CITATION: *Kayline Dorothy Lipinski v Coles Group Pty Ltd* [2014] NTMC 012

| | |
|---|---|
| PARTIES: | KAYLINE DOROTHY LIPINSKI<br>v<br>COLES GROUP LIMITED |
| TITLE OF COURT: | WORK HEALTH COURT |
| JURISDICTION: | WORK HEALTH |
| FILE NO(s): | 21210793 |
| DELIVERED ON: | 5 June 2014 |
| DELIVERED AT: | Darwin |
| HEARING DATE(s): | 28 - 31 January 2014 and 4 - 6 February 2014 |
| JUDGMENT OF: | ARMITAGE SM |

**CATCHWORDS:**

WORK HEALTH – EVIDENCE - Proof of injury – Causation of injury – Evaluation of expert evidence.

*Jason Bannister Green v Porosus Pty Ltd* [2013] NTMC 005 applied
*Jackson v McDonalds Australia Ltd* [2014] NSWCA 162 applied
*Anne Margaret Bryant v Northern Territory of Australia* [2013] NTMC 030 applied

**REPRESENTATION:**

*Counsel:*

| | |
|---|---|
| Worker: | Ms Kerry Sibley |
| Employer: | Mr Wade Roper |

*Solicitors:*

| | |
|---|---|
| Worker: | Ward Keller |
| Employer: | Hunt and Hunt |

| | |
|---|---|
| Judgment category classification: | B |
| Judgment ID number: | 012 |
| Number of paragraphs: | 106 |

IN THE COURT OF
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No.

BETWEEN:

KAYLINE DOROTHY LIPINSKI
Worker

AND:

COLES GROUP LIMITED
Employer

REASONS FOR JUDGMENT

(Delivered 5 June 2014)

Ms Armitage SM:

**Introduction**

1. The Worker, Ms Kayline Dorothy Lipinski, was born on 1 September 1959 and is 54 years old.

2. The Worker is the mother of 4 children and has been employed doing bar work in hotels, doing cleaning and personal care work in a nursing home and with the Red Cross, as a waitress, and most recently as a service station attendant and console operator.

3. The Worker commenced work with the Employer, Coles Group Limited, in August 2009 as a Casual Customer Service Representative[1]. In these proceedings her position title was commonly referred to as a console operator. In 2011 the Worker was working at the Shell Service Station in Daly Street.

4. In about November 2009 the Worker was off work for about 6 weeks for surgery, not the subject of these proceedings. On her return to work she was subject to a 5 kilo lifting limit due to her condition. That limit continued thereafter[2].

5. On or about 5 August 2011 the Worker was re-stocking milk in the fridges. It was during the course of this re-stocking that the Worker alleged she received an injury to her shoulder ("the injury") the subject of these proceedings. Later the same morning the Worker said she reported a sore arm to her manager, Anna. The Worker then continued to work without further complaint about the injury.

6. At the time of the alleged injury it was agreed that the Worker's normal weekly earnings were $637.93 gross per week.

7. The Worker's last day at work was 17 August 2011. The Worker commenced leave on 18 August 2011 to undergo planned surgery for a pre-existing condition, again not the subject of these proceedings.

8. Following surgery, the Worker did not return to work as planned, due to complications following the surgery and, according to the Worker, because she suffered from and continues to suffer from incapacity occasioned by the injury.

[1] Ex 2 p 240
[2] Tr p 32.10

9. The Worker also asserts that she suffered a sequela psychological injury as a result of the injury, namely, an adjustment disorder ("the sequela"), which contributes to her incapacity for work.

10. As to the details of the injury and the sequela, the Worker alleges:

- Supraspimatus tendinosis,
- A partial thickness tear of the supraspinatus tendon,
- Moderate subachromial and subdeltoid bursitis, and
- An adjustment disorder with anxiety and depression.

11. The Worker seeks:

- a declaration that she sustained the injury in the course of her employment,
- a declaration that as a consequence of the injury she developed the sequela,
- a finding as to effective total incapacity,
- a declaration that she requires household services and attendant care benefits, and
- compensation.

12. The Worker made a claim for compensation on 20 December 2011[3]. Pursuant to s85 of the *Workers Compensation Act* ("the Act"), the claim was disputed by the Employer on 28 December 2011. Accordingly, the Worker bears the onus of establishing a basis for the orders sought. It is for the Worker to establish that:

- the injury is present,

3 Ex 2 p18

- the injury occurred out of or in the course of employment,
- the sequela is present,
- the sequela is causally connected to the injury,
- the nature and extent of any incapacity arising from the injury and sequella (additional to any prior incapacity),
- such additional incapacity was productive of financial loss, and
- the injury and/or sequela necessitate household assistance.

13. The Worker must prove her case to the reasonable satisfaction of the Court, according to the civil standard of proof, namely, on the balance of probabilities[4].

14. If the injury is present, the Employer declines to accept that it arose out of or in the course of the Worker's employment. The Employer disputes that the Worker suffers the sequela, or alternatively, that if the sequela is present disputes its causal connection to the injury. The Employer disputes the claims of incapacity, financial loss and household assistance.

15. In accordance with orders of the Court, the Employer has paid interim benefits to the Worker in the sum of $25,356. Pursuant to sections 107(4) and (7) of the Act the Employer seeks revocation of those orders and repayment of the interim benefits.

**The Injury**

16. The first issue is whether the evidence established to the reasonable satisfaction of the Court that the Worker had the injury.

17. Although the particulars of injury were initially disputed in the Notice of Amended Defence to Amended Consolidated Statement of Claim[5], after the

[4] *Jason Bannister Green v Porosus Pty Ltd* [2013] NTMC 005 per Dr Lowndes SM at [24] – [28].

evidence as to the injury was received the Employer conceded the presence of abnormal right shoulder pathology. In Submissions in Reply the Employer accepted that medical diagnoses after 5 August 2011 established[6]:

- A minor subsurface tear of the supraspinatus tendon,
- Supraspinatus tendinosis, and
- Moderate subacromial and subdeltoid bursitis.

18. In my view these concessions properly reflect the weight of the medical evidence and are consistent with the shoulder physiology as revealed by the ultra sound conducted on 5 December 2011[7], the radiology conducted on 21 February 2012[8], and the amended MRI report of 7 November 2013[9].

