to how Mr Potter stated that Mr Stanton had appeared in his meetings with him in 2014, Mr Potter's evidence of Mr Stanton's aggression and intimidating manner was not supported by Mr Wolff or other witnesses who dealt with Mr Stanton, nor in Mr Potter nominating Mr Stanton as one of the people to meet with him in the February 2015 meeting.

[243] Mr Wolff, Ms McCrohon and Mr Stanton all made appropriate concessions and appeared to give evidence to the best of their ability and impartially. Mr Wolff is the only person who remained employed by the Council. Neither Ms McCrohon nor Mr Stanton work with the Council any longer. In my view, neither gave self-serving evidence.

[244] Mr Smith, who was the CEO of the Council at the time of Mr Potter's suspension, gave evidence. While he was an honest witness, he had a very limited recollection of the events. It was evident that as CEO he relied upon those advising him and was not across the detail. Mr Smith no longer works with the Council. He gave his evidence impartially making appropriate concessions, but cast little light on what happened in 2014.

[245] I found Mr Wilkinson to be a straightforward and candid witness, although he became defensive to some cross-examination, as I have outlined above. Overall, I have formed the opinion that he was a very careful individual who sought to undertake the investigation he was engaged to do in a very impartial manner, which was reflected by the terms of the report he gave.

Legal Principles

Duty of Care

[246] It is well established that an employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury.[53] That duty includes an obligation to take reasonable steps to provide a safe system of work.[54]

[247] An employer will be subject to a duty to take reasonable care to protect the employee against injury of a psychiatric nature where there is a foreseeable risk of such injury.

[248] In *Koehler v Cerebos (Australia) Ltd* (***Koehler***),[55] the plurality stated that the central enquiry is whether, in all circumstances, the risk of a plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful.

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53 *Czatyrko v Edith Cowan University* (2005) 214 ALR 349 at [12].
54 *Robertson v State of Queensland* [2021] QCA 92 at [112].
55 (2005) 222 CLR 44.

[249] The judgment of the plurality in *Koehler* emphasised the importance of identifying the content of the duty of care, rather than focusing only on the question of breach of duty.[56] In determining the content of the duty, the Court must be taken to the obligations which the parties owe one another under the contract of employment, the obligations arising from that relationship which equity would enforce and of course any applicable statutory provisions.[57] In *Koehler,* the plurality stated that insistence upon performance of a contract cannot be a breach of a duty of care.[58] In particular, the High Court commented that in that case the agreement to undertake work ran contrary to the contention that the employer ought to have appreciated that the performance of those task posed a risk to the appellant's psychiatric health. An agreement to undertake work was not consistent with let alone expressing a fear of danger to health.

[250] The relevant duty of care is engaged if psychiatric injury to the particular employee is reasonably foreseeable.[59] "Normal fortitude" is not a precondition to liability for negligently inflicting psychiatric injury.[60]

[251] In considering the question of foreseeability in the circumstances of a case, the Court's considerations should include the extent of the work being done by the employee and the signs from the employee concerned.[61] The signs from the employee concerned could include matters such as any express or implicit warnings that may come from frequent or prolonged absences, or complaints from the employees.

[252] An employer is entitled to consider that an employee engaged to perform stated duties, is able to do the job, in the absence of evident signs warning of the possibility of psychiatric injury.

[253] Reasonable foreseeability involves more than mere predictability.[62] The limiting consideration is reasonableness, which requires that account be taken both of the interests of the plaintiff and of the burdens on the defendant. Thus, a central issue is whether it is reasonable to require a defendant to have contemplation of the risk of psychiatric injury to the plaintiff and to take reasonable care to guard against such an injury.[63]

[254] In *Robertson v State of Queensland & Anor*[64] McMurdo JA stated:

"The critical factor in Koehler was that the employer had no reason to suspect that the employee was at risk of psychiatric injury. In contrast, the critical factor in *Eaton v TriCare (Country) Pty Ltd*, where this Court allowed an appeal by an unsuccessful plaintiff (a nurse who had suffered psychiatric injury in her workplace) was that the

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56 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [19].
57 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [21].
58 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [27-29].
59 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [35].
60 *Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317. *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [33].
61 *Hayes v State of Queensland* [2017] 1 Qd R 337 at [109]; *Eaton v Tricare (Country) Pty Ltd* [2016] QCA 139 at [31].
62 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [9].
63 *Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 at [12]; referred to by Spigelman CJ in *Nationwide News Pty Ltd v Naidu; ISS Security Pty Ltd v Naidu* (2007) 71 NSWLR 471 at [23].
64 [2021] QCA 92.

deterioration of that person's psychological state was apparent during the period in which she was mistreated by her supervisor.

As Henry J has explained, at no stage during the relevant period of her employment did the appellant exhibit signs which warned of the possibility of psychiatric injury. The trial judge was correct to hold that signs that she was under stress at work were insufficient to make the risk of a psychiatric injury reasonably foreseeable, so as to result in the relevant duty of care."[65] (footnotes omitted)

[255] It is the risk of psychiatric injury that must be foreseeable. In assessing that question, the employer is not treated as if it is a medical practitioner. However, that does not require the employee to be actually suffering psychological symptoms for a psychiatric injury to be foreseeable.

[256] The plaintiff contends that the defendant owed to the plaintiff:

(a) a non-delegable duty to take reasonable care to avoid exposing the plaintiff to an unnecessary risk of injury while engaging and carrying out work in the defendant's business and to provide and maintain a safe workplace; and

(b) a non-delegable duty to take reasonable care to avoid exposing the plaintiff to a foreseeable risk of a psychiatric injury in his employment.

[257] The plaintiff relies on the majority of the High Court in *Czatryko v Edith Cowan University*[66] in the framing of the first duty. The majority however stated the well established duty in slightly different terms referring to the workplace rather than the employer's "business" and referring to the question of risk in the performance of a task:

> "An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of an injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards. The employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work."[67]
>
> (footnotes omitted).

[258] That is potentially significant in considering whether the duty to provide a safe system of work extended to the decision-making process for a suspension, given the limitations of any such duty where the matters in issue relate to the tasks outside of employment which are discussed below.

[259] The second duty is uncontentious in relation to when the duty of care to avoid psychiatric harm is engaged.

[260] As McMeekin J stated in *Woolworths Limited v Perrins*[68]:

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65 [2021] QCA 92 at [4]-[5].
66 (2005) 214 ALR 349 at [12]-[13].
67 (2005) 214 ALR 349 at [12].
68 [2015] QCA 207 at [42].

> "While it is trite law to assert that every employer owes to each employee a duty to exercise reasonable care not to injure that employee, and further to assert that the duty extends as much to foreseeable risks of psychiatric harm as to physical harm, the content of the duty of care is not at large but needs to bring into account the contract that existed between the parties."

[261] In assessing foreseeable risk it is relevant for the Court to have regard to the statutory provisions contained in the *Work Health and Safety Act 2011* (Qld) (**WHS Act**). Section 305B of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) (**WCRA**) needs to be considered in the context of whether a duty arises.[69]

[262] The plaintiff also contends that the above duties were implied terms of the contract of employment between the plaintiff and the defendant, and exist concurrently in tort and contract. The pleading of the duties as contractual does not raise any additional issues to those raised in the context of negligence. [70] The plaintiff did not pursue any contention that the Council's policies and procedures formed part of Mr Potter's contract. An allegation of an implied term to provide support or adequate support remained a live issue which is addressed below.

[263] In *Nationwide News Pty Ltd v Naidu & Anor*[71] Spigelman CJ noted the usual implied terms are that the employer provide a safe place and a safe system of work.[72] His Honour further commented that he would "…have reservations about the implication of terms beyond those that are co-extensive with an employer's obligation to provide a safe place and a safe system of work. The content of that obligation will vary, depending upon the nature of the employment."[73] I agree with his Honour's observation.

[264] The plaintiff does not contend that any of staff conduct or disciplinary procedures are contractual. However, it does contend Mr Potter's being stood down was unlawful, based on a contention that the policies and procedures are reasonable and lawful directions to Council employees which must be complied with by Council staff. This is, however, framed in terms of negligence rather than damages for breach of contract.

[265] The plaintiff also referred to a duty arising out of s 19(1) and 19(3) the WHS Act, in relation to providing a safe work environment, amongst other things. That was not developed in submissions other than relying on allegations already pleaded. The provisions are generally relevant to the context in considering the duty of care and its content.

[266] According to the plaintiff, the content of the duty which the defendant owed the plaintiff was that the defendant would:

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69 *Adeles Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 432.

70 The parties only identified in paragraph 3 (a) of the SOC as an issue in dispute which pleads that there was an implied term in the contract of a non-delegable duty to take all reasonable care to avoid exposing the plaintiff to unnecessary risk of injury including psychiatric injury whilst engaged in carrying out work in the defendant's business and to provide and maintain a safe workplace as modified by the provisions of the WCRA.

71 (2007) 71 NSWLR 471 at [339].

72 See also Black CJ in *Goldman Sachs JB Were Services v Nikolich* [2007] FCAFC 120 at [31].

73 (2007) 71 NSWLR 471 at [341].

(a) conduct the meeting of 30 June 2014 in a reasonable manner in accordance with the defendant's *Staff Code of Conduct* and the *Disciplinary Action Procedure*;

(b) only suspend the plaintiff's employment if to do so was a lawful and reasonable direction and the criteria set out in the defendant's *Performance and Misconduct/Disciplinary Procedure* were met;

(c) if the defendant had valid grounds for suspending the plaintiff's employment (which is denied by the plaintiff), such suspension would only continue until completion of the Aitken Report;

(d) keep the plaintiff informed as to the progress of the investigation and to properly inform the plaintiff of the outcome of the Aitken Report and that his employment would continue without impact; and

(e) provide the plaintiff with adequate support during the investigation and suspension.

[267] According to the plaintiff, the duty of care is based on:

(a) that it was a duty of the defendant, and an implied term of the contract of employment between the plaintiff and defendant, that the defendant would take all reasonable care to avoid exposing the plaintiff to unnecessary risk of injury, including psychiatric injury, whilst carrying out work in the defendant's business and to provide and maintain a safe workplace;

(b) that the defendant would follow its *Disciplinary Action Procedure* and the *Staff Code of Conduct* in relation to the meeting of 30 June 2014;

(c) that the defendant was required to comply with the defendant's *Performance and Misconduct/Disciplinary Procedure* and its *Staff Code of Conduct*;

(d) that the defendant would follow the *Breach of Council Officers' Code of Conduct* complaints process, namely paragraph 7, that where allegations of unacceptable conduct made against another person cannot be substantiated, that person will be advised accordingly and will be entitled to continue their role without impact;

(e) that any complaint arising out of Mr Potter's contact with Mr Grant would be investigated pursuant to the *Breach of Council Officers' Code of Conduct* complaint process; and

(f) finally, in the *Commonwealth Bank of Australia v Barker,*[74] Kiefel J (as her Honour then was) stated that the Court will imply an obligation on the part of each party to a contract to cooperate in the doing of acts necessary to performance or to enable the other party to secure a benefit provided by the contract. According to the plaintiff that includes that the plaintiff be permitted to undertake his normal work duties.

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74 (2014) 253 CLR 169.

[268] The plaintiff contends that a duty of care was owed to the plaintiff at different points of time and its content differed. I will address each point at time when a duty of care alleged below.

[269] A threshold issue as to whether any duty of care is owed at all is whether the test, as outlined by the High Court in *Koehler*, is satisfied. The issues in dispute formulated by the parties state the issue as "Whether there was ever a not insignificant risk of psychiatric injury to the plaintiff that the Defendant knew of, ought reasonably have known of."[75] If that was not the case at any of the relevant points in time nominated by the plaintiff, no duty of care arises.

[270] According to the defendant, the plaintiff's alleged duty of care is too broad and is misconceived. In particular, the obligations of an employer to take reasonable care to guard against a foreseeable risk of injury do not extend "beyond the conduct of tasks an employee was engaged to perform" and do not comprehend "an obligation to supply a safe system of investigation and decision making in relation to matters concerning the contract of employment itself."

[271] The defendant contends that in any event no duty of care was owed by it to the plaintiff to avoid psychiatric injury as the risk of a psychiatric injury being suffered by Mr Potter was not reasonably foreseeable. However, at a more fundamental level the defendant contends that a duty of care to provide the plaintiff a safe system of work did not encompass a safe system of investigation and decision-making in respect of procedures for disciplining employees and the defendant did not owe any duty of care to the plaintiff to prevent psychiatric harm to the plaintiff, either at 30 June 2014 or 21 July 2014.

[272] The defendant particularly relies on *Paige,*[76] and *Govier*[77] in support of its contention that there was no duty of care owed by the Council to safeguard against the risk of psychiatric injury to an employee in suspending an employee.

[273] The defendant further denies there was a duty to lift the suspension of Mr Potter at the time alleged by the plaintiff.

[274] If a duty of care proposed is of a novel category which involves an extension of duties, the Court has regard to considerations such as the compatibility of the duty sought to be imposed with other legal rights, and issues of coherency with other legal principles or statutory schemes.[78]

[275] If the duty of care is in an established category, or one which the Court recognises, there remains the question of whether a duty of care exists as a matter of fact, which requires the pleading and proof of facts upon which it is said the duty arose.[79]

[276] The Defendant disputes as a matter of law that the duty of care to avoid psychiatric injury of an employee extends to providing adequate support during an investigation but concedes that this court is bound by *Hayes* which held that such a duty was not excluded

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75 Which appears to have been formulated having regard to the terms of s 305 B of the WCRA.
76 (2002) 60 NSWLR 371.
77 [2017] QCA 12.
78 *Sullivan v Moody* (2001) 207 CLR 562; *Paige* at [78] and [91]-[95].
79 *Hayes v State of Queensland* [2016] QCA 191 at [120] and [129].

by reason of the decision of *Paige.* It contends as a matter of fact such a duty did not arise.

[277] Given there was significant argument as to when a duty of care was owed as well as the content of that duty, I have therefore considered those issues even if I have not been satisfied that a risk of psychiatric injury to Mr Potter was reasonably foreseeably, such that no relevant duty arose. That has added considerable time and length to this judgment.

Duty of care to provide adequate support

[278] I will consider the question of the duty of care in relation to each of the factual scenarios raised and whether a duty of care has been recognised.

Policies and Procedures of the Defendant

[279] The plaintiff relies on various policies and procedures of the Council as informing on the content of the duty of care and being relevant to the question of breach.

[280] In the present case, rather than having one coherent policy governing conduct and disciplinary action, the Council has four different documents: the Performance and Misconduct/Disciplinary Procedure (**PMDP**),[80] the Disciplinary Action Procedure (**DAC**),[81] the Staff Code of Conduct (**SCC**),[82] and Breach of Council Officers Code of Conduct Complaints Process (**Complaints Process**).[83] The plaintiff contends that the defendant was obliged to comply or follow these policies in its formulation of the content of the duty of care. Whether the Council was obliged to follow these policies and whether they imposed any relevant duty upon the defendant, created any right in the plaintiff or are justiciable by the plaintiff were identified by the parties as matters in disputes.

[281] At all material times relevant to this proceeding, the parties agree the following procedures were operative:[84]

(a) Performance and Misconduct/Disciplinary Procedure; and

(b) Staff Code of Conduct.

[282] It was uncontroversial that the defendant at the relevant time was a "public sector entity" and its employees were "public officials" within the meaning of the *Public Sector Ethics Act 1994* (Qld) (**PSE**). Ethics values were provided for division 2 of the PSE in Codes of Conduct but were not of themselves legally enforceable. Pursuant to the PSE, the Staff Code of Conduct applied to all public officials and may provide obligations which public officials must comply with and standards of conduct. A public official of a public sector entity must comply with the standards of conduct stated in the entity's Code of Conduct that apply to the official.

[283] In the issues identified by the parties as not being in dispute, it was agreed that:

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80 Exhibit 53.
81 Exhibit 54.
82 Exhibit 56.
83 Exhibit 55.
84 [26] List of Issues Not in Dispute.

> "[7] At all material times, the Defendant was a "public sector entity" and its employees were "public officials" within the meaning of the *Public Sector Ethics Act* 1994 ("PSE").
>
> [8] Pursuant to the PSE:
>
> (a) The ethics values set out in Division 2 were intended to provide the basis for Codes of Conduct for public service agencies, public sector entities and public officials but were not of themselves legally enforceable;
>
> (b) The "Staff Code of Conduct" applied to all public officials as defined in PSE;
>
> (c) The Staff Code of Conduct may provide obligations which public officials must comply with;
>
> (d) A public official of a public sector entity must comply with the standards of conduct stated in the entity's Code of Conduct that apply to the official."

[284] The SCC is a set of standards and behaviours, which is stated to apply to the conduct of employees in the course of their employment with the Council.

[285] The plaintiff did not ultimately in argument develop the argument in respect of the PSE to any degree.

[286] The plaintiff does not contend that any of the procedures have contractual force. That concession appears to be well made, given that the language used in the policies was not promissory in nature such that a reasonable person in the position of Mr Potter would have concluded that the Council intended to be contractually bound by a particular statement.[85] Nor were the procedure documents provided to Mr Potter at the time of his employment, nor incorporated by the terms of his employment contract or the awards said to have governed his employment.

[287] According to the plaintiff however, the differing policies of the Council as to staff conduct and disciplinary procedures were lawful directions as to the manner in which the defendant and its staff were to conduct themselves and with which the defendant had to comply.

[288] The plaintiff in particular relies on *Downe v Sydney West Area Health Service (No. 2)* ***(Downe)***,[86] where Rothman J stated:

> "An employer is entitled, subject to the express provisions of the contract, to give lawful and reasonable directions to an employee as to the manner in which the employee shall perform work. In the case of a policy document dealing with the procedures for disciplinary matters, the employer (in this case the Health Service) promulgates a document that, to the extent that it directs employees to conduct disciplinary procedures in a particular way, is a lawful and reasonable direction as to the manner in which work will be performed…"

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85 Cf. *Goldman Sachs JBWere Services Pty Ltd v Nikolich* (2007) 163 FCR 62 at [23].

86 (2008) 71 NSWLR 633 at [342].

[289] *Downe* was dealing with that question in a different context from the present. It is discussed further below.

[290] The Council however contend that the policies did not impose any duties upon the Council or at least any of the duties that the plaintiff contends.

[291] Clearly, by putting such policies and procedures in place, the Council intended that they would generally apply, and staff would abide by them. To determine the application of such policies and procedures it is necessary to consider each policy and its terms.[87] The direction however cannot rise higher than the terms of the policy or procedure in question. If it is a guideline than that it is a matter to which staff should have regard. If there is a process described but it is provided that there is a discretion as to whether it is followed in the circumstances it does not rise to the level of imposing an obligation. The status of each procedure and any obligation it imposes is obviously dependent on its terms.

[292] Even if compliance with such policies are not obligatory they may still be of relevance in assessing the question of reasonably foreseeability that the employee may suffer a psychiatric injury.

[293] In addition, the *Local Government Regulations 2012* (Qld) (**Regulations**) provides for disciplinary action, which may include suspension.[88] Sections 279, 282 and 283 of the Regulations provide that:

> "279 When disciplinary action may be taken
>
> The chief executive officer may take disciplinary action against a local government employee if the chief executive officer is satisfied the employee has—
>
> (a) failed to perform their responsibilities under the Act; or
>
> (b) failed to perform a responsibility under the Act in accordance with the local government principles; or
>
> (c) taken action under the Act in a way that is not consistent with the local government principles.
>
> 282 Suspension of employees
>
> (1) If the chief executive officer is satisfied, on reasonable grounds, that a local government employee will be subject to disciplinary action, the chief executive officer may suspend the employee from duty.
>
> (2) Suspension of a local government employee from duty does not affect the following—

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87 As was done by Jackson J in *Gramotnev v Queensland University of Technology* [2015] QCA 127 in relation to whether provisions of the policies were contractual promises.

88 The provision of disciplinary action by the Chief Executive Officer in regulations is provided for in s 197 *Local Government Act 2009* (Qld).

(a) the continuity of the employee's service in employment with the local government;

(b) the entitlements previously accrued to the employee from employment with the local government;

(c) the accrual of entitlements to the employee during the period of suspension.

(3) A suspended employee must be paid the employee's full remuneration as at the start of the suspension for the period of suspension.

283 Employee to be given notice of grounds for disciplinary action

(1) Before the chief executive officer takes disciplinary action against a local government employee, the chief executive officer must give the employee—

(a) notice of the following—

(i) the disciplinary action to be taken;

(ii) the grounds on which the disciplinary action is taken;

(iii) the particulars of conduct claimed to support the grounds; and

(b) a reasonable opportunity to respond to the information contained in the notice.

(2) The grounds and particulars are taken to be the only grounds and particulars for the disciplinary action taken, and no other ground or particular of conduct can be advanced in any proceeding about the disciplinary action taken against the local government employee."

[294] The plaintiff submits that the regulations cover the field in relation to suspension. However, the Regulations are limited in their application to action taken in respect of the *Local Government Act 2009* (Qld) and to the situation where it has been determined disciplinary action is to be taken.[89] While I accept that the Regulations provisions may apply to a suspension where it is determined an employee will be the subject to disciplinary action, they do not cover the field for suspension. The provision of suspension as a form of disciplinary action accords with the fact that at common law an employer had no right to suspend an employee without pay for misconduct. The Regulations do not apply relevantly to the circumstance of where allegations are being investigated to determine whether there is any basis for taking disciplinary action and any decision in that context to suspend.[90] A determination that disciplinary action is to be taken is not the only circumstance where an employee may be suspended.

[295] The cases referred to by the plaintiff provide little assistance in this regard. The case of *Promnitz v Gympie Regional Council*[91] was conducted on the basis that the decision was

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89 *Local Government Act 2009* (Qld) s 197.
90 Cf. s 137 of the *Public Service Act 2008* (Qld).
91 [2015] ICQ 11.

made under the *Local Government Act 2009* (Qld).[92] The case of *Hunkin v Siebert*[93] dealt with the application of the *Public Service Act 1916* (Qld) which, as in the case of the present regulations, was determined on the basis of the terms of the Act.

[296] As to the contention made on behalf of the plaintiff that the suspension was not part of any disciplinary process because no disciplinary process had commenced, it is true that it had not been determined that there were grounds for disciplinary action. However, complaints had been made in relation to Mr Potter which were to be investigated to determine whether or not they were well founded, in order to determine whether disciplinary action should be taken. The SCC, PMDP and DAC all contemplated that suspension of an employee may be required during an investigation. For the reasons set out above, there is an implied right to give a direction to suspend an employee during an investigation as an aspect of the implied right of an employer to give lawful directions. The PMDP, DAC and the SCC are illustrative of the directions that can be lawfully given, and the circumstances in which investigations can be carried out and the circumstances in which disciplinary action can occur.

[297] I do not find there was a duty to follow the policies and procedures concerned given the terms of the policies and procedures concerned. However they are relevant to the content of the duty. Policies and procedures may be indicative of reasonable steps that may be taken in relation to a foreseeable risk, and the failure to comply with them may be evidence of a breach of a duty of care. *30 June 2014 Meeting – Duty of Care*

[298] The defendant submitted that no duty of care could arise in relation to the meeting of 30 June 2014, it being, in effect, part of an investigation in accordance with the principles set out in *Paige* and *Govier* which I consider in detail below. Those cases are however quite different to the present, each involving the investigation of complaints not raising matters as to work performance. Work performance management of the nature Mr Potter was subject to, is part of usual employee management in the workplace to address underperformance or shortfailings, as opposed to conduct warranting investigation. While it may have involved into an investigative process and a formal disciplinary process at a subsequent stage which could raise questions of whether it should be regarded as part of a workplace investigation that was not in my view the proper characterisation of the meeting of 30 June 2014. I do not consider that the nature of the meeting of 30 June 2014 was akin to an investigation, or that it was beyond the conduct of tasks an employee was engaged to perform, such that a duty to take reasonable care against a foreseeable risk of a psychiatric injury was excluded by the principles set out in *Paige* and *Govier*. Both cases deal with the investigation of complaints against an employee as a result of a complaint of assault against another employee in *Govier's* case and against an employee for breaches requiring investigation in *Paige* under statute which are discussed below.

[299] The meeting of 30 June 2014 was part of the the ordinary course of employment and was not an investigation into disciplinary conduct. The undertaking of performance management is to ensure that an employee executes their obligations as an employee, it relates to the performance of the employee in carrying out their tasks in the workplace, rather than being an incident of the contract of the workplace arising out of complaints as to the employee's conduct. Thus the general duties of care that apply to the workplace

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92 [2015] ICQ 11 at [5].

93 (1934) 51 CLR 538.

and in particular to take reasonable care to avoid exposing the plaintiff to a foreseeable risk of psychiatric injury in his employment applied.

[300] The plaintiff contends that as part of the duty of the care the defendant was obliged to conduct the meeting of 30 June 2014 in a reasonable manner in accordance with the defendant's SCC and the DAC. According to the plaintiff that arises from the fact that the defendant was obliged to follow the DAC and SCC.

[301] While the formal process under the DAC with respect to the performance management was not implemented by the terms of the 30 June 2014 letter, the defendant did not really dispute and I accept that Mr Potter was told he was to be performance managed arising out of the results of the survey in the meeting of 30 June 2014 with Mr Stanton and Mr Wolff. However, the letter of 30 June 2014 provides the relevant context of that statement.

[302] There is no issue that the Council is attributed with the knowledge of Mr Stanton and Mr Wolff, and is vicariously liable for their actions.

[303] As to whether the Council was bound to comply with the DAC, the overview of the document provides that it is to "provides procedure guidelines on how to take disciplinary action when necessary" and that it "contains information on how to handle disciplinary procedures on how to handle disciplinary situations and the appropriate procedures to follow….". The process in section 4 which sets out the procedure for unsatisfactory work performance states that it will "usually" proceed through the stages set out. The DAC refers to a grievance procedure in section 7 if the employee does not believe they are being given a fair hearing and refers to another Procedure in that regard. These matters do not suggest the procedures are required to be rigidly such that as part of a duty of care the Council is obliged to follow as opposed to forming a general guideline as to the procedure to be adopted, failing which there is an avenue for an internal complaint to be made.

[304] While the SCC of the Council is made to provide a Code of Conduct to meet the principles of the PSE, included treating others with "trust, respect, honesty, fairness, sensitivity and dignity" which should managers and supervisors are said to have " a special responsibility to model", that is framed in aspirational terms rather than in terms of an obligation with which the Council must comply such that it forms part of the content of a duty of care. However other aspects of the SCC are obligatory to follow with provision for disciplinary action to follow if the SCC is breached.

[305] The terms of the DAC relied upon do not suggest that they give rise to a tortious duty to comply.

[306] I do not need to finally decide whether compliance with the DAC or SCC was part of the content of the duty as for the reasons I have set out below I do not find that as at 30 June 2014 the Council had knowledge of a foreseeable risk of a psychiatric illness to Mr Potter and therefore no duty to take all reasonable steps to avoid unnecessarily exposing to Mr Potter to that risk arose. Nor do I find as a fact that the conduct complained of by Mr Potter is bullying, intimidating or threatening.

[307] Even if not forming part of the duty of care, the existence of the DAC and SCC are relevant to the workplace and relationship between the employer and employee which is

relevant in assessing whether it was reasonably foreseeable that Mr Potter might suffer a psychiatric injury.

Foreseeability of risk

[308] The question of whether a duty of care arises in any of the circumstances relied upon by the plaintiff is a question of fact to be determined in accordance with the tests outlined in *Koehler*. The central inquiry identified by the High Court in *Koehler* is whether, in all of the circumstances, the risk of a plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable in the sense that the risk was not far- fetched or fanciful.[94]

[309] As was stated by Dalton J in *Hayes*, evidence as to what notice the employer had that the employee in question was at risk of suffering psychiatric injury will often play an important role in cases. In that respect, the courts have drawn a distinction between stress on one hand and a recognised psychiatric illness on the other.[95] As set out above, it is assumed that unless the employer knows of some particular problem or vulnerability, an employer is entitled to assume that its employees are up to the normal pressures of the job.[96] Similarly, Gleeson CJ in *Tame* stated it was not enough that distress, alarm, fear, anxiety, annoyance or despondency, without any resulting recognised psychiatric illness, might be foreseen. Further, as was pointed out by McMurdo JA in *Eaton v TriCare (County) Pty Ltd*:[97]

> "It was not the legal responsibility of the respondent to its employees to provide a happy workplace or one in which their productivity might have been enhanced by temperate and polite behaviour from those in managerial positions. The relevant legal responsibility was to take reasonable care to avoid a risk of psychiatric injury to the appellant in the circumstances that she was exhibiting a particular vulnerability."

[310] There was no evidence of Mr Potter having any history of any psychiatric issues, prior to 30 June 2014. Mr Potter was, according to the evidence presented in this Court, an extroverted and happy employee, who had not experienced any performance issues in his employment.

[311] While a manger of the Local Laws team, there is no evidence suggesting that Mr Potter's role was a particularly stressful one.

[312] The plaintiff identifies a number of background matters as relevant to whether a duty was owed, as well as what occurred at the meeting himself which are set out at [25] of his submissions. A number of those matters are uncontroversial including that:

(a) At the time of the 2013 survey, Mr Potter had held two positions with a busy workload; and

(b) That the Local Laws section did not rate well in the 2013 staff survey.

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94 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [33].

95 *Hayes v State of Queensland* [2017] 1 Qd R 337 at [130].

96 *Hayes v State of Queensland* [2017] 1 Qd R 337 at [131] referring to *Barber v Somerset County Counci*l [2004] 1 WLR 1089.

97 [2016] QCA 139 at 60.

[313] According to the plaintiff, the fact that there was a foreseeable not insignificant risk of psychiatric injury to Mr Potter as at 30 June 2014 is established by:

(a) The Disciplinary Procedure providing as part of its objective for a fair and legally defensible process;

(b) That the comments of Mr Stanton were highly inappropriate, threatening and contrary to the SCC with Mr Stanton holding a senior position;

(c) The fact weekly meetings requested by Mr Potter in the 30 June 2014 meeting did not occur and he did not receive a response to written action plans;

(d) That the defendant should have been aware that given Mr Potter was a long term employee he knew that for unsatisfactory performance Stage 1 was a verbal warning and then counselling forms were to be used. When they were not used Mr Potter was blown away;

(e) That performance management is a stressful process and the Disciplinary Action Procedure was in place to prevent the type of situation that occurred;

(f) Mr Potter had received accolades for his work done with disasters.

[314] The plaintiff submits that in the context of the 30 June 2014 meeting, the DAC[98] was in place to prevent the type of situation that occurred and the type of injuries suffered by the plaintiff. In particular, the plaintiff refers to the objectives of the procedure which includes the obligation to "ensure the organisation has followed a fair and legally defensible process." However, it is not evident that it is the purpose of the DAC, although it may be an indirect effect of it. The objective referred to by the plaintiff in the context of two other objectives, namely "To explain clearly to the employee the types of behaviour, performance and conduct that is acceptable and to clearly explain the types of behaviour, performance and/or conduct that is unacceptable" and "to provide the employee with an opportunity to improve their behaviour, performance and/or conduct." The stated objectives are more a recognition of an employer to accord procedural fairness to an employee in the process adopted and to provide the employee with a reasonable opportunity to respond to the work performance issues. That is supported by [3.8] of the DAC which provides for disciplinary action to be conducted in accordance with principles of fairness which are outlined. It is not supported by the stated objectives of the DAC in clause 2 of the document.

[315] The plaintiff referred to *Goldman Sachs JB Were Service s Pty Ltd v Nikolich* (2007) 163 FCR in support of its contention. However, in that case, a document titled "Working with us" was found to be incorporated in the complainant's employment contract and the provision of a safe and healthy work environment constituted a contractual promise, which was found to be breached, in circumstances where complaints had been made by the complainant about the conduct of another staff member in respect of bullying which were not acted upon in any timely way. That is quite different to the present case.

[316] While, I accept that Mr Potter had a discussion about the results of the 2013 staff survey with Mr Young in late 2013 and Mr Potter considered that, as a result of that conversation, it did not raise any issues as to him personally and was explicable by the

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98 Exhibit 54.

fact he had two roles, there was no evidence as to the content of the conversation and Mr Young was not called nor was anything done or said by him relied upon in the SOC.

[317] I have found that the survey results were raised twice with Mr Potter in March and June 2014. By that time the restructure of the Council had occurred and Mr Potter was only undertaking one role as manager of the Local Laws team.

