

CITATION: *Maria Rust v Northern Territory of Australia* [2024] NTWHC 2

PARTIES: MARIA RUST
v
NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: WORK HEALTH

FILE NO: 2022 – 00447 – LC

DELIVERED ON: 8 July 2024

DELIVERED AT: DARWIN

HEARING DATES: 16 days being 5 to 9 June 2023, 13, 18, 19 and 20 October 2023, 19 to 23 February 2024 and 26 and 27 February 2024

DECISION OF: ACTING JUDGE NEILL

CATCHWORDS:

WORK HEALTH – onus – case limited to total incapacity – consideration of evidence as a whole – some findings adverse to Worker’s credit – mental injury – section 73 compensation

Return to Work Act 1986 ss 3A(2), 64, 65, 73

Northern Territory Cement Pty Ltd v Ioasa [1994] 58 para 15
Northern Territory of Australia v Yao [2024] NTFCSC 1

REPRESENTATION:

Counsel:

Worker: Ms J Clark

Employer: Mr A Lindsay SC

Solicitors:

Worker: Caroline Scicluna

Employer: Hunt & Hunt Lawyers

Judgment category classification: A

Judgment ID Number: [2024] NTWHC 2

Number of paragraphs: 396

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

No. 2022-00447-LC

BETWEEN

MARIA RUST
Worker

AND

NORTHERN TERRITORY OF
AUSTRALIA
Employer

REASONS FOR DECISION
(Delivered: 8 July 2024)

ACTING JUDGE JOHN NEILL

BACKGROUND

1. Ms Maria Rust (“the Worker”) was born on 25 February 1984 and she is currently 40 years of age.
2. At all material times the Worker was a permanent employee of the Employer performing clerical duties in an A06 position in the Northern Territory Public Service (“the employment”).
3. It is common ground that the Worker at all material times was a worker within the meaning of the *Return to Work Act* (“the Act”), and I so find.
4. The Worker’s case is that at work on Friday 30 July 2021 she was told something by her direct manager at work Mr Christophe Grumelart, the then Executive Director of Capital Program Delivery in the Northern Territory Department of Infrastructure, Planning and Logistics (“DIPL”). She was told that Mr Andrew Kirkman, the CEO of DIPL, had advised Mr Grumelart that same day that the Worker was required to move

from her position with Mr Grumelart to a yet to be determined role. She was told this was because of rumours circulating in the workplace that she and Mr Grumelart were in an intimate personal relationship (“the rumours”).

5. The Worker’s case is that she requested and was granted a meeting at work later the same day, 30 July 2021, with Mr Andrew Kirkman. At the meeting Mr Kirkman confirmed to her that he had made the decision to move her to a different role because of the rumours arising from her perceived relationship with Mr Grumelart (“the meeting”).
6. The Worker’s further case is that during the meeting she was subjected to bullying behaviour and overbearing and unreasonable treatment by Mr Kirkman (“the behaviour”).
7. The Worker’s case overall is set out in paragraph 7(a) of her Reply dated 15 May 2023, namely “...as a consequence of the Meeting and Mr Kirkman’s behaviour at the Meeting she suffered injuries...”. That is, the injury arose as a consequence of the meeting and the behaviour at the meeting. The injury pleaded is a mental injury (“the injury”).
8. The Worker’s case is that as a consequence of the injury she was certified from the next working day, Monday 2 August 2021, as fit to work from home only, and then subsequently from 17 August 2021 as fit to work from home each day for limited hours only, until eventually she was certified as being totally incapacitated for work from 22 December 2021. Except for an unsuccessful attempted return to work in March 2022, the Worker’s case is that as a consequence of the injury she has been totally incapacitated for work since 22 December 2021 – paragraph 12 of her Statement of Claim dated 4 May 2022.
9. The Worker made a claim pursuant to the Act on 26 August 2021 in respect of the injury. That claim was initially deferred on behalf of the Employer and it was subsequently disputed on 29 October 2021. The Worker has commenced this proceeding to determine her entitlement to benefits under the Act.
10. On 11 May 2022, the Worker’s employment was suspended. On 28 June 2022 the employment was terminated. The circumstances of the suspension and termination were not explored during the hearing of this matter.

PLEADINGS

11. The relevant pleadings in this proceeding are:
 - i. the Worker’s Statement of Claim dated 4 May 2022;
 - ii. the Worker’s Further Particulars of Statement of Claim dated 22 August 2022;

- iii. the Employer's Third Amended Notice of Defence dated 30 May 2023; and
 - iv. the Worker's Reply to Defence dated 15 May 2023.
12. The Worker by her Statement of Claim and her Further Particulars of that Statement of Claim and her Reply has limited her case to an injury which occurred directly as a consequence of the meeting on 30 July 2021. She does not in her pleadings identify or rely on any event or events or circumstances in or out of the workplace arising either before or after the meeting on 30 July 2021 as additionally causing or contributing to the injury. She does not plead or rely on any pre-existing mental condition which was aggravated by the meeting on 30 July 2021.
 13. The Worker pleads that the injury is an Adjustment Disorder with Mixed Anxiety and Depressed Mood, and/or a severe Major Depressive Disorder – paragraph 2. of her Further Particulars of Statement of Claim.
 14. The Worker pleads that she was partially incapacitated for work as a consequence of the injury from 17 August 2021 to 21 December 2021. She pleads that she has been totally incapacitated for work as a consequence of the injury from 22 December 2021 and continuing, with the exception of the period from 9 March 2022 to 30 March 2022. She pleads that between 9 and 30 March 2022 she unsuccessfully attempted a return to work on a full-time basis.
 15. The Worker does not plead in the alternative that she has been partially incapacitated for work at any time after 22 December 2021. Her case as pleaded and as run at hearing is that from and including 22 December 2021 to date and continuing, excluding the period from 9 March 2022 to 30 March 2022, she has been and she continues to be totally incapacitated for work because of the injury.
 16. The Employer admits that the Worker's meeting with Mr Andrew Kirkman on 30 July 2021 did take place but denies that the Worker suffered any injury as a consequence of that meeting. The Employer further denies that the Worker suffered any injury at all. Both these denials are set out in paragraph 6.a. of its Third Amended Notice of Defence.
 17. The Employer pleads in the alternative that if the Worker did suffer the injury as pleaded then it was caused wholly or primarily by management action taken on reasonable grounds in a reasonable manner, or by a decision of the Employer, on reasonable grounds, to take management action, and/or an expectation by the Worker that any management action would or would not be taken or any decision would be made to take or not to take any management action. Here the Employer is relying on the statutory defences to work-related mental injuries set out in subsections 3A(2)(a), (b) and/or (c) of the Act, which I shall hereafter refer to as "reasonable management

action”.

18. The Employer pleads further in the alternative that if the Worker did suffer the injury through the employment, it denies that the Worker has suffered any incapacity at any time to undertake paid work as a consequence of the injury.
19. The Employer additionally pleads that the reason the Worker did not work over the period from 22 December 2021 to 11 February 22 was not because of any injury-related incapacity but rather because she had not then received her second Covid vaccination and the NT Chief Health Officer’s Direction number 55 required the Worker at that time to have received her second vaccination in order to continue working (“the vaccination issue”).
20. The Worker by her Reply traverses the Employer’s pleading of the reasonable management action defence, and the vaccination issue.

ISSUES

21. I set out the issues identified from the pleadings and from the way the parties ran their cases at the hearing in the form of the following questions:
 - A. What happened at the meeting on 30 July 2021?
 - B. Did the Worker suffer any and if so what injury?
 - C. Was the injury caused by the meeting on 30 July 2021?
 - D. Was the injury a mental injury caused wholly or primarily by reasonable management action?
 - E. Has the Worker been incapacitated at all for work as a consequence of the injury?
 - F. Has the Worker been totally incapacitated for work as a consequence of the injury?

ONUS

22. The Worker’s Work Health claim was disputed at the outset in accordance with the Act. The Worker bears the onus of proving on the balance of probabilities that she has suffered an injury at all, and if so, the nature of the injury.
23. The Worker bears the onus of proving on the balance of probabilities that the injury arose out of or in the course of the employment.
24. The Worker bears the onus of proving on the balance of probabilities that she has been

totally or partially incapacitated for work for any and if so what periods as a consequence of the injury.

25. If the Worker succeeds in proving the foregoing matters other than total incapacity at all times, and if I were to find that she has been partially incapacitated for work for any periods as a consequence of the injury then ordinarily the onus would shift to the Employer to prove the dollar value of the Worker's remaining capacity to work during any such periods of partial incapacity – *Northern Territory Cement Pty Ltd v Ioasa* [1994] NTSC 58 per Martin (BF) CJ at paragraph 15.
26. However, in this matter the Worker has limited her pleading of partial incapacity to one period, namely 17 August 2021 to 21 December 2021, which was within the initial 26 week period pursuant to section 64 of the Act. She has not pleaded partial incapacity over any other period or periods. She has not pleaded partial incapacity in the alternative. She ran her case at hearing solely on the basis of total incapacity for the period 22 December 2021 to 8 March 2022 and then from 31 March 2022 to date and continuing. She has elected to put all her eggs in the one basket of total incapacity. The issue of partial incapacity therefore does not arise for determination by me other than from 17 August 2021 to 21 December 2021. For this reason, the Employer bears no onus as to the dollar value of remaining capacity in respect of any period or periods when the Worker might have been partially incapacitated.
27. The Employer asserts and therefore it must prove the vaccination issue. It bears that onus.
28. The Employer bears the onus on the balance of probabilities of proving the reasonable management action defence – *Northern Territory of Australia v Yao* [2024] NTFSC 1.

THE EVIDENCE

29. The medical evidence tendered to the Court involved notes, records and reports of the Worker's treating health service providers, and of one medico-legal expert. These included the notes, records, reports and medical certificates of the Worker's GPs at the Palmerston Medical Clinic, including of her treating GP Dr Lynn Yaung. Dr Yaung gave evidence before me.
30. The medical evidence included notes and records of the counselling service Employee Assistance Service Australia Inc ("EASA"). It further included two reports and two transcripts of telephone interviews by the Worker's treating psychologist Mr Gregory Goodluck. Mr Goodluck gave evidence before me.
31. The medical evidence included three reports by and one transcript of a telephone interview with the Worker's treating psychiatrist Dr Dinesh Arya. Dr Arya gave evidence before me.