19. The concessions admit the particulars of injury as alleged in the Amended Consolidated Statement of Claim[10] save for a variation in the description of the tear. The particulars allege a "partial thickness tear of the supraspinatus tendon" but the Employer concedes a "minor subsurface tear of the supraspinatus tendon".

20. I am of the view that this difference is no more than semantic and I accept the evidence of Dr David Harry Sonnabend who was cross examined on this issue. It was his evidence that the size of a tear was "almost irrelevant"[11]. His explanation of the injury revealed that "partial thickness" and "subsurface" are synonymous descriptions of the location of the injury, namely, a tear in the layers of the tendon beneath the surface of the tendon[12].

---

[5] Ex 2 p 17B at [4]
[6] Employer's submissions in reply received 17 March 2012 p 2 at 5 (c) and (d)
[7] Ex 2 pp 170 and 182
[8] Ex 2 p 86
[9] Ex 2 pp 79.1 – 79.4.
[10] Ex 2 p 17A
[11] Tr p 125.10
[12] Tr p 127

21. Therefore I am satisfied on the balance of probabilities that the Worker has discharged her onus as to the existence of the shoulder injury.

**Causation**

22. The second issue is whether the evidence established on the balance of probabilities that the injury occurred out of or in the course of her employment.

23. As to causation in *Jason Bannister Green v Porosus Pty Ltd* [2013] NTMC 005 Dr Lowndes CM at [28] applied and followed the High Court authority of *Medlin v State Government Insurance Commission* (1995) 182 CLR 1, which made it clear that the legal test of causation does not merely involve the application of the "but for" test, but is a question of fact to be resolved on the balance of probabilities, as a matter of commonsense and experience.

24. Relevant to the question of causation, it needs to be noted that the Worker has not pleaded a case of gradual deterioration with her employment materially contributing to the injury. The Worker has pleaded a "frank injury, namely, that the activity at work lifting a crate of milk, caused the injury to her right shoulder[13]".

25. The Worker gave evidence that the store where she was working was undergoing renovations. She normally used a trolley to move stock but the renovation work had created a passage that was too narrow for the trolley. As a result she had to carry stock through the narrow passage. The Worker said that on or about 5 August 2011 she was carrying a crate of milk with her right arm through the passage. As she carried the crate the Worker said she experienced "a very sharp pain making me drop the crate of milk"[14]. She described the pain as being from the tip of her right shoulder down the outside of her arm to her elbow.

---

[13] Worker's submissions 10 March 14 at [4]
[14] Tr p 36.1

26. The Worker said that she continued working for about an hour until her supervisor, Anna, arrived. In her evidence the Worker said she told Anna "I'd hurt my arm, I didn't know it was a shoulder injury at that time because it was my arm that was sore"[15]. The Worker finished her shift and continued to work her rostered shifts until her leave commenced on 18 August 2011. During that time she said she was "sore but not too bad because I was taking two neurofen plus every time I needed them, which is probably three times a day, maybe four"[16]. She also said she modified her duties to reduce lifting.

27. The Worker denied experiencing any shoulder pain before August 2011[17].

28. While on leave for her pre-planned and unrelated surgery, the Worker said that she continued to take pain killers except on the day of her surgery, namely 18 August 2011. On that day she said a nurse moved her arm and "the pain started back again"[18].

29. The Worker was due to return to work 6 weeks after the surgery. However, she suffered from "sinus issues from the operation" which took an additional "three to four weeks" to clear up[19]. During this time she continued taking neurofen plus and the shoulder pain was like a "tooth ache, nagging"[20].

30. The Worker said that after the sinus symptoms cleared she stopped taking the neurofen plus and the pain in her shoulder started again. The first documented complaint of shoulder pain to a medical practitioner was on 21 October 2011. Consultation notes of Dr Elizabeth Moore record "pain in right shoulder, on abduction, feels unable to cope with work, has full range – consistent with subachromial bursitis, contact with helicobacter"[21].

---

[15] Tr p 37.3
[16] Tr p 37.5
[17] Tr p 78.1
[18] Tr p 38.4
[19] Tr p 38
[20] Tr p 39.1
[21] Ex 2 p 236

31. In her evidence in the hearing the Worker detailed numerous significant difficulties that she experienced from about 5 August 2011 which she attributed to the shoulder injury. These included:

- Not being able to reach down and wipe her bottom properly[22],
- Difficulty removing her top and trouble pulling on clothes[23],
- Trouble brushing her hair[24],
- Trouble cutting vegetables or mashing potato[25],
- Cannot lift above head height without pain[26],
- Difficulties with housework such as laundry, sweeping and mopping[27], and
- Can drive but her right arm starts aching, and "sometimes it's a little bit sore when I get home"[28].

32. The Worker continued to report pain in her shoulder and restricted movement. In his report of 6 December 2013 Dr David Sonnabend provided this opinion,

> "The likely cause of Ms Lipinski's pathology is injury caused by work related episode (described above) of August 2011. It is likely there was a degree of pre-existing tendinopathy, making the shoulder susceptible to injury, but given the absence of right shoulder symptoms before that incident, and the very definite pathology seen on the MRI, it seems reasonable to assume that the incident of August 2011 precipitated the cuff tear and subsequent symptoms. The pathology is consistent with the work incident described earlier in this report"[29].

33. However, the Employer contends that the Worker's evidence is demonstrably inconsistent and unreliable. The Employer submits that the

---

[22] Tr p 56.5, 88.5, 99.5
[23] Tr pp 56 -57
[24] Tr p 57.1
[25] Tr p 57.2
[26] Tr p 57.3
[27] Tr p 57.5
[28] Tr p 58.4 although note inconsistent evidence re "a lot of pain driving" at Tr p 101.9
[29][29] Ex 2 p 79A-3

Worker's evidence that the milk crate incident caused the shoulder pain and injury should not be accepted. Further, that any opinions based on her evidence are so substantially weakened by her unreliability that they should be given little weight. The Employer's attack on the Worker's credit was primarily based on the tendered evidence which the Employer argued revealed inconsistencies in the Worker's account and inherent implausibility.

34. Although the Worker was not cross examined on every aspect of her case, on every inconsistency, or on every tendered document, the way in which the Employer conducted its case and its cross examination clearly put the Worker's credit and reliability in issue. As noted by McColl JA in *Jackson v McDonalds Australia Ltd* [2014] NSWCA 162 at [34],

> "The fact that McDonald's lay witnesses' evidence was unchallenged does not mean the tribunal of fact is obliged to accept it. It may be rejected if it is inconsistent with other evidence which the tribunal accepts, or if it is inherently incredible: Masterton Homes Pty Ltd v Palm Assets Pty Ltd [2009] NSWCA 234 (at [105]) per Campbell JA (Allsop P and Basten JA agreeing).