[318] I have made a number of findings of fact relevant to the 30 June 2014 meeting above. I have not found a number of the allegations made in relation to the 30 June 2014 meeting to have been made out. I have, however, found that Mr Stanton referred to Mr Potter being performance managed, and to Mr Stanton undertaking a fishing expedition but not in relation to Mr Potter's management but rather as to the local laws team and that he could be Mr Potter's best friend or worst enemy. In the context in which the statements were made and given Mr Wolff's evidence as to the tone of the meeting and conduct of Mr Stanton,[99] while Mr Potter may have considered Mr Stanton's conduct to be intimidatory and bullying, I am not satisfied that Mr Stanton's comments were made in way that objectively could be perceived to be threatening, bullying or overbearing or contrary to the defendant's SCC. Relevantly, Mr Stanton was in a senior position to Mr Potter. As recognised by Henry J in *Robinson v State of Queensland,*[100] an intrinsic power differential between an employee and their manger may increase the probability and foreseeability of psychiatric injury arising from repeated potential breaches, as his Honour found in that case.[101] Mr Potter was a relatively senior employee in middle management and while there was some power differential, it was not significant.

[319] As to the question of whether there was non-compliance with the DAC,[102] the procedure applied to a disciplinary procedure for unsatisfactory work performance. Stage 1 of the procedure required that there be a meeting between a supervisor and staff member to resolve the issues and that, inter alia, although the process was to be verbal, the supervisor was to record the relevant events and dates using counselling forms. Mr Potter was familiar with the forms having used them when disciplining a junior staff member. According to Mr Potter, the statements of Mr Stanton and the receipt of the letter of 30 June 2014 blew him away. Stage 2 of the procedure provided for a written warning containing a review period in which the poor performance must be rectified.

[320] While I find Mr Stanton did inform Mr Potter at the meeting of 30 June 2014 that he was to be performance managed, the letter of 30 June 2014 explicitly stated that it was not a formal warning regarding his performance, although it foreshadowed that if satisfactory progress towards meeting expectations was not achieved, it was open to the Council to formalise its concerns to him. Thus, it did not appear to be a written warning as contemplated by Stage 2 and was more in the nature of what should have been recorded in counselling forms. How precisely it fitted in to the DAC was unclear.

[321] While however Mr Stanton and Mr Wolff did not use the counselling forms, as provided for in Stage 1 of the DAC, the issues raised in the 30 June 2014 letter was not the first time that issues arising from the survey results had been raised with Mr Potter and that they required action by him.

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99 Which is consistent with Ms Kelly's dealings with Mr Stanton.
100 [2012] QCA 92.
101 [2012] QCA 92 at [19].
102 Exhibit 24.

[322] I have accepted Mr Wolff's evidence that the 2013 survey results were raised with Mr Potter in a meeting in March 2014 with Mr Hartley and Mr Wolff and that Mr Potter was to consider how he would address issues raised in the survey results. I have also found that, there was a further meeting that took place in on 18 June 2014 between Mr Potter, Mr Stanton and Mr Wolff where Mr Potter was requested to come up with a plan as to how to address the matters raised by the 2013 survey. I also accept as recorded in the letter of 30 June 2014 Mr Potter was told the matters discussed were to be followed up in writing.

[323] Thus, while the DAC was not complied with by the provision of counselling forms, in substance the process adopted did largely comply with what was contemplated by the DAC. The meeting and letter of 30 June 2014 should not have taken Mr Potter by surprise. While the use of counselling forms as provided in Stage 1 of the DAC, were forms with which Mr Potter was familiar, he was on notice that the 2013 survey results raised issues with his management and needed to be addressed. The letter of 30 June 2014 while more formal than the use of counselling forms, contained most of the information that would be contained in the counselling forms. The letter of 30 June 2014 set out clear expectations as to what aspects of Mr Potter's management needed to be improved, acknowledged that it was not a matter for which he alone was responsible, and specified that action was required within the Local Laws team and individually. It identified different ways that Mr Potter was going to be assisted in that regard. He was informed how his progress would be assessed. The letter made clear that the matters raised in the letter were serious and a significant improvement was required to meet expected standards of performance. The departure from the process of the use of the counselling forms and the provision of the letter of 30 June 2014 was not significant.

[324] As to the 30 June 2014 meeting Mr Potter was not given notice of the 30 June 2014 meeting until shortly before it commenced and was not informed of what was to be discussed at the meeting, although I accept in the 18 June 2014 meeting it was discussed that issues raised by the survey for the Local Laws team that needed to be discussed were to be reduced to writing as stated in the letter of 30 June 2014.

[325] Although Mr Potter stated that he requested weekly meetings which did not occur, the letter had informed him that he was to prepare fortnightly work plans. He saw Mr Wolff as part of the problem and I consider it is unlikely that even if he had been offered weekly meetings that he would have taken them up. I also accept that Mr Wolff had informed Mr Potter that he would assist him and was available to him. The requests for weekly meetings by Mr Potter were more consistent with someone wanting to address the problems raised than indicating a psychological deterioration.

[326] While being performance managed would carry some stress which the Council would have been aware of, being performance managed was part and parcel of being an employee and it was not unusual that as part of his employment Mr Potter would be subject to supervision and, if necessary, correction by those responsible who were his managers. The defendant was entitled to assume that he could cope with supervision and, if necessary, correction by his managers, that being an inevitable incident of the performance of his duties. As I have found the issues arising out of the survey results had been raised on two occasions more informally and Mr Potter asked to consider how he would address them and the nature of the supervision or correction in the 30 June 2014 meeting was not excessive or inappropriate such that its effect was known or

should have been known by the Council to be out of the ordinary.[103] It was also acknowledged in the meeting by Mr Stanton and in the letter of 30 June 2014 that the issues in the local laws team were not solely attributable to Mr Potter but raised broader issues which would also be the subject of inquiries with staff in the team. While the Council may be fairly criticised for not dealing with the survey results and raising issues as to Mr Potter's performance as a manager earlier, the raising of such matters was an 'inevitable incident of the performance of his duties'.

[327] I accept that the Council knew, or reasonably ought to have known, that Mr Potter was a long term employee he would be upset as a result of the meeting and being given the letter of 30 June 2014, particularly given he had, up until that time, not been told he was not performing and had received compliments for his performance in disaster management. However, performance reviews are an accepted part of the workplace and common place. In the context of the survey results having been discussed at two prior meetings, and the letter of 30 June 2014 making clear that the letter was not a formal warning, any non-compliance with the DAC process was not significant such that the Council should have anticipated it would have shocked him or carried additional stress such that he was psychologically vulnerable. The DAC provisions were in place for procedural fairness not specifically to prevent psychological injury.The fact the Council ought to have known he was aware of the DAC process would not have suggested that he would be psychologically vunerable in the circumstances. The fact he was a manager rather than a junior employee would support the fact that the Council ought not to have known that he would be at risk if it didn't strictly comply but adopted an alternative process.I am not satisfied that the Council knew or ought to have known that there was a not insignificant risk of Mr Potter suffering a psychiatric illness as a result of the meeting and provision of the letter.

[328] I do not find that in the circumstances in relation to the 30 June 2014 meeting the relevant duty of care to take reasonable care to prevent psychiatric injury was engaged.

Post 30 June 2014 meeting

[329] While Mr Potter stated he asked for weekly meetings which did not occur and prepared action plans which were not responded to, there was only a three week period before events were taken over by subsequent complaints. While I accept Mr Wolff's evidence that the Council would have offered him any necessary support, the lack of response may be accepted as adding to Mr Potter's stress in dealing with the matters raised in the 30 June 2014 meeting. There were indications he was stressed as a result of the meeting of 30 June 2014 insofar as he was observed to have been withdrawn by Mr Wolff. That would accord with a normal human reaction rather than of itself raising evidence of mental deterioration. His reaction was however part of the corporate knowledge accumulated by the Council.[104]

21 July 2014 – Duty of Care

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103 *Keegan v Sussan Corporation (Aust) Pty Ltd* [2014] QSC 64; *Robertson v State of Queensland & Anor* [2021] QCA 92.

104 Mr Wolff and Mr Stanton were sufficiently a part of senior management for their knowledge to be regarded as corporate knowledge: see *Robinson v State of Queensland* at [2017] QSC 165 at [9].

Was a Duty of Care Owed at All?

[330] The plaintiff alleges that the Council was negligent in suspending Mr Potter's employment on 21 July 2014.

[331] The plaintiff contends that the duty of care was to take reasonable care to avoid exposing the plaintiff to unnecessary risk of injury whilst engaged in carrying out work in the defendant's business and to provide and maintain a safe workplace. It further contends that the relevant duty of care owed by the Council required it to take reasonable care to avoid exposing the plaintiff to a foreseeable risk of psychiatric injury in his employment and comply with the duties in s 19 of the WHS Act. Relevantly the plaintiff contends that the content of the duty which the Council owed to Mr Potter required that it was only to suspend the plaintiff's employment if to do so was a lawful and reasonable direction and the criteria set out in the defendant's DAC was met. While the procedures are not contended to be contractual, the plaintiff contends that the defendant was obliged to comply with the Procedure as it was a lawful and reasonable direction from the Council as to how matters dealing with the suspension of an employee's employment were to be dealt with as has had been found by Rothman J in *Downe*.[105]

[332] The defendant denies any duty of care was relevantly owed to the plaintiff in relation to the suspension. It contends that the recognised duty of care of an employer to take reasonable care to guard against a foreseeable risk of injury relying on *Govier*[106] does not extend "beyond the conduct of tasks an employee was engaged to perform" and do not comprehend "an obligation to supply a safe system of investigation and decision making in relation to matters concerning the contract of employment itself."

[333] The defendant contends that the act of suspension of an employee, or to "relieve an employee from the obligation to perform work and direct the employee not to attend work" is an exercise of a contractual right and that the exercise of a contractual right, even carelessly, does not give rise to, or be a breach of, a duty of care. In that regard it relies upon the statement of the High Court in *Koehler* that "insistence upon performance of a contract cannot be in breach of a duty of care."[107] In that case, the relevant contractual right being exercised was a direction to work agreed work hours.

[334] The defendant pleads that although its letter of 21 July 2014 refers to Mr Potter being stood down on full pay, the proper characterisation of the Council's direction was a direction that the plaintiff need not perform work whilst remaining on full pay. The Council submits that it was recognised in *Avenia v Railway & Transport Health Fund Ltd* (***Avenia***)[108] that an employer has the contractual right to issue a direction to suspend an employee or direct that they don't work on full pay, provided it is bona fide direction.

[335] The defendant further contends that the present case is indistinguishable from the Court of Appeal's decision in *Govier.* As discussed above, the allegations concerned were found to relate to the respondent's exercise, allegedly in a careless way, of its contractual rights to investigate a workplace incident involving two employees and a client, and to

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105 (2008) 71 NSWLR 633.
106 [2017] QCA 12 at [66].
107 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [29].
108 (2017) 272 IR 151.

make decisions about the appellant's contract of employment which it was contractually entitled to make.[109] In that respect Fraser JA stated:

> "This is not a case in which the claim was based upon a duty by the employer to supply a safe system of work in the workplace by providing support for an employee during the course of an investigation, as was the case in *Hayes*."[110]

[336] The plaintiff however contends that the present case does not involve the exercise of rights which concern incidents of the contract of employment, such as investigation and disciplinary procedures, which was the subject of the decision in *Paige*.[111] Rather, he contends that the issues in relation to the suspension of Mr Potter relate to whether the Council had a right to give him a lawful and reasonable direction in relation to his work duties. The plaintiff has also sought to distinguish *Paige* and *Govier* on the basis that neither case involved the day-to-day work for which the employees were employed, whereas in the present case the suspension of the Council's employee involved the performance of the plaintiff's everyday work activities. The plaintiff therefore contends that the duty which the defendant owed to the plaintiff was to provide a safe system of work to carry out his ordinary work duties and the suspension of the plaintiff's employment was distinct from the investigation process.

[337] The plaintiff further contends *Avenia* was a case where there was a contractual right, whereas the case which is authoritative in the present circumstance is *Downe*.[112] According to the plaintiff, *Downe* recognised that the relevant right was a common law right, not a contractual one.

[338] The points in contention between the parties involve a number of questions, a number involving some legal complexity, namely:

(a) What is the basis of any right to suspend or stand down an employee on full pay;

(b) Is the right to suspend or direct an employee of the Council not to work on full pay limited to the circumstances set out in the PMDP;

(c) Is the right to suspend or direct an employee not to work on full pay the exercise of a contractual right;

(d) Does the duty to provide a safe system of work extend to an employer exercising a right of suspension or does the exercise of the right relate to an incident of the contract of employment as discussed in *Paige* and *Govier*; and

(e) Is the duty of care contended for a new category of a duty of care and should it be found to exist.

Right to Suspend or Stand Down?

[339] It is recognised that at common law, an employer has no right to suspend an employee without full pay as a disciplinary measure, nor is there a right to stand down an employee

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109 *Govier v The United Church in Australia Property Trust (Q)* [2017] QCA 12 at [75].
110 [2017] QCA 12 at [75].
111 2002 NSW CA 235.
112 (2008) 71 NSWLR 633.

during periods in which they cannot be usefully employed.[113] That position can be varied by the terms of employment, awards or legislation. However it is also recognised that an employee may be suspended or directed not to perform work on full pay.

[340] Neither *Downe* nor *Avenia* involved allegations of breach of any duty of care. As the plaintiff relies on *Downe* for a number of propositions I will consider it in some detail.

[341] In *Downe,* complaints were made against a doctor which were subsequently the subject of an investigation. Dr Downe was advised that "Following the receipt of a report concerning alleged inappropriate behaviour by yourself, it has been decided that you are to be suspended from duty on full pay…pending an investigation. Access arrangements for security and computer network have also been suspended at this time…" In that regard his Honour found it unlikely that she was suspended and that Dr Downe was directed not to perform work rather than being suspended, as she still held the position of Director.[114]

[342] An inquiry was conducted by a Queen's Counsel, both of complaints made against and by Dr Downe. None of the complaints were found to be established. Although outside the terms of reference, the report commented that notwithstanding the findings, the interpersonal relationships of staff were such that Dr Downe could not return to work at the hospital unit of which she was director. After the findings of the inquiry, Dr Downe remained suspended.[115] That was found to be contrary to the requirements of the disciplinary policy which had been the agreed basis upon which the inquiry proceeded and that any report findings would be binding on the Health Service and reported to staff.[116]

[343] One of the issues in *Downe* was whether Dr Downe could be suspended for an indefinite duration. In the course of considering that matter, Rothman J also considered the right to suspend during the investigation.

[344] In *Downe,* Rothman J found that there was no statutory right to suspend Dr Downe.[117]

[345] Rothman J, however, recognised that an employer has a right to suspend employment, or direct an employee not to attend work, on full pay during an investigation. His Honour found that the "suspension," if that was the proper characterisation during the investigation, was temporary in nature albeit it ended on the happening of an event rather than by a particular date.[118] His Honour's reasoning in that regard relied upon an employer's entitlement, subject to express provisions of the contract, to give lawful and reasonable directions to an employee as to the manner in which the employee shall perform work.[119] There was no express term of the contract of employment permitting the employee to be stood down or directed not to work in *Downe*.

[346] The Health Service contended that a disciplinary procedure promulgated by it was part of Dr Downe's contract of employment and provided it with a right to suspend her

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113 C Sappideen et al, *Macken's Law of Employment* (Thomson Reuters, 8th ed, 2016) at [7.10].
114 (2008) 71 NSWLR 633 at [293].
115 (2008) 71 NSWLR 633 at [221].
116 (2008) 71 NSWLR 633 at [216].
117 (2008) 71 NSWLR 633 at [319].
118 (2008) 71 NSWLR 633 at [296].
119 (2008) 71 NSWLR 633 at [342].

employment. Rothman J rejected that argument, but found that in any event, the disciplinary procedure was, to the extent that it directs employees to conduct disciplinary procedures in a particular way, a lawful and reasonable direction as to the manner in which work will be performed.[120] Rothman J found that if it permitted a suspension not otherwise allowed under the contract of employment, it would only have applied for the period between the institution of the investigation and its outcome.[121] Given the outcome of the inquiry it did not permit the suspension to be continued but rather the disciplinary procedure required she be reinstated.

[347] Notwithstanding that Rothman J found that there was an implied term in the contract of employment not to conduct oneself in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between an employer and employee[122] and to act in a good faith towards each other, Rothman J found an employer had right under a contract of employment to give a direction to an employee not to perform work during the course of an investigation into allegations of misconduct:[123]

> "In circumstances where an employee, bona fide, takes a view that during the course of such an investigation, the continued performance of duty by an employee is inconsistent with its interests, it is entitled under the terms of the contract of employment, to direct the employee not to perform work."

[348] Rothman J therefore considered that there was not a breach of the contract of employment to provide a direction not to perform work while an investigation into complaints occurred, provided it was given in good faith.[124]

[349] Rothman J did not however accept the contention that a direction not to perform work which extended beyond the time when the investigation has concluded, or operated indefinitely was a reasonable and lawful direction,[125] even if the employee remains on full pay. His Honour found that there was no express or implied term permitting the employer to give such a direction.

[350] Rothman J noted that the implication of a contractual term was constrained by the terms of the contract itself. He considered that the terms of the contract entered into with Dr Downe clearly contemplated performance of work. His Honour found that it was implicit in the contract that she would have the opportunity to exercise her skills as a clinician. Rothman J concluded that there was no implied term permitting the Health Service to give a direction that Dr Downe not perform work at all for an indefinite period.[126] The

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120 (2008) 71 NSWLR 633 at [342].

121 (2008) 71 NSWLR 633 at [349].

122 Which was subsequently rejected by the High Court in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169.

123 (2008) 71 NSWLR 633 at [413].

124 (2008) 71 NSWLR 633 at [415]. In so deciding, his Honour indicated it was a concomitant of a duty of good faith or to a lesser extent of mutual trust that an employer ought to investigate the complaint (as to the latter, its importation in a contract of employment was rejected by the High Court in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169). See [411] and [321]-[328] of *Downe.*

125 (2008) 71 NSWLR 633 at [415]-[416] and [422]-[423].

126 (2008) 71 NSWLR 633 at [427].

only implied right in the contract of employment was to give a direction not to perform work consistent with the investigation of a complaint.[127]

[351] Rothman J therefore concluded in *Downe* that upon the completion of the investigation, it was incumbent upon the employer to inform Dr Downe when she could return to her duties, and by the conduct of the employer, there was an express or implied continuation of the direction not to perform work beyond the period of investigation. Given that none of the allegations against Dr Downe, which were the subject of a lengthy inquiry, were found to be established,[128] his Honour concluded that the suspension "beyond the period necessary to give effect to the investigation" was in breach of contract and unlawful.[129]

[352] In *Avenia*, Dr Avenia had been suspended from employment while his conduct was investigated, until the completion of the investigation. Amongst allegations made was that the first respondent acted dishonestly and in bad faith in suspending Dr Avenia and providing him with a show cause letter.

[353] Dr Avenia contended there was a continuing work implied term but accepted there would be an exception if a suspension was reasonably necessary for the purposes of a disciplinary investigation.[130] Lee J did not find a continuing work implied term but noted the concession made that a suspension that was reasonably necessary would not be in breach of contract.

[354] Mr Avenia's employment contract contained no express power to suspend on full pay, or otherwise, pending an investigation of alleged or suspected misconduct.[131] There was however an express term that Dr Avenia had to comply with all reasonable directions.[132] Lee J did not consider it was necessary to imply any term in the employment contract in order for there to be found a right to suspend. Rather his Honour found that provision to provide reasonable directions was sufficient to provide the employer with a right to suspend on full pay temporarily, for a proper purpose, pending an investigation or fact finding.[133]

[355] Lee J, while acknowledging that suspension on full pay was not a neutral act and cast a shadow over an employee who was subject to suspension, found that where an employer bona fide takes a view that, during the course of an investigation, the continued performance of the duty by an employee is inconsistent with its interest, it was entitled, under the terms of the contract of employment, to direct the employee not to perform work.[134]

[356] In the course of his reasons, Lee J referred to the decision of Rothman J in *Downe,*[135] noting that insofar as Rothman J's reasoning was premised on a mutual duty of trust and confidence, it had to be approached with caution in light of the High Court's decision in

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127 (2008) 71 NSWLR 633 at [429].
128 (2008) 71 NSWLR 633 at [353] such that the employer had an obligation to reinstate Dr Downe.
129 (2008) 71 NSWLR 633 at [431].
130 (2017) 272 IR 151 at [140].
131 (2017) 272 IR 151 at [150].
132 (2017) 272 IR 151 at [134].
133 (2017) 272 IR 151 at [150].
134 (2017) 272 IR 151 at [166], referring to *Downe*.
135 (2017) 272 IR 151 at [157]-[166].

Commonwealth Bank of Australia v Barker (2014) 253 CLR 169.[136] Notwithstanding those observations, Lee J did not think that Rothman J's decision was contingent upon either an implied duty of mutual trust and confidence or an implied duty of good faith, notwithstanding his Honour's reference to term being concomitant on one or other of those terms. Lee J considered his Honour's reasoning was that the right to direct an employee not to perform work for a closed period during the course of an investigation supplemented, but was not contingent upon, an extension of the implied duties.[137] In my view, that is the better view of Rothman J's decision.

[357] Lee J stated that whether or not an employer is entitled to direct someone not to perform available work depends on the circumstances of the direction, the work that is not to be performed and the terms of the contract of employment to ascertain whether the direction was reasonable.[138] His Honour did consider the duty to co-operate implied by law to allow Dr Avenia the benefit of his bargain did not detract from the express right to give a direction to suspend which was reasonable.[139]

[358] Lee J concluded that:[140]

> "More particularly, RTHF was entitled to suspend Dr Avenia under the Employment Contract where it formed the view, bona fide, that the direction to suspend was in furtherance of its duties to enquire into or investigate allegations of inappropriate behaviour when such behaviour could constitute a risk to the safety, health and welfare of its staff and/or its fulfilment of its duty to provide a safe place of work for its staff. Of course, this is just another way of stating that, in these circumstances, a direction to suspend would constitute a reasonable direction and Dr Avenia was obliged to comply with it by reason of the Reasonable Direction Provision…"

[359] Lee J noted that Rothman J had opined more generally that a direction to suspend would be reasonable where the employee had, bona fide, formed the view, during the course of an investigation, that the continued performance of the duty by an employee was inconsistent with its interests. Lee J however stated that it was not necessary to decide whether the exercise of the power in such a way would always be reasonable in all such cases.[141] His Honour, however, stated that in the circumstances which he had set out, the direction was reasonable. That was so even though the investigation was not a formal disciplinary investigation but where the employer was seeking reasonably to determine issues or find facts relevant to allegations or suspicions of employee misconduct.

Suspension was an Exercise of a Contractual Right

[360] The letter of engagement by the Cooloola Shire Council is silent as to suspension or any disciplinary procedures.[142] It is not suggested that the May 2008 letter[143] contained any

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136 (2017) 272 IR 151 at [163].
137 (2017) 272 IR 151 at [165].
138 (2017) 272 IR 151 at [165].
139 (2017) 272 IR 151 at [170].
140 (2017) 272 IR 151 at [170].
141 (2017) 272 IR 151 at [171].
142 See [2A] of the SOC and [1] of the Defence.
143 Although the defendant referred to the letter as exhibit 2, exhibit 2 is in fact the 2003 letter of engagement with Cooloola Shire Council.

express provision providing for any right to suspend nor any express provision for an employee to follow reasonable directions, as was the case in *Avenia*. However, both *Downe* and *Avenia* recognised a right to suspend on full pay during an investigation as being implied into a contract of employment. That appears to arise on the basis that there is an implied term in an employment contract that an employee is obliged to comply with a reasonable and lawful direction of an employer.[144] Rothman J in *Downe* considered such a direction could be given where the employer had formed the bona fide view, during the course of the investigation, that the continued performance of duty was inconsistent with its interests. Lee J in *Avenia* confined the question of reasonableness of the directions to the circumstances, which his Honour outlined,[145] and left open whether in all cases a direction given in the circumstances outlined by Rothman J would always be reasonable.[146]

[361] In the present case, Mr Potter would be obliged to follow a reasonable and lawful direction and that could extend to a direction not to perform work during an investigation into complaints. The right to give such directions is an implied term of the contract of employment consistent with the reasoning of Rothman J in *Downe*. The fact that there was a power to give such a direction does not appear to be in issue. While the plaintiff contends that there would be no term implied into the contract because the employer had a right to issue lawful and reasonable directions, including a direction that an employee be suspended pending investigation if in the circumstances it is appropriate to do so, the right to give such a direction would, consistent with the decision of *Downe,* be implied in the contract, a breach of which would sound in a remedy for a breach of contract.

[362] The plaintiff contends that the exercise of the right to give a reasonable and lawful direction was confined to the circumstances set out in the PMDP. It does not contend that those procedures are incorporated into the contract of employment between Mr Potter and Council, but rather like Rothman J found in *Downe*, they themselves are reasonable and lawful directions to Council employees as to how to conduct themselves.

[363] Lee J in *Avenia* took a different approach and although it was not necessary to consider the question, noted that the policies could be relevant as a contextual matter in assessing the question of what constitutes a reasonable direction.[147] Given the procedures concerned are referred to as guidelines which provide significant discretion as to the extent to which they are followed, Lee J's approach is the relevant one in the present case. While they impose reasonable expectations, they do not impose obligations of a contractual or tortious nature upon an employer.

Was the Direction Given the Subject of a Duty of Care?

[364] According to the plaintiff the Council altered Mr Potter's work duties from a safe system of work to carry out his ordinary work duties to a situation where his work activities were regulated and unsafe. It contends the defendant still owed the plaintiff a duty of care during the investigation and suspension including a duty to provide a safe system of work. The plaintiff contends that unlike the case of *Paige* and *Govier* the suspension

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144 *R v Darling Island Steverdoring & Lighterage Co; Ex parte Halliday & Sullivan* (1938) 60 CLR 601 at 621-622.

145 (2017) 272 IR 151 at [170].

146 (2017) 272 IR 151 at [171].

147 (2017) 272 IR 151 at [194].

involved the plaintiff's everyday work activities. The suspension took place in the context of an investigation not a disciplinary process.

[365] The plaintiff contends that the suspension of employment is distinct from the investigation process as was identified by Dalton J in *Hayes* and the case of *Gogay v Hertfordshire County Council (**Gogay**),*[148] to which her Honour referred and other English cases. That must be accepted.

[366] Although a direction not to work or suspend on full pay and an investigation may be inter-related, a suspension does not necessarily follow whenever an investigation is to be carried out. As has been recognised in a number of cases, suspension is not a neutral act and involves separate considerations from a decision to carry out an investigation of allegations against an employee.

[367] While an employee is suspended or directed not to perform work while an investigation is carried out, they remain an employee. The recognition of a duty of care to provide adequate support to an employee during that period, as was found to be the case in *Hayes* in respect of two of the employees who were suspended can in that context be understood. However, what of the decision to suspend or direct an employee not to perform work, which may involve broader considerations of other employee's interests and potentially the employer itself.

[368] Moreover, while the plaintiff contends the decision to suspend is an alteration of work duties such that the duty to provide a safe system of work would apply to such a decision that does not appear to accord with authority.

[369] In *Paige,* Spigelman CJ found no duty of care was owed to a principal of a school for his employer to take reasonable care to avoid him suffering a psychiatric harm.[149] The principal was the subject of an investigation for breaches of duty for non-compliance with procedures in dealing with complaints about sexual abuse against various teachers and subsequent disciplinary procedures. The primary judge had found that the general duty of care to provide a safe system of work encompassed the provision of a safe system of investigation and decision-making as alleged.[150] While it was conceded by the appellant that there was a risk of psychiatric injury that was reasonably foreseeable, the appellant argued there was no duty of care of a character relevant to the proceedings.

[370] In *Paige* Spigelman CJ identified the provision of a safe system of work as being "exclusively concerned with the conduct of tasks for which an employee is engaged".[151] Spiegelman CJ stated that:

> "His Honour made no reference to any authority, nor was any authority drawn to the attention of this Court, that extended the concept of a "system of work" to matters concerning the incidents of the contract of employment, such as the disciplinary procedures under consideration in the present case. This is a novel category of duty and involves an extension of employers' duties. In the present context, it raises

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148 [2000] EWCA Civ 228.

149 With whom Mason P and Giles JA agreed, save for some qualifications which do not bear relevance to the present case.

150 Summarised at [22] of *State of New South Wales v Paige* (2002) 60 NSWLR 371.

151 [2002] NSWCA 235 at [78].

important considerations concerning the interrelationship between duties of care and statutory powers and duties."[152]

[371] Having considered the decision of the High Court in *Sullivan v Moody,*[153] Spigelman CJ found that the application of the law of negligence to the relationship in *Paige* would intersect with two other areas of law: judicial review of administrative action and the law of contract, as modified by statute, with respect to wrongful dismissal under a contract of employment.[154]

[372] In *Sullivan v Moody,*[155] the High Court had rejected that a duty of care was owed to fathers by medical practitioners and social workers who examined the children, the subject of an investigation by police as to whether they had abused their children. The High Court noted that if a duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that duty exists.[156] In particular, the Court noted that public authorities and their officers would not ordinarily be the subject of a duty to have regard to the interests of those they were investigating when that would impose upon them conflicting claims or obligations. The Court concluded in that case, that the medical practitioners charged with examining the children said to be the subject of abuse and reporting the results to the relevant government department were not the subject to a duty of care as it would be "inconsistent with the proper and effective discharge of those responsibilities that they should be subjected to a legal duty, breach of which would sound in damages, to take care to protect persons who were suspected of being the sources of harm."[157] In that case the statutory scheme made the interests of children paramount. The discussion by the majority pointed out that there is no ready formula for determining whether or not a duty of care is owed, identifying that different classes of care give rise to different problems in determining the existence and nature or scope of the duty of care.[158]

[373] Spigelman CJ in *Paige* considered that the reasoning in *Sullivan v Moody* made it clear that the recognition of a new category of duty for the purposes of the law of negligence must involve consideration of the requirements of a coherent system of law.[159]

[374] Spigelman CJ considered issues of compatibility arose at the level of duty with each stage of the decision-making process, namely: charge, inquiry and decision.[160] His Honour found that one factor that was common to all three stages was the inhibiting effect on the process of investigation and decision making that would arise if the law were to impose a duty of care to avoid risk of mental trauma to the person whose conduct was being investigated.[161]

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152 (2002) 60 NSWLR 371 at [78].
153 (2001) 207 CLR 562.
154 *State of New South Wales v Paige* (2002) 60 NSWLR 371 at [86].
155 (2001) 207 CLR 562.
156 *Sullivan v Moody* (2001) 207 CLR 562 at [60].
157 *Sullivan v Moody* (2001) 207 CLR 562 at [62].
158 (2001) 207 CLR 562 at [50].
159 *State of New South Wales v Paige* (2002) 60 NSWLR 371 at [97].
160 *State of New South Wales v Paige* (2002) 60 NSWLR 371 at [106].
161 *State of New South Wales v Paige* (2002) 60 NSWLR 371 at [114].

[375] After an analysis of the applicable employment[162] and administrative law principles and identifying areas of incompatibility between the obligations arising in those areas and a private law duty of care, Spigelman CJ found that "issues of coherence with the law of employment and administrative law …together with element of incompatibility of duties, are so significant as to outweigh these considerations."[163]

[376] Thus, in *Paige* his Honour found that the duty to provide a safe system of work did not extend to matters concerning the incidents of a contract of employment such as the disciplinary procedures involved in that case. Spigelman CJ found that there was no duty, as found by the trial judge, that to provide " a safe system of work encompassed the provision of a safe system of investigation and decision-making".[164] His Honour determined that no duty of care to avoid psychiatric injury arose in that case having regard to issues of coherence by reference to the statutory scheme that applied, industrial law and administrative law.[165] That case did not consider a decision to suspend an employee but to carry out an investigation under statutory provisions.

[377] The case of *Paige* has been considered by the Court of Appeal in two cases: *Govier*[166] and *Hayes*. In *Govier* it was contended that *Paige* did not apply as it arose in the context of a detailed statutory scheme. That was rejected by Fraser JA, who delivered the primary judgment.

[378] Fraser JA in *Govier* found that allegations of negligence which pertained to the employer's exercise, allegedly in a careless way, of its contractual rights to investigate a workplace incident involving two employees and a client was not a case in which the claim was based upon a duty by the employer to supply a safe system of work. [167]

[379] While the plaintiff seeks to frame its argument by reference to the decision to suspend or direct him not to perform work as altering his day to day work duties, that in my view, is an incorrect characterisation. The effect of the decision to suspend an employee or direct the employee not to perform work while an investigation is carried out requires an employee not to perform work at all during that period at the workplace. It alters the employee's state from working to not working whilst still being employed not the employee's work duties.[168] The decision to suspend is therefore outside of the employer's duty to provide a safe system of work.

[380] In the present case while the Council sought to contend that considerations of the coherence of the law excluded any duty of care being found in relation to the decision to suspend, that was not canvassed in any depth.