32. The medical evidence also included one report by and one transcript of a telephone interview with medico-legal psychiatrist Dr Antonella Ventura. Dr Ventura assessed the Worker and provided her report at the request of the legal representative of the Employer. Dr Ventura's report was supportive of the Worker's case and the Worker relied on that report at the hearing. Dr Ventura gave evidence before me at the hearing.
33. All the medical/expert witnesses called by the Worker were tested in cross-examination and they remained supportive of her case.
34. The Worker, her husband Mr John Ellsley, and her direct manager in the workplace Mr Christophe Grumelart, all gave evidence before me which was tested in cross-examination and which remained supportive of the Worker's case.
35. The Employer called no medical or other expert evidence in its case. It called four lay witnesses. The hearing proceeded on the basis of the above-mentioned medical and psychological evidence and opinion all called and tendered in the Worker's case and in the absence of any contrary expert opinion.

CREDIBILITY

36. The scenario presented by the Worker is challenging. This scenario is that she was apparently perfectly healthy on 30 July 2021 then she became increasingly psychologically unwell over the next couple of weeks. She was then partially incapacitated for work by this condition for about three months, and thereafter she has been totally incapacitated for work by this condition to the present date and continuing. This is all said to have been caused by one work meeting on 30 July 2021 with one other person lasting around 30 minutes, which meeting may have been personally traumatic but which did not involve violence or any threat of violence.
37. This scenario does not invite any application of judicial notice, lived experience and/or lay opinion. Rather, it raises questions for expert medical, psychiatric and psychological evidence and opinion, to be weighed in the light of all the other evidence before me considered on the balance of probabilities. As I have noted in paragraphs 32 and 34 above, all the expert evidence before me was supportive of the Worker's case - that is, of this scenario.
38. The hearing took an unusually long time. It ran for a total of 16 hearing days in three blocks in June and then October 2023, and again in February 2024. Three sets of written submissions were then filed, the last one on 5 April 2024. The main cause of this prolonged hearing was the lengthy adducing and then testing of the Worker's evidence.
39. The Worker gave evidence at the hearing over 10 days. Evidence of two psychiatrists and one psychologist and one GP was interspersed within those 10 days but the

Worker herself was in evidence for around eight days. She was tested in cross-examination over a period of five days. Her credibility was consistently challenged in that cross-examination. It was apparent that a major question in this case is the Worker's credibility.

40. Part of this credibility question is whether the Worker and Mr Grumelart were in fact in an intimate personal relationship – that is, a romantic and/or sexual relationship. Both the Worker and Mr Grumelart firmly denied this in their respective evidence both in chief and in cross-examination. I heard limited further evidence relevant to this question.
41. The Employer has neither pleaded nor run its case on the basis of the existence of an intimate personal relationship. Rather, it has pleaded and run its case on the basis that the Employer perceived a conflict of interest in the workplace arising from the personal and social relationship between the Worker and Mr Grumelart, both at the workplace and outside work. This means that a finding of the existence of an intimate personal relationship would not go to any issue in the proceeding. However, it would impact on the Worker's credibility, and on the credibility of Mr Grumelart.
42. Another part of this credibility question goes to the existence of, or alternatively the extent and/or impact of, the symptoms claimed by the Worker as a consequence of the injury.
43. This includes the diagnosis of the injury and the assessment of the Worker's consequential incapacity for work at different times by the various experts who gave evidence before me. Those experts relied in part on medical records, however they also relied on the histories provided to them by the Worker and on her presentations and demeanour before them at different times.
44. The reliability of those experts' opinions is necessarily dependent on the reliability of those medical records and on the reliability of those histories and presentations, which may themselves depend on the credibility of the Worker.

A. What Happened at the Meeting on 30 July 2021?

i. The Recorded Portion

45. It is accepted by the Employer that Mr Andrew Kirkman, the CEO of DIPL, was not as restrained or detached in his manner and language as he could have been during the recorded part of his meeting with the Worker, an A06 clerical officer in his Department, on 30 July 2021.
46. The Employer set out its Opening at page 32 of the Court Book, Exhibit W5. At paragraph 2.30 on page 37 counsel for the Employer described part of the meeting as follows:

“The worker and Andrew Kirkman spoke over the top of each other at times and each raised their voices. Andrew Kirkman used two swear words as adjectives, but they were not directed at the worker. He subconsciously knocked the table when making some points. Both the worker and Andrew Kirkman put their positions forcefully...”

47. At paragraph 2.34 on page 38 of the Opening counsel for the Employer conceded concerning Mr Kirkman’s behaviour at the meeting:

*“It is anticipated that Andrew Kirkman will give evidence that on reflection, while it was necessary to discuss the topics raised and respond to the worker, **some aspects of his manner and language at the meeting were not as detached and restrained as it could have been** (my emphasis)”*

48. The meeting was initially recorded by the Worker, without the knowledge of Mr Kirkman. That recording was received in evidence as **Exhibit W1** and an agreed transcript of that recording was provided by consent as an **aide memoire** (“the recording”).
49. The recording of the first part of the meeting was subsequently made available in the course of an internal workplace grievance initiated by the Worker. The grievance documents and the conclusion of the grievance Investigator were tendered in evidence as **ExW3**. An Investigation Report of Ms Raelene Burke dated 28 September 2021 was part of **ExW3**. Ms Burke considered the Worker’s allegation that: *“The actions by Mr Kirkman at a meeting on 30 July 2021 were inappropriate”*.
50. Ms Burke found at page 9.9 of the Investigation Report: *“The allegation, on the balance of probabilities, is substantiated as it pertains to the manner and language used by the respondent (Mr Kirkman) when engaging with the complainant during the meeting of 30 July 2021”*.
51. Andrew Kirkman in his evidence before me made a number of concessions about his demeanour, manner of speech and behaviour during the recorded part of the meeting on 30 July 2021. This was not surprising given the content of the recording.
52. Mr Kirkman conceded in his evidence in chief that he had sworn on two occasions during the meeting but denied he was swearing at the Worker. He said: *“I accept I could have been more professional in my language”* – transcript 22 February 2024 at page 170.3.
53. As noted earlier in these reasons, the Worker was an A06 clerk in DIPL and Mr Kirkman was the CEO of DIPL. In cross examination Mr Kirkman agreed concerning the Worker that he was *“very much significantly senior to her”* and *“that there’d be a fairly significant power imbalance between your roles”* – transcript 22 February 2024 page 173.7.

54. In cross examination Mr Kirkman agreed that during the grievance process initiated by the Worker arising out of the meeting he had accepted a number of propositions when put to him by the Investigator Ms Raylene Burke. These included that the actions taken by him during the recorded part of the meeting were inappropriate, that his wording was not as professional as it could have been, that he could have managed the meeting more effectively as it pertained to his mannerism and language used, and that he regretted that he wasn't more appropriate in his communication at that meeting – transcript 22 February 2024 at page 187.1 to 187.4.

55. At transcript 23 February 2024 page 216.1 to 216.4 counsel for the Worker put to Mr Andrew Kirkman that he had threatened the Worker at the meeting when she had suggested she might initiate a grievance process. The following exchange took place:

“Ms Clark: “Do you accept that during the meeting when Ms Rust indicated that she might take the matter to OCPE, that you responded by making threats about what might happen if she did?”

Mr Kirkman: “I expressed concern about what would happen if she did, yeah”.

Ms Clark: “Well, I suggest it’s more than that. That you were trying to intimidate her, to prevent her from taking the matter further?”

Mr Kirkman: “I wanted to make it clear that if she wanted to go down that avenue, then it would be, you know – obviously, there’d be a lot of difficulties relating to that”.

Ms Clark: “Yes. And that was?”

Mr Kirkman: “Which we can all understand”.

Ms Clark: “And that was you intimidating her to try and prevent her from challenging your decision?”

Mr Kirkman: “Look, I don’t think it was my intention. The way it was put, I can certainly see that being the way it’s perceived”.

56. Mr Kirkman’s evidence continued on this subject at transcript 23 February 2024 page 216.6 to 217.9 as follows:

“Ms Clark: “And what’s the ‘shit show’ that you’re referring to?”

Mr Kirkman: “Just the evolving discussion around the relationship, the breakdown between Mr and Mrs Grumelarts’ marriage, the intimacy of the relationship, sexual or otherwise, et cetera et cetera”.

Ms Clark: "And that's intimidating, isn't it? It's saying if you challenge me...?"

Mr Kirkman: "It's true".

Ms Clark: "... all of this embarrassing stuff will be laid out?"

Mr Kirkman: "Well, I was being completely honest".

Ms Clark: "In a - you know, was that appropriate at that time, at that point?"

Mr Kirkman: "No".

Ms Clark: "And she says at 70 that she is happy to go to - to take it further. And you say at 71, 'Fine. You go and do that. But in the meantime, I'll move you and I will have a fight with the Commissioner at the same time'. And there is some knocking sounds on the table. 'And if you want to take me on, take me on, but I'm not going to have your career destroyed about this'".

Mr Kirkman: "Yes, I was reacting. I was..."

Ms Clark: "And again..."

Mr Kirkman: "A poor response".

Ms Clark: "... You're intimidating her, aren't you, to try and prevent her from taking the matter further?"

Mr Kirkman: "I was reacting to the - in the conversation. Yeah".

Ms Clark: "Now, we've heard a number of knocking sounds of the transcript. You agree with that?"

Mr Kirkman: "Yes".

Ms Clark: "And I think - I'll just give you some examples with reference to the transcript. We've got three times at line 67, once at line 71, once at 110, once at 111. Now, I suggest that's you hitting your knuckles on the table with a clenched fist?"

Mr Kirkman: "No, I don't believe so. I do tend to do that from time to time".

Ms Clark: "It's done at a time Mr Kirkman..."

Mr Lindsay: "Your Honour, perhaps the transcript should record what Mr Kirkman

just did”.

His Honour: “I’ll record that I observed Mr Kirkman hitting the table with his clenched fist, not in a – there are different ways one can do that. I observed him do it in a way before the Court. You are asking questions about the way he did it on 30 July”.

Ms Clark: “Yes. Thank you, your Honour (turning to the witness), and I suggest that you did it on 30 July in an aggressive manner?”

Mr Kirkman: “No, I think I was just generally agitated and just knocking on the desk”.

Ms Clark: “Well, it was done at times, I suggest, when you were really trying to get your point across. For example, at line 67 when you say, ‘I am the Chief Executive Officer of this Department’. We hear a knocking sound. ‘And I’m saying so’. And we hear a knocking sound. I suggest that’s you aggressively hitting the desk to try and get your point across?”

Mr Kirkman: “As I indicated, I believe I’m rapping on the desk. I don’t think it was an aggressive fist pumping, by any means.”