35. On the question of reliability and whether or not I could accept the Worker's account on the balance of probabilities I considered the Worker's evidence in conjunction with and as against the evidence of: contemporaneous records, the expert medical opinions and evidence of her legal instructions.

**Analysis of the contemporaneous records**

36. The Worker claimed that between 5 August 2011 and 18 August 2011 the pain in her arm was ongoing but managed by daily use of neurofen plus pain killers. On 11 August 2011 the Worker attended a pre-admission hospital appointment[30]. The hospital notes record an inquiry about her "Regular meds." It must have been obvious to the Worker that it would be important to disclose all her medications as any of them might have been significant

[30] Ex 2 p 213

for the planned anaesthetic and surgical procedures. The records show the Worker reported taking "fish oil and vagimen" but do not record any mention of her stated regular and repeated usage of neurofen plus. The plan for surgical preparation included "advised cessation of fish oil". I have no cause to doubt the accuracy of the contemporaneous medical record and I find it to be directly inconsistent with the Worker's assertion that she was using neurafen plus three or more times a day for shoulder pain. As a result of that inconsistency I was not satisfied on her evidence that she was using neurofen plus as she alleged, which suggests that the pain, if any, from her arm or shoulder was not at the level claimed.

37. The Worker claimed to have re-experienced the shoulder pain when being prepared for surgery on 18 August 2011. In evidence she described the pain as "very sharp"[31] and likened it to the level of pain experienced in child birth[32]. There is no record in the hospital medical notes tendered in these proceedings of this pain. Had pain similar to child birth been experienced during surgical preparation, I would expect it to have been noticed by trained nurses or brought to their attention by the suffering patient. That such severe pain was not apparently noticed, brought to the attention of medical staff, or documented, caused me to be dissatisfied with the Worker's evidence that she experienced sharp pain on the day of her surgery.

38. The Worker remained in hospital until 22 August 2011. In cross examination the Worker maintained that she was experiencing shoulder pain from 5 August through to 21 October 2011 (and onwards) which included a distressing difficulty in toileting as she "couldn't reach down there far enough"[33]. On 19 August 2011 the hospital medical notes record a complaint of "pain in the hip"[34]. From this I infer that when the Worker experienced pain she was willing to report it. The hospital records do not record any

[31] Tr p 72.10
[32] Tr p 73.3
[33] Tr p 99

complaint of shoulder or arm pain. If such pain was experienced as alleged by the Worker, I would have expected it to be reported to nursing staff and recorded. Further, the medical records document that the Worker was "mobilising to toilet"[35]. Given the nature of the surgery, there are reasonably detailed records around the Worker's toileting which was apparently being closely monitored. If the Worker was genuinely experiencing ongoing difficulties cleaning herself it would have been natural to have raised the problem with nursing staff who were monitoring her. However, no such problems are documented. When asked why she did not mention the shoulder pain or toileting difficulties the Worker responded "I was on pretty high pain killers at that time", "I thought it was muscular, I wasn't going to make a claim if it was muscular", and "I thought the pain would go away"[36]. I find these explanations not to the point and unconvincing. Her failure to report any shoulder pain, arm pain or toileting difficulty during her hospitalisation caused me to be dissatisfied with her evidence as to continuous pain arising on and from the milk crate incident.

39. The Worker gave evidence that she first complained of shoulder pain when she attended the emergency department with sinus complaints on 24 September 2011. The medical record of this attendance is detailed and apparently comprehensive. It documents six issues on presentation including: headaches, associated posterior neck discomfort, some associated nausea, vertigo and a blocked right ear. The record notes that "Ms Lipinski has been taking neurofen plus which relieves her head aches"[37]. As to this hospital attendance the Worker said "I told him my arm was playing up at that time and they didn't put it down. They says [sic] well you've only come up here for your sinus issues"[38]. The Worker reported neck discomfort and this was recorded. I consider it highly improbable that any other reported pain would have been ignored by the treating doctor or excluded from the

[34] Ex 2 p 214
[35] Ex 2 p 216 at 19.8.11 1500hrs
[36] Tr p 100
[37] Ex 2 p 181

detailed record created. Further I note that the neurofen plus was reportedly being taken for headaches and not shoulder or arm pain. In my view this contemporaneous medical record is inconsistent with the Worker's evidence. There is no reason why I should doubt the accuracy of the medical record and the inconsistency between it and the Worker's evidence causes me to be dissatisfied with her evidence that she experienced and reported arm pain at this appointment.

40. As noted above, the first medical record of reported shoulder pain is on 21 October 2011 to Dr Elizabeth Moore[39]. It is clear from the doctor's short consultation notes that both the shoulder pain and the Worker's ability to cope with work were discussed during that consultation. The record reveals that Dr Moore printed a letter for the Worker's work on that day (which was not produced in the proceedings). The Worker claimed she told Dr Moore about the milk crate incident[40] but there is no record to this effect. Had the incident been reported as both the cause and commencement of the injury it would have been information directly relevant to both the doctor's assessment of the shoulder pain and, it being a work incident, to any "letter written for work". In my view, the information about the incident was so pertinent and closely connected to the issues raised in the appointment that it would likely have been documented. That it was not documented caused me to doubt the Worker's evidence that she had reported the incident to the doctor as alleged.

41. On 1 January 2012[41] Dr Moore provided a further report about the 21 October 2011 consultation. In that report Dr Moore stated,

> Q1...Kayline works at a supermarket checkout where she uses the right arm to lift and pack groceries constantly, some full shopping bags would weigh 10 kg...

---

[38] Tr p 40.5
[39] Ex 2 p 236
[40] Tr p 81.3
[41] Ex 2 p 236

> Q4. Kayline stated she developed gradual onset of pain on abduction of the shoulder while lifting bags of groceries at work from April 2011. [emphasis added]
>
> Q5. As far as I am aware Kayline has not reported similar symptoms prior to April 2011.
>
> Q6. Some of the changes on the imaging of the right shoulder are long standing likely to take decades to develop...I am less certain about the onset of tendinopathy and impingement seen on ultrasound. These changes are usually due to repetitive strain, for example repetitive weight lifting, causing micro tears on the tendons.