[381] While the prospect that there were other remedies available to Mr Potter under industrial law and administrative law in relation to the suspension were raised, it was not developed in any detail. Given the width of the definition of industrial dispute in s 7(1) of the *Industrial Relations Act 2016* (Qld),[169] which extends to "a matter that effects or

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162 In respect of termination of employment.
163 *State of New South Wales v Paige* (2002) 60 NSWLR 371 at [182].
164 (2002) 60 NSWLR 371 at [76] and [78].
165 (2002) 60 NSWLR 371 at [178]-[181].
166 [2017] QCA 12.
167 [2017] QCA 12 at [75].
168 *Downe* at [294]-[295].
169 Neither party submitted that the *Fair Work Act 2009* (Cth) had any application.

relates to … be the privileges, rights or functions of – (i) employers or employees …" it seems likely that there would be redress for an employee the subject of a suspension.[170] I do not accept, however, that Item 16 of Schedule 1, which was relied upon by the defendant, and refers to "the right to dismiss or to refuse to employ, reinstate or re-employ a particular person, or class of person in a particular calling" would, according to the defendant, clearly apply. Reinstatement would suggest there had been a dismissal from an employee's position,[171] rather than, as here, a suspension for the purpose of investigation, on full pay, as was submitted by the plaintiff. I note, however, Schedule 1 is inclusive not exclusive.[172] I was referred to no authority to support its application to suspension.

[382] While it was suggested by the defendant that there may also be the prospect of an administrative law remedy, the basis for such relief was not identified.[173] The plaintiff took issue with it being raised, as it was not raised in the defence, and objected to it being raised in closing submissions. The defence, in that regard, relied on its contractual right to give the direction to Mr Potter to suspend his employment or direct him not to work on full pay and did not raise any administrative law relief available to Mr Potter based on any statutory provision or decision to which Part 5 of the *Judicial Review Act 1991* (Qld) would apply. The right relied upon by the Council is a private right, albeit by a body created by statute. It is not evident that there would be any basis for review under the *Judicial Review Act 1991* (Qld) upon which Mr Potter could have relied. Given the view I have taken, I do not need to consider the plaintiff's objection to this aspect of the defendant's argument being raised at all on the basis it was not raised in the defence.

[383] However, the defendant's principal argument against any duty of care arising in relation to the decision to suspend Mr Potter is that the decision was made pursuant to a contractual right and the exercise of a contractual right by an employer does not give rise to a duty of care in reliance of the Court of Appeal decision of *Govier*.

[384] In *Govier,* the appellant had suffered psychiatric injury as a consequence of an assault on her by a co-worker. She had been hospitalised. The co-worker made a complaint against the appellant which was ultimately determined to be unfounded. The appellant contended that the employer had breached its duty of care to her by its conduct towards her immediately after the assault. After the incident, the employer wrote letters to the appellant, advising her that there was an investigation and that during the investigation she was to be stood down on full pay and asked her to attend an interview. On the first occasion, the appellant was in hospital. At the time of a rescheduled meeting, she was too sick to attend and was required to obtain a medical certificate. The co-worker then made an allegation that the appellant had assaulted her, amongst other allegations that were found to be false. While she was still on sick leave, the appellant received a show cause letter as to why her employment should not be terminated. The letter stated that she had refused to attend a meeting and purported to make preliminary findings based on the information provided by the co-worker. The trial judge found that there had been a failure to take reasonable care for the appellant's psychiatric health by the sending letters, which was described by Fraser JA in this way:[174]

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170 See also s 265(1)(b) *Industrial Relations Act 1999* (Qld).

171 See for example in *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539.

172 S 7(3) of the Industrial Relations Act 1999 (Qld).

173 [118] of the Defendant's submissions. No reference was made to livelihood cases.

174 [2017] QCA 12 at [64].

> "The primary judge found that the timing, manner and content of the employer's two letters caused a sense of injustice and betrayal in the appellant and aggravated her psychiatric injuries. The primary judge also found that psychiatric injury to the appellant was reasonably foreseeable as a result of the timing, manner and content of the respondent's letters."

[385] In that case, there was psychiatric evidence that the "timing, manner and content of the letters most likely aggravated the trauma of the assault."[175]

[386] The trial judge, however, considered that there was no recognised duty of care, following the decision of *Paige.* Upon appeal it was not argued that *Paige* was incorrectly decided, but rather that it was distinguishable. The Court of Appeal however found that not to be the case.

[387] Justice Fraser also did not find that the case of *Hayes*[176] was a basis for distinguishing *Paige* in *Govier*. Justice Fraser noted that in *Hayes* the claim was not based upon the conduct of the investigation or decision-making in relation to complaints against the employees, but rather was directed to the employer's failure to provide and maintain a safe workplace for each employee in the course of their employment during the investigation and decision-making process.[177]

[388] Unlike *Hayes*, Fraser JA identified that on the basis of the evidence before the primary judge the "particulars of the alleged negligence and the appellant's submissions to the trial judge conveyed that the appellant perceived that she was not supported by management, baseless accusations were made against her of unprofessional conduct, and unjust threats were made to terminate her employment".[178] His Honour characterised the allegations in *Govier* as concerning only the respondent's exercise, allegedly in a careless way, of its contractual rights to investigate a workplace incident involving two employees and a client and to make decisions about the appellant's contract of employment which it was contractually entitled to make.[179] Fraser JA stated that:

> "This is not a case in which the claim was based upon a duty by the employer to supply a safe system of work in the workplace by providing support for an employee during the course of an investigation, as was the case in *Hayes*."[180]

[389] Justice Fraser found that:[181]

> "The appellant sought to distinguish Paige on the ground that it involved a statutory process of investigation and asserted requirements by the employer which would have been inconsistent with the statutory procedures. That difference between this case and *Paige* has no bearing upon the New South Wales Court of Appeal's decision that the proposed duty by an employer to supply a safe system of

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175 [2017] QCA 12 at [63].
176 [2017] 1 Qd R 337.
177 [2017] QCA 12 at [74].
178 *Govier v The United Church in Australia Property Trust (Q)* [2017] QCA 12 at [75].
179 [2017] QCA 12 at [75]. It was not in contest that the respondent was entitled to stand the appellant down on full pay during the investigation or seek an account from the employee about their conduct.
180 [2017] QCA 12 at [75].
181 [2017] QCA 12 at [77].

> investigation and decision-making in relation to the incidents of an employee's contract of employment, as opposed to a safe system of work in relation to the conduct of tasks for which an employee was engaged, would involve a novel category of duty of care. In relation to the question whether that novel category of duty should be established, the passages from *Paige* extracted in these reasons show that the New South Wales Court of Appeal dealt separately with the question whether the proposed duty of care would be incompatible or incoherent with the law of contract, as modified by statute, concerning termination of employment. I do not regard this suggested ground of distinguishing *Paige* as a sufficient basis for holding that the respondent owed the appellant the postulated novel duty of care in the course of the respondent's investigation in this case."

[390] In that respect, Fraser JA considered that in relation to the question of whether a novel category of duty should be established, the passages from *Paige* extracted in the reasons showed that the New South Wales Court of Appeal dealt separately with the question of whether the proposed duty of care would be incompatible or incoherent with the law of contract as modified by statute concerning termination of employment. His Honour affirmed the decision of the trial judge that the respondent did not owe the appellant a duty of care to avoid injury to the appellant by sending the letters.

[391] The decision to suspend or direct Mr Potter on full pay was not part of the investigation itself although made in the context of a decision to investigation allegations against Mr Potter. Unlike *Govier,* it was therefore not made in furtherance of a contractual right to carry out an investigation. However, it was made pursuant to the exercise of a contractual right to give reasonable directions which has been found to extend to a direction to suspend or not to perform work on full pay during the course of an investigation. As was found by Lee J in *Avenia,* the power is not limited to a formal "disciplinary process" but extends to circumstances where the employer "is seeking to reasonably determine issues or find facts relevant to allegations or suspicions of employee misconduct".[182]

[392] While I have not been referred to any Australian authorities which have considered whether a duty of care arises in the context of a decision to suspend an employee, I have been referred to some English authorities in the context of a decision to suspend. I have however not found any of those decisions to be of great assistance.

[393] The plaintiff relies on the decision of *McCabe v Cornwall County Council & Ors,*[183] as supporting the existence of a duty of care in relation to a decision to suspend. In that case, the House of Lords upheld a decision to strike out a claim to recover damages at common law, caused by the manner of the disciplinary proceedings, on the basis that the entitlement to recover did not apply where dismissal in fact followed and industrial proceedings covered the substance of the claim. However, it further upheld the decision not to strike out the claim for damages for psychiatric injury caused by the employer's suspension of the claimant and the failure to inform him for five months of the allegations against him and carry out a proper investigation in breach of the relationship of trust and confidence and breach of duty to provide a safe system of work. Lord Birkenhead noted the incongruity of the result, arising as a result of the statutory code in

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182 (2017) 272 IR 151 at [174].

183 [2005] 1 AC 503 at [27]-[33].

relation to dismissal, as opposed to conduct prior to the unfair dismissal to act fairly towards him.

[394] The case of *McCabe v Cornwall County Council & Ors,*[184] does suggest that the duty to provide a safe system of work does extend to a decision to suspend, at least on an interlocutory basis, however it was in the context of a claim for breach of the relationship of trust and confidence.

[395] Similarly, *Gogay v Hertfordshire County Council*[185] concerned whether the suspension of an employee involved a breach of an implied term of trust and confidence and included consideration of whether or not there was "reasonable and proper cause" to suspend the claimant.[186] A breach of the implied term was found on the basis it was not reasonable to suspend the employee and not inform her of allegations made against her.

[396] In the case of *Yapp v Foreign and Commonwealth Office,*[187] the claimant was withdrawn from his post and suspended during an investigation. He suffered a severe psychiatric illness. It was noted in the judgment that the withdrawal from the post was permanent and closer to an unfair dismissal.[188] The trial judge found that there was a breach of the contractual *Malik* term and a duty of care. The Court of Appeal upheld the decision of the primary judge that there had been a breach of duty in suspending and withdrawing the claimant from his post unfairly.[189] However, in considering the question of remoteness, Lord Underhill stated the if the injury was not reasonably foreseeable, the claim would fail on the basis of remoteness as there was only an obligation to take reasonable steps to prevent psychiatric illness if the injury is reasonably foreseeable.[190] The appeal was allowed and the claim failed, given the fact that the Foreign and Commonwealth Office had no prior knowledge of any vulnerability to stress, nor ought it reasonably have known of any such vulnerability. It was therefore determined that the psychiatric injury was not reasonably foreseeable.[191]

[397] The implication of a term of trust and confidence in the English authorities in the employment contract is a significant point of distinction of those cases from the Australian authorities. The High Court in *Commonwealth Bank of Australia v Barker*[192] rejected the implication of such a term at least as matter of law. Although the question of whether there has been a breach of a duty of care as well as a breach of the implied term has been considered in the English authorities, the fact there is such an implied term would be relevant to the scope of any duty of care. No Australian authority to date appears to have found a duty of care to arise to a decision to suspend as opposed to a duty to provide adequate support.

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184 [2005] 1 AC 503 at [27]-[33].
185 [2000] EWCA Civ 228 at [53].
186 [2000] EWCA Civ 228 at [55].
187 [2013] EWHC 1098.
188 [2013] EWHC 1098 at [82] per Lord Underhill and at [151] per Lord Justice Davis.
189 The implied term as to trust and confidence ("the *Malik* term") imposes a duty to act fairly: see *Eastwood v Magnox Electric plc; McCabe v Cornwall County Council* [2005] 1 AC 503 at [11].
190 [2013] EWHC 1098 at [81].
191 [2013] EWHC 1098 at [125], [127], [129], [133] and [155].
192 (2014) 253 CLR 169.

[398] In the present case I consider the better view is that there was implied in the contract of employment a term that the Council could give reasonable and lawful directions to an employee. Although it appears to be a right recognised at common law, more recent authority has recognised it is now an implied term in a contract of employment. Those authorities discussed above recognise that a reasonable direction can be given to an employee, suspending him or directing him not to perform work on full pay during the investigation of allegations against the employee. Whether it is a reasonable direction will depend on all of the circumstances.

[399] Any duty of care needs to bring into account the contract that existed between the Council and Mr Potter.[193] A duty to an employee to protect the employee from psychiatric harm does not extend to injury suffered by undertaking the very obligation imposed by the contract.[194] Unlike the case of *Koehler,* the provision of such a direction involves an element of discretion[195] rather than simply requiring an employee to undertake the very obligation to perform work under a contract of employment. The Council, however did have a contractual right to give a direction to suspend or not to perform work to an employee on full pay where allegations against an employee were being investigated, albeit the direction had to be reasonable. Similarly, the decision to suspend or direct an employee not to work on full pay is separate from the investigation process albeit that it is connected to it since it is recognised as being a reasonable direction in limited circumstances where it is given in the context of an investigation. The entitlement of an employer to suspend or direct an employee not to work on full pay has been recognised as a reasonable direction where the employer bona fide forms the view that it was in furtherance of its duties to inquire into or investigate allegations of inappropriate behaviour at least in the circumstances identified by Lee J in *Avenia,*[196] and potentially more broadly where the employer *bona fide* forms the view that the continued performance of the employee's duties was inconsistent with the employer's interests, according to Rothman J in *Downe*. The present case is not concerned with decisions relating to the investigation process itself or disciplinary processes as was the case in *Paige* and *Govier.* However, like *Paige* and *Govier,* it does relate to a decision-making process concerning the incidents of a contract of employment and not the carrying out of tasks by an employee such that it is outside the scope of the duty of an employer to provide a safe system of work and the plaintiff 's duty of care would be a novel duty of care.

[400] The recognition of such a right to relieve an employee of the obligation to perform work during an investigation is inconsistent with a duty not to injure an employee by giving such a direction.[197] As is evident from the discussion above, the determination of whether such a direction is given involves a number of competing interests which may need to be considered, including the interests of other employees and the employer as well as the employee concerned. That weighs against the recognition of any duty of care. Nor is the fact that it may be foreseeable that the exercise of that right without reasonable care might result in a psychiatric injury sufficient to justify the imposition of a duty of

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193 *Woolworths Limited v Perrins* [2016] 2 Qd R 276 at [43]; *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [21].

194 *Woolworths Limited v Perrins* [2016] 2 Qd R 276 at [43]; *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [21].

195 Subject to the terms of the contract of employment.

196 (2017) 272 IR 151 at [170].

197 *Sullivan v Moody* (2001) 207 CLR 562 at [54]-[62].

care.[198] While the fact of the employer/employee relationship and the potential vulnerability of the employee weighs in favour of a duty of care, the present case, in my view, is more analogous to the situation considered in *Govier* insofar as the proposed duty of care relates to the exercise of a contractual right which is an incident of the contract of employment connected with the undertaking of an investigation.

[401] I find that the circumstances do not justify the recognition of a duty of care to supply a safe system of decision-making to avoid the risk of foreseeable injury in relation to the making of directions to suspend an employee or not perform work connected with the carrying out of an investigation. The employee would not be left without a remedy if the direction was not reasonable. If the direction was not found to be a reasonable direction, a remedy would be available for breach of contract as was evident from the decision of Rothman J in *Downe*, albeit no breach was found in that case.

[402] In those circumstances, although strictly unnecessary to decide due to my findings that psychiatric injury was not reasonably foreseeable when Mr Potter was suspended, I find that there was no duty of care owed to Mr Potter in deciding to suspend Mr Potter, even if the exercise of the contractual right was careless.

Foreseeable Risk of Psychiatric Injury as at 21 July 2014

[403] I do not find, that on 21 July 2014, the risk of a psychiatric illness being suffered by Mr Potter was reasonably foreseeable in the sense that the risk was not far-fetched or fanciful[199] or to phrase the issue as the parties have that there was not a significant risk of psychiatric injury to the plaintiff that the plaintiff knew of or ought reasonably to have known of in the suspension of Mr Potter.

[404] It is not in issue that the knowledge of Mr Stanton and Ms McCrohon, who conducted the meeting of 21 July 2014, could be attributed to the Council and that the Council is vicariously liable for the acts of its employees as pleaded. Similarly there is no issue that the knowledge of Mr Stanton and Mr Wolff arising from the meeting of 30 June 2014 was part of the Council's corporate knowledge which was added to by the events of 21 July 2014.

[405] The Council would have been aware or should have been aware that Mr Potter appeared shocked and upset at being told of his suspension. That was observed at least by Ms McCrohon and was consistent with the fact that he had been a long-term Council employee who held a middle management position and had been given positive feedback at times in respect of his work, not criticisms, until issues were raised as a result of the 2013 survey results. As was acknowledged by Lee J in *Avenia* and Ryan J in *Walters v Hanson*,[200] suspension is not a neutral act.

[406] As to the circumstances relied upon by the plaintiff to contend that the Court should draw the inference that it was reasonably foreseeable that there was a risk of the plaintiff sustaining a recognisable psychiatric illness:

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198 *Sullivan v Moody* (2001) 207 CLR 562 at [54]-[62]; *Govier v Uniting Church in Australia Property Trust (Q)* [2017] QCA 12 at [73].

199 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 and followed in *Hayes v State of Queensland* [2017] 1 Qd R 337 at [109].

200 *Walters v Hanson* [2020] QSC 216.

(a) The defendant was aware of all the facts relating to the meeting of 30 June 2014. I have made findings in that regard above.

(b) That after the meeting of 30 June 2014, the plaintiff appeared to be a lot quieter and appeared to be 'down in the dumps' and his demeanour had changed which was observed by Mr Wolff. I accept this was the case.

(c) Ms Kelly observed that Mr Potter lost confidence after receiving the 30 June 2014 letter and had gone from holding himself quite high and proud to slumping and questioning his decisions. I accept Ms Kelly's evidence although there is no evidence that she relayed her observations to anyone more senior in the Council, nor does she appear sufficiently senior for her knowledge to be part of Council's "corporate knowledge". However, no issue was taken by the Council in that regard and her observations were generally consistent with those made by Mr Wolff.

(d) Ms Smith told Mr Stanton and Mr Wolff that Mr Potter had told her that he felt he was being "stitched up" and he had two rich sisters and would fight it all the way. While the plaintiff submits that this demonstrated to Mr Stanton and Mr Wolff that the plaintiff was vulnerable because he was concerned about the longevity of his employment and thought he may be terminated, the comment could equally indicate Mr Potter was defiant and felt that he was in a strong position rather than being vulnerable. I do not consider that this was a significant indicator that Mr Potter was not coping or displaying significant vulnerability or stress.

(e) The defendant knew that the plaintiff was a long term employee who was employed in a senior position and that a suspension from duty is not a neutral act. I accept that to be the case.

(f) The fact that the suspension involved removing Mr Potter from his substantive role. In that regard, the plaintiff submits that such a consideration was an important aspect of Dalton J's reasoning in *Hayes,*[201] where her Honour rejected that a duty of care was owed in relation to Ms Greenhalgh who was shifted to an alternative role she wanted and was not suspended. However, her Honour referred not only to Ms Greenhalgh not losing her substantive position and being moved to a new role which she had sought, but also the fact that she was somewhat insulated from the workplace conflict, which was in contrast to Ms Harris and other employees. In any event, as I have found the suspension or direction not to perform work was not a neutral act.

(g) The defendant knew that it was purporting to act on the basis of the DAC, which was only applicable to a situation where disciplinary action had been taken. Regardless of whether or not the Council procedures were correctly followed, I do not find that in determining to suspend Mr Potter, any Council employee were not acting bona fide and thought they were acting outside Council procedures.

(h) The defendant knew that the letter of 21 July 2014 did not specify the period of suspension, such that it was indefinite and the plaintiff did not know when it was likely that he could return to work. I deal with this matter further below

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201 *Hayes v State of Queensland* [2017] 1 Qd R 337 at [301].

> While there is no date specified for when the suspension would end in the letter, it was implicit in the letter that the suspension would end upon the completion of the investigation depending on the outcome. While the lack of a definite date for when the investigation was to be finalised and the outcome would be known would have given rise to uncertainty for Mr Potter and could have been a source of some stress, he did not display that to be the case. At least in Mr Potter's conversation with Mr Wilkinson about when he thought he would finish his investigations, he was calm and did not demonstrate any anxiety in that regard, although one can accept he was eager to have the matter resolved.

[407] While no time was specified for the completion of the investigation, timeframes were given as to when the first part of the investigation would be completed, allegations would be provided, and when Mr Potter would be interviewed. While no definite time was specified as to when the suspension would end, as I stated above, it was implicit in the letter that it would last until the final outcome was reached. In the second last paragraph of the letter of 21 July 2014, the letter stated:

> "I emphasis again that during your suspension from employment you are required to refrain from having any contact with the complainant and any other Council employees outside of those previously advised. You will not be permitted to attend Council premises for any reason with the exception of pre-arranged meetings pertaining to this investigation and all your computer access including remote access will be suspended until a final outcome is reached."

[408] The plaintiff contends that consideration of all of the stressors cumulatively demonstrates that it was reasonably foreseeable that there was a risk that Mr Potter could suffer a psychiatric injury. It is appropriate to have regard to all of the circumstances in considering the question of reasonable foreseeability and consider them cumulatively. In *Robinson v State of Queensland*,[202] the Court considered the cumulative effect of the relevant stressors. That case, however, was different to the present. There were multiple events which occurred over some 12 months where there were repeated instances of managerial mistreatment of Ms Robinson and signs progressively exhibited by the plaintiff of a high and an increasing degree of emotion, concern and distress.[203]

[409] In the present case it is relevant to consider the fact that the Council was aware prior to 21 July 2014 that Mr Potter would already have suffered some stress by being subject to a performance management process, albeit not in a formal sense where the corporate knowledge of the Council was that Mr Potter was somewhat withdrawn and despondent after receiving the letter of 30 June 2014. Similarly, the Council was aware that Mr Potter had made reference to his possible termination to Ms Smith, however for the reasons set out above, that was not relayed in a way which was indicative of someone displaying significant vulnerability.

[410] The Council were also aware that standing down an employee on full pay whether described as a suspension or a direction not to perform work where serious allegations are made was not a common circumstance and would have been a stressful matter for

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202 [2017] QSC 165 at [18].

203 [2017] QSC 165 at [299], [300] and [302].

any employee. The possibility of being stood down pending an investigation rather than as part of a disciplinary sanction, was not outside the realm of decisions an employee could expect to be made and was a matter raised in Council procedures. While Ms McCrohon was aware that Mr Potter's suspension was stressful for him, she did not find his reaction was unexpected. It could reasonably be anticipated by the Council that Mr Potter would be placed under significant stress by being suspended during an investigation. There is no basis however for the plaintiff's contention that Ms McCrohon should have been aware that Mr Potter would suffer extreme stress as a result of the complaints, the suspension and the investigation, that is a matter of supposition. The Council knew that Mr Potter was somewhat shocked and upset at the meeting of 21 July 2014, and asked what he had done wrong, his response was not out of the ordinary in the circumstances. Even if I had found that Mr Potter had put his head in his hands, that action is equally consistent with somebody who is upset at what he is being told and would not have indicated such a level of distress that would suggest that he was responding in a way that was out of the ordinary for any employee in such a situation where serious allegations were being made and he was being stood down from his employment while the investigation occurred.

[411] While being stood down was confronting, I do not find that either Mr Stanton or Ms McCrohon were confrontational in the way they conducted the meeting but rather I find that their approach was professional, informing Mr Potter of the process that was to be an undertaken with an external investigator to be appointed. I do not find that Ms McCrohon's description of the complaint made by RS suggested it was anything other than an allegation and that there was no prejudgment. Nor do I find that Ms McCrohon's reference to termination was anything other than one of the possible outcomes if the allegations were established. The letter of 21 July 2014 made clear that no findings had been made in relation to the investigations and that an investigation was to be carried out.

[412] Mr Potter had no history of any psychiatric illness nor any special vulnerability of which the Council was aware. It is not necessary that there be such a pre-condition in order to find that an employer has reason to suspect that the employee is at risk of psychiatric injury. While it is acknowledged that workplace stress can give rise to recognisable psychiatric illness,[204] something further is required to say that the risk of psychiatric injury to an employee by an employer is reasonably foreseeable. Nor is mere predictability enough.[205] The Council would have been aware of the pressures upon Mr Potter caused by both the events of 30 June 2014 and 21 July 2014, which he had not apparently experienced before. However, the pressures were not of the level that they alone would make a psychiatric injury reasonably foreseeable assuming Mr Potter was a person of normal fortitude. An employer is entitled to assume that an employee is up to the usual pressures of a job including disciplinary procedures.[206] Of course, there is no precondition that psychiatric injury would be suffered by a person of normal fortitude. It

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204 *New South Wales v Paige* [2002] NSWCA 235 at [199]-[200] per Spigelman CJ.

205 *Eaton v Tricare (Country) Ltd* [2016] QCA 139 at [32] referring to Gleeson CJ in *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269.

206 *Croft v Broadstairs & St Peter's Town Council* [2003] EWCA Civ 276 at [73]; *Yapp v Foreign and Commonwealth Office* [2013] EWHC 1098 at [104]; *Hayes v State of Queensland* [2017] 1 Qd R 337 at [131] per Dalton J, referring to *Barber v Somerset County Council* [2004] 1 WLR 1089.

is the risk of the employee concerned sustaining a recognisable psychiatric illness that must be reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful.

[413] There is no evidence that, aside from the events of 30 June 2014 and 21 July 2014, Mr Potter was experiencing undue workload or having to work hours outside the normal working day. While Mr Potter had requested reviews of his workplans and weekly meetings to discuss the way forward after 30 June 2014, Mr Potter had made no complaints of stress which were relayed to senior management. The present is not a case involving prolonged workplace stress.[207] As to implicit warnings that may have come from Mr Potter's conduct, knowledge of Mr Potter's conduct in response to the events of 30 June 2014 or 21 July 2014 either alone, or in addition to the pressures raised by the performance management and suspension and investigation of allegations, were not sufficient for the Council to reasonably foresee that he was at risk of psychiatric illness. Mr Potter's being withdrawn and showing some signs of distress and anxiety after 30 June 2014 and on 21 July 2014 were not an abnormal reaction to the situation he found himself in and were not out of the norm of what would have been expected from someone of normal fortitude in his situation. They were not such to cause the defendant to suspect Mr Potter was at risk of psychiatric injury. It is not enough that "distress, alarm, fear, anxiety, annoyance or despondency, without any resulting psychiatric illness" might be foreseen.[208] The Court does not assess an employer's capacity to detect signs of mental illness as though it was a medical specialist.[209] While Mrs Potter gave evidence of her husband crying and being distraught on 21 July 2014 there is no evidence that was relayed to anyone in the Council.

[414] The signs Mr Potter was under stress as a result of the suspension and the other circumstances relied upon were insufficient to make the risk of psychiatric injury to Mr Potter reasonably foreseeable from the Council's perspective so as to result in the relevant duty of care.

Duty of Care to Lift the Suspension

[415] The plaintiff contends that the Council breached its duty of care in failing to lift the suspension of the plaintiff's employment on 9 or 11 August 2014. It contends that the duty of care owed by the Council to the plaintiff to take reasonable care to avoid exposing the plaintiff to unnecessary risks of injury included a duty to lift the suspension upon completion of the Aitken report and to inform Mr Potter of the outcome of the report and that his employment would continue without impact. The plaintiff also relies on the failure to lift the suspension as being negligent conduct, as a failure to provide adequate support in breach of the duty of care to provide adequate support.

[416] The plaintiff relies on the fact that even if a reasonable and lawful direction could be given to suspend Mr Potter's employment, on the basis of *Downe* and *Avenia,* it could only be given to an employee not to perform work for the period of the investigation. The plaintiff contends that time arose from the moment that Mr Wilkinson delivered his report to the Council as the investigation was complete upon delivery.

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207 Cf McMurdo P in *Hayes v State of Queensland* [2017] 1 Qd R 337 at [12].
208 *Tame v State of New South Wales* (2005) 211 CLR 317 at [7].
209 *Hayes v State of Queensland* [2017] 1 Qd R 337 at 377 per Dalton J.

[417] According to the plaintiff, the Aitken report was completed on 9 or 11 August 2014. I have found that the report was only sent by Mr Wilkinson to the Council on 9 August 2014, which was a Saturday. There is no evidence to suggest that it came to anyone at the Council's attention before 11 August 2014. The evidence supports the fact it first came to the attention of Ms McCrohon.

[418] As the duty of care is premised on the completion of the investigation on either of those dates, I will consider first whether that was in fact the case prior to considering the question of foreseeability and other matters affecting the existence of a duty.

[419] In *Downe,* Rothman J, after referring to a policy which provided for suspension from duty pending the outcome of an investigation, stated:

> "The foregoing, if it allowed a suspension not otherwise allowed on a contract of employment, would allow a suspension limited only to the period between the institution of an investigation and its outcome."[210]

[420] While in that case it was found that the investigation was complete on delivery of the report, which found the allegations against Dr Downe to be wholly or substantially unproven, the case does not establish, as a matter of principle, that an investigation finishes upon the delivery of a report as that was the basis upon which the inquiry was undertaken in that case. The letter which suspended Dr Downe stated that she was suspended on full pay "pending an investigation."[211] Subsequently, a Queen's Counsel was appointed to conduct an inquiry which had terms of reference addressing complaints against and by Dr Downe.[212] According to Rothman J:

> "Dr Downe agreed to the process for the Peterson Inquiry, and thereby acted to her prejudice, in the understanding that any Report arising from the Inquiry would be confined to the specific allegations referred to it and that any such Report findings would be binding on the Health Service, and reported to staff."[213]

[421] In those circumstances, the investigation was complete upon the delivery of the report which all parties had agreed would be binding. However, that does not lead to a conclusion that will be the relevant time in all cases.

[422] In *Waddell v Mathematics.com.au Pty Ltd,*[214] which was referred to by Lee J in *Avenia*, Rothman J stated[215]:

> "An employee is entitled, for a limited period pending an investigation or the determination of issues, to require an employee not to attend for work. In the circumstances pertaining to this employment, such a direction was reasonable."[216]

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210 (2008) 71 NSWLR 663 at [348].
211 (2008) 71 NSWLR 663 at [33].
212 (2008) 71 NSWLR 663 at [39].
213 (2008) 71 NSWLR 663 at [216].
214 [2013] NSWSC 142.
215 Having referred to his Honour's decision in *Downe*.
216 [2013] NSWSC 142 at [106].

[423] That suggests that the completion of the investigation may occur when there is a determination of the issues.

[424] As discussed above, it was implicit in the letter of 21 July 2014 that Mr Potter was to be stood down on full pay until the investigation was completed. Mr Wilkinson was, according to the letter of 21 July 2014, appointed as investigator "to assist the Council by carrying out the investigation and was appointed to make final recommendations to the Council". It was evident from the letter that the Council would review the findings in order to determine what action would be taken "there will be no determinations without appropriate findings".

[425] In the present case, any decision was to be made by the CEO in light of the investigation report. The Complaints Process provided for an investigation of an alleged breach of the Council Officers' Code of Conduct to be carried out by way of an external investigation. The procedure states that:

> "The CEO will be advised of the outcome and be responsible for determining any action to be taken. The outcome of any investigation and related documentation must be provided by the Manager, People & Organisational Development for recording on the relevant file."[217]

[426] That process outlined in the Council's procedure contemplates an assessment of any investigation to be made by the CEO after the outcome of any investigation has been provided to the Manager, People & Organisational Development, who is to pass it on.

[427] The plaintiff also relies on the Complaints Process. Clause of 7 of the policy provides:

> "All reports of alleged or suspected improper conduct made under this policy will be properly assessed and if appropriate, will be independently investigated in a timely manner with the objective of locating evidence that either substantiates or refutes the claims made by the whistleblower.
>
> Where issues of discipline arise the response will also be in line with Council's procedures for disciplinary matters. Where allegations of unacceptable conduct made against another person cannot be substantiated, that person will be advised accordingly and will be entitled to continue in their role without impact."
>
> (emphasis added)

[428] That however is of little assistance to the plaintiff. Given the findings made by Mr Wilkinson in his report, the second paragraph did not provide that Mr Potter had to return to work. While he did not make findings and recommendations that serious misconduct had been established on the evidence, Mr Wilkinson did still find that the evidence substantiated a finding of misconduct in relation to allegation four, and that in relation to allegation one and three, that the evidence did not support a finding of misconduct but that what occurred was evidence of poor judgement or decision-making as a manager.

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217 Exhibit 55, section 2.0.

[429] There is a further matter which arose during the investigation process. As a result of the Aitken report, a matter was raised by Mr Wilkinson about Mr Potter having contacted Mr Grant contrary to the direction given in the letter of 21 July 2014. The letter provided to Mr Potter on 22 January 2015 raised it as a further allegation that arose during the course of the investigation that needed to be responded to by Mr Potter. Mr Smith did not regard that as a new allegation that had to start a fresh investigation process, but rather an allegation that arose out of the original investigation. Counsel on behalf of Mr Potter submitted, however, that it was not part of the original investigation process but rather the subject of an investigation required by the Complaints Process.