Ms Clark: “It was a pretty – do you agree there was a pretty pronounced sound on the transcript – on the recording?”

Mr Kirkman: “I did hear the knocking on the recording. Yes.”

Ms Clark: “Yes. And it was a bit more than a light tap?”

Mr Kirkman: “That’s quite noisy, isn’t it?”

Ms Clark: “Yes. And it comes off pretty aggressively, doesn’t it?”

Mr Kirkman: “I could have been more appropriate”.

57. At transcript 23 February 2024 from page 219.3 to 219.10 the counsel for the Worker cross examined Mr Kirkman as follows:

Ms Clark: “Mr Kirkman, yesterday you accepted that allegations about married employees having affairs is a sensitive topic?”

Mr Kirkman: “Yes”.

Ms Clark: “And that you accepted that that was something that must be broached sensitively and respectfully?”

Mr Kirkman: "Yes".

Ms Clark: "Do you accept that you didn't approach that topic sensitively and respectfully in your meeting with Ms Rust on 30 July 2021?"

Mr Kirkman: "Yes, I accept that".

Ms Clark: "And that you said – and I will take you through the transcript if you need it, but just in broad terms, do you accept that you said that everyone was talking about the rumours, that she and Mr Grumelart were having an affair?"

Mr Kirkman: "Yes".

Ms Clark: "And that the whole Department was talking about it?"

Mr Kirkman: "Yes, a very broad, no doubt incorrect statement".

Ms Clark: "But that, nonetheless, is what you said?"

Mr Kirkman: "That's what I said".

Ms Clark: "And at the time I think you had understood that it had gone beyond just the Department into other areas as well?"

Mr Kirkman: "I hadn't understood it went beyond the Department, but certainly in different divisions of the Department".

Ms Clark: "And you understood it was widespread?"

Mr Kirkman: "I understood that. Yes".

Ms Clark: "And you are conveying that to Ms Rust?"

Mr Kirkman: "Yes".

Ms Clark: "I suggest that it was wholly inappropriate for you to be saying that the whole of Ms Rust's workplace thinks she is having an affair?"

Mr Kirkman: "It was not appropriate".

Ms Clark: "Do you accept that something that would be likely to cause a great deal of stress to someone if they thought that everyone in their workplace was talking about them having an affair?"

Mr Kirkman: "if they weren't aware of that. But me reminding Ms Rust what she already knew, yes, would have caused her distress".

Ms Clark: "Well, for the CEO – someone very superior to her – to be saying, 'Everyone in this Department thinks you're having an affair', you accept that's something that would be very stressful for a person to hear?"

Mr Kirkman: "Yes, I accept that".

58. At transcript 23 February 2024 at page 220.7 to 220.9 Mr Kirkman made the following concessions in cross-examination:

Ms Clark: "Just out of fairness to you, Mr Kirkman, I suggest that the way you discussed the rumours with Ms Rust – in that you were telling her everyone in the Department was talking about her – was a completely inappropriate way to raise such a sensitive matter?"

Mr Kirkman: "Yes, and I've agreed with that".

Ms Clark: "Do you agree that you spoke in a raised voice on a number of occasions during the meeting?"

Mr Kirkman: "Yes".

Ms Clark: "And that your tone was angry and frustrated on a number of occasions?"

Mr Kirkman: "Yes".

Ms Clark: "And do you agree that's an improper way to speak to an employee?"

Mr Kirkman: "I agree".

59. At transcript 23 February 2024 at page 211.4 Mr Kirkman made the following concession concerning his behaviour during the recorded part of the meeting:

Ms Clark: "You were embarrassed about your conduct?"

Mr Kirkman: "I was embarrassed about my conduct, for sure".

60. The recording demonstrates that Mr Kirkman repeatedly interrupted and spoke over the Worker during the recorded part of the meeting, and I so find.

61. On the basis of Mr Kirkman's volume and tone of voice and interruptions of the Worker in the recording of the meeting, on the basis of the transcript of the recording, of the

admissions made by Mr Kirkman to the Investigator Raelene Burke set out above, and of the admissions and concessions of Mr Kirkman set out above in his evidence before me, I am satisfied and I find that in the course of the recorded part of the meeting on 30 July 2021 Andrew Kirkman, the CEO of DIPL, behaved toward the Worker, an A06 clerk in his Department, in an aggressive, threatening, dismissive, insensitive and inappropriate manner.

62. On the basis of the recording and the transcript of that, I find that Mr Kirkman's behaviour toward the Worker as identified in the previous paragraph was not an incidental or occasional feature of the recorded portion of the meeting. I find this behaviour largely pervaded the recorded portion of the meeting.

ii. The Unrecorded Portion

63. The meeting was interrupted when Mr Kirkman took a phone call from the Minister for his Department. Mr Kirkman's evidence about that call appears in his evidence in chief at transcript 22 February 2024 page 168.9 to 169.3 as follows:

Mr Kirkman: "I had a very quick (my emphasis) conversation with the Minister and it was in regard to the bio security matter I discussed and I said, 'can I call you back Minister'.

Mr Lindsay: "You put off the Minister to continue with Ms Rust, is that right?"

Mr Kirkman: "Yes".

Mr Lindsay: "Why did you do that?"

Mr Kirkman: "Because Ms Rust was in my office and I felt – and I needed to finish the meeting. I was mindful of that, I guess, the tension in the room and how upset Ms Rust was and I felt it wasn't ideal to say, 'Please go and wait outside while I have this conversation' which I normally would do".

64. The meeting resumed for a period, and that resumed period was not recorded. The evidence of the Worker differed from the evidence of Mr Kirkman about what happened after the meeting resumed.
65. Andrew Kirkman gave evidence that the unrecorded portion of the meeting lasted approximately as long as the recorded part of the meeting. He said at transcript 22 February 2024 at page 169.3:

Mr Lindsay: "Yes. So how did the meeting progress from that point? (following the telephone call from the Minister)".

Mr Kirkman: "Well, I believe it continued probably for a similar length of time to

the transcript, probably another 15 minutes”.

66. Mr Kirkman was cross-examined to the effect that the unrecorded part of the meeting lasted for only a very short time, but at transcript 23 February 24 on page 230.8 he maintained his recollection that:

“I believe it was as long, if not longer, than what the transcript was”.

67. The Worker had given contrary evidence about the duration of the unrecorded part of the meeting. She gave evidence which suggested that the meeting after the phone call from the Minister had continued for only a short time. In her examination in chief starting at transcript 5 June 2023 at page 43.9 through to page 44.5 the Worker gave the following evidence:

Ms Clark: “Now you stopped the recording at a time where it appears that the Minister called. Why did you stop the recording?”

Worker: “Because the Minister called and his conversation to the Minister wasn’t my business”.

Ms Clark: “And what occurred after the Minister called and the recording stopped?”

Worker: “So he had to go, because he had things he needed to get done. And he said to me, look, I’ve got to go, I’ve got other matters to attend to. And then he said but look, put together a proposal on how you can mitigate the rumours affecting the Department. And then he said to me, ‘if Chris was your friend, you’d consider or you’d think about him’ and that was pretty much it”.

Ms Clark: “Was anything further said about you moving to a different position?”

Worker: “No. He made it clear that I was moving”.

Ms Clark: “And how did he make it clear?”

Worker: “Because he said it multiple times”.

Ms Clark: “And did he say it again after the recording stopped?”

Worker: “After he got off the phone to the Minister he just said, ‘Look, I’ve got other things to attend to’. He told me he was going on leave and then he just said ‘Put together a proposal to mitigate the rumours affecting the Department’. And I said to him I was embarrassed and that I didn’t want to send it to him in an email. And he said to me just text it or write it on a piece of paper and give it to Dwayne”.

Ms Clark: "And was anything said after the meeting about conflicts or perceived conflicts or anything?"

Worker: "No, never".

68. The Worker gave more evidence in cross-examination about the duration of the unrecorded portion of the meeting. At transcript 6 June 2023 starting at page 197.7 and going through to page 198.2 the Worker gave the following evidence:

Mr Lindsay: "Yes. And then, I suggest to you that, when the conversation resumes, we can hear in the call Mr Kirkman saying to the Minister, "I'll call you back in five". We can hear that can't we?"

Worker: "Yes".

Mr Lindsay: "But then, when the conversation resumed, it went on for longer than five minutes?"

Worker: "No, it did not".

Mr Lindsay: "And it went on for up to 10 minutes?"

Worker: "No, it did not".

Mr Lindsay: "And there were further discussions about what Mr Kirkman regarded as a conflict?"

Worker: "No, he did not".

Mr Lindsay: "And at the end of the conversation, it concluded, the meeting concluded by Mr Kirkman saying to you, "You go and talk to Chris and come up with a plan for how to manage the conflict over the weekend and then run that past Dwayne McInnis?"

Worker: "No, he asked me to come up with a plan to mitigate the rumours affecting the Department, to do it with Chris and to send it through to Dwayne and he told me he was going on leave".

Mr Lindsay: "So, you agree that he asked you to come up with a plan with Chris and Dwayne McInnis, who were the line managers, your immediate line manager and your line manager's line manager, but I suggest to you that plan he asked you to come up with was for one to deal with the conflict of interest?"

Worker: "No, it was to mitigate the rumours that were affecting the Department and the text messages that I sent to Dwayne McGuinness said that immediately

after the meeting with Andrew, I sent Dwayne a text message saying, 'Andrew has asked me to mitigate the rumours affecting the Department and to put a proposal together', which is what I sent to Dwayne".

69. Mr Kirkman went on to give evidence both in chief and in cross-examination about what was discussed during the unrecorded part of the meeting. He did not now accept that during the recorded part of the meeting he had already made a decision when he repeatedly said to the Worker that he had made a decision to move her from her position working directly for Mr Grumelart. In examination in chief at transcript 22 February 2024 at page 169.6 referring to the recorded part of the meeting, Mr Kirkman gave the following evidence:

Mr Lindsay: "There were some points in the meeting, Mr Kirkman, where you said that you had made your decision. Had you made your decision?"

Mr Kirkman: "No".

Mr Lindsay: "Did your attitude towards the issue you are dealing with in the meeting change during the meeting at all?"

Mr Kirkman: "It did".

Mr Lindsay: "In what way?"

Mr Kirkman: "As I mentioned, I appreciated the fact I hadn't given Ms Rust the opportunity to be heard and put forward, I guess, strategies. I was reacting as opposed to, I guess, allowing sort of that opportunity for discussion".