I note that in a report of 27 March 2012[42] Dr Moore corrected the date of the shoulder injury to "August 2011, not April", but no other corrections or alterations were made.

42. The Worker denied giving the account recorded by Dr Moore[43]. Dr Moore was not called to give evidence. In my view the difference between Dr Moore's documented and seemingly detailed account of the cause of the injury as compared to the Worker's denial that she gave such an account has not been satisfactorily explained. At a minimum, it is clear from Dr Moore's report that she understood the Worker's shoulder pain was of "gradual onset", and this understanding was internally consistent with her opinion that the relevant observed changes "are usually due to repetitive strain". Given the differences between the two versions I can only conclude that the milk crate incident was not reported to the doctor as alleged by the Worker. I consider this to be another example of the unsatisfactory nature of the Worker's evidence.

43. The Worker saw Dr Dianne Erickson on 25 October 2011. Dr Erickson's consultation notes[44] record a complaint by of "right arm, neck, ankles, hip pains for 8 years" [emphasis added] and on examination the doctor noted "right shoulder pains, with restricted abduction, unable to do internal

[42] Ex 2 p 237.1
[43] Tr p 81.3
[44] Ex 2 p 144

rotation". Dr Erickson referred the Worker to Rheumatology. The referral was for joint pains and stated, "Noted to have joint pains for 8 years (ankles, hips, wrists, shoulders, fingers)"[45]. When asked whether this was the account given to Dr Erickson the Worker denied shoulder pain before August, admitted hip and hand pain and explained "it sounds like she's put it all in one bundle"[46]. Dr Erickson was not called. In my view Dr Erickson's record of long standing pain is more consistent with Dr Moore's understanding of "gradual onset"of the injury than with the Worker's account of sudden and immediate onset. Accordingly, I find a degree of consistency between the independent doctors' records and inconsistency between them and the Worker's evidence. I find the Worker's explanations to be unconvincing.

44. Further, I note that the Worker had consultations with Dr Erikson on 3, 17 and 18 November without reference to shoulder pain. Her shoulder pain was next raised during a consultation on 1 December 2011. On this occasion Dr Erickson documented it as "right shoulder pain 3 ½ months"[47]. I have no reason to doubt the reliability and accuracy of Dr Erickson's contemporaneous records. I consider that when read together, Dr Erickson's records provide evidence that the Worker initially complained of long standing joint aches and pains, including shoulder pain, but thereafter her complaint about the onset of the shoulder symptoms changed.

45. The first documented reference to shoulder pain attributable to a work injury is found in the medical record of Dr Mira Klein on 11 November 2011[48]. The record states,

> "I reviewed Kayline in emergency regarding her right shoulder pains for the last three months following an injury at work.
>
> She has been having shoulder pains on movement and at night she wakes up with pains as well. She has little relief from voltarin."

[45] Ex 2 p 163
[46] Tr p 83
[47] Ex 2 p 143
[48] Ex 2 p 178

No details of the alleged work incident are recorded at this time. It is odd that the alleged cause of the pain was not recorded by Dr Klein. I infer from this that the milk crate incident was not reported to the doctor. Equally it is odd that after this hospital attendance the Worker did not further report the injury to Dr Erickson during her visits on 17 and 18 November, particularly as Dr Erikson had referred her for joint (including shoulder) pain investigation on 25 October 2011. These oddities have not been adequately addressed by the Worker and they add to my dissatisfaction with her evidence.

46. The first record of any details as to the nature of the work incident are contained in the notes of Dr Ajith De Silva dated 15 December 2011[49] which relevantly consist of the following,

> "C/O R shoulder pain for 4 months which she thinks is related to her lifting at work usually about 20 kg lifting each time. Works as a consol (sic) operator at coles.....
>
> O/E R shoulder, tenderness over the AC joint. Painfully restricted abduction, forward elevation above 90 degrees. Internal rotation is totally restricted. Discussed the issue with Dr Mark Carvil and advised to explain to the patient about my opinion and give a work related certificate. Explained to the patient that history and investigations are not compatible with injury but more likely due to degenerative changes. Patient accepted it."

47. Dr De Silva provided a worker's compensation medical certificate which further clarified the history given to him by the Worker. In the certificate[50] Dr De Silva stated,

> "Workers description of the injury or disease: R shoulder pain for last 4 months. No specific injury but patient thinks it has [sic] caused by her routine work...
>
> In my opinion the injury or disease is: not consistent with the history. No specific injury was explained but she thinks it is due to

[49] Ex 2 p 227
[50] Ex 1

her routine work and investigation shows degenerative changes of shoulder which is more likely cause of pain." [emphasis added]

48. I find it highly significant that the Worker provided no details of the specific work incident she claims caused the onset of pain. As to this glaring inconsistency, in cross examination the Worker offered,

> "I was trying to work out what kind of injury I had. I didn't know, I have no experience of rotator cuff tears or anything else at that time and I was wondering why I was still in pain after I hurt myself at work.[51]"

49. I consider her answer to be non-responsive. It is clear from the medical records that enquiries were being made as to when and how the pain commenced. In response, the Worker did not report the milk crate incident but rather referred generally to repetitive heavy lifting at work. This is entirely inconsistent with her evidence that the pain arose "instantaneously" and "on the spot"[52] at the time of the alleged milk crate incident. This glaring inconsistency, together with the other numerous problems with her evidence, led me to conclude that the Worker's evidence was unsatisfactory.

50. In the certificate Dr De Silva records the date the injury was first noticed as being 18 August 2011, namely, the date of the Worker's surgery and not the date of the milk crate incident. When cross examined about this the Worker asserted,

> "No I told him around 5 August. I told all the doctors around 5 August"[53].

51. When compared against the records of Dr Erickson it is apparent that this assertion is not entirely accurate. Further Dr De Silva was not called to give evidence. I am not persuaded I should doubt the accuracy of Dr De Silva's contemporaneous records and medical certificate and this further, albeit

[51] Tr p 101.3
[52] Tr p 101.4
[53] Tr p 101.1

small, inaccuracy contributed to my dissatisfaction with the Worker's evidence.