[430] It is not evident that the Complaints Process would require a fresh investigation to be carried out, as opposed to Mr Potter being given a further opportunity to address the additional matter arising out of the investigation. There was no further complaint that had been made. Rather, it arose out of the matters being investigated and was evidence of behaviour that was potentially contrary to a direction given by the Council, albeit a different matter from the allegations which were the subject of the investigation by Aitken Legal. Even if adopting this approach, the Council was going outside its policy and procedures by extending the investigation to the allegation regarding Mr Potter contacting Mr Grant, that is a matter which is not justiciable according to the principles set out in *Paige*.

[431] Given the further issue raised was one that arose out of the original investigation, I consider that the better view is that the investigation process was not complete until after the allegation in relation to Mr Grant had been addressed. I discuss this further below.

[432] In my view, the investigation was not complete upon the delivery of the Aitken report by Aitken Legal to the Council, and until the Council had a reasonable opportunity to review the report in order to assess the findings made, consider whether it had addressed the matters which were the subject of investigation and advise Mr Potter of the outcome and whether the Council considered any action should be taken on the basis of the findings. In that regard, consistent with that view, Mr Potter was asked to respond to the findings of the investigation in the letter of 22 January 2015 before consideration was to be given to disciplinary action itself.

Foreseeability of Risk – 9 or 11 August 2014

[433] Even accepting the plaintiff's contention that the investigation was complete on 9 or 11 August 2014 and that there was an obligation to lift the suspension, was the risk that Mr Potter may suffer a psychiatric illness or psychiatric injury reasonably foreseeable?

[434] As at 9 or 11 August 2014, the only additional matters known by the Council to its knowledge as at 21 July 2014 was that a medical certificate was provided by Mr Potter on 9 August 2014, which stated that he was not fit for duty due to a medical condition and the fact he had attended and had been interviewed by Mr Wilkinson on 30 July 2014. There was nothing in Mr Wilkinson's report which suggested that Mr Potter indicating he was suffering any stress, anxiety or any emotional difficulties.

[435] The terms of the medical certificate provided on 9 August 2014 which stated Mr Potter would be unfit to return for a week did not put the Council on notice that Mr Potter was suffering any psychological condition or indeed any particular condition which could have informed the Council that there was a not insignificant risk of Mr Potter sustaining a recognisable psychiatric injury.

[436] The build up of knowledge of the Council was not sufficient for it to reasonably foresee that Mr Potter might be at risk of a psychiatric injury on 9 or 11 August 2014.

[437] The further medical certificate provided to the Council on 13 August 2014, which stated, *inter alia*, "he is suffering from work-related stress and anxiety and requires further management". It stated that he would be unfit for work from 13 August 2014 until 30 August 2014.

[438] The defendant contends that the reference to stress and anxiety was not enough for the Council to think the prospect of psychiatric injury was sufficiently real to give rise to a risk that needed to be guarded against.

[439] While work related stress and anxiety do not equate to a psychological injury *per se*, given the Council knew that Mr Potter had been exposed to stress through the suspension and investigation and the period for which it was stated that he would not to be fit to return to work and required further management the Council know or ought to have known that there was a not insignificant risk of psychiatric injury to the plaintiff.

[440] By 13 August 2014 the risk that Mr Potter might suffer a psychological injury was reasonably foreseeable.

Duty of Care to Provide Adequate Support

[441] The plaintiff contends that the defendant owed Mr Potter a duty of care to take reasonable steps to prevent psychiatric injury by providing support or adequate support to Mr Potter.[218] That duty was said to extend to the period when Mr Potter was suspended and being investigated, relying on the formulation of the duty articulated by Dalton J in *Hayes* was not affected by the decision in *Paige.*

[442] The plaintiff alleges in [8E] of the SOC that there was an implied term in the contract of employment that the defendant would provide adequate support to Mr Potter from the time a formal complaint was made by RS, when suspending the plaintiff, during the period when he was suspended and during the course of any investigation into the alleged misconduct.

[443] While that was one of the matters identified in the Issues in Dispute for determination, neither party addressed the question, neither party's submissions addressed the question of the implication of the term nor does the SOC identify whether or not the term is implied as a matter of law or fact. As was stated by Spigelman CJ in *Nationwide News Pty Ltd v Naidu & Anor,*[219] the Court should not readily imply terms in an employment contract. In the present case, there is no basis in law or fact which has been established by the plaintiff for the implication of such a term.

[444] That the duty of care to take reasonable steps to avoid the risk of an employee suffering psychiatric injury by providing adequate support to an employee during an investigation has been recognised as being distinct from a duty of care being owed in relation to the conduct of the investigation itself. In *Hayes,* two of the claimants had been suspended while an investigation was conducted into the complaints in the workplace. The trial

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218 [8D]-[8F] SOC.

219 (2007) 71 NSWLR 471 at [339].

Judge had found that no duty of care was owed on the basis that the duty of care arose directly from the fact of allegations made against the plaintiffs, the investigations or the removal from the position. The decision was overturned on appeal.

[445] In *Hayes,*[220] McMurdo P described the duty as turning not solely on the conduct of the investigation or lack of decision, but the respondent's lack of support of each of them at the time of the complaints and the investigation.[221] Dalton J (with whom Mullins J, as her Honour then was, agreed as did McMurdo P save in relation to one appellant Ms Greenlagh) distinguished *Paige* and found that it did not exclude a duty of care arising in the circumstances of the case. Dalton J found that while the duty of care had not been properly pleaded, that the case in *Hayes* had been principally run on the basis that the duty principally relied upon by the appellant was a duty to provide adequate support during the investigation. Dalton J however, found that while there were some particulars of breach which challenged the way the investigation was carried out, for example failure to provide detailed or timely information about the allegations made and failing to comply with policies or procedures, which were indirect allegations of failing to provide natural justice, for the most part, the breaches of duty alleged were the failure to provide support or adequate support in circumstances of workplace hostility and the investigations.[222]

[446] Justice Dalton distinguished the decision of *Paige,* on the basis that the decision to investigate and the process of investigation were attacked, whereas *Hayes* was like the cases where, to the knowledge of the employer, the appellants were vulnerable in a hostile workplace while their conduct was being investigated.[223]

[447] Justice Dalton referred to the decision of *Gogay v Hertfordshire County Council,*[224] where it was alleged that a suspension caused the employee to suffer clinical depression. In *Gogay,* Hale LJ stated that there was a distinction between an investigation into whether a child was at risk of significant harm, following the making of allegations by the child, and the process of dealing with a member of staff who may be implicated in that risk. In that regard, her Honour noted the considerations relevant to each differed. As to that, Dalton J stated that:

> "There is a clear distinction made in *Gogay* between the duty of an employer to investigate alleged misconduct in the workplace, and a duty to support the employee whose conduct is under investigation. In some circumstances an employer will owe both duties."[225] (footnote omitted)

[448] Her Honour considered that the trial judge erred in not considering the distinction was a meaningful one. Her Honour stated that:

> "In my view, the trial judge failed to understand the type of distinction made in *Gogay* (above). In fact the distinction made in *Gogay* was the very distinction which he thought not to be meaningful. Insofar as the appellants did not attack the fact of, or processes of, the investigations, there was no incoherence or

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220 [2017] 1 Qd R 337.
221 [2017] 1 Qd R 337 at [7].
222 *Hayes v State of Queensland* [2017] 1 Qd R 337 at [121].
223 *Hayes v State of Queensland* [2017] 1 Qd R 337 at [121].
224 [2000] IRLR 703.
225 *Hayes v State of Queensland* [2017] 1 Qd R 337 at [123].

inconsistency between any administrative law concepts and the duty of care alleged. Nor was there any inconsistency between the duty of care alleged by the appellants and the employer's duty (common law in this case) to investigate the complaints made by one group of employees against another group of employees. My conclusion therefore is that the principles in *Paige* did not stand in the way of a duty of care arising."[226] (footnotes omitted).

[449] Ms Hayes was a manager who worked in a disability unit. She had been the subject of complaints by a residential care officer, Ms Johnson, made in 2008 which included alleged workplace harassment, which resulted in an investigation and were found to be unfounded. She made further allegations in 2009 as did a significant number of residential care officers, together with their union. In relation to the 2008 complaints, there were matters raised insofar as there was an error in the resolution of the complaint, resulting in the employee against whom the allegations were made falsely believing that the complaint had been upheld. Her Honour noted that those matters were not justiciable because of the principles in *Paige*, but that the respondent's knowledge was relevant in assessing what the respondent could reasonably foresee in 2009.[227] Her Honour concluded a duty was owed to Ms Hayes:

"At the end of 2008 the Department knew, or ought to have known, that Ms Johnson was a difficult person in the workplace who had made and pursued an unfounded complaint against Ms Hayes. The Department knew Ms Hayes had been upset at the complaint being made and that there had been a distressing error in the resolution of the complaint, so that for some time Ms Hayes falsely believed the complaint had been upheld. While these matters are not justiciable because of the principles in Paige, it is legitimate to consider the respondent knew of them when assessing what it could reasonably foresee in 2009."

[450] In making that conclusion Dalton J considered the following factual matters:

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

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

The Department knew, through Mr Costello, that by the end of 2008 Ms Hayes feared further attack from Ms Johnson. As discussed, the Department knew the magnitude of the 2009 complaints. It knew their similarity to those which had been made in 2008. By early January 2009 the Department knew that there would be a

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226 *Hayes v State of Queensland* [2017] 1 Qd R 337 at [125].

227 *Hayes v State of Queensland* [2017] 1 Qd R 337 at [169].

substantial period of delay while the complaints were investigated and that Ms Hayes would have to be removed from her position during the investigation.

I cannot see that any duty arose towards Ms Hayes before the 2009 complaints were made. However, once the 2009 complaints were made, the Department was well aware that there would be a substantial, serious and protracted dispute and investigation. The Department should not be judged as though it had psychiatric expertise. However, it was a large Government Department and had, or ought to have had, enough sophistication to reasonably foresee by 5 January 2009 that if support were not offered to Ms Hayes in the difficult circumstances which lay ahead, she might suffer more than just distress, but psychiatric harm. In *Johnson v Unisys Ltd* the speeches in the House of Lords recognised that in modern times it is generally recognised and understood that "work is one of the defining features of people's lives" and that workplace stress can give rise to recognisable psychiatric illness."[228] (footnotes omitted)

[451] The defendant contends that her Honour's reliance on *Gogay* resulted in her Honour making an error, as the decision in that case was made upon the basis that there was an implied term of mutual trust and confidence, whereas the High Court in *Commonwealth Bank of Australia v Barker*[229] had refused to imply such a term into employment contracts. The defendant also contends that the decision of *Hayes* is inconsistent with *Paige* and *Govier*. Notably, Fraser JA in *Govier* did not appear to adopt the same view. It is not, however, appropriate or necessary for me to consider the veracity or otherwise of the defendant's submissions that the decision of *Hayes* was the result of an error, given as is acknowledged by the defendant I am bound by the decision.

[452] The existence of a duty is a question of fact. The plaintiff relies on a number of matters in contending that a duty of care arose.[230] The present case is far different from *Hayes.* A number of the matters relied upon in relation to the duty of care have been addressed above in the context of the suspension.

[453] Relevant to the duty which the Plaintiff contends it owed to provide a duty of are to provide adequate support to the plaintiff from the time of the complaint was made by RS, when Mr Potter was suspended, during the period of suspension and during the course of the course of the investigation the plaintiff pleads a number of matters in [8F] of the Statement of Claim. In relation to those matters:

(a) There was no notice given of the meeting;

(b) Insofar as the plaintiff relies on matters said at the meeting I have not accepted that matters alleged to have been said by Ms McCrohon;

(c) While the terms provided for Mr Potter being stood down on full pay in the letter of 21 July 2014 did provide conditions of Mr Potter's suspension including return of the Council vehicle, not attending the premises and not having contact with other employees would be matters which the Council ought to have been aware would cause Mr Potter stress as was the case with being stood down itself, there was no indicator by which the Council ought to

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228 *Hayes v State of Queensland* [2017] 1 Qd R 337 at [169]-[173].
229 (2014) 253 CLR 169 at [40]-[41].
230 [8F] SOC.

have been aware that the conditions of the suspension would cause Mr Potter psychological symptoms. A suspension during investigation was not exceptional and unlike the case of Hayes it was not known that the investigation would take a considerable time. While the Council ought to have known it can be stressful being stood down on full pay, it similarly would have been aware as was the case in Hayes, that where an investigation involves the team which you manage suspension could potentially have reduced stress for Mr Potter.

(d) Not providing for Mr Potter to respond to the allegations would not have been a matter which the Council ought to have known would create significant stress or psychological symptoms. To the contrary raising the allegations and requiring a response would have been stressful and arguably unfair. In any event the letter made clear that full particulars of the allegations were to be provided to Mr Potter prior to the investigator meeting with him and that he would have the opportunity to respond with it having been made clear that no findings had been made.

(e) Even though Mr Potter was a long term employee who was known to enjoy his job, he was also a manager who was aware that the Council had to respond to complaints of employees in circumstances such as the present complaint was made;

(f) Given the meeting was only to stand down Mr Potter on full pay and not ask him to respond to any allegations and was in the context of an investigation that was to be carried out by an independent investigator and Council policies provided for when support persons were to attend the lack of provision for a support person and prior notice was to be given the failure to provide for the attendance of a support person or notice was not a matter which the Council ought to have known would have given rise to psychological symptoms;

(g) As set out above the context of the statement by Ms Smith to Mr Stanton and Mr Wolff about concern about termination was not made in a context to put him on alert to any matter.

[454] As to the contention of the Plaintiff that the failure to keep the plaintiff informed about the progress of the investigation that is a matter pertaining to the conduct of the investigation itself which consistent with the principles in *Paige* and *Govier* would not be justiciable.

[455] However, in determining whether such a duty of care to provide adequate support is owed, the Court must still determine whether, in all the circumstances, the risk of the plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable. I do not consider that the matters relied upon in the context of the duty of care to provide adequate support, were such that it was reasonably foreseeable that without such support there was a risk Mr Potter could suffer psychological damage.

[456] As discussed above, I have found that the risk of Mr Potter sustaining a recognisable psychiatric illness was not reasonably foreseeable until the Council received the medical certificate of 13 August 2014. The plaintiff contends the duty continued to be owed until August 2016 when Mr Potter's employment was terminated.

Breach of Duty

[457] In relation to breach predictability is not enough to establish liability. In *Robertson v State of Queensland & Anor,*[231] Henry J stated that:

> "The premise upon which his Honour proceeded, namely that the defendants did have the posited duty, did not of course mean that there had been a breach. As much was explained in the following observations by Spigelman CJ in *Nationwide News Pty Ltd v Naidu*:
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> "[I]t is now well established that workplace stress, and specifically bullying, can lead to recognised psychiatric injury. That does not, however, lead to the conclusion that the risk of such injury always requires a response for the purpose of attributing legal responsibility. Predictability is not enough. …
>
> An employer can be liable for negligence because of a failure to protect an employee against bullying and harassment. However, the existence of such conduct does not determine the issue of breach of duty. …
>
> One of the elements required to be assessed is the degree of probability that the risk of psychiatric injury may occur, even when the reasonable foreseeability test of a risk that is not farfetched and fanciful, has been satisfied."

[458] In considering whether there has been a breach of the duty of care at common law, it is first necessary to consider whether a reasonable person in the defendant's position would have foreseen the risk of injury and if so, determine what a reasonable person would do by way of response to the risk.

[459] The risk must be defined taking into account the particular harm that materialised and the circumstances in which that harm occurred. However, it is not confined to the precise set of circumstance in which the plaintiff was injured. Rather, what must be reasonably foreseeable is the nature of the particular harm that ensued or more relevantly, the nature of the circumstances in which that harm was incurred.[232]

[460] In determining whether the relevant risk was a risk of which the defendant ought to have known, it is to be determined objectively taking into account the particular facts and circumstances subjective to the defendant.[233]

[461] It is relevant to consider the statutory provision in the context of breach which operate against the background of common law principles, but has modified them to an extent.[234]

[462] Whether there has been any breach of duty must be considered by reference to s 305B and s 305C of the WCRA. These provisions state:

> "305B General Principles

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231 [2021] QCA 92.
232 *Erickson v Bagley* [2015] VSCA 220 at [33].
233 *Erickson v Bagley* [2015] VSCA 220 at [46].
234 *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* (2009) 239 CLR 420 at [11].

(1) A person does not breach a duty to take precautions against a risk of injury to a worker unless—

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and

(b) the risk was not insignificant; and

(c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.

(2) In deciding whether a reasonable person would have taken precautions against a risk of injury, the court is to consider the following (among other relevant things)—

(a) the probability that the injury would occur if care were not taken;

(b) the likely seriousness of the injury;

(c) the burden of taking precautions to avoid the risk of injury.

305C Other principles

In a proceeding relating to liability for a breach of duty—

(a) the burden of taking precautions to avoid a risk of injury includes the burden of taking precautions to avoid similar risks of injury for which the person may be responsible; and

(b) the fact that a risk of injury could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of injury does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk."

[463] Each of the elements of s 305B(1)(a) to (c) are to be judged from the viewpoint of the defendant, in the circumstances that were known, or ought to have been known at the time of the alleged injury.

[464] As to the assessment of whether the risk of injury was "not insignificant," Justice Fraser stated in *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd,*[235] replacement of "not insignificant" for the common law formulation of "not farfetched or fanciful" produces some slight increase in the necessary degree of probability.

[465] In order to prove that there was a breach of duty, it therefore must be established that the risk of injury was foreseeable and not insignificant,[236] and that in the circumstances, a reasonable person in the position of the Council would have taken precautions.

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235 [2013] 1 Qd R 319 at [26].

236 See s 305B of the WCRA.

[466] It is necessary to assess the magnitude of the risk of injury and the degree of probability of its occurrence along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have,[237] as they bear upon what a reasonable employer would do by way of response to the risk.

[467] McHugh J in *Dovuro Pty Ltd v Wilkins*[238] observed that:

> "A defendant is not negligent merely because it fails to take an alternative course of conduct that would have eliminated the risk of damage. The plaintiff must show that the defendant was not acting reasonably in failing to take that course. If inaction is a course reasonably open to the defendant, the plaintiff fails to prove negligence even if there were alternatives open to the defendant that would have eliminated the risk."[239]

[468] In assessing the question of breach, and what is required in the exercise of reasonable care, the Court must avoid hindsight and must consider the issue by looking forward to identify what a reasonable employer would have done, not backward to identify what would have avoided the injury, particularly in the context of psychiatric injury.[240]

Breach of Duty – 30 June 2014

I will address the question of breach in the event that I am wrong, and a duty of care was owed by the defendant to the plaintiff to avoid a foreseeable risk of a psychiatric injury to conduct the meeting of 30 June 2014 in a reasonable manner in accordance with the defendant's SCC and DAC.

[469] The plaintiff has alleged some 11 breaches of duty by the defendant. In terms of the factual basis of those breaches:

(a) I have not found that the conduct of Mr Stanton and his statements were aggressive, threatening, intimidating, overbearing and/or bullying or in breach of the SCC.[241]

(b) The fact that the issues related to the staff survey, which had been carried out in 2013, did not preclude it as the basis for performance issues for the 30 June 2014 letter.[242] I have found that the survey results were discussed in earlier meetings that were held in March 2014 and May 2014. It is not clear how this can be linked to any pleaded duty. In any event, while some time had passed since the survey results, there had been a restructure at the Council, including Mr Potter changing positions, I am not persuaded the results were redundant. It is not clear on the face of the survey results themselves that the dissatisfaction and observations of staff which reflected on Mr Potter's management could be clearly explained by Mr Potter having dual roles.

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237 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at [47]-[48].
238 (2003) 215 CLR 317.
239 (2003) 215 CLR 317 at [38].
240 *Hegarty v Queensland Ambulance Service* (2007) Aust Torts Reports 81-919 at [41], [49]; *Nationwide News Pty Ltd v Naidu; ISS Security Pty Ltd v Naidu* (2007) 71 NSWLR 471 at [20].
241 [12(a)] of the SOC.
242 [12(b)] of the SOC.

While Mr Potter attributed the results to his undertaking dual roles, there was, even on Mr Potter's own evidence ongoing internal issues in the team, which Mr Potter had attempted to address at his weekly team meetings. Ms Kelly's evidence also supported the fact that there had been ongoing issues within the team.

While Mr Stanton had not been at the Council for the six-month period, he considered the survey results did raise issues that needed to be addressed, even though he was not aware that there had been any change in the constitution of the Local Laws team, which indicated that the survey results were still not relevant, notwithstanding Mr Potter had changed to a single role. Mr Stanton had the benefit of the involvement of Mr Wolff who had been present at the Council at the time of the restructure. The results of the survey had also been discussed with Mr Potter including by Mr Stanton and Mr Wolff prior to the letter of 30 June 2014 and the meeting to discuss the letter.

(c) While Mr Potter was not told on the day what the nature of the meeting was that would occur, or offered a support person, the meeting was one which followed prior meetings of 25 March 2014 and 18 June 2014.[243] It was not a formal disciplinary interview requiring twenty-four hours' notice, or attendance of a support person, which was made clear by the terms of the letter of 30 June 2014.

(d) I am not satisfied that the defendant failed to go through the points raised in the letter with Mr Potter, even if the defendant did not go through the letter line by line.[244] Further, the letter itself outlined a path forward as to how the plaintiff could improve his performance and the assistance that could be provided in that regard.

(e) While Ms McCrohon did not attend the meeting, there is nothing to suggest that it was reasonably necessary for her to do so in the circumstances.[245]

(f) The letter of 30 June 2014 was clear in articulating what was expected of Mr Potter and how improvement would be assessed and managed.[246] Any alleged gaps in the letter have not been articulated by the plaintiff. Further, to the extent that it was unclear, I accept that Mr Wolff had informed Mr Potter that he had his full support to assist him in achieving any sort of work expectations. Mr Potter's view that Mr Wolff was part of the problem because he was in the meeting with Mr Stanton was not a view that could be reasonably formed as a result of the meeting that occurred.

(g) While the letter did not identify any previous discussions that had occurred, it referred to the earlier meetings on 18 June 2014 and 25 March 2014, including the subject matter of the discussion, namely the organisational survey. No case is articulated that the alleged failure had any effect in the context of Mr Potter.[247]

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243 [12(c)] of the SOC.
244 [12(e)] of the SOC.
245 [12(f)] of the SOC.
246 [12(g)] of the SOC.
247 [12(h)] of the SOC.

(h) The survey results did raise potential management issues in relation to Mr Potter's management, which could be properly used as a basis to address issues with him.[248]

(i) The plaintiff has not articulated a specific breach of s 19(1) of the WHS Act, save by reference to the breaches dealt with above. Section 19(1) of the WHS Act does not create a separate right of action of itself.[249]

(j) I am not persuaded that Mr Stanton or Mr Wolff's conduct was contrary to the SCC for the reasons set out above.[250]

(k) While it does appear that prior to March 2014 Mr Potter was not given feedback in terms of his management, in relation to the survey results and his management, it was discussed in the 25 March 2014 and 18 June 2014 meetings, and he was asked to consider what action would be taken. There is nothing to suggest that it was anything other than constructive feedback, nor that it would have made any difference to have raised it earlier with Mr Potter.[251]

(l) It is not apparent what corrective action was required to "make safe" the workplace by reference to the particulars in 12(a) to (i).

[470] As was succinctly stated by Henry J in *Keegan v Sussan Corporation (Aust) Pty Ltd:*[252]

> "The consideration of whether a reasonable person in the position of the defendant would have taken precautions necessarily involves a consideration of what a reasonable person would have done by way of response to the risk. Importantly, that inquiry is prospective. In *Nationwide News Pty Ltd v Naidu* Spigelman CJ explained the particular significance of the prospective nature of the inquiry in the case of psychiatric injury:
>
> "In any organisation, including in employer/employee relationships, situations creating stress will arise. Indeed, some form of tension may be endemic in any form of hierarchy. The law of tort does not require every employer to have procedures to ensure that such relationships do not lead to psychological distress of its employees. There is no breach of duty unless the situation can be seen to arise which requires intervention on a test of reasonableness." (footnote omitted)

[471] The nature of the work which Mr Potter was required to perform did not involve heightened stress or risk. He was in the position of middle management and was subject to supervision. While being subject to performance management for unsatisfactory work performance can be stressful insofar as an individual's performance is being questioned particularly for a long term employee, raising issues in relation to a staff member's performance that management considers needs to be addressed and corrected is a commonplace matter in the workplace. While the DAC was to ensure that an employee had the benefit of a fair process in being informed of unsatisfactory performance and

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248 [12(i)] of the SOC.
249 S 267 of the WHS Act.
250 [12(m)] of the SOC.
251 [12(m) of the SOC.
252 [2014] QSC 64 at [26].

being able to respond to it, the risk of psychiatric injury arising from departure from the DAC which was not for the reasons outlined above a significant departure would not have been a risk that the Council knew or ought to have known and would have been insignificant such that would have led a reasonable person to take precautions against the risk of injury. While the burden of taking precautions to avoid the risk of injury would not have been onerous the probability that injury would occur if care were not taken in complying with the DAC in the conduct of the meeting of 30 June 2014 and the likely seriousness of the injury would have been low

[472] While the DAC was not followed insofar as the counselling forms were not completed, as provided in stage 1 of the procedure, discussions had occurred with Mr Potter as to the issues raised by survey results and the fact that action needed to be taken by him prior to the 30 June 2014 meeting. The letter documented the shortcomings and how they were to be addressed by Mr Potter and specified that it was not a formal warning as to his performance. In the circumstances, I do not consider that the non-compliance with the DAC was a breach of duty.

Alleged Breaches Arising out of 21 July 2014 – Suspension

[473] It is alleged that in suspending or standing Mr Potter down from his employment, when it had no legal right to do so, the defendant breached its duty of care. As discussed above, it has been recognised that there is a contractual right to stand down an employee on full pay when an investigation is being carried out. The plaintiff, however, contends it was not a reasonable and lawful direction for the defendant to do so.

[474] The plaintiff contends that the suspension of Mr Potter was not a reasonable and lawful direction, because the defendant was confined to only giving such directions as provided for in the PMDP, the SCC and the DAC and none of those were complied with by the defendant in determining to suspend Mr Potter. It further contends that none of the circumstances identified by Lee J in *Avenia* in determining that the direction given was a reasonable and lawful direction applied in this case to justify the suspension. The defendant, however, contends that the Council was not bound to only give a direction to suspend employment under the terms of the policies and procedures but, in any event, those documents did not limit a suspension to the situation where an investigation had occurred, and disciplinary action was being taken.

[475] The plaintiff also points to the fact that the suspension was not specified to only operate for a particular period of time, such that it was indefinite suspension which was not a reasonable and lawful direction.[253]

[476] The plaintiff relies, *inter alia*, on the fact that the letter of 21 July 2014 refers to Mr Potter being stood down so that he could have time to prepare for his interview in relation to the allegations. It notes that the letter of 21 July 2014 only refers to clause 6 of the Council's DAC, which the plaintiff contends could not justify the suspension. It also submits that the other policies and procedures of the Council did not permit Mr Potter's suspension.

[477] The plaintiff contends that the defendant did not, in suspending Mr Potter, comply with any of its policies and procedures which operated as reasonable and lawful directions,

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253 *Downe v Sydney West Area Health Service (No. 2)* (2008) 71 NSWLR 663 at [417]-[422].

confining the power to give a reasonable and lawful direction to suspend him. The policies and procedures were not in mandatory or exclusive terms. I consider the power to suspend, in the case of Mr Potter, is derived from the implied contractual term that an employee must obey a reasonable and lawful direction. Unlike the case of *Downe*, there is nothing to suggest that Mr Potter's contract of employment required him to be able to perform his work duties at all times.

[478] Suspension as a disciplinary measure in the absence of authorisation by the contract, statute or award would constitute an unlawful suspension.[254] As discussed above it has been recognised that there is an implied contractual right to suspend an employee on full pay while an investigation is being carried out.

[479] The defendant admits that it suspended Mr Potter pursuant to clause 6 of DAC. The plaintiff contends that clause 6 of the DAC only applies where there is already disciplinary action in place. The defence also pleads that the PMDP provided a power to suspend when carrying out an investigation[255] even though it is not referred to in the letter of 21 July 2014.

[480] Clause 6 of DAC provides that:

> "**Serious Misconduct**" is misconduct of a serious and wilful nature and is usually conduct of the type that would make it unreasonable to require Council to continue employment of the staff member concerned.
>
> Conduct which may constitute serious misconduct includes, but is not limited to, such things as:
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> - theft;
> - violence;
> - fraud;
> - conviction of a criminal offence, during the period of employment, which in the opinion of Council either impacts adversely on the staff member carrying out their duties or adversely on the reputation of Council;
> - wilful conduct of a kind which constitutes an impediment to the carrying out of a staff member's duties or to the staff member's colleagues carrying out their duties;
> - a wilful and serious breach of Council's Code of Conduct (PR-HR-001) or Policies; and
> - wilful disobedience of a lawful and reasonable employer request.
>
> Acts of Serious Misconduct can result in suspension and/or instant dismissal without notice. This is therefore the strongest option available within the disciplinary processes of Council. It's application has been narrowed within the decisions of the Industrial Commissions to only that

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254 C Sappideen et al, *Macken's Law of Employment* (Thomson Reuters, 8th ed, 2016) at [7.10].

255 [5C(b)] of the Defence.

conduct that is proven to be wilful and which goes to the heart of the employment contract. No action should be initiated to suspend or dismiss on the basis of serious misconduct without reference to the Chief Executive Officer.

- If a Manager/Supervisor suspects that a staff member has displayed serious misconduct he or she should discuss this immediately with the relevant Director who will assess the situation and decide on the appropriate disciplinary process to be followed in the circumstances."

[481] The DAC is stated to be a guideline only. Clause 6 of the DAC is a poorly drafted provision. Its application is limited to serious misconduct. The last paragraph makes it clear that the disciplinary process to be adopted is to be determined by the Director and thus takes it outside of the process outlined in clause 4 of the DAC for unsatisfactory conduct. The defendant submits that the reference to "suspension without notice" suggests that a suspension may occur where acts of serious misconduct are alleged and not proven while the appropriate disciplinary process is decided and the matter resolved, rather than it being limited, as the plaintiff submits, to final disciplinary action. At the time the DAC was introduced the Local Government Act 2009 provided for the CEO to take disciplinary action.[256] The Regulations were not enacted until 2012. They provided for suspension when the Chief Executive believed on reasonable grounds that a local government employee will be subject to disciplinary action, the employee may be suspended from duty.[257] The Regulations do not provide for suspension of an employee however to be disciplinary action that can be taken.[258]

[482] Given suspension is not lawful disciplinary action unless supported by statute, an award or contract, the reference to suspension without notice arguably refers to action prior to actual disciplinary action given the DAC is dated 2009 and there is no evidence it was updated. However, it may be the provision for suspension on the basis disciplinary action was going to be taken was only supported with the introduction of the 2012 Regulations. Regulations do not cover the field and did not preclude the suspension of an employee on full pay while an investigation into allegations was carried out.

[483] I consider the better view is that the reference to suspension without notice was referring to suspension as being part of disciplinary action rather than in the context of an investigation to determine whether there were grounds for disciplinary action. However as apparent from the discussion above the position is far from clear.

[484] In any event, any disciplinary process that is to be adopted in the case of serious misconduct under clause 6 is left to the discretion of the Director. That would extend to determining that it was appropriate to suspend the relevant on full pay pending any investigation into the allegations if it was reasonable to do so.

[485] The PMDP also provides for a procedure to be applied when dealing with necessary discipline arising from matters associated with poor performance and/or misconduct in any circumstances at, in connection with, or arising out of employment with the Council. According to the procedure it commenced in April 2013 and "It replaces all other

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256 S 197 Local Government Act.
257 Reg 282.
258 Reg 280.

performance and misconduct policies of the Council (whether written or not)." It is directed to the taking of disciplinary action but does make provision for investigations. While the DAC was apparently issued before the PMDP in 2009, it is referred to in the Complaints Process[259] dated 2014. The DAC is also referred to in the SCC in the context of breaches of the SCC, which also refers to an employee being suspended on full pay until an investigation is completed if deemed appropriate by the CEO and disciplinary action being taken under the DAC.[260] Although the position is not altogether clear, given the Complaints Process post-dates the PMDP, it appears the DAC continued after the PMDP and that all procedures were operative at the relevant time and it was not contended by either party that the position was otherwise.