70. In cross examination on 23 February 2024 Mr Kirkman was prepared to concede that the recording showed he had said a number of times that the Worker was going to be moved from her role, that he had made a decision, and that was his final decision. He sought to qualify this by saying that was his position "at that point" or "at that stage" and even "at that point in the conversation". He sought to characterise this at transcript 23 February 24 from page 203.8 to page 205.2 as "reacting", as follows:

Ms Clark: "Well, I suggest when you say to Ms Rust, "Absolutely not your role", you could not be clearer you had made a decision that you are moving her?"

Mr Kirkman: "In - in my mind, at that point in the conversation, perhaps I thought - you can absolutely take that as read. Clearly, there was a lot longer to take place in this conversation. That - that wasn't the end - the end of - the decision".

Ms Clark: "Yes, and we'll keep going with that?"

Mr Kirkman: "Yep".

Ms Clark: "She asked why, at 64. You say, at 67, "I am the" – you say at 65, "Because I'm saying so". And that is you are saying she's moving, I suggest?"

Mr Kirkman "Well, I guess I'm referring to it – what I have previously said is her – her role, yeah. Yep".

Ms Clark: "Yes, which is that absolutely, she cannot stay in her role?"

Mr Kirkman: "That's what I'm saying at that point, Yep".

Ms Clark: "And you go on at line 67 to say that you're the Chief Executive Officer for this Department, and then we hear a knocking sound and you say, "I'm saying so". Another knocking sound, "Your alternative is that you can go to OCPE and complain. I don't care. If you do that, you know what's going to happen – do you really know what's going to happen, the whole" – got another knocking sound – "shit show is going to be laid out". You're make it very clear that you are moving her and nothing she can do can change that, aren't you?"

Mr Kirkman: "At that point, yes".

Ms Clark: ""Then if we turn over the page to line 90 Ms Rust says to you, "Why are you getting angry with me?" You say at 91, "Because you come in here" – she says, at 92 "to talk to you" and you say, "To challenge my decision" you see that?"

Mr Kirkman: "Yes".

Ms Clark: "And that decision you're referring to, I suggest, is the decision to move Ms Rust?"

Mr Kirkman: "That's correct".

Ms Clark: "Then if we go to line 108, Ms Rust says to you, "But instead of just moving me – and I work so hard – can I just talk, please?" You say at line 109, "no, but look. You cannot stay there. That will be my final decision." I suggest in saying that, you're saying she cannot stay in her role and that will be your final decision?"

Mr Kirkman: "At that stage".

Ms Clark: "At 110 she says, "Can I keep my position maybe relocate where I sit?" You go on at line 111 to say, "if it's working with Chris, then absolutely not". Accept that?"

Mr Kirkman: "Yes".

Ms Clark: "And that's another example of you saying she absolutely must move from her role?"

Mr Kirkman: "At that point in the conversation, yes".

Ms Clark: "And at line 135 you say, "You're not working with Chris anymore". And again, that means moving her from her role?"

Mr Kirkman: "Yes".

Ms Clark: "Line 157 - over a couple of pages - you say - you have some talk about them having lunches. You say you can - just above that, you can see why Ms Rust's upset. And then you go on to say at line 157, "I understand and I made a decision". And that decision is the decision to move Ms Rust from her role to another role?"

Mr Kirkman: "That's correct".

Ms Clark: "You could not have been clearer, could you, throughout the aspects of the meetings that I have taken you to, could you?"

Mr Kirkman: "Throughout these aspects, yes".

Ms Clark: "And you couldn't be - you were saying that she absolutely cannot stay in her role?"

Mr Kirkman: "At this point in the conversation when I was, obviously, reacting and not thinking yes".

Ms Clark: "And you said it on the number of occasions?"

Mr Kirkman: "Yes".

Ms Clark: "And that's because that was a decision you had made, going into the meeting with Ms Rust?"

Mr Kirkman: "No".

Ms Clark: "And you were sticking to that decision?"

Mr Kirkman: "No, I hadn't made the decision before Ms Rust came into the office. I reacted, I guess, badly to the conversation and made the statements which, you know, didn't eventuate as being (inaudible)".

71. Subsequently, Mr Kirkman sought to say that during the unrecorded portion of the meeting he then made it clear to the Worker that he had not made a final decision on

whether she would be moved from her role. At transcript 23 February 2024 starting at page 224.9 and going through to page 225.3 Mr Kirkman said the following:

Ms Clark: "And at line 158, Ms Rust really sort of pulls you up on this; not having given her the opportunity to speak. She says, "You made a decision without speaking to me and giving me the opportunity to..." You cut her off at line 159, and say, "I made a decision without speaking to Chris".

Mr Kirkman: "Yes, I was reacting".

Ms Clark: "And you are very clear at that stage that you'd made a decision, and that no one was going to be able to have the opportunity to be heard about it?"

Mr Kirkman: "Yes, at that point".

Ms Clark: "I suggest that was the message you conveyed to her for the entirety of the meeting, including the unrecorded aspects of it?"

Mr Kirkman: "No, that's entirely incorrect, and Ms Rust's text to Mr McInnis confirming outcome of the meeting, which was I guess coming forward with a plan, confirms, in my view, that the meeting did come to a more satisfactory conclusion".

Ms Clark: "It's just not true is it? It didn't come to a satisfactory conclusion?"

Mr Kirkman: "In my view, it did".

72. In his examination in chief Mr Kirkman denied that he had already made his decision to move the Worker from her role working with Mr Grumelart by the time of the meeting. He said at transcript 22 February 2024 at pages 169.3 to 169.8 as follows:

Mr Lindsay: "Yes. So how did the meeting progress from that point?"

Mr Kirkman: "Well, I believe it continued probably for a similar length of time to the transcript, probably another 15 minutes. We discussed further whether there was an issue, whether there was a conflict. I did appreciate that I'd been a little bit, perhaps, less than professional in the first part of the conversation and I did need to give Ms Rust the opportunity to put her story forward, which I did. And we finished the meeting with agreeing that Ms Rust and Mr Grumelart could discuss, you know, some of the options and come up with a plan with the General Manager, Mr McInnis, the following week".

Mr Lindsay: "The options to encompass what? What licence did they have?"

Mr Kirkman: "I left that open at the end of the meeting. I sort of said it was up to them to come up with a plan to manage."

Mr Lindsay: "A plan to manage what?"

Mr Kirkman: "What I considered the conflict of interest".

Mr Lindsay: "And would you normally have been involved in negotiating the details for such a plan at this level?"

Mr Kirkman: "No".

Mr Lindsay: "There were some points in the meeting, Mr Kirkman, where you said that you had made your decision. Had you made your decision?"

Mr Kirkman: "No".

Mr Lindsay: "Did your attitude towards the issue you are dealing with in the meeting change during the meeting at all?"

Mr Kirkman: "It did".

Mr Lindsay: "In what way?"

Mr Kirkman: "As I mentioned, I appreciated the fact I had given Ms Rust the opportunity to be heard and put forward, I guess, strategies. I was reacting as opposed to, I guess, allowing sort of that opportunity for discussion."

73. There is one piece of contemporaneous physical evidence relevant to the question of what took place during the unrecorded portion of the meeting. This is a text message which the Worker sent to DIPL General Manager Dwayne McInnes at 5:37 PM on 30 July 2021, not long after the meeting. It appears in **Exhibit W4** in **Tender Document Bundle at page 75**. That message read as follows:

"Hi Dwayne

*Just had a conversation with Andrew, in regards to my friendship with Chris and have been given the opportunity to put up a proposal to **mitigate the continual rumours** (my emphasis) affecting the Department.*

I have worked extremely hard to establish the position I am in and I am an integral part of the team's success. I can't control what people say, it's disappointing and I have been dealing with this for years. However, I will work with you to ensure I can remain in my current position and remain where I sit as I get migraines hence the lights being turned off around me. My initial proposal is to remove Every One from work from my social media and not discuss my personal life in the work environment with anyone. I will have lunch in the lunchroom and not travel to the

*regions with Chris and I also will not have discussions with Chris in the workplace that are not related to my job. I am extremely disappointed and saddened by this as I have been a victim of bullying for years and have had little support from HR as they couldn't do anything about rumours. I have documented evidence of this if you would like to see. Apologies this is in text as I am embarrassed to send via email. Sorry to send on your afternoon off **but I'm extremely upset** (my emphasis).*

Maria".

74. I do not accept the evidence of Mr Andrew Kirkman that the unrecorded portion of the meeting went for as long as or longer than the recorded portion – he said perhaps for 15 minutes. The idea that the CEO of an NT government Department would have put off the Minister of his Department for a further 15 minutes after the Minister had called him during a meeting, to continue his discussion with an A06 clerk in his Department whom he had already told emphatically that he had made a final decision, is not inherently credible. I prefer the contrary evidence of the Worker that the unrecorded part of the meeting continued for no more than five minutes.
75. I find that the unrecorded part of the meeting on 30 July 2021 between Andrew Kirkman and the Worker continued for a period of no more than five minutes.
76. The Worker's evidence was that the meeting ended with an invitation from Mr Kirkman for her to put up a proposal to mitigate the rumours. This is qualitatively different from Mr Kirkman's evidence that the meeting ended with an invitation from him to the Worker to put up a plan to manage what Mr Kirkman described as a conflict of interest.
77. I do not accept Mr Kirkman's evidence on this point. The Worker's contrary evidence is corroborated by the text message she sent very shortly after the conclusion of the meeting to Mr Dwayne McInnes clearly identifying her understanding of Mr Kirkman's invitation at the meeting, namely to put up a proposal to mitigate the rumours.
78. I find that Andrew Kirkman did not issue an invitation to the Worker during the unrecorded portion of the meeting on 30 July 2021 to put up a proposal to manage any conflict of interest. I find rather that he issued an invitation to the Worker to put up a proposal to mitigate the rumours in the workplace.
79. The transcript *aide memoire* of the recorded part of the meeting is located at page 69 of the Tender Document Bundle of documents jointly tendered by the parties. That transcript shows that Andrew Kirkman, the CEO of DIPL, said on 14 occasions during the recorded part of the meeting with the Worker on 30 July 2021 words to the effect that he had made a decision to move her from her position so that she would no longer be working with Mr Christophe Gumelart. These 14 occasions can be found at numbered lines 41, 51, 53, 59, 65, 67, 71, 93, 109, 111, 135, 137, 157 and 158 of the transcript. He unequivocally stated at line 109 "No – but look your... you're... you

cannot stay there. That will be my final decision”.