52. The Worker completed a worker's compensation claim form on 20 December 2011[54]. This was the first documentation of the alleged milk crate incident tendered in the proceedings (although the Worker said that on the same day Anna also completed a form for the worker's compensation claim ("the Anna form"))[55]. In the worker's compensation claim form the Worker wrote,

> "I was lifting a crate of milk. Having to walk approximately 10-12 metres with crates to the fridges as trolley would not fit through gap as renovations were being carried out at the time. The renovations were ongoing for approximately four weeks. Only had a slight pain in my shoulder so continued to work and noticed a sharp pain on the day of my operation. Took 6 weeks off to recover from surgery." [emphasis added]

53. Although this report accords generally with the Worker's evidence in these proceedings it departs from her evidence in a significant particular, namely, the nature and extent of the pain experienced on the day of the alleged incident. Her description in the claim form of a slight pain at the time of the incident was, in my view, clearly deliberate (especially when contrasted to her description of sharp pain at the hospital). Further, that description is inconsistent with her evidence in the hearing that the milk crate incident caused a "very sharp pain, making me drop the crate of milk"[56]. That inconsistency adds to my overall rejection of her evidence.

54. The Anna form was not produced in evidence but the Worker said that she read the form and saw that Anna had ticked a box indicating that the incident had happened at work[57]. The Employers were given no advance notice as to this form's alleged existence or of their alleged failure to produce it. Counsel for the Worker explained that she had "only found out

[54] Ex 2 pp 18-19
[55] Tr p 47.4
[56] Tr p 36.3
[57] Tr p 52

about it (the Anna form) yesterday"[58]. Although I admitted evidence about the Anna form, taking into account: the hearsay nature of the evidence, and the failure of the Worker to give any notice of it; I gave the evidence little weight. Further, even if the Anna form contained a concession that there was a work incident, it was a concession based wholly on the account provided by the Worker. The content of the form could not be said to be independent of the Worker, and so it could not be suggested that it corroborated her account. If it existed, the Anna form amounted to nothing more than a simple restatement of the Worker's version, albeit at an early time. Further, any such a restatement could add little of relevance on the question of causation.

55. The first report by the Worker of experiencing a "sharp searing pain" at the time of the milk crate incident, coupled with the further additional detail of dropping the crate, was to Dr Lester A. Walton on 23 July 2012[59], some 11 months after the incident. In my view, the chronological analysis of the records clearly demonstrates that the Worker's evidence as to the detail of the incident and the level of pain she experienced changed over time and became exaggerated. I am further persuaded that this is the case because the version given to Dr Walton was not thereafter consistently maintained. For example, just one month later on 28 August 2012 the Worker participated in an "assessment of activities for daily living" with Ms Annie Davis, Occupational Therapist. In her report Ms Davis documented the history provided by the Worker as follows,

> "Ms Lipinski reported that she was working with a new manager whom did not acknowledge her permanent weight restrictions. She reports she was required to repeatedly lift crates of milk to fill fridges during her shifts at work. She reports that in July 2011 she began to notice some aching and discomfort in her left shoulder. By the beginning of August 2011 the pain had increased so much that it

[58] Tr p 51
59 Ex 2 p 56

caused her to seek medical attention at the emergency department at the Royal Darwin Hospital[60]". [emphasis added]

56. This account is markedly different from the history given to Dr Walton one month earlier, and significantly different from the version given by the Worker in her evidence in these proceedings. Mere error, inadvertence or mistake cannot explain these very different stories. They point in my view to the inescapable conclusion of unreliability, exaggeration and possibly fabrication.

57. Finally, I did not find the Worker's account of her toileting difficulties to be either convincing or satisfactory. In her evidence the Worker maintained toileting difficulties were preventing her return to work[61]. However, as previously noted these difficulties were not reported to any medical staff during the Worker's hospitalisation in August 2011, nor subsequently to Doctors Hofer[62], Moore[63], Erickson[64], Klein[65], Oo[66], De Silva[67], or Modak[68]. Further, her purported toileting difficulties appear to be inconsistent with her continued prescription for vagifem vaginal tablets as noted by Dr Erickson on 25 October 2011[69]. Toileting difficulties were reported to Dr Talbot on 8 June 2012. The Worker described being unable to get either hand to her bottom but as to this Dr Talbot recorded: "On the range of movements today she certainly displayed the ability to touch her bottom with her left hand, in fact she had full internal rotation" [70]. Thereafter, although the Worker intermittently reported toileting difficulties she did not report them to Dr Walton on 6 August 2012[71], or to Dr Sonnabend on 6

60 Ex 2 p 66.4
61 Tr p 99
62 Ex 2 p 181
63 Ex 2 pp 232 and 236
64 Ex 2 pp 144, 143
65 Ex 2 p 178
66 Ex 2 p 172
67 Ex 2 p 227
68 Ex 2 p 142
69 Ex 2 p 144.7 (a product requiring insertion into the vagina)
70 Ex 2 pp 35 and 36.7
71 Ex 2 pp 56-61

December 2013[72] and, to the contrary, on 28 August 2013 Dr Doron Samuell positively reported "she dresses and showers and toilets herself"[73].

58. The Worker submitted,

> "the Worker's evidence on the issue of injury including cross examination was consistent in relation to the date of the onset of symptoms in her shoulder and that evidence is consistent with the history she gave the doctors who examined her.[74]"

59. I disagree with that submission. To the contrary it is readily apparent that there were repeated inconsistencies between the Worker's various accounts to the doctors, and between her evidence and the contemporaneous records kept by each of them. I was not satisfied that the inconsistencies were adequately explained, nor was I satisfied that I should prefer the Worker's evidence over the tendered records. Indeed, I found the contemporaneous medical records to be largely consistent with each other and preferable to the Worker's account.

60. When the medical records were considered chronologically they pointed to a changing account by the Worker, possibly in response to the medical opinions she was receiving. Initially she complained of generalised pains and shoulder pain of gradual and uncertain onset but perhaps related to repetitive lifting. This evolved into a final version of shoulder pain commencing on and from the milk crate incident. The pain at the time of the incident transformed from "slight" to "sharp searing". In my view, the changes were all in one direction, namely, to strengthen her claim for compensation.

61. Analysis of the records demonstrated to me that the Worker's evidence was unreliable and lacking in credit. On the balance of probabilities her evidence

72 Ex 2 p 79A 1-4
73 Ex 2 p 120.7
74 Worker's submissions at [34]

fell far short of satisfying me that the alleged milk crate incident caused the injury.

**Analysis of expert medical opinions**

62. Having found the evidence of the Worker to be unsatisfactory, I then turned to consider and evaluate the expert medical evidence with a view to determining whether the expert evidence might support the Worker's case. (I note that some of this expert evidence has already been discussed above and I will only repeat such additional detail as is necessary to clarify my further reasoning.)