[486] The PMDP contemplates that it may be necessary to investigate allegations of wilful or serious misconduct by an employee and provides for it to be done properly and fairly. In addition, it states:

> "If Council is satisfied, on reasonable grounds, that there appears to be sufficient evidence to support the allegations against an employee, and if those allegations were proven, will lead to disciplinary action of some form against the employee, the employee may, if Council believes this to be reasonably necessary in the circumstances, suspend an employee from duty on ordinary pay pending completion of an investigation. In such circumstances the employee should be informed in writing of the conditions of the suspension at the time of the suspension and must be paid the employee's full remuneration as at the start of the suspension for the period of suspension."

[487] The PMDP was stated to be a guide only. The plaintiff contends compliance with the PMDP was mandatory although not contractually, as a reasonable and lawful direction that the Council staff were obliged to comply with in suspending Mr Potter. While the PMDP provided that the actual disciplinary process to be adopted remained within the Council's discretion, the plaintiff contends that it was limited to disciplinary procedures which the suspension was not. The plaintiff relied upon the cases of *Romero v Farstad Shipping (Indian Pacific) Pty Ltd,*[261] and *Goldman Sachs JBWere Services Pty Ltd v Nikolich*,[262] both of those cases found that the policy in question was relevantly incorporated into the employment contract. Similarly, the plaintiff relied on *Gramotev v Queensland University of Technology.*[263] That was also a case where the Court considered whether various policies had a contractual effect in contrast to the present.

[488] The reference to the actual disciplinary procedure being discretionary appears to extend to any investigation considered to be necessary, given the reference is contained in "Disciplinary Procedure Overview" and it refers to the procedure rather than disciplinary action. In my view disciplinary procedure would include the provision for investigation. The provision for suspension of an employee on full pay in the PMDP is wider than clause 6 of the DAC insofar as clause 6 is directed to allegations of serious misconduct.

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259 Exhibit 55.
260 Exhibit 56, pg. 14.
261 (2014) 231 FCR 403.
262 (2007) 163 FCR 62.
263 [2015] QCA 127.

[489] Although the right to suspend Mr Potter was an exercise of a contractual right, in determining whether it was a reasonable and lawful direction it is relevant to consider the Council policies and procedures[264] even if they were not obligatory. To the extent that the policies and procedures were not complied with, it may be evidence that the direction to suspend Mr Potter was not a reasonable one. That would be a breach of contract and, assuming a duty of care is owed (contrary to my findings), it would potentially be evidence of negligence if there was a foreseeable risk of psychiatric injury at the time of the suspension. The plaintiff is not claiming damages for breach of contract.[265]

[490] The plaintiff and defendant diverge as to whether the letter of 21 July 2014 was a suspension (as contended by the plaintiff) or a direction that the plaintiff need not perform his work duties (as contended by the defendant). The plaintiff relies on the fact that Mr Potter was not to attend the workplace and had other restrictions placed upon him by the letter of 21 July 2014 in rejecting the defendant's contention it was not a suspension but a direction not to perform work. In *Downe,* Rothman J characterised the suspension during the investigation as being of a temporary nature which accorded with the nature of a suspension. [266] In that case his Honour considered that properly characterised the direction was one not to perform work rather than a suspension when Dr Downe was stood down pending the investigation. However in the submissions of the defendant, it refers to a right to suspend. Nothing of significance turns on how it is characterised for present purposes, because I have determined above, it was not an indefinite suspension but one for the period of the investigation only.

[491] The reason stated for standing Mr Potter down in the letter of 21 July 2014 and 28 July 2014 was to allow him time to prepare for the meeting with Mr Wilkinson to answer the allegations made.

[492] Prior to the suspension of Mr Potter, after RS had made the formal complaint, Mr Wolff and Mr Stanton had taken statements from the other employees in the Local Laws team as to Mr Potter and from RS himself. Ms McCrohon stated that the statements would have been discussed although not received as a formal summary prior to the engagement of Aitken Legal on or about 16 July 2014. The notes of the interviews were provided to Aitken Legal on 17 July 2014.[267]

[493] Mr Smith as CEO signed the letter of 21 July 2014. Mr Smith's usual practice was to discuss the background to the issue, to inquire as to whether they were following the proper practice and procedures and get a general understanding of a matter and if they had taken legal advice. He could recall RS' personal details which was part of the matter and stated that the circumstances were unusual. Mr Smith's evidence was that he was well aware that it was a serious matter to suspend an employee, and there had to be a reasonable basis for him to consider the allegations sufficiently serious to warrant the standing down of Mr Potter.

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264 See *R v Darling Island Stevedoring & Lighterage Co; Ex parte Halliday & Sullivan* (1938) 60 CLR 601 at 621-2 per Dixon J; *Australian Telecommunications Commission v Hart* (1982) 43 ALR 165 at 170 per Fox J.

265 plaintiff's Outline of submissions [96].

266 *Downe v Sydney West Area Health Service (No. 2)* (2008) 71 NSWLR 663 at [295], referring to Moore J in *Moshirian v University of New South Wales* [2002] FCA 179 when considering the application of s 47 of the *Interpretation Act* 1987.

267 Exhibit 60.

[494] Mr Smith could however recall nothing of the detail of what transpired other than the fact that he would have satisfied himself of the contents of the letter and asked about any legal advice.

[495] Although Mr Smith referred to the Council having the statements taken by Mr Wolff and Mr Stanton when he signed the letter of 21 July 2014 he candidly stated he could not recall whether they were before him when he signed the letter. I infer that it is likely that he was at least informed of their contents insofar as they supported the complaint of RS given the reference in the letter to evidence of other colleagues who were aware of the incidents and that Mr Stanton who reported to him had interviewed the employees and Ms McCrohon had been provided with them and they were provided to Aitken Legal.

[496] Even though the letter of 21 July 2014 only outlined some of the allegations, the allegation described as blackmail based upon the use of personal confidential information of RS was serious, and could if proven constitute serious misconduct which would found disciplinary action.

[497] I find that given Mr Smith's position it is likely that someone involved in the initial investigation of the allegations and engagement of Aitken Legal spoke to him prior to his signing the letter. Mr Smith thought Ms McCrohon had drafted the letter and recommended Mr Potter's suspension which is incorrect. Ms McCrohon stated Aitken Legal drafted the letter and that it was Mr Smith's decision to suspend Mr Potter. Ms Mc Crohon couldn't recall if she took the letter to Mr Smith or Ms Johnston did so but she stated there would have been a conversation with someone in her team and Mr Smith. I consider that was likely to have been Ms McCrohon. Ms McCrohon stated that in relation to the suspension that there was a discussion around the dysfunction of the team. She stated she did not recommend one way or another whether Mr Potter should be suspended but stated the respondent had a duty of care to Mr Potter and also to the group of employees in his team where there was lots of fighting and arguing and it was about putting space between those groups of people, given her role as manager of HR and that she was asked for her opinion. She said that they needed to think about the health and wellbeing of the team as well.

[498] Ms McCrohon could not recall whether she provided material to Mr Smith,but thought he would have seen all of the information she had.

[499] Aitken Legal had drafted the letters of 21 and 28 April 2014. It is likely that they had access to the Council's procedures.

[500] Given Aitken Legal were on the panel for the respondent I accept Ms McCrohon's evidence that they would have had access to Council procedures, having previously managed at least one previous investigation, given they were a Local Government provider although she could not specifically recall the ones that they would have had.

[501] Although Mr Smith could not identify the process he had adopted by reference to the DAC or the PMDP his evidence reflected he was aware that suspension of an employee was a serious matter. He indicated that for a suspension there had to be reasonable grounds that disciplinary action may follow. Mr Smith's evidence was somewhat confused in this regard He was familiar with clause 6 of the DAC. When asked about the provision for suspension during an investigation in the PMDP, he commented that accorded with the test contained in the Local Government regulation that he had to be satisfied that there are reasonable grounds for disciplinary action, but commented that a

further investigation needs to be undertaken and there had to be reasonably strong evidence that there is something there. Mr Smith stated that the suspension was around acknowledging what the letter said – that there was evidence and information that warranted action, notwithstanding the limited reason stated in the letter.

[502] The letter stated that Mr Potter was being stood down to allow him to prepare for his interview pending the investigation. That was in the context of it being identified in the letter of 21 July 2014 that the complaints, if proven, could result in a finding of serious misconduct. While Mr Smith acknowledged that the reason for Mr Potter being suspended identified in the letter of 21 July 2014 and 28 July 2014 was limited to preparing from his interview, his evidence indicated that he had an appreciation of the nature of the complaint, considered the allegations were serious if established and that he had conversations with his staff, likely Ms McCrohon about the prospect of Mr Potter's suspension. On the basis of the scant recollection of Mr Smith and Ms McCrohon's incomplete recollection, I consider that Mr Potter was not stood down merely to give him time to prepare for the meeting with Mr Wilkinson to respond to the allegations but because the allegations included allegations which could constitute serious misconduct in related to RS based on a complaint from him and evidence of members of his team.

[503] Mr Smith did not recall considering redeployment but commented that given the nature of allegations made against Mr Potter he did not think that redeployment would have been appropriate.

[504] Mr Smith did not give evidence that he considered Mr Potter's interests in determining he should be suspended but his evidence does reflect that the suspension was determined taking account of broader circumstances rather than just being on the basis of giving him time to prepare for the interview and an appreciation that it was a significant step to suspend an employee. However it would appear Ms McCrohon raised the need to consider the competing interests of Mr Potter's welfare and the members of his team in considering a suspension.

[505] Mr Smith's evidence was incomplete. I did not consider his lack of recollection to be anything other than genuine. Mr Smith did not attempt to reconstruct events and was very candid about his lack of recollection, recalling the events as best he could in a very piecemeal way. I am satisfied his evidence reflected he made the decision bona fide. He did not conjure up a reason[268] but rather his evidence indicated he had a broader knowledge of matters relevant to the context of the decision made. His evidence did not reflect any underlying agenda or preconceptions about Mr Potter's guilt in determining to suspend Mr Potter or any antagonism towards Mr Potter.

[506] I do not find that Mr Potter's employment was automatically suspended. The reason provided in the letter of 21 July and 28 July 2014 was incomplete insofar as it is plain further matters were considered by Mr Smith most likely in consultation with Ms McCrohon and Mr Stanton. While there is no evidence as to how Aitken legal were instructed to include a provision for suspension in the letter of 21 July 2014, the fact it was not automatic is supported to some extent by the fact that it was not foreshadowed in the original request to draft the letter to Mr Potter[269] and must have been the subject of a subsequent instruction. Ms McCrohon was clear that only Mr Smith had the relevant

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268 Cf [113] plaintiff's submissions.

269 Exhibit 60.

authority to suspend Mr Potter. While the reason given for standing him down was incomplete, the evidence supports the decision was made bona fide in the context of the matters raised in the letter of 21 July 2014. The prospect of suspension was also the subject of discussions as I have found above.

[507] As to whether the direction standing him down was a reasonable and proper direction, I consider that the Council had the power to give a direction made standing him down on full pay until completion of the investigation and that it was not limited to the taking of disciplinary action as discussed above.

[508] I do not accept that Mr Potter standing down was an indefinite suspension. The cases relied upon by the plaintiff of *Downe* and *Moshirian v University of New South Wales* (***Moshirian***)[270] to support the contention that the present suspension was an indefinite suspension are however quite different to the present case. In *Downe* the suspension that was found to be an indefinite one was the suspension that occurred after a report was provided finding that the allegations that were the subject of an inquiry were not established. The decision to continue the suspension was found to be one that was made due to difficulties in the workplace, and not as a result of findings of the investigation.[271] *Moshirian* was a case where the suspension was for the remainder of the employee's position as the Head of School and, in effect, was found to be tantamount to dismissal.

[509] While it was remiss of the Council not to state in the letter to Mr Potter that he was being stood down "pending an investigation",[272] I do not find that the suspension was indefinite, but rather that it was only until the completion of the investigation for the reasons set out above. That is given further support by the fact that the letter also stated:

> "You will be immediately stood down from your employment on full pay. As your vehicle is allocated on a commuter use basis, the vehicle will need to remain on the Council premises for the duration of the investigation;……..
>
> *….your computer access including remote access will be suspended until a final outcome is reached."*[273]

[510] That was reiterated by Ms McCrohon in the meeting of 21 July 2014.

[511] As to whether the standing down complied with the DAC or the PDMP, the evidence does not suggest that the Council specifically addressed the requirements of the PDMP.

[512] Given the reference to clause 6 of the DAC, it is evident that Mr Smith as CEO of the Council was satisfied that the allegations made could constitute serious misconduct and required investigation. The letter stated "I have assessed the complaint and have formed the view that if the complaint is proven findings of serious misconduct could be made." His evidence supported the fact he did consider them to be serious allegations and he acknowledged that he had referred to clause 6 of the DAC in the letter of 21 July 2014 in his evidence. To the extent clause 6 of the DAC is said to be confined to suspension where disciplinary action was to be taken rather than an investigation, Mr Smith was aware that the investigation had to occur to determine whether the allegations could be

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270 [2002] FCA 179.
271 *Moshirian v University of New South Wales* [2002] FCA 179 at [219], [222]-[223].
272 See *Downe* at [33].
273 Exhibit 7.

substantiated and the suspension was in the context of an investigation. The letter supported the fact that Mr Potter was stood down in the context of an investigation being carried out. It referred to "no findings have been made but given the complaint made and the potential for serious misconduct to be found, I have needed to give consideration to how this matter will be handled." The fact that an external investigator was appointed and the letter emphasised no findings had been made support the fact that the suspension was not made as part of a disciplinary action but in the context of the investigation and according to Mr Smith the process had to then play out. If clause 6 of the DAC permitted Mr Potter to be stood down on the basis allegations of serious misconduct had been made, as opposed to proven, that was satisfied insofar as the most serious allegation involving RS referred to in the letter could be characterised as serious misconduct, noting the examples given are inclusive.

[513] Given there was provision for the Director to determine the appropriate disciplinary process, that could extend to the giving of a direction standing down an employee on full pay pending an investigation as identified by Rothman J in *Downe* and Lee J in *Avenia* which have been discussed above.

[514] Mr Smith's approach to determining Mr Potter should be stood down on full pay appeared to be on the basis that he regarded the allegations as serious and that there were reasonable grounds to consider that the allegations if proven would result in disciplinary action. In reaching the view that Mr Potter would be suspended, I have found that he was informed of the opinion of Ms McCrohon as to the considerations relevant to suspension, despite his lack of recollection.

[515] Objectively there were facts which supported the suspension pending the completion of the investigation. Those included the fact that allegations if proven could constitute serious misconduct and involved a junior member of Mr Potter's team. While RS had indicated he could still work with Mr Potter, he was the complainant and serious allegations had been raised in relation to his treatment not only by him but by other employees in Mr Potter's team. One of the allegations arose out of alleged disclosure of personal private information of RS. Ms McCrohon stated that the Local Laws team discussed matters between themselves, sometimes inappropriately and there seemed to be a level of dysfunction in the team. The allegations in the letter of 21 July 2014 were at least supported by the complaint of RS and to preliminary statements from employees in Mr Potter's team and were likely to be interviewed by the investigator.

[516] While the plaintiff submits that was no evidence that Mr Potter's presence in the workplace was causing disruption, I am not persuaded that was the case. Given the nature of the allegations made by his team of which he was manager with a previous allegation made against him and that it related to confidential information which was apparently disclosed confidential information of one employee to Ms Smith in the context of asking about the meeting that had taken place between Ms Smith and Mr Stanton and Mr Wolff, his continued presence during the investigation may cause disruption and difficulties for those subordinate to whom who were going to be interviewed in the investigation. That environment could have been hostile or stressful for both the team members and Mr Potter potentially creating a risk to the welfare of all staff.

[517] In those circumstances, a view could be reached, bona fide, that it was in the interests of ensuring the welfare of all in the team, including Mr Potter, that he be removed from the

workplace while the complaints were investigated. The direction was in those circumstances a lawful and reasonable direction as discussed by Lee J in *Avenia* and Rothman J in *Downe.*

[518] If the PMDP constrained the circumstances in which a reasonable and lawful direction was given there were additional requirements that had to be met. The guidelines in the PMDP provided that an employee could be suspended during an investigation if:

(a) The Council believes on reasonable grounds that there appears to be sufficient evidence to support the allegations against the employee;

(b) If those allegations were proven will lead to disciplinary action of some form against the employee;

(c) The Council believes it is reasonably necessary in the circumstances.

[519] The first two matters were satisfied in the present case. A formal complaint had been made by RS, it was supported by the preliminary investigation taken by Mr Stanton and Mr Wolff which was sufficient evidence to support the allegations, of course pending an investigation, and if proven the allegations would lead to some form of disciplinary action against an employee as was evident from the terms of the DAC and the SCC with respect to workplace bullying and harassment.

[520] While Mr Smith could not identify the material he had before him when he made the decision, given preliminary statements had been taken from employees supporting the allegations contained in the letter involving RS which were prima facie of a serious nature there were reasonable ground to consider that there appeared to be sufficient evidence to support the allegations, although that proved not to be the case. If proven they would have resulted in disciplinary action of some form.

[521] The plaintiff complains there was deficient investigation of the complaints in the letter of 21 July 2014, either on the basis that the interviews of RS and Ms Smith were inadequate and Mr Potter had not been interviewed in relation to the allegation, although the plaintiff doesn't identify the deficiencies. The formal investigation was not commenced until the engagement of Mr Wilkinson by the Council. Prior to that the Council required RS make a formal complaint before it was acted upon and subsequently there was some investigation into RS's complaints by Mr Stanton and Mr Wolff by the carrying out of preliminary interviews with other members of staff involved in the alleged disclosure or who worked with RS. Further allegations were raised by Mr Wilkinson following his interviews with staff during the investigation which were the subject of further allegations provided to Mr Potter prior to his interview.

[522] Notwithstanding the typed notes of the interviews were dated 17 July 2014, I am satisfied that the substance of what had been said by the employees interviewed by Mr Stanton and Mr Wolff on 14 July 2014 were known and discussed with Ms McCrohon prior to the appointment of an external investigator and prior to Mr Smith signing the letter of 21 July 2014. I am satisfied Mr Smith was at least aware that those interviews had occurred and gave some support to RS' complaint.

[523] I am satisfied that the complaint of RS and the interviews carried out by Mr Wolff and Mr Stanton of RS and other employees including Ms Smith on 14 July 2014 established a sufficient evidence for the allegations made by RS to be investigated and adequate investigations had been made in relation to into the allegations contained in the letter of

21 July 2014, to establish that they had foundation and if proven could constitute serious misconduct.

[524] While Mr Potter was not interviewed in relation to the allegations on 21 July 2014, there is generally no obligation for the Council to do so prior to the suspension where it is on full pay. [274] Given there was to be an investigation of the allegations and Mr Potter was entitled to full particulars of the allegations before responding it would have been improper to do so. The meeting was to inform him of the process and his being stood down on full pay. The letter outlined that Mr Potter would be interviewed after those making the complaints had been interviewed. It was not a breach of duty to not interview Mr Potter beforehand.

[525] As to whether the Council could believe it was reasonably necessary in the circumstances I consider in the context of the decision to suspend it was not limited to providing Mr Potter with time to prepare for the meeting.

[526] Given the allegations related to the manager of the team and were made by members of that team it was open to consider that it was reasonably necessary to suspend Mr Potter during the period of the investigation such that the provision for suspension in PMDP could have been satisfied although Mr Smith had not necessarily turned his mind to the specific question. Ms McCrohon had given advice as to the competing interests in relation to suspension which I consider it is likely Mr Smith was made aware of prior to the suspension. He was aware of the nature of the allegations in relation to RS which were outlined in the letter and that other members of staff were involved and that it involved the threat of disclosure about confidential information of RS which was described by one staff member which was said may be considered as "blackmail".

[527] The plaintiff refers to the fact the suspension was not reasonably necessary given the timing of events. While some allegations related to events some months prior that was not the case in relation to the alleged disclosure of confidential information in relation to RS. Despite his preparedness to continue to work with Mr Potter,[275] the circumstances of the allegations made and their serious nature, supported the fact that for the period of the investigation it was reasonably necessary to suspend Mr Potter. In that regard the Council also had an obligation to the employee who made the complaint to pursue if there was a proper claim.

[528] Standing down an employee to provide time to prepare for meeting where, as here, serious allegations were made, may be regarded as a reason it is reasonably necessary to stand down an employee out of fairness to the employee. It is not evident that was the case here given details of all allegations had not been made and the allegations had not been fully particularised as at 21 July 2014 and they involved Mr Potter giving his version of events. While the plaintiff contends that the reason was disingenuous, given the context in which the decision was made which was largely set out in the letter of 21 July 2014, I do not consider that the suspension was based on that reason alone for the reasons I have set out above. The raising of the issues supporting Mr Potter's suspension

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274 *Rucker v Stewart* [2014] QCA 32, referring to *Lewis v Heffer* [1978] 1 WLR 1061 at 1073.

275 The plaintiff relies on the notes of Mr Stanton and Mr Wolff in this regard which it says were provided to Mr Smith – see [125(c)] although it also submits the Council cannot prove what material was before him – [121]. I am satisfied that it is likely that he at least knew the contents of the notes.

may have placed greater stress upon Mr Potter and the way it was framed at least gave Mr Potter assurance that he would have time to prepare to respond for the allegations being made against him.

[529] The plaintiff also contends that the Council failed to consider whether Mr Potter should have been deployed to another position.[276] Although in an organisation such as the Council it may have been possible to redeploy Mr Potter and the matter appears to have been raised at least with Mr Stanton it was not pursued. Mr Stanton agreed it was also "possible" that someone could be placed in another position although the question of practicality of doing so was not explored. Mr Smith was of the view given the nature of the allegations made that redeployment would not have been appropriate. Suspension of an employee is a serious matter. While the consideration of redeployment to another position would generally be a matter that one considers should be considered prior to suspension to determine whether it was reasonably necessary, the PMDP was not prescriptive in this regard. I am not satisfied that the failure to consider the alternative positions was in breach of the PMDP in determining whether in the present circumstances the suspension was reasonably necessary, given the context of the allegations made and that the investigation was one to be carried out expeditiously which was envisaged would be completed in a number of weeks, although each case will turn on its own facts in this regard.

[530] If it was reasonably foreseeable as at 21 July 2014 that Mr Potter was at risk of suffering a psychiatric injury the Council would have been obliged to take all reasonable steps to avoid unnecessarily exposing him to risk. Consideration of the extent of the duty and whether there has been a breach of the duty includes consideration of the magnitude of the risk of injury and the probability of psychiatric injury if not complied with. The decision as to whether Mr Potter should be redeployed is not a straightforward matter. The redeployment of Mr Potter to another position in the Council while reasonably possible and not a significant burden for an organisation such as a Council for a short period of time would still have displaced Mr Potter from his position. In circumstances where he was psychiatrically vulnerable that could have made him more vulnerable in having to deal with a new position, albeit he had significant experience in the Council. He would also have to potentially deal with questions as to why he had been temporarily redeployed. If the circumstances otherwise supported the employee being suspended, looking at the response to the foreseeable risk that ought to have been made prospectively, I am not satisfied that a reasonable person in the position of Council would have redeployed Mr Potter given that there is no evidence it would have avoided psychiatric injury.[277] In any event there was no evidence suggesting that Mr Potter would have accepted an alternative position.

[531] As to the suggestion RS could have been relocated there was no evidence that relocating RS was possible or reasonable.

[532] I am satisfied that the decision to stand Mr Potter down on full pay was a bona fide decision made by Mr Smith and was a reasonably and lawful direction in the

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276 Which it points had occurred in the case of Ms Greenlagh in *Hayes* where no breach of duty was found. In that case however the investigation was expected to take a number of months.

277 See comments of Keane JA in *Hegarty v Queensland Ambulance Service* [2007] QCA 364 at [41].

circumstances. I am satisfied that in the circumstances, Mr Potter's suspension did not materially depart from the requirements of the PMDP such that it was not reasonable or lawful.

That is not to say that criticisms cannot be made of the Council in failing to properly outline the basis upon which the suspension was made, including streamlining their policies and procedures to make clear what procedures applied in what circumstances. The duration of the suspension should also have been explicitly stated with further clarity as should the reasoning in terms of the suspension.[278] There is no evidence however that had the reasons fully reflected the terms of the PMDP that would have made any difference in the present case.

[533] The plaintiff alleged numerous breaches of duty in connection with the meeting of 21 July 2014 which have largely been dealt with above. The allegation that the suspension was unlawful was the principal complaint by Mr Potter. I will address the other alleged breaches briefly to the extent that they have not been addressed above.

[534] It is further alleged that the followings matters constituted a breach of duty:

a) The failure to give consideration to whether it was reasonable to suspend and/or stand the plaintiff down from his employment given the position he had held; the fact that the complaint made by RS was vague;

b) The fact that the allegations were not serious;

c) The fact that some of the allegations were alleged to have occurred many months prior.

[535] As to Mr Potter's position that was a matter which was clearly known within the Council. I am not persuaded that there was any failure to consider it.

[536] I do not consider that the complaint by RS was vague. The substance of the complaint was potentially serious if, in fact, it was found that RS' personal information was being used to force him to take certain action as directed, although that was not ultimately found to be the case.

[537] In regard to c) above, while some of the allegations did relate to earlier points in time, they did relate to Mr Potter's dealings with RS which was alleged to have involved bullying and at least one of those allegations related to what was said to be an allegation of "blackmail" was a serious allegation which could amount to serious misconduct. The fact that time had passed does not mean its seriousness could not be considered to be relevant to the question of whether to suspend Mr Potter.

[538] The applicant alleges that the Council also breached its duty by failing to give consideration to each of the steps set out in Appendix B to its SCC. In that regard, it is not evident which step in Appendix B is said to be relevant. It is also not immediately evident that those steps have any relevance to the claim by Mr Potter and could have

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278 Contrary to the submission of the plaintiff, the defendant did contend it was for the purposes of the investigation: see [5BB(c)] of the Defence.

avoided psychiatric injury. It is not a matter that is addressed in the submissions and I therefore will not consider it further.

[539] The plaintiff also alleges that the defendant failed to ensure the health and safety of the plaintiff in breach of s 19(1) of the WHS Act. Given that allegation in paragraph 13(h) of the SOC relies on the allegations made in sub-paragraph (a) – (g) of paragraph 13, which I am not satisfied are established, I will not address the matter further.[279] It is the same position in relation to sub-paragraph (i).

[540] I do not consider that the Council breached any duty it may have owed Mr Potter in suspending him.

Failure to Lift Suspension

[541] It is alleged that the failure to lift Mr Potter's suspension on 9 or 11 August 2014 was a breach of duty of itself and was also failure to provide adequate support.[280] I have discussed above the question of the timing of the suspension, and I have found that the Council was not obliged to lift the suspension until the completion of the investigation. In the course of that discussion I considered the cases of *Downe* and *Avenia* as to when the investigation was complete. While the plaintiff has relied upon *Downe* to contend that the investigation was complete, that case involved the parties having agreed on the scope of the inquiry and being bound by the findings and Dr Downe being fully exonerated of the allegations against her. In the present case, the letter of 22 January 2015 when informing Mr Potter of the findings of the investigation invited him respond to the findings of the investigator noting no decision had been made to take disciplinary action against him and that no further steps would be taken until Mr Potter's response had been received.

[542] I have found that it was not reasonably foreseeable until 13 August 2014 that there was a risk that Mr Potter might suffer a psychiatric injury. Therefore, no duty of care arose as at 9 or 11 August 2014 to avoid exposing Mr Potter to a foreseeable risk of psychiatric injury in his employment at the time that the plaintiff alleges that the suspension should have been lifted. Notwithstanding that, I will address briefly the allegations of breach.

[543] On 9 August 2014 Mr Potter provided a medical certificate certifying he was not fit enough to attend work. He did not indicate he was in a position to discuss the outcome of the investigation until January 2015.

[544] The plaintiff contends that the fact that Mr Potter was on sick leave did not abrogate the obligation to lift the suspension, even if the Council did not discuss the outcome of the investigation.

[545] While the suspension could only be for the duration of the investigation I do not accept that the completion of the investigation occurred upon delivery of the report. Given there was a finding of misconduct, paragraph 7 of the Breach of Council Officers Code of Conduct Complaints process did not require that Mr Potter was entitled to return to work without impact.

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279 In any event, I note the terms of the s 267 of the WHS Act which provides that nothing in the Act is to be construed as conferring a right of action in a civil proceeding in relation to a contravention or of a provision of the Act.

280 [11A] and [11C] SOC.

[546] Mr Potter was exonerated of any serious misconduct, particularly any suggestion he had sought to exert influence over RS on the basis of confidential information RS had shared with him. It was found that his conduct constituted misconduct in relation to the allegation that on 11 July 2014 Mr Potter had attempted to divulge to Ms Smith the information RS had shared with him regarding personal confidential information but on the basis he had made a joke regarding RS which was inappropriate and reckless, not disclosure of confidential information. The investigator stated that the misconduct was sufficient for disciplinary action to be taken against Potter which was said to be a sanction up to a written warning. In relation to three of the allegations he was found to have demonstrated poor judgement on his part as a manager. It was recommended his performance as a manager be reviewed and performance managed. The investigator further found that "during this investigation, it became apparent that Potter had spoken with Michael Grant **(Grant)** regarding the investigation and allegations after he was suspended, and after it should have been apparent that Grant was likely to be a witness to the investigation. This again demonstrates poor judgement on Potter's part. Council may wish to put this allegation to Potter as part of the raising of issues generally in respect of his performance."

[547] The letter of 22 January 2015 informed Mr Potter of the results of the investigation in relation to which it said no decision had been made as to the disciplinary action, if any, that was required and invited submissions to be made. It raised that there would be necessary to continue the performance management process that had begun prior to his suspension. It further raised an allegation of misconduct said to arise of out his not following the direction in the letter of 21 July 2014 not to have contact with potential witnesses and a verbal direction by Ms McCrohon to him, namely that Mr Potter had spoken to Mr Grant which was alleged to be contrary to directions that had been given to him. That was identified as potentially being serious misconduct if substantiated.

[548] I do not consider that the investigation was completed until the Council discussed the findings of the investigation with Mr Potter and he had the opportunity to respond, and until the further allegation raised in relation to his conversation with Mr Grant was responded to by Mr Potter and determined. While it was contended on behalf of Mr Potter that the allegation in relation to Mr Grant should have been subject to a fresh process, I consider that the better view is that given it an allegation that arose as a result of the investigation process in connection with directions given to Mr Potter in relation to the conduct of the investigation, it could be raised as a further allegation as part of the investigation. The matter raised was not a "complaint" as contemplated in paragraph 1 of the Breach of Officers Code of Conduct Complaint Process. The plaintiff's contentions overlook the fact disciplinary procedure to be adopted under the PMDP remained within the discretion of the Council with the procedures in the PMDP being a guide only. There was therefore no obligation on the Council to lift the suspension prior to 22 January 2015.

[549] I do not need to consider the contention of the Council that the Council would not be obliged to lift the suspension until it had determined the Council had decided what sanction to impose, other than noting that the only support for the argument was that it would be hardly rational to suggest that if an employee's conduct warranted termination the employee could return to work. That does not provide a legal justification.

[550] Even if the suspension had to be lifted upon completion of the investigation and that excluded the raising of the further allegation in relation to Mr Grant, I have found for the

reasons set out above that at best for the plaintiff that the duty to lift the suspension did not arise upon the delivery of the report but the completion of the investigation would not occurred until the Council had a reasonable time to review and consider the report of the investigation and that would not have been before 14 August 2014.

[551] The foundation underlying the plaintiff's argument that the investigation was complete on 9 or 11 August 2014 upon delivery of the report is therefore not established. I do not find that there is any breach of duty as alleged.

[552] The plaintiff relies upon the same matters in contending that the failure to lift the suspension was a failure to provide the plaintiff with support or adequate support during the investigation.

[553] While it is submitted that the fact that Mr Potter was on sick leave added to the urgency of lifting the suspension, there was little to indicate to the Council that the suspension, in and of itself, was having a detrimental effect upon Mr Potter's health. The plaintiff also submits that the fact Mr Potter was on sick leave did not prevent the Council from lifting the suspension. That may be accepted.

[554] While Mr Potter's email of 27 August 2014 did show his concern at being suspended and the prospect that he may be terminated as a result of the investigation "just coping I'm gathering I am still suspended and you are waiting for my [sic] to return to discuss the next step in the process or give me the ass", he further stated that he was being managed by doctors and would "advise you in due course the advice from my doctors on the management of my health." He sent an email shortly after, apologising to Ms McCrohon for being short. Mr Potter's email could not reasonably be construed as inviting the Council to tell him of the position given that he was responding to Ms McCrohon's email where she had informed him that there was an employee assistance program available and inviting her to let her know if there was anything else they could do to support him at that time.

[555] While litigious hindsight may suggest the Council should have lifted the suspension and left the discussion of the letter to another day, a reasonable person in the position of the Council would likely to have responded as the Council did and waited until Mr Potter was ready to discuss matters arising out of the investigation particularly when it was raising a further matter arising out of the investigation such that the investigation was not complete.