80. I do not accept the evidence of Mr Andrew Kirkman that he made a complete about turn and changed his mind about this decision following the very brief telephone call from the Minister, and during the fortuitously unrecorded part of the meeting. Any such change of mind would have been utterly inconsistent with his repeatedly stated position as recorded and transcribed in the *aide memoire*. I prefer the evidence of the Worker as to what took place during the unrecorded portion of the meeting.
81. I find that Andrew Kirkman had made a decision on or before 30 July 2021 and in any event prior to his meeting that day with Mr Grumelart, to move the Worker away from her position working with Mr Grumelart. I find that Mr Kirkman informed Mr Grumelart of that decision at their meeting earlier on 30 July 2021. I find that Mr Grumelart then told the Worker of that decision on 30 July 2021 before her meeting later that day with Mr Kirkman. I find that Mr Kirkman confirmed that decision to the Worker during the recorded part of their meeting.
82. I find that Andrew Kirkman did not tell the Worker of any change of that decision in the unrecorded portion of the meeting following the phone call from the Minister on 30 July 2021.

THE LAY EVIDENCE

The Worker

83. I find that the Worker began working for the Northern Territory Public Service as an executive assistant in 2008. She began working for DIPL in 2010. Save for two periods of maternity leave she remained employed with the Employer until her employment was suspended in April 2022 and ultimately terminated in June 2022.
84. I further find that in January 2017 the Worker obtained the position of program manager for the Remote Housing Program at DIPL. This role was an A05 position however in May 2018 through internal Public Service processes the Worker's role was reclassified to A06.
85. The Worker gave evidence and was cross-examined about her mental health prior to the meeting on 30 July 2021. This largely stemmed from a number of documents submitted by the Worker when seeking to have the Employer's decision to dispute her Work Health claim reviewed. These documents deal with a history of bullying of the Worker allegedly not managed by the Employer over a period of 11 years – **Exhibit E35**. The Worker gave evidence that she had been contacted by somebody at Gallagher Bassett, the entity which manages the NT government's Work Health claims, and requested to provide further information, including any other examples of stressful issues she might have encountered in the workplace. The Worker said that she considered all such possibilities and submitted those in the hope that it would assist

her application to review the Employer's decision to dispute her claim.

86. I am not satisfied that these documents and the evidence concerning this history being revisited over the previous 11 years are of real assistance to the Court. I prefer the contemporaneously recorded evidence of the Worker's attendances on her treating GPs at the Palmerston Medical Centre which are set out from **page 308 in Exhibit W5**.
87. These records show that the Worker had consistently been a patient at the Palmerston Medical Centre from 10 September 2012, a period of eight years and nearly 8 months up to the meeting on 30 July 2021. They show that over this period the Worker had attended on GPs at the Palmerston Medical Centre on an average of nearly seven occasions each year. They show a total of only three occasions when the Worker attended and complained of symptoms which might have any relevance to her psychological health or to any form of mood disorder.
88. The Worker attended the Palmerston Medical Centre on 10 September 2012 complaining of sleeping difficulties and she was prescribed Stilnox. Her mood and performance at work were noted to be good. She next attended on 15 May 2013, at which time she was pregnant. It was recorded that she had had poor sleep, early morning waking and depressed mood. She was not prescribed any medication for this. The third occasion occurred on 16 July 2013 when the Worker attended again complaining of insomnia. She was still pregnant at this time. There is no record of her complaining of anxiety or any symptoms of altered mood on this occasion.
89. There is no record of the Worker's attending on her GPs and making any complaint about symptoms suggestive of any form of altered mood or psychological disorder after the attendance complaining of insomnia on 16 July 2013, eight years before the meeting on 30 July 2021.
90. An entry on 3 July 2020 by GP Dr Mahajan records the Worker had attended and was "*asking for Diazepam persistently*" which the doctor refused. The Worker's evidence in cross examination on this subject was that around this time she was experiencing shoulder pain associated with her breast implants – **transcript page 339**. The evidence was that she took diazepam only as a muscle relaxant and in this context. There was nothing else in the entry on 3 July 2020 in any way suggestive of symptoms of altered mood or difficulty in sleeping.
91. There is a reference to a prescription for diazepam on 3 December 2020. The purpose of that consultation appears to have been "*Lesion in left side just below the nose ? BCC*". There is nothing in the entry on that occasion in any way suggestive of symptoms of altered mood or difficulty in sleeping.
92. The GPs' records show an unbroken history of the Worker's consistently attending on her GPs at the Palmerston Medical Centre for various physical issues over the entire period from 10 September 2012 to 30 July 2021. They show only this foregoing very

limited history of any complaints of symptoms suggestive of any mood or psychological disorder.

93. I am satisfied on the balance of probabilities and I find that the Worker did not have any relevant recorded history of psychological disorder prior to the meeting on 30 July 2021.
94. The Worker gave evidence that she and Mr Christophe Grumelart, her immediate boss in the workplace, had over the three years prior to 30 July 2021 been close friends both at work and outside work. She gave evidence that this relationship had continued after 30 July 2021. She firmly denied that their relationship had ever been an intimate personal relationship in the sense of a romantic and/or sexual one.
95. The Worker gave evidence of what happened at the meeting on 30 July 2021 with Mr Andrew Kirkman. I have considered that evidence and set out my findings above.
96. The Worker gave evidence of the almost immediate impact of that meeting on her emotional state. She gave evidence of the persisting impact of that meeting on her emotional state through to the present time and continuing. She gave evidence of how that impact had affected her capacity to work at different times thereafter.
97. Counsel for the Employer has submitted that the Worker's evidence of the matters in the preceding paragraph should not be accepted at all, or alternatively should not be accepted in its entirety, because in his submission the Worker was dishonest and/or inconsistent and/or not forthcoming on a number of matters in her evidence, so as to affect her credibility overall. I proceed now to examine the Worker's evidence relevant to these submissions.
98. The Worker's case and her evidence is that she suffered the work injury on or shortly following 30 July 2021. This injury had the effect of causing her to be partially incapacitated for work on the Worker's pleaded case from 17 August 2021 to 21 December 2021. It had the effect of causing her to be totally incapacitated for work from 22 December 2021 to 8 March 2022. The Worker then attempted to return to work on a full-time basis from 9 March 2022 to 30 March 2022 but this was unsuccessful. The Worker's case and her evidence is that she was again totally incapacitated for work from 31 March 2022 to the present date and continuing.
99. I now consider evidence inconsistent with the Worker's case and/or impacting on her credibility.

CREDIBILITY EVIDENCE

i. Attendance at jujitsu

100. The Worker gave evidence about the impact of the injury on the frequency of her

attendances at jujitsu and she was cross-examined at length about this. The Worker further gave evidence on the reduced extent of her involvement in jujitsu classes and her involvement in administrative tasks at the jujitsu studio, on the occasions when she did attend. She was cross-examined at length about this.

101. The Worker may have exaggerated the post injury reduction in the frequency of her attendances at jujitsu, and the extent of her involvement in classes and in administrative tasks when she did attend. She was firmly tested on these issues in cross examination. However, there was no unequivocal evidence before me contrary to the thrust of the Worker's evidence on this subject. Her version was largely corroborated by the evidence of each of Mr Grumelart and of her husband. I do not conclude that the Worker lied or knowingly attempted to mislead the Court on these subjects.

ii. Loan to Christophe Grumelart

102. The evidence before the Court is that the Worker and her husband Mr John Ellsley loaned some large sums of money to Mr Christophe Grumelart. In cross examination it emerged that the Worker's and her husband's bank records showed transfers totalling \$80,000 from their account to Mr Grumelart's account – **Exhibit E 52**. The Worker's evidence on this significant subject arose only in cross-examination. It was not led in the Worker's evidence in chief.
103. The Worker gave evidence that Mr Grumelart was trying to finance the purchase of a house. He needed a temporary bridging loan while his family law proceedings with his former wife ran their course. The Worker and her husband re-mortgaged their house to raise these moneys. The Worker and her husband gave evidence that these monies were a loan and were repayable in due course.
104. The Worker on 6 December 2021 had signed a Form for the Lender Bankwest called a "Gifted Funds Declaration" in which she declared that the moneys provided to Mr Grumelart were a gift and were not repayable at any time in the future. In that Form the Worker had also declared that she was a sibling of Mr Grumelart - **Exhibit E 48**.
105. I am satisfied and I find that both these declarations were knowingly false.
106. In cross examination the Worker initially said she did not remember signing this document and then when pressed, she attempted to say that she had no good memory of the document or its import because of the impact on her at the relevant time of the symptoms of her psychological condition - ie the injury. At transcript 18 October 2023 at page 72 the following exchange appears:

"Mr Lindsay: Ms Rust, last week when we were here I also took you to the gift declaration that you had signed on 6 December 2021, and do you recall your explanation for not remembering that document was that you were unwell at that

time, that was the effect of your explanation?

Ms Rust: Yes.

Mr Lindsay: Yes. On 6 December 2021, Ms Rust, I suggest to you that - 6 December 2021, I suggest to you that you recorded 7.21 hours work that day for which you were paid?

Ms Rust: Hey, what?

Mr Lindsay: There's a schedule of your flextime that shows that - would you like to see that, or do you accept that if that's on the flextime, that's the hours you recorded?

Ms Rust: I think - if that's on my flex sheet, then that...

Mr Lindsay: (to the Court) Exhibit 12, if your honour is making a note".

107. **Exhibit E12** is the Schedule of the Worker's hours worked over this period. The entry for 6 December 2021 does in fact show that the Worker worked 7.21 hours that day.
108. I am satisfied on the evidence and I find that the Worker at the time she signed the Gifted Funds Declaration document on 6 December 2021 was working from home, but she was working full-time hours and she did record having worked 7.21 hours on 6 December 2021. Indeed, she recorded working no fewer than 7 hours on each of the 10 days in the fortnight which included 6 December 2021 - **Exhibit E12**. For this reason I do not accept the Worker's explanation that she was unwell on 6 December 2021 and that was why she had a very poor memory of events that day, when she gave evidence before the Court on 18 October 2023.
109. I am satisfied on the balance of probabilities and I find that the Worker was knowingly dishonest in her evidence that she did not remember signing the Gifted Funds Declaration document and that she had no true memory of its import. Further, I am satisfied and I find that the Worker was knowingly dishonest in her purported explanation for this, namely that she was unwell on and around 6 December 2021.

iii. Conflict of Interest Form

110. On 8 March 2022 the Worker completed a Northern Territory Government Form entitled "Disclosure of interests" - **Exhibit E 42**. On the first page of that form she identified Christophe Grumelart as her supervisor. On the second page under the heading "Description of matter for consideration" the Worker stated "*I socialise outside of work and have friendships with...*" and then she listed 12 names. Mr Grumelart's name was not one of these.