63. How this assessment is to be undertaken was discussed in *Anne Margaret Bryant v Northern Territory of Australia* [2013] NTMC 030 per Dr Lowndes CM at [130] and [131] which made clear that in order to give weight to an opinion the Court must be satisfied that the factual premise on which it is based is established. Further,

> "The Court is required to determine the extent to which a particular expert opinion is based on the history given by the Worker and to test the validity of the opinion by reference to the accuracy and reliability of the provided history. The validity of the opinion is also to be tested by having regard to the objective medical evidence and evaluating the extent to which the opinion is consistent with and supported by that evidence. Most importantly, the reasoning analysis underlying the expert medical opinion must be subjected to careful analysis. The degree of cogency and persuasiveness of the reasons underpinning the opinion must be assessed."

64. In the same case at [134] Dr Lowndes CM noted,

> "It is also helpful to bear in mind the observations of the members of the Court in *Fernandez v Tubemakers Australia Ltd* [1975] 2 NSWLR concerning the relationship between causation and the civil standard of proof. Glass CJ observed that 'the evidence will be sufficient if, but only if, the materials offered justify an inference of probable connection'."

65. On 15 December 2011 Dr De Silva examined the Worker and received a history from her which did not include the milk crate incident. Following examination of the shoulder and noting pain and restricted movements, Dr De Silva was of the opinion and explained to the Worker, "that history and investigations are not compatible with injury but more likely due to degenerative changes"[75]. It is clear that Dr De Silva's opinion did not support the Worker's claim that her injury was caused by an acute incident, to the contrary he considered it more likely to be the result of degenerative changes.

66. Following examination on 21 October 2011, Dr Moore provided her opinion in a report dated 1 January 2012[76]. Again, no history of the milk crate incident was provided to the doctor, rather the reported history was "she developed gradual onset of pain on abduction of the shoulder while lifting bags of groceries at work". It was Dr Moore's opinion that,

> "Q1. ...She has some degenerative change of the bony structures in the right shoulder, but visible pinching on ultrasound of the right rotator cuff tendons on abduction, which reproduces [sic] her pain. There is no sign of bursitis on imaging.
>
> Q6. Some of the changes seen on imaging of the right shoulder are long standing likely to take decades to develop, and therefore would predate the onset of symptoms – specifically the bony changes seen in the acromioclavicular joint, and greater tuberosity. I am less certain about the onset of tendinopathy and impingement seen on untrasound. These changes are usually due to repetitive strain, for example, with repetitive weight lifting, causing microtears on the tendons". [emphasis added]
>
> Q8. The work at Coles Express is not the sole cause of her right shoulder problems, specifically the bony changes seen. It is my opinion the work has contributed to the tendinopathy and impingement seen on abduction with ultrasound."

[75] Ex 2 p 227
[76] Ex 2 p 236

67. As to Dr Moore's evidence the Employer submitted[77],

> "The problem for the worker that falls from the forgoing is the manner in which she has elected to progress and plead her case.
>
> Firstly, the Worker does not advance a case built upon the premises of aggravation or exacerbation of an existing condition, rather the Worker asserts the events of 5 August 2011 led to an acute injury, an injury *simpliciter*, from which all else flows.
>
> Secondly, the Worker has not asserted that the injury concerned an impingement....Rather the Worker has asserted she suffered a tear and resulting bursitis and tendonitis."

68. I find those submissions to be persuasive. I consider that Dr Moore's opinion is more consistent with a history of gradual onset (degeneration and repetitive strain) than with the Worker's evidence of immediate and acute onset. In my view, Dr Moore's opinion does not support the Worker's assertion that her injury was caused by a single and acute work incident.

69. The Worker relied on three reports of Dr John Talbot, Consultant Orthopaedic Surgeon. He first saw the Worker on 8 June 2012. During that consultation she reported lifting milk crates on 5 August 2011 and said this was the first time she noticed pain in her right shoulder[78]. Dr Talbot diagnosed the Worker's shoulder pathology as: a near full thickness tear, subacromial bursitis, degenerative arthritis and tendonitis. As to the cause of this pathology Dr Talbot opined,

> "Q4. On the grounds of probability, I consider that Ms Lipinski would have had pre-existing degenerative changes affecting the rotator cuff and certainly the acromioclavicular joint of her right shoulder and these rotator cuff changes would have made the tendinous structures more brittle and more easily torn. However, the work activity described would have aggravated and exacerbated her symptoms and may have contributed to the rotator cuff tear, although they sometimes occur slowly and insidiously in the shoulders of the middle aged to elderly, quite often without appreciable pain."
> Q5. I would consider that the injury may have arisen by way of a

[77] Employer's written submissions at [56] – [58]
[78] Ex 2 p 34.4 , although I note this is inconsistent with her evidence that the pain was in her arm not her shoulder at Tr p 37.3.

gradual process over a period of time as I have mentioned in my reply to the previous question. [emphasis added]

70. As to this opinion the Employer made the following submissions,

> "..the Worker's case is not one which relies upon the alleged injury arising gradually or constituting an aggravation/ exacerbation of an existing condition. The worker's case is that there was no underlying tear, bursitis and tendinosis prior to the events of 5 August 2011. Dr Talbot's opinion, in the result, flies fairly in the face of the case that is advanced.[79]

71. I agree with those submissions. In my view, Dr Talbot's first report puts his opinion no higher than a possibility that lifting on 5 August 2011 may have contributed to part of the injury, namely, the tear. That possibility is entirely dependent on Dr Talbot's acceptance of the Worker's history. Once the Worker's history is rejected as unreliable, it follows that the portion of Dr Talbot's opinion that is solely reliant on it must be given little weight. Save for that history, the remainder of Dr Talbot's opinion provides little support for the Worker's case. In my view the overall tenor of his opinion supports the likelihood that there were "existing degenerative changes" and further, that any additional injury is likely to have been caused by "gradual process over a period of time".

72. Dr Talbot reassessed the Worker on 10 April 2013 and provided a second report[80]. He stated,

> "Q3(i) It appears from her history that this injury was more of an abrupt process than a gradual process...
>
> (ii) Her history certainly suggested that her employment was the real, proximate and effective cause.
>
> Q4. ...

[79] Employer's Written Submissions at [70]
[80] Ex 2 p 45

Q5. I consider that her incapacity has been materially contributed to by the injury on 5 August 2011.