[556] In circumstances where the Council was faced with the situation of Mr Potter having identified that he was not well enough to work and where a medical certificated indicated he was suffering work-related stress and anxiety, it was not unreasonable for the Council not to address the question of suspension separately and determine that the Council would not say anything in terms of the investigation until it was indicated that Mr Potter was well enough to deal with it. While the question of lifting the suspension and informing Mr Potter of the outcome of the investigation were not necessarily tied together, there was also a risk that informing Mr Potter that the suspension was lifted without informing him of the outcome of the investigation could have led him to think he was fully exonerated by the investigation and the process was finished.

[557] A reasonable person in the Council's position would not have considered that the risk of psychiatric injury was significant if it failed to lift the suspension (assuming it was obliged to do so) or that there was a probability that psychiatric injury would occur if

that was not done. Once a reasonable person in the position of the Council was aware that Mr Potter was at risk of suffering a psychiatric injury would have heightened the prospect of Mr Potter's psychological state worsening and would not have taken the precaution of lifting the suspension on the basis that the probability of a psychiatric injury worsening may occur, even though the burden of taking the precaution was not unreasonable.

[558] The contention in the alternative that the failure to lift the suspension was a failure to provide adequate support does not succeed.

Failure to Provide Adequate Support

[559] Further matters were relied upon to allege that the Council failed to provide adequate support throughout the investigation,[281] included:

(a) Failing to advise the plaintiff that he could bring a support person to the meetings of 30 June 2014 and 21 July 2014 and failing to give notice of the meetings;

(b) The contents of the letter of 21 July 2014 and the fact that the comments of Ms McCrohon in the meeting of 21 July 2014 were inappropriate;

(c) Failing to keep the plaintiff informed of the progress of the investigation; and

(d) Failing to advise the plaintiff of the outcome of the investigation until 22 January 2015.

[560] Dealing with (a) and (b), I have found that the risk of Mr Potter suffering a psychiatric injury was not foreseeable as at 30 June 2014 and 21 July 2014. Assuming that was not the case and a duty was owed:

(a) The meeting of 30 June 2014 was not a disciplinary interview which required notice to be given as to the contents of the meeting, or for Mr Potter to be provided with a support person under the PMDP. In any event, I do not consider a reasonable person would have considered that the circumstances in which the 30 June 2014 occurred required the provision of a support person. The meeting was directed to performance management however the letter was not explicitly stated not to be a formal warning. I have found that there was a discussion in relation to the issues raised prior to the 30 June 2014 meeting. Even if someone was psychologically vulnerable, a reasonable person would not have considered that the risk of psychiatric injury would not be significant or that any such injury would be serious and taken the precaution of providing for him to have a support person at the meeting.

(b) The meeting of 21 July 2014 was also not a disciplinary interview which required notice to be given as to the contents of the meeting or for Mr Potter to be provided with a support person. It was a meeting to inform him of the fact that allegations had been made as a result of which there was to be an investigation by Aitken Legal, during which he was to be stood down. The circumstances in relation to this matter however differ from the 30 June 2014 meeting insofar as it was to inform Mr Potter that complaints had been made by a member of staff which could constitute serious misconduct and if proven could result in termination and that he

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281 [1(d)] plaintiff's submissions.

was to be stood down on full pay while an investigation was carried out. Inevitably those matters would likely cause Mr Potter to be shocked and surprised. It was not a burden for the Council to advise Mr Potter he could bring a support person. As to whether a reasonable person would have taken precaution of permitting a support person, the position is more uncertain insofar as how the support person would provide a benefit is uncertain given Mr Potter was not required to answer any allegations and was only being informed of the decision and the process to be adopted. A reasonable person would not necessarily consider in those circumstances failing to provide a support person would affect the probability of an injury occurring or that the injury would be serious as a result. However insofar as the presence of a person might reasonably be thought to provide support to a person a reasonable person in the position of the Council would likely have taken the precaution given it was not a burden to Council to allow such a person to be present. In the circumstances I would have found it to be a breach of duty not to offer a support person.

[561] As to the other complaints raised:

(a) I have not found that the comments that Mr Potter alleged Ms McCrohon made in the meeting, being that Mr Potter had disclosed private information about RS, as opposed to phrasing it as an allegation, were made. I have also not found that stating that if the allegations were established, it could result in disciplinary action up to and including termination were inappropriate and indicated any prejudgment. That was one of the possible outcomes if serious misconduct was found as was identified in clause 6 of the DAC. I do not accept that Mr Potter's employment could not have been terminated if serious misconduct had been found. The circumstances of termination outlined in the Regulations were confined to the conduct in breach of the *Local Government Act 2009* (Qld) and did not cover the field. The matters referred to in s 282 of the *Local Government Regulation* does not apply to misconduct that could be in breach of an employee's contract of employment which could result in termination. In the case of *Promnitz v Gympie Regional Council*[282] the comments of Martin J were made in the context of the parties proceeding on the basis that the action fell within s 282 of the Local Government regulation. That has no application to the situation in the present case.

(b) As stated above, there was no obligation on the Council to hear Mr Potter's version of events prior to standing him down and determining to investigate the allegations. It was plain that the matters were to be the subject of any investigation by an outside investigator and that no findings had been made against him.

(c) The omission to attach the DAC while a matter referred to by Mr Potter was not said to have affected him. I note however that the cumulative effect of the matters complained of may constitute a breach of the duty.

(d) The letter provided an overview of the allegations made, and informed Mr Potter that he would be provided with further details of the allegations which occurred prior to his interview.

[562] As to the failure to inform Mr Potter of the outcome of the investigation in the circumstances where he was unfit for work, I do not consider it was a breach of duty of

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[282] [2015] ICQ 11 at 8.

itself nor a failure to provide adequate support. Informing him of the outcome of the investigation could have risked further stress and anxiety. Given the findings of the Aitken Legal report, contrary to the plaintiff's submission clause 7 of the Complaints Process did not require that Mr Potter be permitted to return to work without impact. As discussed above, it was not improper for the Council to raise the additional issue of disclosure to Mr Grant as a further matter to be investigated, arising out of Mr Wilkinson's investigation and raised in his report. It is not necessary for me to determine whether and when Mr Potter was told by Ms McCrohon not to speak to Mr Grant, or whether the direction in the letter of 21 July 2014 not to speak to potential witnesses applied to Mr Potter. The letter of 22 January 2015 raised it as an allegation for him to respond. It was not a spurious allegation having been raised by the investigator himself. Further, although Ms McCrohon could not remember details of giving a verbal direction to Mr Potter it was confirmed in the letter of 22 January 2015 that such a direction was given to Mr Potter when Ms McCrohon was present. The criticisms raised by the plaintiff of the description in the letter were not matters of significance. To the extent that it was suggested that Mr Potter could not be terminated in relation to his contact with Mr Grant, while the circumstances outlined by Mr Wilkinson indicated that may have been unlikely, wilful disobedience of a reasonable direction could constitute serious misconduct.

[563] It is also relevant that Mr Potter had been informed by the Council that they were ready to discuss the findings when he was ready and he had not requested such a meeting until January 2015.

[564] In that regard, Mr Potter had also informed Mr Latimore in October 2014 that doctors were encouraging him to find out the results of the investigation, but he could not deal with it.

[565] As to the position after 9 August 2014, Ms McCrohon did inform Mr Potter on 14 August 2014 that the Council was in a position to discuss the outcome of the findings when he was well enough to do so. In the context of the exchange of emails on 27 August 2014, while Mr Potter did raise the question of whether he was still suspended and the fact the Council were waiting to meet him to discuss the next step or 'give him the ass', he had further stated he would advise in due course about the advice of the doctor as management of his health. He apologised shortly after suggesting it was not a matter where he was seeking a response. He had been made aware he could be told of the outcome of the investigation when he was ready to discuss it. He had not indicated he was ready. In those circumstances it was not a breach of duty to provide support for Ms McCrohon not to respond.

[566] Given Mr Potter could not return to work because of the work-related stress and anxiety a reasonable person in the position of the Council would not have informed him of the outcome of the investigation at the risk of exacerbating his condition, given there were negative findings, albeit positive ones as well.

[567] The response was further complicated by the fact that the Council had determined that it would raise the allegation in relation to Mr Grant. In those circumstances it was not unreasonable for the Council not to say anything in relation to the outcome of the investigation until 22 January 2015 when Mr Potter indicated that he was ready to deal with it and had provided a medical clearance. Ms McCrohon had dealt with Mr Potter in a sensitive way by not placing any pressure upon him to engage in discussions about the

outcome of the investigation until he was ready, checking in on his health, reminding him that they could discuss the outcome when he was ready and reminding him about the fact that the Council has an employee assistance program available to support him and his family. I do not find that the Council failed to act reasonably in not advising Mr Potter of the outcome at an earlier point in time or in not advising him in a piecemeal manner of the outcome.

[568] The plaintiff submitted that Mr Potter could have been told of the outcome of the investigation and the question of contacting Mr Grant could have been deferred. That however is based on a misguided premise that the findings effectively exonerated Mr Potter. While Mr Potter's version of events had largely been believed and adopted by Mr Wilkinson, Mr Potter still found himself in a position where some negative findings had been made against him. While Dr Byth thought it would have assisted Mr Potter to inform him of just those outcomes I found his evidence unconvincing in that regard and preferred the evidence of Dr Jetnikoff. In any event a reasonable person in the position of the Council would have considered the risk of informing Mr Potter of the findings when he was psychologically vulnerable and the fact that he was on sick leave which after 13 August 2014 was described as relating to work related stress and anxiety which may have increased the risk of him suffering a psychological injury as opposed to waiting for him to be medically cleared that it would have been safe to do so. In my view a reasonable person would not have taken the precaution of informing him of the outcome of the investigation and the Council did not breach it duty in this regard.

[569] The plaintiff makes further allegations in relation to the 22 January 2015 and 1 February 2015 meeting. On the plaintiff's own case by 22 January 2015, the plaintiff's adjustment disorder had evolved into major depression and anything that occurred on 22 January 2015 did not contribute to the plaintiff's psychiatric condition.[283] Given that concession, I will not consider allegations in relation to those matters further as they have no bearing on the outcome of the case, nor have I considered the legality of the suspension of Mr Potter not being lifted after that time.

[570] As to allegation that the Council breached its duty to provide adequate support by keeping Mr Potter informed of the progress of the investigation, the letter of 21 July 2014 outlined the dates when interviews with witnesses would occur and then when Mr Potter would be interviewed. Mr Potter was informed of the people at the Council that he could make contact with, and that Ms Johnstone was co-ordinating arrangements. I have made findings above as to what Mr Potter was told in terms of the finalisation of the report by Mr Wilkinson and the timing of the report where I did not accept Mr Potter's version of events.

[571] As to the allegation that the defendant failed to keep Mr Potter updated as to the progress of the investigation and provision of the report I have not accepted Mr Potter's version of events in that regard. In that regard, Mr Wilkinson did give Mr Potter and his union representative an indication of how long he expected his investigation to take before it was finalised and the Council contacted him within days of receiving the report. As to the complaints of that there was a failure to keep Mr Potter informed of the progress of the investigation and respond to Mr Potter's emails:

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283 [1(e)] of the plaintiff's outline of submissions.

(a) The medical certificate of 9 August 2014 did not identify anything medical condition that may have alerted Ms McCrohon that Mr Potter was suffering from any stress related to the investigation, nor had Mr Potter communicated that to anyone within the Council at that time. A reasonable in the position of the Council would not have responded in the circumstances that he should have counselling.

(b) Ms Mc Crohon did respond to Mr Potter's follow up email on 27 August 2014 and could reasonably have determined in the circumstances further response was not required;

(c) Paragraph 8 of the letter of 21 July 2014 indicated that no further interview of Mr Potter may be required and the letter made clear that Mr Wilkinson was to make findings and recommendations before any action would be taken by the Council;

(d) I have dealt with not advising Mr Potter of the outcome.

[572] As to the direction not to speak to Council employees being alleged to be unreasonable or unnecessary, caution must be exercised in making such directions to ensure that they do not exceed what is required for an investigation to be carried out fairly, and for witnesses to give untainted evidence so as not to jeopardise the investigation. The allegations included disclosures or threatened disclosures of private confidential information of an employee including to another employee by Mr Potter. The outcome of the investigation depended on the evidence given by employees. The scope of potential witnesses that may have been required by the investigator was not known at 21 July 2014 and may have included other Council staff depending on the evidence, including the evidence from Mr Potter as was in fact the case. In those circumstances seeking to ensure the evidence given was not contaminated by discussions outside of the investigation was not unreasonable. Unlike the position in *Hayes,* this was not an investigation which would be reasonably anticipated as taking a considerable length of time where Mr Potter was exposed to a campaign of the level that occurred in *Hayes*.[284] Four Council employees were nominated as points of contact. Ms McCrohon and Ms Johnstone were experienced in HR management. There was no suggestion that they could not act impartially as was the case of the nominated person in *Hayes*. Indeed, Ms McCrohon had telephoned Mr Potter on the evening of 21 July 2014 to primarily check that he was okay and to reiterate the need to let the process occur and not to contact Council employees or ex-employees because it may compromise the investigation. I do not consider that a reasonable person in the position of the Council would have considered that the direction in the circumstances would have given rise to a not insignificant risk of psychological injury or that it was probable that it would cause psychological injury such that they would not have given the direction. Nor do I find that a reasonable person in the position of the Council would have provided a support person to discuss the progress of the investigation and raise any concerns outside beyond providing for Mr Potter to make contact with the four nominated persons from the Council, which included the CEO. I find no breach in that regard. While Mr Potter should have been reminded of the Employee Assistance Program if required, given it was matter of which he was aware it is not a matter of any consequence.

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284 [2017] 1 Qd R 337 at [173].

[573] I have dealt with the question of redeployment above. The plaintiff pointed to the fact that in *Hayes* there was no breach of duty in relation to the employee who had been deployed. While that was so the fact of suspension was not the breach of duty identified in relation to the other employees.

[574] As to the allegation that there was a breach of duty insofar as it was not made clear that the suspension was not an indication it had pre-judged the outcome of the investigation, it was made clear to Mr Potter that the complaints were allegations in relation to which no findings had been made, and that an external investigator had been appointed, both in the meeting of 21 July 2014 and in the letter of 21 July 2014. Additionally, in the meeting on 30 July 2014 with Mr Wilkinson, Mr Potter's statements indicated that accorded with his understanding. I do not find a reasonable person in the position of the Council would have taken any further precaution in this regard.

[575] Although Mr Potter had been told he could have a support person at the meeting of 30 July 2014 he chose to have a union representative present. While he was not told that he could have a support person at the meeting of 22 January 2015, he had indicated that his union representative would be present. In that regard the conditions of the meeting and where it was and who would attend was a matter where the Council were guided by Mr Potter. There was no breach in the circumstances.

[576] While the plaintiff seeks to characterise the giving of notice of the meeting and providing a certain time for the provision of the report as part of the duty to give support, they are more properly characterised as matters incidental to the investigation which are not justiciable.[285] In any event I have dealt with those matters.

[577] Other matters such as the fact the Council failed to provide breach or breaks in the meeting when Mr Potter was upset, the evidence does not support the fact that the level of upset displayed by Mr Potter indicated that a break was required. The meeting was not a lengthy one where Mr Potter was required to respond to the allegations. To the extent that it was suggested Mr Potter should have been briefed further in relation to the complaints, and given an outline of the process, an outline of the allegations which had led to the decision to appoint an investigator and an outline of the process were contained in the letter of 21 July 2014 which were elaborated upon by Ms McCrohon. Other matters said to be breaches arising out of the meeting of 21 July 2014 have been previously dealt with.

[578] Given the findings above I do not find the Council breached the Staff Code of Conduct, PSE or WHS Act. The other matters have been dealt with above or I have not found on the evidence that the basis of the allegation was established.

[579] In the circumstances, if there had been a duty of care to avoid exposing Mr Potter to psychiatric injury the only breach of that duty I have found was the failure to provide a support person.

Meeting of 22 January 2015

[580] The plaintiff conceded that allegations of breach are not alleged to have resulted in loss or damage. I will not therefore address them save that I have addressed the Council's

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285 [2017] 1 Qd R 337 at [169].

raising of the allegations of contact with Mr Grant arose as a result of Mr Potter's conduct in the investigation as the evidence was that had Mr Potter been advised earlier than 22 January 2015 that would have been contained in the letter provided to him. For the reasons set out above I do not find it was negligent to raise the allegations in relation to contact with Mr Grant in the letter of 22 January 2015.

Causation

[581] Given my findings above, it is not necessary for me to address the questions of causation or damages, but I will do so in the interests of completeness.

[582] The plaintiff must establish that the injury was caused by a breach of duty according to the principles set out in s 305D of the WCRA.

[583] Sections 305D and 305E of the WCRA states:

"305D General principles

(1) A decision that a breach of duty caused particular injury comprises the following elements—

(a) the breach of duty was a necessary condition of the occurrence of the injury (factual causation);

(b) it is appropriate for the scope of the liability of the person in breach to extend to the injury so caused (scope of liability).

(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party in breach.

(3) If it is relevant to deciding factual causation to decide what the worker who sustained an injury would have done if the person who was in breach of the duty had not been so in breach—

(a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and

(b) any statement made by the worker after suffering the injury about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party who was in breach of the duty.

305E Onus of proof

In deciding liability for a breach of a duty, the worker always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation."

[584] Justice Jackson in *Peebles v Work Cover Queensland,*[286] stated that:

> "There is a continuing tendency for the practising profession to refer to cases about causation in the tort of negligence at common law, even though statutory provisions such as ss 305D and 305E have been in operation now for more than 15 years. While cases at common law may be illustrative, the applicable principles are those required by the statutory provisions. Those informing principles have now been discussed by the High Court in several cases.
>
> In *Strong v Woolworths Ltd,* the majority of the High Court held that the "factual causation" element under s 305D(1)(a) is a statutory statement of the "but for" test of causation, that it requires proof that the defendant's negligence was a necessary condition of the occurrence of the particular harm, and that a necessary condition is a condition that must be present for the occurrence of the harm. The majority continued:
>
> > However, there may be more than one set of conditions necessary for the occurrence of particular harm and it follows that a defendant's negligent act or omission which is necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of the harm will meet the test of factual causation within [the section]. In such a case, the defendant's conduct may be described as contributing to the occurrence of the harm."[287] (footnotes omitted)."

[585] His Honour further stated that:

> "The correct approach to the statutory causation question was re-emphasised by the High Court in *Wallace v Kam* as follows:
>
> > The distinction now drawn by [s 305D(1)] between factual causation and scope of liability should not be obscured by judicial glosses. A determination in accordance with [s 305D(1)(a)] that negligence was a necessary condition of the occurrence of harm is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with [s 305E]. …
> >
> > Thus, as Allsop P explained in the present case:
> >
> > [T]he task involved in [s 305D(1)(a)] is the elucidation of the factual connection between the negligence (the relevant breach of the relevant duty) and the occurrence of the particular harm. That task should not incorporate policy or value judgments, whether referred to as 'proximate cause' or whether dictated by a rule that the factual enquiry should be limited by the relationship between the scope of the risk and what occurred. Such considerations naturally fall within the scope of liability analysis in [s 305D(1)(b)], if [s 305D(1)(a)] is satisfied, or in [s 305D(2)], if it is not.
> >
> > The determination of factual causation in accordance with [s 305D(1)(a)] involves nothing more or less than the application of a but for test of causation.

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286 [2020] QSC 106. The case was not relevantly overturned in this regard upon appeal.

287 *Peebles v Work Cover Queensland* [2020] QSC 106 at [32]-[33].

> That is to say, a determination in accordance with [s 305D(1)(a)] that negligence was a necessary condition of the occurrence of harm is nothing more or less than a determination on the balance of probabilities that the harm that in fact occurred would not have occurred absent the negligence."[288] (footnotes omitted).

[586] Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred. Pointing to things that might have made a difference does not prove the factual causation nor is factual causation established simply because the injury is the "very kind of thing which is the subject of the duty".[289]

[587] In *Lush v Sapwell,*[290] Wilson AJA stated that "Where an employer's negligence consists of an omission to provide certain safeguards the employee must establish that performance of the duty would have averted the harm." It is relevant to consider the statutory provision in the context of breach which operate against the background of common law principles, but modified them to an extent.[291]

This provision adopts the "but for" test of causation. Proof that the breach of duty was a "necessary" condition of the occurrence of the injury thus requires Mr Potter to prove that, but for the defendants' negligence, his psychiatric injury would not have occurred. Such proof necessarily relied upon the psychiatric evidence.

[588] There is no dispute that Mr Potter suffered a psychiatric injury as a result of being stood down on 21 July 2014. It was a matter agreed between Dr Byth and Dr Jetnikoff, the psychiatrists called on behalf of the plaintiff and defendant respectively. The evidence which I accept supported the fact that prior to the events in 2014, Mr Potter was a happy extroverted individual. There is no evidence of him having suffered psychological problems prior to 2014.

[589] By way of brief summary, Mr Potter first attended his General Practitioner in a state of distress on 9 August 2014. On 13 August 2014 the medical certificate identified that he was suffering anxiety and work-related stress. Mr Potter attended Mr Coveny a psychologist in 2014 who's notes revealed he was in an angry and distressed state particularly in 2014 and 2015. He continued to see Mr Coveny until 2018 and then began seeing Amy White. He subsequently attended Dr Martin who diagnosed him with an adjustment order with anxiety and depressed mood and prescribed various medication. In 2015 he had a medical episode which resulted him being admitted to hospital where he was said to be suffering psychotic symptoms and possible alcohol abuse.

[590] Dr Byth's and Dr Jetnikoff's opinions differed significantly insofar as Dr Jetnikoff diagnosed Mr Potter with a chronic adjustment disorder while Dr Byth diagnosed Mr Potter with a major depressive order. The differences of opinion were accepted as being a matter of degree only and little turns on the distinction save that Dr Byth's diagnoses is of a far more severe psychological injury compared to Dr Jetnikoff,

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288 *Peebles v Work Cover Queensland* [2020] QSC 106 at [35].
289 S*trong v Woolworths Ltd* (2012) 246 CLR 182 at [18],[32] and [64].
290 [2011] QCA 59 at [76].
291 *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* (2009) 239 CLR 420 at [11].

[591] There is, however, considerable controversy as to whether any of the alleged breaches caused the psychiatric injury which was suffered by Mr Potter.

[592] The presentation of psychiatric evidence by both parties in the present case was unsatisfactory, with the Court being presented with eight reports or signed memoranda of telephone conversations by Dr Byth[292] and six reports or signed file notes by Dr Jetnikoff.[293] The necessity for the multiple reports was not readily apparent, although there appeared to be some stabilisation of Mr Potter's condition after the earlier reports. A lengthy diary note of the telephone conference with Dr Jetnikoff which was signed by him[294] was submitted on behalf of the defendant. The plaintiff noted the unusual circumstances of providing such a diary note. However, the plaintiff also tendered in evidence a file memorandum signed by Dr Byth.[295] In addition, Dr Byth and Dr Jetnikoff provided separate notes of an expert conclave said to have occurred on or about 30 March 2020 with no joint report being provided. Both doctors subsequently provided further reports. While I did not doubt the independence of either Dr Byth or Dr Jetnikoff, the independence of an expert is paramount. Solicitors should exercise great caution in drafting memoranda of conferences with the experts to be signed by the expert rather than having experts themselves preparing such documents.[296] While it was the subject of comment in the present case by the plaintiff's Counsel as being relevant to weight, to which I had due regard, cross-examination of Dr Jetnikoff clarified that he had made considerable changes to the memoranda of the conference before signing the memoranda. I also reviewed the signed memorandum compared to Dr Jetnikoff's earlier reports and I am satisfied that it does fairly reflect his opinion. It is not however a practice which should be encouraged.

[593] Each expert had had regard to other medical reports. Save where they were specifically admitted on the basis of the truth of the contents, the medical reports referred to were not able to be relied on as truth of their contents. Unfortunately I need to address the broader reasoning of the medical experts in order to demonstrate why I am not satisfied that the plaintiff could establish causation even if the other elements of the duty of care were established.

30 June 2014 meeting

[594] According to Dr Byth, Mr Potter suffered an adjustment disorder as a result of the meeting of 30 June 2014 from which it is said he suffered significant anxiety and depression.[297] However, I have not made the factual findings to support any link between the conduct of the Council to that anxiety and depression in terms of the conduct of the meeting. There is a further problem.in terms of causation in any event. According to Dr Byth, Mr Potter suffered the disorder as a result of his feeling that that he was unfairly placed on performance management without proper explanation and without good reason.[298] That does not relate to the majority of the alleged breaches in the SOC. Although it is alleged the 2013 survey results were dated from an anonymous

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292 Exhibit 36 – 43.
293 Exhibit 47 – 52.
294 Exhibit 52.
295 Exhibit 37.
296 The dangers of solicitors going beyond their proper role was demonstrated in *Universal Music Australia Pty Ltd v Sharman Licence Holdings Ltd* (2005) 222 FCR 465 at [227]-[231].
297 Exhibit 38 at [14.2]-[14.3].
298 CF Exhibit 38 at [14.2].

survey such that it should not have been relied upon[299], the allegations otherwise made are directed to the conduct of the meeting that occurred.[300] Although Mr Potter considered reliance on the survey results were unfair the evidence does not support the fact that but for the reliance on the survey results Mr Potter would have still developed the mind adjustment order. Dr Jetnikoff did not opine that Mr Potter suffered a psychological injury at all but found that its occurrence was a relevant factor in Mr Potter developing a psychological injury on 21 July 2014. I prefer Dr Jetnikoff's views for reasons outlined below. The relevant causal link is not established.

Suspension on 21 July 2014, Lack of adequate support and failure to inform and lift suspension

[595] As to the events of 21 July 2014 and particularly the standing down of Mr Potter, both Dr Byth and Dr Jetnikoff opine that the events of 21 July 2014 resulted in Mr Potter developing a psychiatric disorder.

[596] According to the case that was pleaded by the plaintiff, suspending or standing the plaintiff down from employment and/or not providing adequate support to the plaintiff at the time he was suspended, in the circumstances pleaded was the cause or were the causes of the plaintiff developing and/or aggravating Mr Potter's psychiatric injury.

Dr Byth

[597] According to Dr Byth's first report, Mr Potter had told him that after suffering the setback of being told he was to be performance managed, as set out in the letter of 30 June 2014, he stated that he was stood down on full pay pending an investigation "although I was not told what the allegations were for about two weeks".[301] The letter of 21 July 2014 did touch upon the allegations in relation to RS.[302] Further particulars of the allegations were provided and further allegations were provided seven days later in the letter of 28 July 2014.[303] Further, the letter of 21 July 2014 informed Mr Potter that a detailed letter of allegations would be provided to him by 5.00pm Monday 28 July 2014. Mr Potter also informed Dr Byth that he was upset about the allegations made which he did not accept, and further "Shortly after, he attended a meeting at work about the allegations, and he was "dumbfounded", but nothing happened and they said they would get in touch with me about the result, but it never happened – I saw my GP about having a breakdown."[304]

[598] Mr Potter informed Dr Byth that his alcohol intake increased when he left work, to eight standard drinks per day, as well as another substance. Dr Byth considered was an attempt at self-medication to control his anxiety, anger and restlessness.[305]

[599] Dr Byth considered that that most likely diagnosis was of major depression with prominent associated anxiety and agitation.[306] He stated further:

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299 Which I did not accept was a breach.
300 [7] and [11C] and [12 SOC.
301 Exhibit 36 at [2.9].
302 Exhibit 7 at page 2.
303 Exhibit 8.
304 Exhibit 36 at [2.12].
305 Exhibit 36 at [14.4].
306 Exhibit 36 at [11.1].

> "I thought that his depression and anxiety had commenced when he left work in 2014 as an Adjustment Disorder, and they subsequently gradually worsened and evolved into the more substantial diagnosis of Major Depression over the next few months and this condition has now become chronic, and it has not responded well to treatment."[307]

[600] Dr Byth also considered that Mr Potter had a possible additional diagnosis of post-traumatic stress disorder, but conceded in cross-examination that the relevant traumatic event which is a necessary trigger for post-traumatic stress disorder had not occurred.[308] In addition, he observed other symptoms such as symptoms resembling agoraphobia and some amnesia after episodes of agitation and possible psychosis, but thought that they were associated with major depression.[309]

[601] When he saw Mr Potter he considered that his major depression and anxiety had only marginally improved with his treatment and his remaining symptoms were following a chronic course. He considered with treatment and counselling he should improve over the next three years.

[602] As to the cause of Mr Potter's psychological condition, Dr Byth opined that:

> "14.1 Following a series of stressful events in his work in 2014, which he complained amounted to harassment and bullying by his Director and his Manager, Ronald Potter has developed an adjustment disorder with anxiety and depressed mood, which has gradually worsened to become Major Depression with associated anxiety and agitation.
>
> 14.2 This psychiatric condition was caused by his difficulty coping with interactions with his superiors at work, whom he complained were treating him unfairly and withholding from him information about allegations against him. He also complained they were intimidating and belittling him in meetings, and they were not prepared to allow him to defend his behaviour at work. As well he complained that they were misconstruing his interactions with his staff, which made him feel increasingly confused, dumbfounded and devastated at work." (emphasis added)
>
> …
>
> 14.8 He had no history of psychological problems prior to 2014. I believe he would have been unlikely to develop anxiety and depression of such intensity and such persistence despite treatment along with symptoms of PTSD but for the effects of stressful events in his work in 2014."

[603] I have not found that Mr Potter was subject to harassment and bullying by his Director and Manager, nor that he was treated unfairly with information being withheld from him in an unreasonable manner. Mr Potter was not asked to respond to allegations at the meeting. Natural justice was not required at the meeting of 21 July 2014, as I have found above. In any event, those matters dealing with the withholding of information and

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307 Exhibit 36 at [11.4].
308 Under either DSM-IV or DSM-V.
309 Exhibit 36 at [11.7] – [11.8].

misconstruing interactions are matters which would relate to the investigation rather than any matter which is justiciable.[310]

[604] On the basis of the history said to have been relayed by Mr Potter to Dr Byth,[311] what is said to be "bullying and harassment" is a generalised statement rather than providing a description of the conduct said to constitute "bullying and harassment". Other than making reference to Mr Stanton informing him that he was going to be performance managed and that Mr Stanton was going to "go on a fishing expedition to find out what you are doing wrong,"[312] the conduct referred to is not identified. The conduct referred to by Mr Potter included a complaint about the fact that complaints as to performance that had been made by staff were raised at all.[313]

[605] Dr Byth does not identify what the "stressful events" referred to in [14.8] are. However, the history of events referred to what had occurred at the 30 June 2014 meeting, the 21 July 2014 meeting and not being contacted after the 30 July 2014 meeting.

[606] In his report of 5 September 2018,[314] Dr Byth stated:

> "The cause of this mental illness remains that of his difficulty coping with interactions with his superiors at work in 2014, when he complained that he was intimidated in meetings, and not allowed to defend his behaviour at work, and that he was unfairly investigated, and that the results of the investigation were withheld from him for a period, which increased his anxiety and loss of self-esteem at work. He was also very crestfallen when he was stood down at work in 2014, which he also felt was most unfair." (emphasis added)"

[607] That raises the additional matter of the results of the investigation being withheld from Mr Potter. I have addressed those matters above as to why Mr Potter was not told the outcome and found that the Council had not withheld information such that it was a breach of duty.

[608] According to Dr Byth Mr Potter told him that:[315]

> "3.2 He is "still daydreaming a lot about 2014, how I was in shock about being told I was to be performance managed, because I had done nothing wrong; and it made me feel worthless, like my whole career was over, particularly when I was later stood down."
>
> "3.3 He is also "daydreaming that there were allegations about Rhys – I had said an assessment wasn't necessary, but another worker, Rob, did it anyway; and it was shown to Rhys, who claimed I was using it to force him to do things, which was not true.""

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310 *Hayes* at [187].
311 Exhibit 36 at [2.1]-[2.12].
312 Which I have not found was fully accurate on the basis was a reference to what was wrong in his team.
313 Exhibit 36 at [2.4]-[2.5] and [2.10]-[2.11].
314 Exhibit 38 at [11.2].
315 Exhibit 38 at [3.2]-[3.3].

[609] Dr Byth further described Mr Potter in his mental state examination:[316]

> "7.9 His thought content involved a preoccupation with harassment and bullying at work by the manager and director in 2014, which he relived in recurring nightmares and flashback memories."

[610] Dr Byth's diagnosed Mr Potter with Major Depression with prominent associated anxiety and depression. He also considered that he had symptoms of Post-traumatic Stress Disorder (**PTSD**).