111. Also on page 2 of this Form the Worker responded to another heading “Discuss the actual, potential or perceived conflict of interests declared above with your manager and outline below the agreed action to be undertaken to manage or eliminate the conflict of interests”. She completed this part of the Form as follows: *“I am unaware of any potential or perceived conflict of interests, however, as I may be seen having lunching with these people and or socialising out of work hours staff may believe my friendships are a conflict and/or perceived in some way I wish to declare the friendships”*. The Worker went on page 3 of the Form to describe these potential conflicts of interest as “Perceived”.
112. The Worker did not identify anywhere in this form the private loan arrangement she and her husband had entered into with Mr Grumelart four months earlier, on 6 December 2021.
113. The issue of the Worker’s relationship with Mr Grumelart had been raised with her in the workplace on 30 July 2021 and by 8 March 2022 the Worker was very aware of rumours about Mr Grumelart and herself, and the allegation that her relationship with Mr Grumelart raised a conflict of interest in the workplace. I am satisfied on the balance of probabilities and I find that the Worker knowingly chose not to include this highly relevant evidence of conflict of interest in this Form, namely her loan to Mr Grumelart.

iv. Capacity for Work – Records and Correspondence

114. The Worker gave evidence of her partial and subsequently her total incapacity for work. She was cross-examined on this generally, and also on inconsistent contemporaneous documents.
115. The first relevant period was November 2021. By undated letter on or shortly after 12 November 2021 the Worker responded to a letter dated 12 November 2021 from Andrew Kirkman, the CEO of DIPL, on the subject of her Covid vaccination status – **Exhibit W4 page 90**. The Worker in summary submitted that she did not need to be vaccinated to work from home, and that she had been and was continuing to work from home to a high standard. Relevantly, the Worker said:

*“I respectfully disagree, as I have been working from home since 3 August 2021, and have demonstrated that whilst working from home, in my nominal position as Program Manager Capital Program Delivery, **that I have been performing all duties pertaining to my position including all other assigned duties to a high standard whilst meeting deadlines** (my emphasis)”*.

116. The second relevant period was December 2021. **Exhibit E 12** was the Worker’s record of hours worked each day. The entry for the fortnight 25/11/21 to 8/12/21 shows that the Worker worked 7.21 hours on 6 December 2021, the date she signed the Gifted Funds Declaration Form to declare the loan to Christophe Grumelart. This page

of that exhibit shows that in the same fortnight the Worker has recorded she worked all 10 days of the fortnight and the smallest number of hours worked was 7 hours on 26 November 2021.

117. The third relevant period was the Worker's return to the workplace from 9 March 2022 to 30 March 2022. **Exhibit W5 page 95** is a Letter of Support dated 28 March 2022 from the Worker's treating GP Dr Yaung. In that letter Dr Yaung says: "*This is the letter supporting that Mrs Maria Ellsley is currently under treatment for the medical reason. I would recommend her to work from home*". In my opinion Dr Yaung here was expressing the view that the Worker as at 28 March 2022 was fit to work but that it would be better for her to do so from home.
118. **Exhibit E 40** is an email trail. The first document is an email from the Worker to Mr Grumelart and to Mr McInnes on 28 March 2022 attaching the letter of support. The next document in this email trail is an email in response on 29 March 2022 at 11:08 AM from Mr McInnes to the Worker referring her to the Department's "*Home - Based Work Guidelines (Attachment A)*". The email goes on to advise the Worker of the steps she would need to take to comply with those Guidelines and recommends that she make her application pursuant to them.
119. The next document in this email trail is an email from the Worker to Mr McInnes on 29 March 2022 at 11:43 AM advising that her Industrial Relations representative Mr Lucio Matarazzo would be meeting with Andrew Kirkman and the work from home issue would be included for discussion at that meeting.
120. The Worker then wrote to Mr McInnes by email on 29 March 2022 at 1:11 PM seeking permission to work from home until Mr Matarazzo and Mr Kirkman could organise their meeting. The Worker stated: "*I have worked from home for an extended period recently and also previously successfully, at no detriment to the division and or my work (my emphasis). Evidence of this can be provided*".
121. Mr McInnes responded by email at 2:48 pm to the effect that the Worker must apply to work from home through the identified process and until that application might be approved she was expected to attend in the workplace.
122. The Worker responded by email on 29 March 2022 at 3:50 PM as follows:

"Hi Dwayne

The Dr provided a letter of support, as I was not comfortable sending you another medical certificate as you breached privacy by forwarding it onto other staff previously.

I will submit sick leave from tomorrow as per my Dr recommendation, as I am not to work within the office".

123. Dr Yaung provided a medical certificate dated 30 March 2022 - **Exhibit W 5 page 358** - in the following terms:

"THIS IS TO CERTIFY THAT

Mrs Maria Ellsley

IS RECEIVING MEDICAL TREATMENT AND FOR THE PERIOD

Wednesday, 30 March 2022 to Wednesday, 13 April 2022 INCLUSIVE

She will be UNFIT TO CONTINUE her USUAL OCCUPATION

This Certificate was completed on 30 /3/2022".

124. Dr Yaung next submitted a medical certificate dated 22 April 2022 certifying the Worker unfit to continue her usual occupation from Friday 22 April 2022 to Friday, 6 May 2022 inclusive. This was the last medical certificate tendered in evidence before the Court in this proceeding.

125. The Worker set out in her email on 28 March 2022 that she should be allowed again to work from home from that date because she had previously done so "*at no detriment to the division and or my work*". The Worker gave different evidence before the Court on 5 June 2023 at **transcript page 97.2** concerning her fitness for work in late March 2022 as follows:

"Ms Clark: In that three-week period when you returned to the office, can you give his Honour some examples of an average day and how that looked in terms of what sort of work you were performing?"

Ms Rust: I honestly don't think I did any work, like tried to catch up maybe a few emails, trying to figure out where outstanding invoices were".

126. The Worker continued with her evidence in chief at **page 97.4**:

"Ms Clark: And how effective were you with your attempts to get - putting aside the high workload, in terms of your ability to function?"

Ms Rust: I didn't have the motivation to do it and I couldn't function. I was just there, physically there. My brain wasn't there".

127. This evidence conflicts somewhat with the claim in the Worker's email of 29 March 2022 above that at that time she would be able to work from home "*to a high standard*

whilst meeting deadlines". It conflicts with the evidence of the Worker's then supervisor Mr Dwayne McInnes. Mr McInnes gave evidence at **transcript 26 February 24 starting at page 476.8** about the Worker's return to work in late March 2022. He said that he received work product from the Worker and that he made no negative observations about its quality or timeliness. He said he did not at that time receive any complaints from anybody about the Worker's capacity to perform her work.

128. I am satisfied on the balance of probabilities and I find that in each of early November and early December 2021 the Worker put herself forward as being able to perform her work duties while she was working from home.
129. I further find that in late March 2022 the Worker put herself forward as being able to perform her work duties if she would be permitted to work from home.

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130. In the course of these proceedings the Worker through her legal representatives prepared, filed and served three sets of Lists of Documents, by way of discovery of documents in her possession or control relevant to any question in the proceedings. The third and most recent of these was her Further Amended List of Documents filed 11 May 2023. This was filed pursuant to directions made by me in the course of the management of this matter prior to the commencement of the hearing on 5 June 2023.
131. The Worker did not discover any documents in any of these three Lists of Documents relevant to her earnings other than as a public servant, and I so find.
132. The Employer had formed the view that the Worker had failed to discover documents relevant to her income and business activities, at least for the period from the commencement of the claimed partial incapacity from 17 August 2021 to date. The Employer made an interlocutory application which was heard before me on 31 May 2023. On that date I ordered that the Worker was to give discovery of documents going to her earnings for the period 17 August 2021 to date, and she was to do so by close of business on 1 June 2023.
133. The Worker then did produce her tax return for financial year 2021/2022. That document revealed that the Worker had earned income through a cleaning business. In cross examination on **9 June 2023 at transcript page 432.9** the Worker denied having any documents relevant to her income and expenses for that cleaning business. When it was put to her that she must have had documents, the following exchange took place:

"Mr Lindsay: Where are the documents that support this income and your expenses and trust?"

Ms Rust: I don't have a document for this.

Mr Lindsay: Well, that's not true, you've kept records of your cleaning business from which you're able to calculate the costs of sales, your depreciation and your other expenses, for example...?

Ms Rust: I don't have any documents.

Mr Lindsay: That's just not true Ms Rust is it?

Ms Rust: That is true, yes.

Mr Lindsay: How do you run your business without any documents?

Ms Rust: I didn't. **That's why it the business stopped operating, because I didn't have the capacity to do anything for it** (my emphasis).

Mr Lindsay: you were in court, Ms Rust, when the order was made that you produce documents evidencing that income that you earned outside of...?

Ms Rust: Yep.

Mr Lindsay: I suggest to you that there are documents and that you are (not) producing them because they demonstrate that you have been carrying out a cleaning business?

Ms Rust: That's not correct, no.

Mr Lindsay: Are you telling the court that there is not a single document that supports these entries in the tax records?

Ms Rust: That's correct.

Mr Lindsay: Did you make it up? Did you make up the precise number of \$20,106 f income, for example?

Ms Rust: I would have - what would I have done, looked at my banking. I don't have the records of this and I only just - I have declared everything I've given you is everything that I have".

Mr Lindsay: What are the sales?

Ms Rust: What are the sales?

Mr Lindsay: Cost of sales, you claim the precise figure of \$11,554. What are they?

Ms Rust: Is that like...

Mr Lindsay: It's your document, Ms Rust, you tell me what they are?

Ms Rust: I'm just looking. That would be like subcontractors that were paid.

Mr Lindsay: it's your document, Ms Rust, what is it?

Ms Rust: Subcontractors, that would have been subcontractors may be that was paid. I don't...

Mr Lindsay: So people what, people submitted documents to you and you paid them?

Ms Rust: I don't know what that is. I don't recall, sorry. This is just...

Mr Lindsay: Ms Rust, you're in breach of the court order to produce documents that support that income that you earned, I suggest to you?

Ms Rust: I have given youse all my income stuff. I don't have anything else.

Mr Lindsay: you have no supplied documents this Court".

His Honour: I propose to adjourn this matter until 2 o'clock. And Ms Clark, I invite you to discuss this issue and this issue only with your client.

Ms Clark: Yes your honour.

His Honour: And the court will expect and have a better understanding of the situation, and will resume at two.

Ms Clark: Certainly, your Honour".