Q6. I had no reason to doubt the history she gave." [emphasis added]

73. As to this opinion the Employer made the following submissions,

> "The problem with the Doctor's opinion in this regard is that it is predicated upon the veracity of the history provided by the Worker" which Dr Talbot did not doubt[81].

74. Again I find those submissions to be persuasive. The inconsistencies in the Worker's account cause me to reject her as a reliable historian. Consequently, I cannot be persuaded to give much weight to any of Dr Talbot's opinions which relied solely on her self-reports and for which he articulated no further basis for the opinion.

75. Indeed, on this second visit to Dr Talbot, the Worker also complained of,

> "widespread pain in her lower back, hips, knees and ankles which she had developed since my last assessment...[82]" [emphasis added]

When compared against:

- a history of "joint pains for 8 years" previously reported to Dr Erickson on 25 October 2011[83], and
- a long standing history of joint pain subsequently reported to medical staff at Royal Darwin Hospital on 30 August 2012[84],

I consider that this part of the Worker's account provides further evidence of her unreliability, and her changing and evolving story.

76. On 2 September 2013, in response to questions posed, Dr Talbot said,

---

[81] Employer's Written Submissions at [74]
[82] Ex 2 p 49 at (1)
[83] Ex 2 pp 144 and 163
[84] Ex 2 p 202 "joint pains 25 years, intermittent, no significant triggers: /hips/knees/hands/shoulders"

"Looking at the MRI from 2013 the AC joint is actually age related process between the clavicle and scapular. May occur after injury but likely age related.

...

How does a supraspinatus tear usually result? Not precise. Can occur acutely with a fall onto the arm or lifting a heavy weight. Can occur by way of gradual process.

...

How confident are you she did not have bursitis prior to employment with Coles? Cannot be confident. In my report I gave her the benefit of the doubt, quite likely though she had degeneration and bursitis before.

..."[85] [emphasis added]

77. In my view these opinions are consistent with Dr Talbot's first report, namely, that if one accepts the history the injury might have been caused by lifting a weight, but it is rather more likely to be age related and caused by degeneration and gradual process.

78. The Employer persuasively submits,

> "if Dr Talbot's evidence is accepted the Court cannot find that the Worker has established any causal link between her employment and the alleged injury.[86]"

79. So far as the Worker's case is concerned, I considered Dr Talbot's evidence was at best equivocal. It pointed to no objective indicators that the injury was more likely caused by the milk crate incident. That possibility was dependent entirely on the acceptance of the Worker's account. Once the history was found to be unreliable, then in my view, Dr Talbot's reports tended to prefer a cause arising from degeneration and gradual onset. Accordingly, Dr Talbot's evidence did not remediate my concerns about the

85 Ex 2 pp125A 1-4
86 Employer's written submissions at [77]

reliability of the Worker or the history she provided, and I considered that his opinion provided little support for her case.

80. Dr Sonnabend examined the Worker on 6 December 2013. The Worker told Dr Sonnabend about the milk crate incident and described feeling sudden pain which persisted. The Worker told Dr Sonnabend that she had no problems with her right shoulder prior to the incident. Dr Sonnabend diagnosed: a deep surface tear of the tendon extending into a delamination defect medially and tendinopathy.

81. Dr Sonnabend opined,

> "The likely cause of Ms Lipinski's pathology is injury caused by work related episode (described above) of August 2011. It is likely there was a degree of pre-existing tendinopathy, making the shoulder susceptible to injury, but given the absence of right shoulder symptoms before that incident, and the very definite pathology seen on the MRI, it seems reasonable to assume that the incident of August 2011 precipitated the cuff tear and subsequent symptoms.
>
> The pathology is consistent with the work incident described earlier in this report. Mrs Lipinski was holding a milk crate in an awkward position, with her right arm in an abducted position, and with her "just hanging onto" the crate. This is a typical position and mechanism for rotator cuff injury."[87]

82. The only basis articulated by Dr Sonnabend for his opinion as to causation was the history provided by the Worker. No other objective observations or bases are identified. Accordingly, given my view as to the unreliability of the Worker, I could not attach much weight to Dr Sonnabend's opinion which relied solely on her account.

83. In cross examination Dr Sonnabend was apprised of some of the variations in the Worker's accounts and gave the following evidence:

87 Ex 2 p 79A-3

- As people age tendons are more prone to injury and easier to damage [88].

- He could not date the Worker's injury other than by the history she provided which he relied on[89].

- The Worker did not inform him of a history of joint pains as disclosed to Dr Erickson and if she had he would have asked about the cause and conditions[90].

- The description of the incident set out in the Worker's claim form is enough to explain her symptoms, but according to the account given to him, he understood the pain to have been severe rather than slight[91].

- He had not previously received Dr De Silva's report which contained a history of repetitive lifting and the statement "no specific injury was explained but she thinks it is due to her routine work"[92].

84. In response to this further information Dr Sonnabend provided this clarification,

> "The key to this I guess is what she experienced. Let's say in August. If that was a minor problem that slowly got worse, then it becomes far less clear cut. If she had severe pain at the earlier August episode, then that's much more likely to be the cause of it. I don't know which of the stories you can believe. They are two quite different stories.
>
> ...
>
> If she had the pain from April on, then the episode in August would be a far smaller contributor to the symptoms at the start of all this.[93]" [emphasis added]

85. In light of these observations the Employer submitted,

> "following the concessions made in cross examination, Dr Sonnabend's report does little to assist the Worker. If one cannot

88 Tr p 13.10
89 Tr 131.6
90 Tr p 132
91 Tr p 133.7
92 Tr p 134
93 Tr p 135

> reliably date the tear, one cannot satisfy the requisite burden of proof[94]".

86. In my view this is correct. Dr Sonnabend clearly conceded that the only information from which he could date the injury was that provided by the Worker. As previously stated, once her account was found to be unreliable then Dr Sonnabend's opinions based upon it could be given little weight.