[611] Dr Byth expanded upon the causative factors of Mr Potter's illness, stating that his depression and chronic anxiety …"have been caused by an accumulation of a series of stressful events in his work in 2014, which each successfully made him more depressed, hopeless and demoralised, leading initially to an Adjustment Disorder and eventually to treatment-resistant Major Depression, with some PTSD-like features."[317] Dr Byth considered the anxiety and depression originated in the meeting of 30 June 2014, opining that the meeting made him more vulnerable to an Adjustment Disorder "…as the meeting questioned his self-image as a loyal and reliable worker, and Ronald Potter stated to question his own mental stability."[318] Dr Byth stated that the meeting of 21 July 2014 where Mr Potter was stood down had a "major emotional effect" on him insofar as "he felt that his integrity as worker had been shattered and his career was over and he felt his reputation was tainted at work and he was being unfairly treated by his employee".[319] Dr Byth considered that made Mr Potter "…more vulnerable to developing an Adjustment Disorder and Major Depression, and it contributed to his eventually developing a recognised psychiatric injury…".[320]

[612] Dr Byth considers that had Mr Potter been told that forms of support were available for him, his vulnerability to mental illness would have been significantly reduced and his anxiety and depression may well have been more short-lived and more responsive to psychiatric treatment. According to Dr Byth, Mr Potter would have been at a lesser risk of developing mental illness had he been allowed a witness support person to accompany him. His reasoning in that regard was scant nor was his oral evidence compelling.

[613] Further, Dr Byth commented that his "…worsening anxiety and depression after 21/7/14 would also have been less severe had he been immediately informed of the favourable outcome of the investigation of his case on 8/8/14 i.e. had he been informed that he was cleared of any serious wrongdoings, and that he would be able to return to work, he probably would have been greatly relieved and less anxious and depressed, and his Adjustment Disorder would have been easier to treat and probably not developed into Major Depression."[321]

[614] Dr Byth considered that "in the period between when the investigation was completed on 8/8/14, and when he communicated via email with his employer on 27/8/14, I believe his anxiety and depression would have been steadily worsening, and his confidence and

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316 Exhibit 38 at [7.9].
317 Exhibit 38 at [14.1].
318 Exhibit 38 at [14.2].
319 Exhibit 38 at [14.3].
320 Exhibit 38 at [14.3].
321 Exhibit 38 at [14.8]. See also Exhibit 39 at [1.8] and [1.10].

mental stability were deteriorating, making him more vulnerable to mental illness, and thereby contributing to his eventually developing Major Depression."[322]

[615] Dr Byth commented that "His failure to be informed of his being cleared by the investigation has "...made him vulnerable to increasing anxiety and depression over the period, and left him lacking in confidence about his leaders at work, and has contributed to making it more impossible for him to return to work again in the longer term."[323] Dr Byth had the same view of the extension of the investigation process arising out of Mr Potter's alleged conversation with Michael Grant. Mr Potter complained that "he remained confused as to the allegations of poor management made against him and he was upset the proposed weekly management meetings never happened." Dr Byth commented that the process "…distressed him and undermined his confidence, and it also led to a worsening of his vulnerability to mental illness, and to his eventually developing work related Major Depression".[324]

[616] In his report of 17 November 2020, Dr Byth was provided with various documents which were either not in evidence or were not admitted on the basis of the truth of their contents. The report reiterated Dr Byth's opinion and noted that he believed it was supported by the observations made in the notes. Dr Byth stated that he believed Mr Potter would have had an adjustment disorder in June/July 2014 but that it was Major Depression by late 2014. Dr Byth stated that:

(a) He considered that Mr Potter's Adjustment Disorder would not have evolved into Major Depression had he been given more warning of the meeting and had he been encouraged to have support of a witness during the meeting;[325]

(b) Had Mr Potter been provided with proper support from his employer on 21 July 2014, his Adjustment Disorder would not have developed into Major Depression as he would have had time to absorb and understand the content of the meeting;[326]

(c) Had Mr Potter been told immediately of the favourable outcome of the investigation report "…his anxiety and depression would also have been greatly relieved … and that he was not being kept off work by his employer, which would have also reduced his feelings of anxiety and depression…and would not have evolved into Major Depression."[327] According to Dr Byth, "His spending some weeks at home thinking he would be terminated and not returning to work exacerbated his anxiety and depression, and also contributed to his Adjustment Disorder deteriorating into Major Depression".[328]

[617] After a telephone conclave meeting with Dr Jetnikoff in March 2020,[329] Dr Byth interviewed Mr Potter and his wife by telephone for a third time because he had not interviewed him since 2018, and he and Dr Jetnikoff differed in opinion. The document morphed into Dr Byth's report on the conclave meeting.

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322 Exhibit 38 at [14.9].
323 Exhibit 38 at [14.10].
324 Exhibit 38 at [14.12].
325 Exhibit 39 at [3.1].
326 Exhibit 39 at [3.3].
327 Exhibit 39 at [3.4].
328 Exhibit 39 at [3.4].
329 Exhibit 40.

[618] On 18 January 2021,[330] Dr Byth provided yet another report commenting on a report of Cameron Covey which was not admitted in evidence. In that report, Dr Byth set out a number of propositions including:

(a) "I believe that, had he not been suspended from his employment on 21/7/14, he would, on the balance of probabilities, have made a recovery form his psychological symptoms prior to his being suspended";[331]

(b) "I also believe that, had he not been suspended from his employment on 21/7/14, on the balance of probabilities, he would have been able to continue with his employment from a psychiatric perspective.";[332]

(c) "I believe that his Adjustment Disorder commenced on 30/6/14 and it was amplified by being stood down on 21/7/14 and then further amplified by his not being told the result of the investigation in a timely fashion and by his delayed notification that he could return to work and that he had no substantial charges against him;"[333] He considered in the three to six months after the chronic Adjustment Disorder evolved into Major Depression; and

(d) "I believe that, had his psychiatric condition been only a mild Adjustment Disorder, he would, on the balance of probabilities, have been able to continue working from a psychiatric perspective."[334]

[619] The report is really a series of propositions or conclusions which are mostly a summary of what Dr Byth has said before, seemingly to support his diagnosis of Major Depression as opposed to an Adjustment Disorder, save that it comments on the counterfactual, relevant to the question of causation. What is lacking, at least in this report, is any reasoning which sets out the factual basis for his view.

[620] In his report of 28 January 2021,[335] Dr Byth was asked to comment on clinical records which were not generally in evidence, or at least not as evidence of the truth of their contents. The report was a commentary of matters contained in the notes concerned, noting that they reflected some improvement in Mr Potter's condition but that Dr Byth considered the observations were consistent with his diagnosis of Major Depression with associated anxiety. He also comments "I also noted that he still has some symptoms resembling PTSD."[336]

[621] In his report of 16 February 2021,[337] Dr Byth states he was asked to elaborate on his report of 17 November 2020. He stated at [1.2] that:

> "I believe that, had his suspension been lifted on 9/8/14, he could have been less likely to develop a severe Adjustment Disorder, as described in DSM-5 i.e. as this psychiatric condition was being caused by stressful factors in his work at the time, his psychological state would have been likely to improve with the reduction of

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330 Exhibit 41.
331 Exhibit 41 at [5].
332 Exhibit 41 at [6].
333 Exhibit 41 at [7]
334 Exhibit 41 at [9].
335 Exhibit 43.
336 Exhibit 43 at [3.3].
337 Exhibit 42.

these work-related stresses at the time, and his prognosis would have been improved, and he would have had a better chance of recovery."[338]

[622] He elaborated on [3.4] of his report of 17 November 2020 as follows:

> "2.2. At the time the investigation report was completed, around 9/8/14, Ronald Potter was experiencing an Adjustment Disorder in relation to the work stresses involved in his being suspended at work, and he had been distressed by meetings involving his performance leading up to his suspension; and I believe his Adjustment Disorder would have diminished and improved had he been told immediately that he had been cleared of any major wrongdoing at work, and that he had only minor problems to deal with from the investigation.
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> 2. 3. As his Adjustment Disorder was a psychological reaction to stressful events at work, which included his being suspended, I believe this Adjustment Disorder would have been likely to improve had he been placed under less stress immediately on 9/8/14, particularly had he been immediately reinstated in his position i.e. his anxiety and depression would have been more likely to improve, and he would have had a better chance of recovery.
>
> 2.4. Having read the Investigator's Findings of the Gympie Regional Council dated 22/1/15, with its discussion of the 5 allegations, I believe that Ronald Potter would have responded positively to being informed that he was cleared of any major transgression at work, and that he had only a small number of minor problems to address back at work; and he would have found his situation less anxiety-provoking and less depressing, which would have, on the balance of probabilities, lessened his likelihood of an ongoing Adjustment Disorder.
>
> 2.5. I believe that he found his suspension was the major stress causing his anxiety and depression at the time, and, had his suspension been removed 9/8/14, he would have felt under less stress overall, and he would have made a recove1y.
>
> 2.6. I believe that, on the balance of probabilities, had he been informed immediately of the investigation findings, he would have felt under less stress generally, which would have reduced his feeling so anxious and overwhelmed, as he had only minor problems to still sort out at work, which could have been worked through after he returned to work."[339]

[623] He further commented that, had Mr Potter had more support at the meeting of 21 July 2014, he believes Mr Potter would have felt less isolated, and less ostracised and less intimidated; and he would have been less predisposed towards developing an Adjustment Disorder at the time. In Dr Byth's view, part of the stress causing the Adjustment disorder would have been ameliorated had he had a support person with him.[340]

[624] In cross-examination, however, Dr Byth agreed that had Mr Potter been provided with the letters of 22 January 2015[341] and the letter of 12 February 2015,[342] on or about 8

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338 Exhibit 42 at [1.2].
339 Exhibit 42 at [2.2]-[2.6].
340 Exhibit 42 at [3.2].
341 Exhibits 22 and 23.
342 Exhibit 34.

August 2014, it is likely to have made the situation worse.[343] Dr Byth agreed that Mr Potter had personality traits which made him more sensitive to criticism and agreed that he perceived the allegations against him as a personal attack. In particular, Dr Byth agreed that Mr Potter thought he was going to be sacked and his career was finished.[344] The plaintiff submits that if he was not told the further allegations in relation to Mr Grant, he may have been less depressed having not been found guilty of any major misconduct. The difficulty with that assumption, however, is that even aside from the allegations with respect to Mr Grant, which I have found were properly raised, there was also a finding of misconduct by Mr Wilkinson as well as performance issues found in relation to Mr Potter's management. Given one of the underlying complaints which Mr Potter raised with Dr Byth was that he felt resentful that the performance of his work had been challenged and thought it was unfair. Even if the further allegations had not been put to Mr Potter in relation to Mr Grant, Dr Byth's opinion that had he been told of the outcome of the investigations his depression might have not been as bad, is difficult to accept.

[625] Dr Byth agreed that had the letters of 22 January and 12 February 2015 been given to Mr Potter on or about 8 August, given his condition was such that he was quite anxious and depressed at that time,[345] and it would not be expected the position was different.

[626] While I found Dr Byth to be an honest witness, I found his opinions lacked a certain objectivity and in a number of respects were statements of conclusion lacking proper reasoning where he appeared to be adopting the most favourable view to Mr Potter. For example, his opining that Mr Potter probably also suffered PTSD in addition to Major Depression based on nightmares and flashbacks of traumatic events which he considered did not in fact satisfy the threshold criteria. To the extent that his opinions were based on various factual assumptions arising from matters of which he was informed by Mr Potter, I found that a number were not established.

[627] Dr Jetnikoff also provided several reports, all of which were admitted in evidence. He had originally been engaged in December 2015 by Local Government Workcare to provide an independent examination and report in relation to the claim lodged by Mr Potter.

[628] According to Dr Jetnikoff's first report dated 17 December 2015,[346] Mr Potter had referred to the survey about management and that it revealed dissatisfaction with Mr Potter's management style by his team. He attributed this in part to a particular individual within the team who also heavily influenced RS. According to Dr Jetnikoff, Mr Potter indicated that he was upset after being advised that there were complaints about his management style, that there were areas of underperformance and that he had issues with Mr Stanton. He stated that Mr Potter was very upset that he was stood down and his access to the workplace was withdrawn before the end of the business day. Mr Potter had stated that he was upset by the lack of warning about the meeting and "...that he was advised of the seriousness of the allegations against him but he believes that being stood down in that context was heavy handed and unnecessary and when he was advised of the details of the allegations the following week he was even more

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343 T 3-47-3-48, particularly 8-15.
344 T 3-46/36-3-47-5.
345 T 3-50 13-15.
346 Exhibit 47.

disappointed, as he believed this could have all been handled with some mediation. He felt ambushed and shocked by the allegations themselves."[347] He also told Dr Jetnikoff that he went home in shock and was convinced he was going to be terminated. Dr Jetnikoff noted that Mr Potter certainly gave him the impression that he was very upset by criticisms about his management style.

[629] Dr Jetnikoff noted that since that time, Mr Potter had been very angry and "made no comment about his own management style being anything less than adequate."[348] In the summary of the history from his previous report he noted one of the aspects of Mr Potter was his particular presentation to sensitivity to criticism in response to criticisms of his management style and that his views suggested a lack of accountability in the perception by others regarding his management.

[630] According to Dr Jetnikoff, at the time he saw Mr Potter, he was " ... remains very angry and has no trust in the staff that he was managing, such that he does not believe he could ever work with them again."[349] Mr Potter had indicated he could not return to work in the section unless staff were replaced, but could work in an alternate area. Mr Potter agreed in cross-examination that it was possible he said that but could not recall as his mental state was not good at the time. Mr Potter discussed his increase in alcohol intake since the 2014 events.

[631] Mr Potter told Dr Jetnikoff that he thought he could return to the Council in an alternate position in the near future. Mr Potter's description of how his psychological condition was affecting him is markedly different to that described to Dr Byth. I will return to that in the discussion as to damages.

[632] Dr Jetnikoff considered, at the time of the examination, that Mr Potter had "a chronic adjustment disorder with anxiety and depressed mood, extreme mood swings, rage attacks and severe alcohol abuse over a more than 12-month period."[350] He opined that "This occurred after increasingly(sic) workplace stress, after a perception of being unjustly treated in the workplace when he was stood down pending investigations and allegations about his management."[351]

[633] Dr Jetnikoff further stated as to the cause of Mr Potter's injury that:

> "…it seems fairly clear that in his view the injury was caused by being stood down on the allegations not having been investigated but on the seriousness of them and having a perception that criticism of his management was unwarranted."[352]

[634] Dr Jetnikoff interviewed Mr Potter again in July 2016 and prepared a report.[353] Mr Potter indicated to Dr Jetnikoff that he had been approached by the Council to return to work but he would not return until the further allegations from 2014 were resolved and he could return with his reputation completely untarnished. He also stated he could never forgive those who he blamed for the way he was treated. At that stage Mr Potter thought

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347 Exhibit 47 at page 9.
348 Exhibit 47 at page 9.
349 Exhibit 47 at page 10.
350 Exhibit 47 at page 13.
351 Exhibit 47 at page 13.
352 Exhibit 47 at page 14.
353 Exhibit 48.

he could look for work outside of the Council even though he felt he "lost respect, confidence, integrity and his reputation as a result of treatment by others". His description of his lifestyle was again a more positive one than he appeared to describe to Dr Byth. At the time Dr Jetnikoff considered that Mr Potter had stabilised since his previous assessment and that "his clinical symptoms were residual and not causing any impairment to his domestic function". He considered they "continue to be a barrier to returning to his old employer and as such can be considered the cause of some occupational impairment" but that he would be able to find alternate work and work without the symptoms disrupting his work, although there will be a degree of sensitivity with future employees and colleagues." He considered the main stressor at that time were unresolved allegations against him. Dr Jetnikoff did not consider that Mr Potter would completely recover but a partial recovery was likely with residual symptoms but the impairment would be negligible if he found suitable employment. He did not consider the residual symptoms were likely to alter given "the nature of the symptoms themselves such as perceived injustice and resentment and anger and the fact that they have stayed fairly intense and persistent in a more than two year period."

[635] Dr Jetnikoff prepared a detailed report for the defendant in relation to the present proceedings on 11 July 2017.[354] Dr Jetnikoff saw Mr Potter again for the purpose of preparing the report. Mr Potter stated at that time he was focussing on finalising the damages claim and getting on with his life. He had by that time got his qualifications as a personal trainer. He found it difficult to think beyond the damages claim. His description of his lifestyle was more positive than that described to Dr Byth.

[636] As to causation, according to Dr Jetnikoff the chronic adjustment disorder with anxiety and depressed mood which he considered Mr Potter suffered from was attributable to workplace factors namely that "Mr Potter was stood down in July 2014 by his management with little notice regarding allegations against him and just prior to that he had been advised that he was going to be placed on some form of performance management with limited warning." Dr Jetnikoff "could not see evidence of other factors that could be clearly identified as contributing to the ongoing symptoms of the adjustment disorder with anxiety and depressed mood." Dr Jetnikoff did consider Mr Potter had the capacity to work at that time although he thought once his damages claim was finalised he may be able to return to work in 18 months to 2 years' time.

[637] Dr Jetnikoff further observed that he does not consider that treatment would be effective in resolving Mr Potter's condition as he believed Mr Potter had "proven to be someone who is unable to let go" of some of the issues. He noted although he had been provided with the psychological means to alleviate the severity of symptoms he was unable to use them. He stated that "This is a narcissistic injury and I suspect he will maintain a degree of entitlement and sadness with respect to the developments that led to him going off too work and ultimately being terminated from his position."

[638] Dr Jetnikoff provided a further report dated 27 February 2020.[355] He saw Mr Potter again for the purpose of the report. Mr Potter informed Dr Jetnikoff that his symptoms of strong resentment in relation to his treatment remained. By this stage Mr Potter did not think he would recover and was uncertain as to whether he would work again. His ongoing damages claim was a major focus. Mr Potter reported improving since 2017.Dr

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354 Exhibit 49.

355 Exhibit 50.

Jetnikoff's diagnosis did not change from that previously expressed and he continued to disagree with Dr Byth that he suffered a major depressive disorder. He noted that Mr Potter had features of alcohol dependence and that many of his symptoms were consistent with an unmasked and untreated alcohol dependence.

[639] A diary note was prepared signed by Dr Jetnikoff dated 25 January 2021.While he had previously mentioned that Mr Potter appeared to have a problem with alcohol and that may or may not have been supported by the MRI according to this note the MRI showing some cerebral atrophy which predated July 2014 was consistent with long term alcohol abuse disorder. He commented that alcohol abuse could explain Mr Potter's presentation to Dr Byth. He maintained his opinion that the plaintiff's injury was caused by his being stood down on 21 July 2014 on misconduct allegations. By reference to his 2015 report where he stated his opinion as to causation. he stated that Mr Potter's condition came about because he perceives what happened to him on 21 July 2014 and the subsequent investigation was unjust.

[640] Dr Jetnikoff did not agree with Dr Byth that a longer period of warning or being allowed a support person at the meeting would have made any difference. What acted upon Mr Potter's psyche was the allegations made against him on or after 21 July 2014.[356] Dr Jetnikoff reviewed the letter of 22 January 2015 and a letter of 12 February 2015. He considered that Dr Byth may have been acting under a misunderstanding that the outcome was more favourable to Mr Potter and he had been cleared of any wrongdoing and could return to his position in proffering his opinion that had Mr Potter been informed in mid-August 2014 that he was cleared of any major malpractice at work and could return to work that would have made a difference to the outcome.

[641] Dr Jetnikoff did not consider that communication of the letters of 22 January 2015 or 12 February 2015 would have improved Mr Potter's condition but if anything made it worse when he was suffering a psychiatric condition from about 9 August 2015. Similarly informing him that he could not return to his previous position would have made him worse.

[642] Dr Jetnokoff did not agree in cross-examination that if Mr Potter had been told of the results of the investigation such that he was cleared of any serious misconduct and allowed to return to work within three to four weeks of the suspension he would have been likely to make a good recovery. The basis of his opinion was because Dr Jetnikoff considered that it would not have addressed his concern about his reputation at work which related to the criticism of his performance, the results of the survey and other allegations.[357] While he conceded that the findings that he was not guilty of any serious misconduct would have assisted him he did not consider it would resolve his problems.[358]

[643] I also found Dr Jetnikoff an honest witness. I preferred his opinions to those of Dr Byth as I found his reasoning was clear, considered and dispassionate. Other than where he dismissed a question on the basis it was unclear, his answers were direct and he was able to clearly state his reasons for his view. Unlike Dr Byth who appeared to attribute the difference in their opinions to Dr Jetnikoff not speaking to Mrs Potter, notwithstanding

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356 [18(a)].
357 T4-38 – T4-39.
358 T4-38 – T4-39.

Dr Jetnikoff had summarised in detail what Mrs Potter had told Dr Byth when considering his report and further to him not asking questions deeply enough, which were not borne out by his reports. In rejecting a suggestion that Mr Potter had overstated his symptoms, Dr Jetnikoff had referred to the potential for that due to Mr Potter's anger but noted his presentation had been consistent in his presentation for assessments.[359]

[644] As to whether the suspension was causative of Mr Potter's psychiatric condition both psychiatrists agree that Mr Potter's condition stemmed from his being stood down on 21 July 2014 and told there were allegations against him. I accept that his being stood down from work did contribute to his psychological decline. The difficulty is determining whether or not "but for" his having been suspended Mr Potter would have suffered the psychological injury he did. While the suspension clearly had an impact upon Mr Potter and was one of the stressors contributing to his condition, I accept Dr Jetnikoff's view that it was one of the stressors. He also identified the delay in the full outline of allegations being provided as another stressor which was identified by Mr Potter as being a couple of weeks when in fact it was seven days.

[645] I accept that Mr Potter was very sensitive to criticism particularly in relation to his work performance had been criticised and perceived those criticisms as a personal attack. Dr Byth agreed in cross-examination that Mr Potter developed an extreme suspicion of the Council, believing that he was to be sacked and his career finished. That was evident from his response to the letter of 30 June 2014 where he raised with Ms Smith the possibility that the Council was trying to get rid of him. However, I am unpersuaded that the suspension alone was a substantial cause of the injury suffered in isolation from the fact that allegations were made against Mr Potter and that they were to be investigated. Or to put it in the converse I am not satisfied that Mr Potter would not have suffered the psychological injury but for his having been suspended or stood down[360] given the allegations made against him still would still have been the subject of an investigation and the results and his sensitivity to that criticism appear to equally feature in his psychiatric injury. I find that Mr Potter's feelings of injustice and that he had been unfairly treated were not limited to the suspension alone, and that consistent with his stated grievances to the psychiatrists particularly in the two to three year period after the 2014 events, before the overlay of the present litigation also weighed upon Mr Potter. Mr Potter expressed anger and resentment towards not only management but the people who made the complaints and that his management was the subject of criticism. That was also apparent from the evidence he gave in cross-examination.

Informing of the Outcome Earlier

[646] As to whether providing the letter of 22 January 2015 would have made a difference to Mr Potter in cross-examination however, Dr Byth agreed that had Mr Potter been provided with the letters of 22 January 2015,[361] and the letter of 12 February 2015,[362] on or about 8 August 2014, it is likely to have made the situation worse given he was quite anxious and depressed at the that time.[363] Dr Byth agreed that Mr Potter had personality

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359 Exhibit 49 , Section 6.

360 *Strong v Woolworths Limited* (2012) 246 CLR 182 at [190]; *The Corporation of the Synod of the Diocese of Brisbane v Greenway* [2017] QCA 103 at [338].

361 Exhibits 22 and 23.

362 Exhibit 34.

363 T3-47-T3-48.

traits which made him more sensitive to criticism and agreed that he perceived the allegations against him as a personal attack. In particular, he agreed that Mr Potter thought he was going to be sacked and his career was finished.[364]

[647] The plaintiff submits that if he was not told the further allegations in relation to Mr Grant, he may have been less depressed having not been found guilty of any major misconduct. The difficulty with that assumption, however, is that even aside from the allegations with respect to Mr Grant, which I have found were properly raised, there was also a finding of misconduct by Mr Wilkinson, as well as performance issues found in relation to Mr Potter's management. Given that was one of the underlying complaints which Mr Potter raised with Dr Byth, and that he resented the fact that the performance of his work had been challenged and thought it was unfair, even if the further allegations as to Mr Grant had not been put to Mr Potter in relation to Mr Grant, Dr Byth's opinion that his condition may not have deteriorated as it did is difficult to accept.

[648] Dr Jetnikoff's view was that if informed of the outcome of the investigation in terms of the 22 January 2015 letter Mr Potter's psychiatric condition would not have improved but likely worsened. He also considered the 12 February 2015 would have had a detrimental effect because Mr Potter was not effectively cleared by the letters as Dr Byth considered to be the case.

[649] In that regard, I generally preferred Dr Jetnikoff's opinion to the extent that it differed from Dr Byth. In particular, I accept Dr Jetnikoff's opinion that if Mr Potter had been told the outcome of the investigation within three to four weeks of the suspension, he would not have been much more likely to make a good recovery because Mr Potter "…felt victimised, criticised and that his performance, which had been, prior to that, in question – he disagreed with everything that was told to him that was negative, and he wanted those things addressed. And he doesn't believe they were addressed, and those are factors that I believe perpetuated his problem."[365] That was consistent with Mr Potter's evidence, particularly in cross-examination where he steadfastly would not accept the results of the survey raised potential issues in relation to his management as opposed to staff which needed to be addressed. It is also consistent with the way Mr Potter framed his grievances with the Council's conduct to both Dr Byth[366] and Dr Jetnikoff.

[650] Further, I accept Dr Jetnikoff's view that the fact that the letter of 12 February 2015 suggesting that he could not return to his role and may be demoted would have made his condition worse. I note that the plaintiff contended that the Council could not demote Mr Potter and was negligent in suggesting it could. It was a possible disciplinary measure outlined in the PMDP. In any event I do not need to decide whether or not demotion was available given the effect of the 22 January 2015 letter alone would not have resolved Mr Potter's symptoms given Dr Jetnikoff's opinion.

[651] Dr Jetnikoff had also expressed the view that the findings of the investigation would have resulted in the continuation of his condition. Dr Jetnikoff stated that Mr Potter developed a chronic condition mainly due to the persistence of symptoms which would have occurred substantially after he had discovered the findings of the investigation and

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364 T3-46-T3-47.

365 T4-38.

366 For example see Exhibit 41at 14.2 -14.3; Exhibit 42.

would not have had a particularly great influence from actions of the employer with respect to the chronicity of the condition. [367]

Lifting the Suspension

[652] As to whether "but for" not lifting the suspension Mr Potter would have improved, consistent with my finding above, even absent the suspension Mr Potter would have suffered his injury given the allegations made by RS and the criticisms made of his management which lifting the suspension would not have resolved. There is no evidence to support the notion of Dr Byth that discussing the matter with his superiors would have improved matters given the findings of the Investigation.

[653] While the plaintiff submitted that Dr Jetnikoff had only for the first time suggested that Mr Potter was a narcissistic individual who would have required some compensation for what he perceived was unfair treatment and injustice, Dr Jetnikoff had stated in his earlier report that Mr Potter's injury was a narcissistic injury where he had developed a sense of entitlement.

[654] As to whether the lack of a support person was causative of Mr Potter's condition, I accept Dr Jetnikoff's evidence in that regard. While Dr Byth opined that had he been given more notice of the meeting and a support person to attend with him his symptoms would not have been as severe and probably would not have evolved into major depression, Dr Byth did not address why the support that Mr Potter could have affected his symptoms given the allegations made against him and the fact that the letter of 21 July 2014 set out the process to be adopted. I accept Dr Jentnikoff's opinion that what was acting on Mr Potter's psyche was the allegations made against him. I do not find that the provision of a support person or greater warning would have avoided Mr Potter suffering the psychological injury he did. It is insufficient to establish causation that the steps could or might have prevented the harm. [368] In any event given Mr Potter was a stoic, proud man and did not take a support person to his meeting of 30 July 2014 but his Union representative and did not seek a support person when meeting with the Council representatives in January 2015 I do not consider that he would have taken a support person to the meeting.

[655] As to the remaining allegations[369] there is no evidence to suggest that they were causative of the defendant's psychological condition or rather that had those steps been taken Mr Potter would not have suffered the psychological condition nor would it have been so severe. The evidence supports the fact that Mr Potter would have developed the condition in any event.

[656] The critical fact in this matter is that even if Mr Potter had been told that his suspension had been lifted or the outcome of the investigation, given his psychological state it is likely to have made things deteriorate further.

[657] Causation is not established.

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367 Exhibit 50 p 21

368 *Woolworths Ltd v Perrins* [2015] 207 at [173].

369 [9A] and [10].

Damages

[658] I will briefly outline the relevant findings relevant to any calculation of damages although I have not found in Mr Potter's favour.

[659] Mr Potter has a significant psychiatric condition. As a result, the life he has lived since 2014 is in stark contrast to the life he lived before. He has been unable to return to work of a similar nature having tried in 2016 to apply for jobs but was advised by his psychiatrist not to proceed with that course after he started shaking at the interviews and stumbling. He has a limited social life. He does not engage in social sport as he once did. His wife is his bedrock. He has suffered periodic rage episodes including with his children. His involvement with touch football and refereeing was in jeopardy for some time but in recent years he has upgraded his refereeing qualifications and been engaged in some regional judging. He has also obtained qualifications as a personal trainer and managed to engage in some part-time work.

[660] Dr Byth opined that Mr Potter suffers principally from an adjustment disorder which developed into major depression with prominent associated anxiety and depression and symptoms of PTSD.

[661] Dr Jetnikoff diagnosed Mr Potter as suffering from a chronic adjustment disorder with anxiety and depressed mood.

[662] As to the possibility that Mr Potter suffered from PTSD, Dr Byth agreed that Mr Potter did not suffer a traumatic event so as to satisfy the threshold criteria to establish PTSD under with DSM-IV or DSM-V.[370]

[663] Dr Jetnikoff did not consider that Mr Potter satisfied the criteria for the diagnosis as outlined in DSM-IV Diagnostic Criteria for Major Depressive Episode. Dr Byth, at paragraph 4.2 of his report of 17 November 2020, had stated in relation to his diagnosis of major depression that he was surprised that Dr Jetnikoff did not agree with that diagnosis as he thought there were numerous features about Mr Potter's case which pointed to very severe depression rather than simply an adjustment disorder, namely:

- "Neurovegetative symptoms for Major Depression
- Ongoing depressive thoughts of low self-esteem, guilt and hopelessness
- Being a hospital discharge
- Needing long-term follow-up with his Psychiatrist Dr Martin
- His also having long periods of counselling with 2 Psychologists
- Needing very high doses of the antidepressant Zoloft
- His antidepressant being augmented by the antipsychotic agent Olanzapine
- Rage attacks, amnesic episodes, and his temporary psychotic symptoms

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370 T3-55.

- His being totally unable to work over the past 6 years.

- His needing supervision by his wife at home because of mental instability".[371]

[664] According to Dr Jetnikoff, Mr Potter did not suffer persistent low mood and/or anhedonia for the diagnosis to be considered at all. He noted neither of those symptoms were found to exist by Dr Byth. He also found that neurovegetative symptoms were not present in the history presented to Dr Byth which comprise of four of the nine diagnostic criteria. He further stated that the remaining three symptoms related to psychomotor slowing/agitation, guilt/worthlessness and recurrent thoughts of death or self-harm whereas Mr Potter was not feeling guilty but rather that he felt himself to be a victim of his employer's actions and did not describe morbid thinking. Dr Jetnikoff found that while Mr Potter did describe frequent agitation and connected that with his moral outrage from the treatment he perceived he received from his employer, he considered that was a normal human reaction to feeling unfairly treated. Dr Jetnikoff expressed the view that that the single criteria alone was insufficient to make a diagnosis of major depression. He also considered Mr Potter was not distressed as a result of a disorder but by trigger events and that the presentation of Mr Potter could be explained by an excess of alcohol. Dr Jetnikoff considers that Mr Potter suffers from alcohol abuse disorder which predated July 2014. In that regard he referred to an MRI scan showing cerebral atrophy disproportionate to Mr Potter's age.[372]

[665] According to Dr Jetnikoff, one of the reasons for a difference in diagnosis between chronic adjustment disorder as opposed to major depressive order is a focus on subjective impression rather than the specific diagnosis criteria which he thought could have occurred in this case.

[666] Neither Dr Jetnikoff nor Dr Byth were challenged in cross-examination as to their respective diagnoses. The plaintiff submitted that whatever diagnosis is ascribed to Mr Potter's condition is not a matter of particular significance. The defendant appeared to adopt the same view. According to the plaintiff the level of impairment that is significant. However, to the extent it is necessary for me to make a finding, I preferred the evidence of Dr Jetnikoff where he clearly explained his diagnosis by reference to the diagnostic criteria of a chronic adjustment disorder as opposed to major depressive disorder. In addition, Dr Jetnikoff had the advantage of having seen Mr Potter at an earlier point in time than Dr Byth from December 2015 and December 2016 where as Dr Byth did not see Mr Potter until February 2017. Dr Jetnikoff therefore had the advantage of having seen Mr Potter over a longer period of time. While both doctors were very experienced and empathetic to Mr Potter, Dr Byth tended to become an advocate for Mr Potter by some of the views he expressed.