134. At 2 PM that day, 9 June 2023, Mr Lindsay SC for the Employer advised the Court that the Worker through her legal representatives had provided some documents over the lunch break relevant to her tax return and earnings in financial year 2021/2022 and that more were expected to be provided shortly. These document were ultimately tendered before the Court as **Exhibits E 43, E 44, E 45 E 46 and E 47.**
135. These documents evidence that the Worker conducted a cleaning business under the trading name Maria Ellsley in financial year 2021/2022. These documents evidence 41 separate payments made to persons identified by the Worker in the course of her ongoing cross examination as subcontractors over this financial year, the first having been made on 6 August 2021 and the last on 7 July 2022 - **Exhibit E 44.** These documents evidence a gross income through this business of \$20,106, with a "cost of

sales” - namely payments to subcontractors - totalling \$11,545, and a motor vehicle depreciation claim for \$15,000 - **Exhibit E 43**. These documents evidence that the Worker purchased the motor vehicle for which she claimed the depreciation sum of \$15,000 only on 28 June 2022 – letter by Joshua David Robinson, seller, to whom it may concern which is part of the bundle in **Exhibit E 46**. The Worker’s tax return for financial year 2021/22 therefore showed that the Worker had no income left from this business after deducting expenses and depreciation from gross earnings.

136. There are two important issues arising from these documents and the way they came to be before the Court. These are first, what this history tells us about the Worker’s willingness to withhold relevant evidence from the Court and second, what these documents tell us about the Worker’s capacity to work in financial year 2021/2022.
137. I am satisfied on the balance of probabilities and I find that the Worker knowingly at all times did not include the records of her cleaning business during financial year 2021/2022 in the process of discovery. I am satisfied and I find that she knowingly withheld these documents until she was forced to disclose them during the course of the hearing. I am satisfied and I find that the Worker was not mistaken but rather that she was knowingly dishonest in her answers before the Court about the existence of such documents. I find that she did this so as not to undermine her claim that she was totally incapacitated for work, at least over the balance of the financial year from 22 December 2021.
138. For these foregoing reasons I do not accept any of the Worker’s explanations after the documents were produced in which she sought to clarify and downplay her role in the cleaning business.

CHRISTOPHE GRUMELART

139. Christophe Grumelart was the Worker’s direct boss and manager in the workplace. He gave evidence that he held the Worker in the highest regard in terms of her work performance, and her presentation and personality. I accept and reproduce some of the Worker’s Submissions dated 20 March 2024 as accurately summarising Mr Grumelart’s evidence in this regard concerning the Worker prior to the meeting on 30 July 2021.

“Mr Grumelart gave evidence that prior to the meeting on 30 July 2021, the Worker would coordinate a lot of functions for their work team. He described her as being “the glue” to their team at work and at the jujitsu club. He described her as being very friendly with everybody at jujitsu and being one of the bubbliest, most involved socially people that he knew. He described her as always been well presented, with her hair done well, always dressed well and wearing make up, and in professional attire” - Submissions paragraph 37.

140. Mr Grumelart described Ms Rust, prior to the meeting, as being an “*amazing competitor*” in jujitsu competitions, training hard at the jujitsu studio and always being involved in the planning of social functions - **Submissions paragraph 38.**
141. In terms of her work performance prior to the meeting, Mr Grumelart’s evidence was:
- “... Maria is actually to date still the best person, worker I’ve had working for me... We were dealing with a very difficult client; very toxic client and she was across information like no one else I’d ever met. Her ability to retain detail is far above anyone else in my team at the time, and I’ve worked with previously. It didn’t take me long to realise that if she checks something, it was probably going to be of a higher calibre than if I checked it... She would – the level of detail she could remember was phenomenal. So yeah, she was – and I was clear with executive about how fundamental her role was to the team. She was critical in us being able to deliver accurate reporting to the client about where the program was at... I still to this day can’t believe the amount of work she could get done in a week..” - Submissions paragraph 39.*
142. There was no evidence before the Court contrary to Mr Grumelart’s foregoing assessments of the Worker’s pre-meeting work performance, presentation and personality, and I accept this evidence and find in accordance with it.
143. Mr Grumelart gave evidence that after the meeting on 30 July 2021 the Worker’s personality changed for the worse. She had become reluctant to leave the house. When she did leave the house she would only do so when accompanied by one or more family or close friends. Her attention to her personal grooming deteriorated. These changes had persisted to the present time.
144. Mr Grumelart gave evidence that he and the Worker were close friends, both within the workplace and outside the workplace. Mr Grumelart firmly denied that the relationship between the Worker and him was an intimate personal relationship in any romantic and/or sexual sense.

JOHN ELLESLEY

145. John Ellsley is the Worker’s husband. He gave evidence as to the Worker’s personality, presentation and commitment to her employment prior to the meeting on 30 July 2021. I accept and reproduce some of the Worker’s Submissions dated 20 March 2024 as accurately summarising Mr Ellsley’s evidence in this regard over the period prior to 30 July 2021:

“Mr Ellsley described the Worker as being a “very happy, bubbly person” and “very social” prior to the meeting. He described the worker as always having people over and doing and organising social events, doing stuff with their children frequently, taking the children places and taking a lot of pride in her appearance. He described

that she loved her job and that she would be in at work early and home late. He described her as being “one of the easiest people to talk to” and as someone who is happy and friendly when interacting with other people, and who was a big hugger - Submissions paragraph 35.

“While he frankly acknowledged that, as everyone does, the Worker would have bad days prior to the meeting, it was Mr Ellsley’s evidence that the Worker was “never a stressed person or having a hard time or anything like that”. He described being “jealous of how well she slept” prior to the meeting. He described that she absolutely loved jujitsu and would attend every class she could, which was on average approximately 3 to 5 times per week. She would attend the studio frequently with the children and was very energetic and happy with them – Submissions paragraph 36.

146. There was no evidence before the Court contrary to Mr Ellsley’s foregoing assessments of the Worker’s pre-meeting personality, presentation and commitment to her employment, and I accept this evidence and find in accordance with it.
147. Mr Ellsley went on to give evidence that after 30 July 2021 the Worker’s personality and engagement in life changed for the worse. He described the Worker’s reluctance to leave the house at all. He described her as being willing to leave the house only in the company of another person or persons. He described how he and his good friend Mr Grumelart would have to encourage and cajole the Worker to leave the house to attend jujitsu classes with them.
148. Mr Ellsley confidently dismissed the suggestion that the Worker and Mr Grumelart were in any intimate personal relationship. He gave evidence that he had become aware through the Worker’s work colleagues whom he was also friendly with of rumours of an affair between the Worker and Mr Grumelart. He gave the following evidence at: at **transcript 19 February 2024 at page 40.10:**

“Ms Clark: What was the nature of what you’d heard?”

Mr Ellsley: That they were having an affair or something. Along of that lines.

Ms Clark: Did you have any concerns about that?

Mr Ellsley: No. I’d made jokes that it was probably more likely that me and Chris were going to have an affair than her and Chris. We were closer at the time.

Ms Clark: When you say you didn’t have any concerns, can you explain to his Honour why it is that you didn’t have any concerns?

Mr Ellsley: I didn’t find any concerns there. Like, Chris was my friend. He spoke with my wife. He worked with my wife. There was no indication that I had anything

to worry about”.

149. Mr Ellsley also gave evidence concerning his wife’s cleaning business. He said that he had taken over some of the work of issuing invoices and making payments to subcontractors because his wife no longer had the energy or interest to attend to these matters. I note that the Worker had been intensively cross-examined on these matters and that her credit had been significantly undermined by the introduction of the evidence of her cleaning business. It is probable that the Worker discussed her cross-examination experience with her husband before he gave his evidence. In light of this, the subsequent evidence of Mr Ellsley that he had in fact taken over some of the duties of the cleaning business because of the Worker’s incapacity, was not persuasive.

DWAYNE MCINNES

150. Dwayne McInnes is the General Manager of the Housing Program Office at DIPL. In that role he was senior to both Mr Grumelart and to the Worker at DIPL.
151. Mr McInnes became aware in July 2021 of complaints and rumours concerning the apparent relationship between Mr Grumelart and the Worker. I set out that evidence in more detail in my conclusions concerning the relationship later in these Reasons.
152. Mr McInnes received a phone call from the CEO Andrew Kirkman in the late afternoon of 30 July 2021 concerning his meeting with the Worker shortly before that phone call. Mr McInnes recalled Mr Kirkman told him *“that he had talked about moving Maria but he left it to Maria to come up with a proposal from – with Chris to present to me to manage the conflict moving forward”*. Ms McInnes said that he received a text from the Worker *“which was pretty much verbatim what Andrew conveyed to me”* - **transcript 26 February 24 page 462.1**.
153. A great deal of the evidence elicited from Mr McInnes in chief related to the existence of any conflict of interest in the workplace arising from the actual or perceived relationship between the Worker and Christophe Grumelart. I deal with that further later in these Reasons when I consider the operation of subsection 3A(2) of the Act.
154. Mr McInnes gave evidence at **transcript 26 February 24 at page 502.10 and over the page to 503.2** that he had directly asked Mr Grumelart whether he was having a relationship with the Worker and Mr Grumelart told him *“There was no substance to the rumours”*.

DERRICK QUANG

155. Mr Derrick Quang was called by the Employer in the Employer’s case. He had been a Project Manager in the Remote Housing Program of an NT government Department in the relevant period 2018 to 2021. Mr Quang gave evidence on two subjects. The

first and main subject was his observations of interactions in the workplace between the Worker and her immediate supervisor Mr Christophe Grumelart. The second subject was Mr Quang's observations of the Worker's post injury mood and demeanour on one specific occasion, namely an office Christmas excursion in late 2021.

156. Mr Quang gave evidence that while he had almost no direct dealings with either the Worker or with Mr Grumelart at the workplace, he did work in the same office areas as they did in two different buildings over the period 2018 to 2021. He gave evidence that he was aware that the Worker had her desk directly outside Mr Grumelart's office. He gave evidence that he observed them eat lunch together in Mr Grumelart's office, sometimes with the door shut, "*Probably on average three to - yeah, three - three to four times a week, maybe. Sometimes maybe more, sometimes maybe less*" - transcript 23 February 2024 at page 255.2.
157. Mr Quang also gave evidence that he observed the Worker and Mr Grumelart arrive at work together "*Again, maybe three to four times a week*" - same transcript page 255.3.
158. Mr Quang was directly asked in examination in chief whether he was aware of rumours in the workplace about the relationship between the Worker and Mr Grumelart. At transcript 23 February 2024 at page 255.4 to 255.6 the following exchange took place:

"Mr Lindsay: Were you aware of rumours about a relationship between Ms Rust and Mr Grumelart?"