87. Dr Anthony Kam provided a report for the Employer dated 2 September 2013. Dr Kam was originally on the witness list but the Employer decided not to call him. The Worker made no objection to his report and it remained part of Exhibit 2. In it Dr Kam stated,

> "In my clinical experience findings of low grade supraspinatus tear and acromioclavicular joint osteoarthritis are extremely prevalent. Especially in patients of similar age to the worker. This type of finding often occurs with age related degeneration and as a result of wear and tear from activities of daily living. Whilst partial or full thickness tear may also occur as a result of a single traumatic event such as the alleged incident around 8 August 2011, I expect the occurrence to be accompanied by acute pain and incapacity following the time of injury. [95]" [emphasis added]

88. Dr Kam referred to two possible mechanisms of injury, gradual age related degeneration and wear and tear, or a single traumatic event, such as the milk crate incident. Dr Kam considered that had the injury been occasioned by a single traumatic event as suggested by the Worker, it would have been accompanied by acute pain and incapacity. The Worker's first description of pain associated with the incident is found in the claim form in which the pain is described as "slight"[96]. Further, according to the evidence, the Worker continued to complete that shift and her remaining shifts before her planned leave. By her own account, the Worker was not immediately incapacitated. That the objective criteria identified by Dr Kam as likely being associated with a single traumatic event were not present, makes it

[94] Employer's written submissions at [89]
[95] Ex 2 p 79B-2
[96] Ex 2 p 18

reasonable to conclude that it was unlikely that the injury arose from the milk crate incident as claimed.

89. Generally, as to the expert opinions, when no history of an acute incident was provided (Doctors De Silva and Moore), the opinions tended to support the more likely cause as being degenerative change and gradual onset.

90. When the history was provided (Doctors Talbot and Sonnabend), the opinions continued to recognise two possible causes of the injury, degenerative and gradual, or acute. It was only upon acceptance of the history, that the milk crate incident was elevated to a possible or probable cause of some, or all, of the injury. The factual premise on which these opinions were based was the history provided by the Worker. It is now known that the history provided by the Worker is not supported by the contemporaneous medical records and is less than reliable and credible. Accordingly, the substratum of facts upon which these opinions were based was undermined. No other objective evidence was identified in support of either opinion. As the basis on which each of the opinions rested was discredited, the opinions could be given no weight.

91. In the end there was nothing in the expert medical opinions which objectively supported the Worker's case. To the contrary, I considered what remained of the expert opinions pointed to degeneration and gradual onset as being the more likely cause of the injury.

**Analysis of the Worker's instructions**

92. There remains one further aspect of the case to be considered. The Employer submitted that, as part of my assessment of the Worker's case, I should consider evidence of her instructions to her solicitors.

93. I found this submission somewhat problematic. Although, the Worker agreed in cross examination that she was careful to provide accurate information to her lawyers and that she knew the information would be used in the proceedings[97], it was not always clear from the Worker's documents whether the contents came from direct instructions or were derived, for example, from received medical reports. Further, there was no evidence that the various documents were checked by the Worker before they were filed, served or sent. It is possible inconsistencies already identified between the Worker's version and the medical records were simply repeated in the legal documentation.

94. With these limitations in mind, I considered the available material but gave it less weight than that given to the contemporaneous records and medical opinions.

95. The legal documentation appears generally consistent with the analysis of the contemporaneous records and expert evidence. Initially the Worker's allegation was of "injury by way of gradual process over time as a consequence of carrying out her employment duties, which resulted in an injury ("the injury") giving rise to an incapacity to carry out her employment duties on 5 August 2011.[98]" There was no reference to the milk crate incident now relied on as the critical incident. Further, the initial claim alleged gradual onset as opposed to acute onset of injury.

96. The Employer's Particulars of Defence dated 25 June 2012 denied the initial claim, and in doing so relied at least in part on the Worker's claim form which referenced the milk crate incident[99]. Even so, an Amended Statement of Claim was filed on 12 September 2012[100] and a Consolidated Statement of Claim was filed on 11 January 2013[101] in which the allegation of gradual

97 Tr p 77
98 Ex 2 p 1, Statement of Claim filed 7 June 2012 at [3]
99 Ex 2 p 3, Notice to Defence to the Statement of Claim at [3(a)]
100 Ex 2 p 6 at [4]
101 Ex 2 p 11 at [4]

injury over time culminating in incapacity on 5 August 2011 was maintained, without reference to the milk crate incident.

97. On 13 June 2012 Dr Talbot provided his first report which included the milk crate incident history. On 17 August 2012 the Worker's lawyers wrote to Ms Annie Davis enclosing, inter alia, Dr Talbot's report[102]. The letter to Ms Davis included the following,

> "Kayline has sustained a right shoulder AC joint tear over a gradual period of time as a result of her employment. On 5 August this injury led to an incapacity for work.[103]" [emphasis added]

98. In my view, the history provided by the Worker to her lawyers as evidenced by her first three statements of claim and this letter is inconsistent with the evidence given by her in these proceedings. Her denial in evidence of ever giving such an account to her lawyers is unconvincing. This further evidence of inconsistency simply reinforced my assessment of the Worker as largely unreliable and lacking in credit.

**Conclusion on the Worker's Claim**

99. Having carefully considered the Worker's evidence I found it to be inconsistent and unreliable. My concerns about her evidence were not limited to isolated issues or discreet examples; rather following careful analysis of all the evidence I found the Worker's evidence to be largely unreliable. The inevitable result was that I could not give it any weight.

100. As there was no independent evidence of the milk crate incident it was difficult to determine whether or not it in fact occurred, but even if it did, I was not satisfied on the balance of probabilities that it caused the injury. In particular I reiterate that, once the Worker's history and opinions based on it were rejected, the expert opinions provided no objective support for the Worker's case.

---

102 Ex 2 p 64
103 Ex 2 p 63.5

101. The Employer submitted,

> "If, as the Employer contends must be the case, the Court determines that the Worker has manifestly failed to satisfy the requisite burden of proof with respect to the alleged injury, all else fails.[104]"

102. In my assessment, the Worker fell far short of proving on the balance of probabilities that the injury arose out of or in the course of her employment. In consequence the entirety of the Worker's claim must fail. Therefore it is not necessary for me to address the further issues claimed concerning the alleged sequela, any alleged incapacity, financial loss or claim for household assistance.

**Decision**

103. The Amended Consolidated Statement of Claim is dismissed.

104. Pursuant to s107(4) of the Act the Courts orders for interim benefits are revoked.

105. Pursuant to s107(7) of the Act the Worker is ordered to repay the interim benefits to the Employer in the sum of $25,356.00

106. I will hear the parties as to costs.

Dated this 5 day of June 2014.

**Elisabeth Armitage**
STIPENDIARY MAGISTRATE

104 Employer's written submissions [158]