[667] While Dr Byth agreed that Mr Potter had an alcohol abuse disorder but he felt it was a consequence of his Major Depression and reflected self-medication. While there was evidence of a considerable consumption of alcohol after the events of 2014, there is little

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371 Exhibit 39 at 4.2.

372 While that was admitted into evidence it was not ultimately proved by a radiologist.

evidence that Mr Potter had a pre-existing alcohol abuse disorder such that I can be satisfied that Mr Potter had such a disorder. I therefore will not reduce damages on the basis of that he did suffer from a pre-existing alcohol disorder.

[668] Neither Dr Byth nor Dr Jetnikoff consider that Mr Potter will make a full recovery. Dr Jetnikoff however envisages that Mr Potter will make some recovery when the litigation is complete as he considers that this damages claim was a major focus of Mr Potter. That was given some support by the evidence of Mrs Potter. Dr Byth however does not believe that it was unlikely to improve after the legal proceedings given he has developed chronic depression. Given the steps Mr Potter has taken particularly in terms of obtaining qualifications to referee and get part time work and the fact that Mr Potter has in discussions with Dr Jetnikoff focussed on the litigation more and more, I think there is some prospect that Mr Potter's life will improve after some time has passed. Dr Jetnikoff had originally thought Mr Potter could have returned to full-time employment but that view changed as the years went on with each assessment and is no longer the case. He considers that he is only capable of part-time employment. Dr Jetnikoff notes in this regard that Mr Potter has not responded to treatment.

General Damages

[669] The assessment of damages is carried out by reference to the WCR and the Workers' Compensation and Rehabilitation Regulation 2014. Pursuant to s 306O if general damages are to be awarded the court must assess an injury scale value (**ISV**) to be calculated by reference to those provisions prescribed in the regulations.[373] Both Dr Byth and Dr Jetnikoff have done a PIRS assessment. Schedule 9 of the Regulations determines the relevant ISV for mental disorders by reference to a psychiatric impairment rating scale (**PIRS**) as provided in Schedules 10 and 11. Schedule 12 provides the monetary calculation provisions to identify relevant damages amount for the ISV. Both Dr Byth and Dr Jetnikoff have done a PIRS assessment.

[670] The difference between the two medical opinions is remarkably different. The expert conclave did not result in either a joint report and little shift in opinion, although Dr Jetnikoff increased his assessment of Mr Potter's assessment from 5%-7%. Dr Byth modified his assessment to 47% as opposed to 51% on the basis of a slight improvement by Mr Potter after he spoke to Mr Potter after the conclave.

[671] The plaintiff contends Dr Byth's opinion should be adopted emphasising that Dr Byth had the advantage of interviewing Mrs Potter on the basis of which Dr Byth considered Mr Potter had minimised his symptoms. [374] Dr Jetnikoff did not interview Mrs Potter. He was however aware of what she had told Dr Byth on the basis he had reviewed Dr Byth's report that made reference to what he was told.

[672] As to the contrast in the presentation to Dr Jetnikoff and Dr Byth I provide two examples at a similar time. In his report of 7 February 2017, Dr Byth described Mr Potter as stating that:

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373 S 306P WCR.

374 Exhibit 36.

“4.1. Despite having antidepressant medication and a mood stabiliser, and having ongoing counselling, he continues to complain of anxiety and depressed moods, along with low self-esteem and hopelessness, without feeling suicidal.

4.2. He continues to have occasional outbursts of anger and irritability at home, during which he will punch and break things, and he subsequently has no memory of what happened. He also has "periods of feeling like crying, and thinking that this is what they have done to me".

4.3. As well, he continues to sleep poorly, and he will "sometimes have dreams about the meeting at work and the allegations, and I think about it all the time during the day, which makes me angry- I get flashbacks of the work stresses 6-10 times per day".

4.4. At home, he lacks his usual energy and interest/or housework and home maintenance tasks. He will "feel anxious and depressed, and I do a little housework to keep busy and to distract myself - my wife has to make me eat, but I have increased appetite from taking a major tranquilliser, Zyprexa ".

4.5. He also lacks interest in going out and seeing friends, and he will "try and avoid people, like I will not go into town during the day to avoid people, and my friends have stopped asking me out - I won't go, and I will not arrange any gatherings, and I can only tolerate visitors briefly".

4. 6. In relating to his children, he is "upsetting them by losing control and becoming aggressive, and they are nervous that I will snap, and that they will have to try and calm me down".

4. 7. With his wife, he is "getting complaints that I am withdrawn and I won't talk, and I am irritable and crabby - our relationship is less close, and there is not much of a physical relationship, but she is supporting me, and there is no talk of separation".

4.8. Regarding travel, he is "finding it hard to leave the house, like the home is my sanctuary, and I avoid crowded places - I get my wife to drive, because I have poor concentration, and I don't like going anywhere - I am a bit less anxious in places where no one knows me".

4.9. His concentration and memory are affected e.g. he will "forget a lot of things, like [forget conversations and arrangements with my wife, which upsets her, and I will nearly drive into others cars because I am not concentrating on the road - I cannot concentrate to read a novel or a magazine, and it is hard to read documents".

4.10. Regarding future work, he is "too angry and too agitated to work, and I cannot think logically or consistently - I have tried applying for jobs, but the interviews didn't go well, and they said I lack confidence and leadership - I could not answer their questions, and they said they were disappointed in my performance".

4.11. He is also "worrying that I am burning my bridges for future work, because everyone in my field knows me and my resume - I get upset that I am rejected for

each job, and my Psychiatrist says the interviews are making me worse, and I should stop them".”[375]

[673] Mrs Potter suggested, amongst other things, that Mr Potter neglected feeding himself so she had to watch what he eats, was depressed and angry, had aggressive outbursts, and was incapable of thinking ahead or the consequences of what he was doing.

[674] In contrast, Mr Potter’s description to Dr Jetnikoff in July 2017 was as follows:[376]

“Current Problems:

Mr Potter summarised by saying there had been no change since the last review. He explained that his mood was low or irritable most of the time although one or two days a week he would describe as good days. He did report anger outbursts and intermittent homicidal urges towards the Council staff as has been referred to earlier. This was only with triggers such as discussions about his work experiences. He noted four weeks prior to the assessment he was at a local supermarket with his wife and recognised the voice of one of his ex-colleagues that he had held some hostility towards which triggered a strong urge to aggression and he found himself staring at the person. His wife instructed him to go to the car and there was no further development.

Mr Potter reported that his sleep could be refreshing and varied depending on his level of activity and what was going on mentally for him. His energy levels were reported as reasonable although he reported reduced motivation. He did note a busy daily routine. His appetite was reportedly good. He reported reduced concentration and made reference to driving his car and at times finding himself in near miss situations although no actual accidents or similar have occurred.

Mr Potter denied anhedonia and referred to a number of activities that he pursued. He denied suicidal Ideation. He denied feelings of guilt or worthlessness. He had ongoing rumination about the workplace issues with a sense of entitlement and resentment about his perceived mistreatment. He explained that since I had seen him he had gone on an overseas trip to southern Thailand with his wife, his sister and brother-in-law but that on that trip he was withdrawn.

Mr Potter reported intermittent agitation most days. He reported uncertainty about how he would cope in an employment situation in the future but acknowledged a desire to be able to work again.

He had difficulty planning ahead as he had struggled to see what his life would be like beyond his current issue regarding this damages claim, the ongoing assessment being a challenge for him as it aggravated his feelings about the workplace,

Current Lifestyle:

Mr Potter lived on a two-acre property with his wife who worked in full-time in retail as a manager. He reported generally being independent of activities of daily

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375 Exhibit 36 at 4.1-4.11.

376 Exhibit 49 at 12-13.

living although noted that his wife arranged the finances as part of their splitting of household duties. Mr Potter explained that he did most of the housework. He also maintained the pool, mowed the lawn and looked after their three dogs. He fed the chickens and looked after their cattle. He was actively involved in maintaining the landscaping with weeding, hedging and watering all part of his regular routine. He washed the cars for him and his wife. When he is not physically active he watches sports on television. He reported a need to take regular breaks but the ability to follow plots in fictional shows was noted.

On Mondays and Wednesdays Mr Potter attended and played touch football and his wife would attend on a Monday. On Wednesday he would also do refereeing. He reported coping well with this and enjoying this activity. Every day he did one hour of gym activity at home. He also referred to running for two hours around noon each day on his local roads.

He was able to visit his son and daughter who live locally and the three stepchildren whom he saw once a fortnight. He was able to still play with his grandchildren which is a situation that appeared better than previously. He reported a general degree of social withdrawal although this had been relatively stable since he had been off work.

Mr Potter continued to drive a motor vehicle and was able to do this by himself. He was able to do the grocery shopping using lists. Mr Potter acknowledged that he had resumed regular alcohol, drinking four to six beers on average on Tuesdays, Fridays, Saturdays and Sundays. He was unable to estimate exactly how much he would have per week. He monitored his intake. He was aware that others had advised him to maintain sobriety. He did not feel this was necessary."

[675] On 31 March 2020, Dr Byth spoke to Mr and Mrs Potter again. Mr Potter told him that he was "still the same and not working and I don't like going anywhere and I used touch football and my running as my outlet to reduce stress. I am not really socialising and I have cut my alcohol intake down to 2 cartons of beer per week. I will go out briefly because I have a phobia of seeing Council workers." Mrs Potter described some improvement but still described Mr Potter as having rage episodes, being ok for three to four days but then not getting out of bed for three to four days, sitting alone by himself and ignoring family and being very sensitive such that she did not like him going anywhere on his own. She stated at social gatherings he sits by himself and does not talk.

[676] In contrast, Dr Jetnikoff described Mr Potter in his review of 6 February 2020[377] as describing himself as having improved and giving examples of being able to drive alone and for long periods. He denied problems with his day-to-day cognitive functioning and "explained to me how good his concentration was on the 11 hour drive to Proserpine for example." He also did not report suicidal ideation or self harm thoughts in the last two years. He did describe "feelings of hopelessness with regards to his future work predominantly and had feelings of low self-esteem in relation to not being employed." As to lifestyle he stated that:

"Mr Potter spent most of his days at home. He noted he would go to his home gym on his property one hour four times per week. He would also run 6 km over 30

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377 Exhibit 50.

minutes most days of the week unless he had some sort of lower limb injury. Recently he had a stiff Achilles heel which made it hard for him to run for a few days. He attended the supermarket with his wife to do larger grocery shops but is able to do smaller shops by himself. He is able to do things around the home to assist his wife including mowing and yard and most of the housework. He watches television at times to pass the time and twice a week an elderly neighbour visits him or vice versa. He reported his ongoing attendance at touch football on Mondays and Wednesdays when he would play. He would attend the venues alone but play with his son or daughter on alternate days of the week. He also did one to two hours of referring on those days of other players. He reported no issues with this and that he was competent in the application of the rules and his concentration on the games.

Mr Potter explained that he resumed alcohol use and he was now he estimated drinking much less than previously. He did acknowledge at one stage drinking up to six cartons of beer per week and he would drink all day. This he claims ended in 2017. He now reported using alcohol merely to reduce anxiety or anger. He estimated consuming approximately two cartons of beer over a week and over five days per week he would drink about 12 beers each time. This has been in the last 12 months or more. He denied any illicit drug use in the last two years. He noted that he was able to travel and drive his car by himself and that he was generally prone to driving outside of his local area to do his shopping, for example when buying small amounts of groceries or necessities he would go to the South Gympie area to avoid running into people that he had worked with. He is able to do this alone. He reported no other changes to his life, family or friendships despite the domestic violence order and the strains in the relationship that have occurred. He regarded his relationship with his wife as having survived the strain and being positive and supportive. There were no current issues in his marriage.

In addition to the above, I reviewed what I commented on in our previous assessment meeting. Mr Potter confirmed he continued to live in the Gympie area on a 5 acre property with his wife who worked in full-time retail, that he was fully independent of his wife while she was at work, capable of self care, personal hygiene, making meals, managing finances although he confirmed that his wife generally did manage the finances as this was part of the split of household duties. By comparison he did most of the housework, maintained the pool and yard and looked after their two dogs. They lost the dogs since I have last them. He confirmed he no longer washed his and his wife's cars on a regular basis due to motivation problems but that was somewhat unpredictable and he was able to do all aspects of the household duties and maintenance if it was required. He had regular contact with his grandchildren who lived locally."[378]

[677] Mr Potter's evidence-in-chief accorded more with the description given to Dr Byth than Dr Jetnikoff[379] although he made concessions in cross-examination which supported what he had told Dr Jetnikoff.

[678] Mr Potter has recently started running a boot camp since November 2020 for an hour on Wednesday mornings with 2 or 4 people and one occasion 6 people.[380]

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378 Exhibit 50, page 11.
379 Eg T1-74, T1-76 and T1-79.
380 T 1-78.

[679] In cross-examination he agreed however that his wife worked full time, that they lived on a five acre property and that he was an avid gardener and landscaper and did a lot of cleaning and domestic work "because I had excess energy and anger" that he had to get rid of. [381] He stated that he had reduced social contact to a degree but attended some social functions such as at his son's because they said "it would do me good to get out". He attended touch football, upgraded his refereeing certificate, travelled in the Wide Bay-Burnett area to referee and since 2018 had coached a women's football team which he enjoyed, which he told Ms White.[382] He had coached them for some twelve months and attended a dinner with them.[383] He agreed he had driven to Proserpine with his wife in late October 2018 to see his mother.

[680] Mrs Potter described Mr Potter's condition as up and down, being aggressive and starting arguments such as at touch football, when depressed not going out, not eating, sleeping and not speaking to him. She stated his rage attacks had receded, that he didn't do anything socially and would mow the lawn if she harped on but didn't do anything else and sometimes did not shower even after jogging and she didn't let him drive because of his poor compensation. She did not consider he could work because he was up and down and had days where she could not get him out of bed.

[681] In cross-examination she agreed that he felt he had suffered injustice because of what had occurred. She rejected the description of what Mr Potter told Dr Jetnikoff in 2022. She stated he got up with her and she made him breakfast but then he did not eat until she got home, or dress and shower. She agreed he had coached the women's touch football team and had pleasure in that. She stated he'd improve his mood until something happened and then he tended to blame himself.[384]

[682] I considered that the cross-examination of Mr Potter and Mrs Potter did show that they had both exaggerated Mr Potter's symptoms to a degree insofar as they described Mr Potter at his worst, not as a result of there being any dishonesty. I consider that also permeated the description of symptoms to Dr Byth as opposed to Dr Jetnikoff. In Mr Potter's case, it is evident that his feelings towards the Council's actions have had a destructive effect upon him and his antagonism towards the Council does not appear to have abated. Mr Potter has seen Dr Jetnikoff both before and after this litigation commenced. Dr Jetnikoff did not consider what he was told by Mr Potter was likely an over-exaggeration. While Dr Jetnikoff noted the potential for such exaggeration, he considered that Mr Potter's presentation had been consistent.

[683] In the case of Mrs Potter, I do not underestimate the difficulty she would have in watching the deterioration in her husband and dealing with Mr Potter and his ongoing symptoms which, on any view, are not insignificant and at times were quite extreme. They clearly fluctuate. That may have led to some exaggeration by her insofar as she may have focussed on the bad days. Given she was at work all day, Mr Potter clearly had to fend for himself to some degree. The fact that there were examples of exaggeration were evident from her description that he was not able to drive a car and yet she had to concede that he shared the driving when they went to visit his mother up north. Similarly, while she indicated that he was not able to enjoy things socially, it was

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381 T2-27/35-38.
382 T2-31/33-34.
383 T2-33/6-36.
384 T2-47.

evident that Mr Potter was proud of the fact that he had obtained his personal training certificate and had been coaching the female football team and had engaged in a social outing with them.

[684] Dr Byth considered that Dr Jetnikoff underestimated the severity of Mr Potter's psychiatric impairment, possibly because Mr Potter was very lethargic and withdrawn and tending to underreport his symptoms because of severe major depression. I do not accept that given the contrast in the description of symptoms in both 2017 and 2020, even accepting Mr Potter's condition would vary. Nor can it be explained by Mr Potter being said to minimise his symptoms when there is a considerable difference to what is described to Dr Byth as opposed to Dr Jetnikoff by Mr Potter. If Mr Potter was understating his symptoms which Dr Byth said became evident from his discussion with Mrs Potter one would expect them to have understated it to both. If Mr Potter's description to each doctor had been similar, Mrs Potter's description of Mr Potter may have been of greater significance, and give greater support to the view he was minimising his symptoms. [385]

[685] To the extent Dr Byth suggested Dr Jetnikoff had not questioned Mr Potter deeply enough about the impact of his depression, anger and social withdrawal on his marriage and family and had not realised how the depressive symptoms would make it impossible for him to apply for work and undertake any paid work,[386] that is not reflected by the terms of the reports of Dr Jetnikoff, which reflects somebody who has provided a considered opinion after discussing matters with Mr Potter. It was evident from Dr Jetnikoff's evidence that he does not lack empathy for Mr Potter. It was not suggested that Mr Potter did not trust Dr Jetnikoff. In contrast, Mr Potter did not tell Dr Byth about his obtaining the personal training certificate, upgrading his referee certificate, training the women's football team or driving to Proserpine. Nor did Mrs Potter. That is consistent with there being some exaggeration of Mr Potter's symptoms to Dr Byth. Nor did either discuss Mr Potter's alcohol intake with Dr Byth. In relation to the psychiatric impairment rating scale which focuses on several areas of function, the difference between the last assessments of Dr Byth and Dr Jetnikoff are set out in the table below:

Activities of Daily Living	**Dr Byth**	**Dr Jetnikoff**
Self-care and personal hygiene	Class 3	Class 2
Social and recreational activities	Class 4	Class 2
Travel	Class 3	Class 1
Social functioning (relationships)	Class 2	Class 4
Concentration	Class 4	Class 2
Adaption	Class 4	Class 4

385 Report of September 2018 updated on 30 March 2020.
386 Exhibit 38 at [13.5].

[686] Dr Byth agreed in cross-examination that if Mr Potter's description to Dr Jetnikoff in the memoranda at [35] and [38] was correct, his assessment of PIRS 2 for self-care and hygiene would be open.[387] While Mrs Potter appears to drive the household activities and Mr Potter, given Mrs Potter was at work all day, and given the concessions made in cross-examination, he is able to function without supervision and do regular exercise. He attended Dr Jetnikoff on some occasions on his own well groomed. I consider Mr Potter's description as to his self-care and hygiene to Dr Jetnikoff as being generally more accurate. However, giving some weight to the limitations described by Mrs Potter, I consider that his impairment would be a mild impairment although towards the upper range of impairment within class 2

[687] Dr Byth also agreed that if Mr Potter's description to Dr Jetnikoff in the memoranda at [40] and [41] of Social and Recreational Activities was more accurate, that his assessment of PIRS as class 2 would be appropriate. Dr Jetnikoff's assessment was supported by his evidence of his engagement with the Girls Football team and travelling away from home, albeit to a limited extent to referee.[388] Dr Byth has failed to explain how these matters could be carried out by Mr Potter. I accept however that while he has attended social events it is often at the prompting of his family and remains quiet. He also interacts with his neighbour. I consider that he would be towards the upper range of impairment within class 2.

[688] In relation to his assessment in relation to travel, Dr Byth while accepting Dr Jetnikoff's assessment on the basis of what he was told and the matters in [45] – [49], commented that it was also affected not just by the physical activity but the desire to carry out that activity and how it might be affected by the mental illness. Class 3 is described as not travelling away from home without a support person and there may be problems resulting from excessive anxiety or cognitive impairment. That assessment is not justified on the evidence. Given Mr Potter on his own evidence has been travelling away albeit on limited occasions on his own and will go to the shop and medical appointments if necessary and shared driving with Mrs Potter to Proserpine, he does not satisfy the description in class 3. Dr Jetnikoff however presumed Mr Potter drove on his own to Proserpine which was not the case insofar as it was shared. Given that I think his impairment is accurately described as class 1 but at the top of the range.

[689] Similarly, Dr Byth made the concession in relation to social functioning that if what Dr Jetnikoff was told by Mr Potter was true, the PIRS as class 2 would be how to assess it. Dr Byth considered that Mrs Potter's evidence was of some importance in that regard given it is questionable how much reliable a depressed person's symptoms were. Dr Byth's assessment of class 4 does not accord with the evidence of either Mr or Mrs Potter. While the relationship between Mr Potter and Mrs Potter and Mr Potter and his family has been subject to strain, the evidence does not suggest the impairment is a moderate impairment. Further, the evidence suggests that in recent times it has improved. I consider Dr Jetnikoff's assessment of Mr Potter's level of impairment as class 2 is correct. Again, I consider it would be at the upper end of the range.

[690] Dr Byth similarly accepted Dr Jetnikoff's assessment for concentration, persistence and pace as PIRS class 2 was correct if the symptoms described to him at [55] and [57] were accurate but stated that he did not believe the description from his observations. Given

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387 T 3-59/14-15.

388 T3-59/16-21.

Mr Potter was able to referee at touch football and gain his certificate in personal training and drive to Proserpine, I consider his description provided to Dr Jetnikoff was more accurate than Mr and Mrs Potter's description to Dr Byth. However, Dr Jetnikoff has taken into account Mr Potter's alcohol consumption as affecting his concentration. I agree Dr Byth's description of the symptoms he has taken into account falls short of a severe impairment.

[691] Dr Byth did not appear to give any weight to Mr Potter's achievements in his role as a referee and being able to drive to North Queensland. Clearly Mr Potter is affected by his psychiatric condition, but I am not persuaded it is to the level described by Mr Potter to Dr Byth. I note Dr Jetnikoff expressed the view that he thought Mr Potter's alcohol consumption would probably impair his concentration and without it his adjustment disorder would be unlikely to do so but still assessed his impairment as class 2.

[692] Taking into account Dr Jetnikoff's ability to drive with Mrs Potter to Proserpine. While Dr Jetnikoff regarded Mr Potter's alcohol intake as a separate issue, he considered "at most" Mr Potter would have a mild impairment. Taking his exclusion of the factor of alcohol into account, I would assess it at the upper end of class 2.

[693] Both Dr Jetnikoff and Dr Byth agreed that the appropriate PIRS assessment for Adaption was class 4. Given Mr Potter's work history since 2014 I find that is the appropriate classification. While Dr Byth considered this assessment to be incongruous with the remainder of the assessments by Dr Jetnikoff and contended that the six classes were usually of similar effect that was rejected by Dr Jetnikoff. There was no evidence of any weight to support Dr Byth's view. Dr Jetnikoff explained that it was assessed at this level because his psychiatric illness was linked to his employment.

[694] According to Dr Jetnikoff, Dr Byth's assessment of 47 per cent describes a person with a level of impairment that would usually need to be regularly, if not continuously, hospitalised and while he noted that Mr Potter had had periods of hospitalisation in 2015 that was because of his alcohol consumption, it was not because of his psychiatric condition. The evidence does not support Dr Potter being hospitalised on a regular basis. While there is evidence Mr Potter was admitted in 2015, the precise cause of the hospitalisation was not addressed in evidence in any depth but it was not suggested it was a matter which would require to be revisited.

[695] One further point of distinction between Dr Byth and Dr Jetnikoff is that Dr Jetnikoff considered that Mr Potter suffered alcohol abuse disorder which was not caused by his workplace issues.[389] He stated that Mr Potter's alcohol dependence impacted on the PIRS rating and that the effects of alcohol consumption were not components of his PIRS rating which only considered the psychiatric condition. Dr Jetnikoff however agreed that there was a link between his increased alcohol consumption and his psychiatric condition. I accept that Mr Potter's alcohol consumption did increase following the 2014 events. It would also appear that his alcohol intake did not assist his recovery with both Dr Byth and Dr Jetnikoff noting that he should reduce or cease his alcohol intake. Mr Potter himself noted to Dr Jetnikoff that his condition was worse when he had alcohol, although his rage incidents were not limited to when he had consumed too much alcohol. That was confirmed by Mrs Potter. Counsel for the

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[389] Exhibit 50 at page 15. In that regard he relied on Dr Martin's reports: T4-44/35-36.

Defendant effectively conceded that they have to take Mr Potter as they found him.[390] I would not consider that Mr Potter's PIRS impairment should be reduced because he has an alcohol dependence.

[696] Overall, I prefer Dr Jetnikoff's assessment although I would place Mr Potter's ISV at a higher level taking account that he made some downgrading due to his assessment that Mr Potter had an alcohol dependency unrelated to his psychiatric condition. While I accept he was already a heavy drinker before the events of June and July, given he indicated to Dr Blake he preferred to drink over taking medication, I find that the events of June and July did exacerbate his heavy drinking to greater levels. The other reasons I prefer Dr Jetnikoff's assessment is that:

(a) Mr Potter has managed to upgrade his referee qualifications and do some travel to referee. Although he may have at times created conflict when he attended the game, it was not to the extent that he was excluded from attending;

(b) he has been able to obtain his personal training certificate and undertake some personal training of a small number of clients;

(c) he has been able to coach the women's football team and build sufficient rapport with them that they had a celebratory dinner with him;

(d) His marriage has survived the challenges posed by his condition;

(e) He was able to drive with his wife to Bowen to see his mum;

(f) His rage incidents have generally been recorded as being worse when he had consumed a significant amount of alcohol;

(g) The fact that he was most affected in his capacity to work is supported by the fact he went for job interviews and developed high anxiety such that Dr Martin advised him to stop going to interviews. Similarly, he felt unable to engage with those in the workplace to find out the outcome of the investigation for many months and could not attend the workplace but rather some neutral ground away from the office was found; and

(h) There is some evidence that the present litigation may have led Mr Potter to exaggerate his symptoms albeit unconsciously. His engagement with Dr Jetnikoff prior to the litigation commencing was more positive and measured than after the litigation. That accords with his evidence where he was unwilling to make concessions.

[697] I therefore consider that the injury suffered by him is consistent with a PIRS of 7% as found by Dr Jetnikoff which is a moderate mental disorder. Taking into account that Mr Potter has not responded well to treatment and still suffers the effects of his injury on a daily basis and Mr Potter adopted alcohol as a form of self-medication although I agree with Dr Jetnikoff that the completion of litigation is likely to result in some improvement in the future. I consider a higher ISV than proposed by the Defendant of 6 and adopt ISV of 9 which equates to $13,360.[391]

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390 T6-63/5-6.

391 *Workers' Compensation and Rehabilitation Regulations* 2014 (Qld) Schedule 9 and Schedule 12, table 5.

Past Special Damages

[698] Past special damages are agreed between the parties at $53,533.34.

[699] Interest on past special damages is $453.00 as calculated by the plaintiff.

Future Special Damages

[700] Dr Byth gave evidence that Mr Potter may need hospital admissions and considerations for electrode convulsive therapy in the future. That was a highly precautionary view adopted by Dr Byth based on what can occur in the general population with Mr Potter's condition and he estimated it was a 5-10 % chance that he included for completeness, rather than it having any sound basis. Dr Jetnikoff did not consider such treatment was required at all. I am not persuaded future hospitalisation or ECT will be required in the future and make no allowance for that. As to his future treatment, Dr Jetnikoff did not consider that Mr Potter would benefit from ongoing treatment with a psychiatrist and psychologist. In his report of 11 July 2017, Dr Jetnikoff considered that future treatment would cost $2,200.00 but adjusted that to $7,500.00 to make allowance for specialist review every few months based on his view that Mr Potter's condition was not responding to treatment, but did consider he would benefit from treatment for his alcohol problem and for some sessions with a psychologist to assist in the transition after the finalisation of this litigation. Dr Jetnikoff's view is supported to some extent by Dr Martin who wrote to Mr Potter's GP stating that Mr Potter's condition had settled and he would be seeing him every few months for review. Similarly, at least from Mr Potter's view, he has felt assisted from his sessions with Ms Amy White. I consider a higher allowance should be made than proposed by the defendant given Mr Potter has been having treatment since 2015 to take into account that he may need more consultations upon completion of the litigation to obtain closure and move forward with his life goals and to assist "making sense of the last few years which have been very difficult for him". The evidence does not support Mr Potter needing to continue with a psychologist once a month and a psychiatrist once every two months long term. I would double the defendant's proposed amount and allow $15,000.

Past Economic Loss

[701] Mr Potter was born in 1971. He had been employed by the Council or its predecessor prior to the merger) since March 2003. He had worked at the Warwick Shire Council for six years prior to that. He had left school in year 10. He had obtained a number of certificates and two diplomas between 1996 and 2007. Prior to the incidents in question, the evidence supports the fact he loved his job. I find that he would have chosen to have continued to work with the Council in his role as manager of Local Laws.

[702] The defendant calculates the past economic loss to be $371,900.00 whereas the plaintiff calculates to be $508,836.20. The defendant appears to have adopted a significant reduction on the basis that the plaintiff has demonstrated a capacity to engage in football coaching and personal training since 2 August 2018 and also states the weekly compensation benefits were paid until December 2016 whereas the plaintiff accounts for that until August 2016. The plaintiff however states he has earned only a nominal sum of $5,626.92 which it reduced from the calculation of the amount he would have continued to earn in his position.

[703] The plaintiff has shown since August 2018 an ability to carry out some work. I do not however consider the evidence supports the substantial reduction that has been calculated by the defendant of $500 net per week. Based on the psychiatric assessments, I find that Mr Potter could have at least worked as a personal trainer for four people one day a week from August 2018. I therefore will deduct $100 per week from his nett weekly earnings.

[704] Therefore, I would adjust the plaintiff's estimation to provide for 12 weeks from August 2018 at $1,261.48, from 19 December 2018 to be $1,296.03 and from 19 December 2019 to be $1,328.17 and from 19 December 2020 to be $1,360.74 which will also require an adjustment to the calculation of interest and Superannuation.

[705] Past superannuation is claimed at 13.5% in accordance with his payslips. While the Council uses the amount of 12% but given the amount of 13.5% accords with Mr Potter's payslips I adopt that amount.

[706] As to future economic loss, the plaintiff bases its calculation on the plaintiff continuing to personally train locals which may attract a net income per week of $125.00. The defendant estimates he should be able to work 20 hours a week. Given the plaintiff has been out of employment for 6.5 years and both Dr Jetnikoff and Dr Byth agree that he cannot work more than one to two days per week and less than twenty hours per fortnight, it is unlikely he will be able to return to the work force other than as a personal trainer as is proposed.

[707] In *Peebles v Work Cover Queensland*[392] Jackson J stated that:

> "The assessment of the hypothetical factual bases or assumptions for the calculation of future economic loss in this case is attended with great uncertainty. The plaintiff's approach to that uncertainty is that the defendant has to disprove the assumptions for which the plaintiff contends. I do not agree. Overall, the plaintiff bears the onus of proof on the issue of damages. But the question should be considered, having regard to the obvious difficulties of such a hypothetical assessment and the attendant complexities raised by the evidence. The court is required to assess these assumptions and complexities as best it can."[393]

[708] Mr Potter is 49 years of age. Given the length of time Mr Potter had worked for Councils it is likely he would have remained with the Council for the rest of his working life in a similar position to that which he held before the 2014 events. I accept that given the psychiatric evidence and the fact that Mr Potter has been out of the work force for over 6.5 years that he is unlikely to return to work other than part-time and then not more than twenty hours over a fortnight. He has started to earn income as a personal trainer running a bootcamp. He has had one occasion when six people attended. Although Dr Byth indicated in 2017 that Mr Potter should not work as a personal trainer, bootcamps organised by him would seem to be a viable option for Mr Potter. One would reasonably expect he could build that up to three mornings a week for an hour with an average of four people. Based on $25 per head with some expenses for travel and equipment the best estimate of his earnings would be $225 per week. His loss would therefore be

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392 [2020] QSC 106.

393 [2020] QSC 106 at [141].

$1335.74 -$225 nett per week for the remaining 18 years of his working life until the notional retirement age.

[709] That is then calculated on the 5% discount tables

[710] The Council contends there should be a discount of 20% whereas the plaintiff contends that a discount of 12% is appropriate. I think an appropriate discount for the vicissitudes of life would be 15%. Although I consider Mr Potter was a heavy drinker prior to the 2014 events I have not found he had an alcohol abuse disorder and has no other known health conditions, although it is evident he was psychologically vulnerable. I therefore am not making any additional discount on that basis. He has no other pre-existing condition. Future Superannuation then must be calculated based on 13.5%.

Conclusion

[711] The claim is dismissed.

[712] I will allow the parties seven (7) days to make any submissions as to costs.