Mr Quang: No, not sort of rumours about. Some people might have been asking the question, but - yeah.

Mr Lindsay: What sort of question?"

Mr Quang: Yeah, whether they - whether there was a relationship or not and I'm going, "Well".

Mr Lindsay: Did you involve yourself in that?"

Mr Quang: No, no.

Mr Lindsay: How - how many times did you hear that kind of discussion?"

Mr Quang: Over the whole period of the time?"

Mr Lindsay: Yes?"

Mr Quang: Half a dozen. 10 times, maybe.

Mr Lindsay: Did you form any impressions yourself about the relationship between Mr Grumelart and Ms Rust?

Mr Quang: I suppose when we moved to Energy House, seeing that the interactions, you know, having lunch together, arriving, leaving together. In public together. Sort of made an assumption that they may be in a relationship there, but none of my business”.

159. At transcript 23 February 2024 from pages 255.7 to 258.9 Mr Quang gave evidence of the only interaction he could recall he ever had directly with the Worker in the workplace. This was an occasion when the Worker had refused a request Mr Quang had made for equipment and Mr Quang was of the opinion that the Worker had not even passed his request on to her superior Mr Grumelart. Mr Quang believe the Worker had exceeded her authority in that regard. It was plain from that examination in chief that Mr Quang had resented the Worker's behaviour in that interaction, and I so find.
160. On the second subject, Mr Quang gave evidence that he and other fellow work colleagues of the Worker and of Mr Grumelart had attended a Christmas party function in late 2021 at the Discovery Nightclub in the Darwin CBD. The Worker was there and Mr Grumelart also joined the party. From transcript 23 February 2024 at page 259.8 to 260.7 Mr Quang described some observations of the Worker and Mr Grumelart. He describes the worker as: *“She was in a good mood, she was happy, enjoying herself”*. He did not see the worker crying at any stage.
161. Mr Quang went on to describe how the party had left the Discovery Nightclub and walked to the Mayberry Nightclub. During that walk he had observed the Worker put her arms around Mr Grumelart shoulder. She seemed to be happy.
162. Mr Quang gave evidence that at the Mayberry Nightclub he saw the Worker dancing on a silver dance pole on the podium.
163. In cross examination Mr Quang agreed that his work duties at all relevant times required him to be away from the workplace around 50% of the time – transcript 23 February 2024 page 263.3. Plainly this means that his observations of interactions between the Worker and Mr Grumelart were limited to occasions over only 50% of the approximately three year period he and they worked in the same workplaces.
164. Mr Quang agreed at transcript page 263.7 that his workstation was *“probably 20, 30 metres away”* from the Worker's workstation in the workplace.
165. Mr Quang agreed at transcript page 263.10 that he did not have frequent interactions with Mr Grumelart in the workplace.
166. Mr Quang agreed at transcript page 264.1 that he did not have frequent interactions

with the Worker either before or after July 2021 in the workplace.

167. Mr Quang agreed in cross examination at transcript page 264.3 that he had no particular reason to pay attention to what the Worker and Mr Grumelart were doing on a day-to-day basis in the workplace.
168. At transcript 23 February 24 at page 264.3 to 264.5 the following exchange took place in cross examination:

“Ms Clark: You had no particular reason to pay attention to what they were doing on a day-to-day basis?”

Mr Quang: No.

Ms Clark: Sorry, you agree with me that you had no particular – I just want to make sure we’re not at cross purposes. Do you agree that you didn’t have any particular reason to pay attention to what they were doing on a day-to-day basis in the office?”

Mr Quang: No, I didn’t.

Ms Clark: I suggest that you are being asked about matters that happen some three years ago, or 2 ½ years ago by the time you asked for your recollection. I suggest you don’t have a clear recollection of Ms Rust’s interactions with Mr Grumelart in the period of 2020 and 2021?”

Mr Quang: What I said and what I saw, I have good recollection of it.

Ms Clark: But you didn’t see much at all, did you?”

Mr Quang: Personal opinion”.

169. I am not satisfied by Mr Quang’s evidence of his recollections of the interactions between the Worker and Mr Grumelart in the workplace over the period 2018 to 2021. On the entirety of his evidence there was no reason to him to have taken particular notice of the Worker or of Mr Grumelart or of their interpersonal dealings. He had no frequent interactions with either of them in the workplace. He was absent from the workplace 50% of the time. He was seated 20 to 30 metres away from them in the workplace. I am not persuaded that Mr Quang would remember such fine detail as the frequency of the Worker’s and Mr Grumelart’s taking lunch together or arriving at work together over this nearly 3 year period when asked about it 12 to 18 months after the conclusion of that period.
170. I am satisfied the evidence of Mr Derrick Quang on the question of the nature of the relationship between the Worker and Mr Grumelart in the workplace at any relevant time is unreliable and I find that it is of no assistance to the Court.

NAOMI BERGAMIN

171. Naomi Bergamin was called by the Employer and gave evidence in the Employer's case on 26 and 27 February 2024. She gave evidence at page 554.4 of the transcript on 26 February 2024 that she was employed as an office coordinator and claims administrator for Gallagher Bassett.
172. Ms Bergamin gave evidence that Gallagher Bassett is the claims manager for the Employer for some Work Health claims, including the claim by the Worker Ms Rust. Ms Bergamin said that she personally had nothing to do with the management of Ms Rust's claim – transcript 26 February 2024 at page 554.6. Ms Bergamin gave evidence that she first heard the Worker's name in her employment with Gallagher Bassett in about June or July 2022.
173. Ms Bergamin's evidence was that she came into contact with the Worker because Ms Bergamin's four year old son Beau attended jujitsu lessons from May 2024 at Mr Grumelart's jujitsu studio. Ms Bergamin gave evidence that she came into contact with the Worker through her son's jujitsu classes.
174. Ms Bergamin gave evidence that she attended with her son for his jujitsu lessons on Saturday mornings at 8:30 AM for half an hour. She gave evidence that the instructors were the Worker and Mr Grumelart. She said that Beau attended these lessons for a term. Ms Bergamin gave evidence that a term was 10 weeks and that she had attended with her son at these lessons for eight of these 10 weeks – transcript page 556.4.
175. Ms Bergamin gave evidence that the Worker and Mr Grumelart would work as a team running the children through exercises and teaching them different jujitsu moves. She said she thought from her observation of their interactions that they were husband and wife running the class, or partners running the class – transcript page 555.8.
176. Ms Bergamin said that after the first term her son moved up to classes for the older children which were held in the evening. She said she attended those classes with him, starting about 10 weeks after April 2022. She said that the Worker was not Beau's class instructor but that she was present and worked administratively at the jujitsu studio. Ms Bergamin said that the Worker did sizing for her son's uniforms and took payments behind the counter and appeared to be organising the class.
177. Ms Bergamin recalled that she would see the Worker arriving at the jujitsu studio. She said the Worker would arrive with Mr Grumelart and with her children on a Tuesday and a Thursday evening.
178. Ms Bergamin said that her involvement with the jujitsu studio came to an end at the end of the first term in about April 2023. Ms Bergamin said that she would attend the majority of the classes on Tuesday and Thursday nights, that occasionally her husband

would take her son to these classes, and that if her son had been unwell they did not attend.

179. Ms Bergamin's evidence was that the Worker was in attendance for the majority of the times when Ms Bergamin and her son attended classes up until the end of 2022, but that she was there less frequently in 2023 in the first term ending in April that year.

180. In cross examination Ms Bergamin accepted that she had in fact attended Saturday morning jujitsu classes with her son Beau on only about five occasions – transcript 26 February 2024 at page 562.1. She agreed from page 562.8 that she was not then aware of the Worker's role in a Work Health matter being managed by Gallagher Bassett and that she therefore had no particular reason to pay attention to the Worker when her son was attending Saturday morning classes and that she saw the Worker interacting with those classes on no more than *"a couple of occasions, assisting in those classes"*.

181. At transcript 26 February 24 at page 565.7 the following exchange took place:

"Ms Clark: You were reporting back at this stage I suggest to Gallagher Bassett about observations you have made of Ms Rust?"

Ms Bergamin: Yes".

182. There was then an exchange between counsel and myself, and the cross examination continued after that on the same subject at transcript page 566.6 as follows:

"Ms Clark: And after you reported – so, did you report this interaction that you had had with uniforms, all Ms Rust assisting with uniforms back to Gallagher Bassett?"

Ms Bergamin: Yes.

Ms Clark: Who did you report to?"

Ms Bergamin: It was never a specific report.

His Honour: I am sorry, that wasn't the question?"

Ms Bergamin: Yes, I know, sorry. I would have told Amanda the manager of liability.

Ms Clark: When did you tell Amanda?"

Ms Bergamin: I can't say. It depends on when I purchased the uniform. I would have to find out.

Ms Clark: Did you make any notes of your discussion with Amanda?

Ms Bergamin: No.

Ms Clark: did you observe Amanda making any notes?

Ms Bergamin: No.

Ms Clark: Did you send any emails to Amanda about this issue?

Ms Bergamin: No.

Ms Clark: What about other observations? What else were you reporting back to Gallagher Bassett in 2022?

Ms Bergamin: Just if Ms Rust had attended the classes.

Ms Clark: How frequently were you reporting back to – back?

Ms Bergamin: It would be next day. I would mention that she had or hadn't attended.

Ms Clark: And so, so I make sure I understand this. You would attend a class, and then each – well, you would attend a class with Beau and then each time you would – the next day you would be reporting back to Amanda or one of your other managers at Gallagher Bassett the observations that you had made?

Ms Bergamin: Yes.

Ms Clark: And did you ever make any notes about what you were reporting back?

Ms Bergamin: No.

Ms Clark: Did you ever report it back in via email?

Ms Bergamin: No.

Ms Clark: were you ever aware of any – Amanda or anyone else taking notes at the time you were there?

Ms Bergamin: No”.

183. Counsel for the Worker then sought to adjourn the cross examination overnight and to have discussions with counsel for the Employer about the possible existence of any discoverable records in the light of this foregoing evidence of Ms Bergamin.

184. On the basis of the exchange reproduced in paragraph 12 above it is clear that the witness Ms Bergamin's evidence was that she regularly reported back to a person or persons at Gallagher Bassett the day after she attended a jujitsu class with her son Beau concerning observations she had made of the Worker at the jujitsu class. It is clear that the witness Ms Bergamin was not limiting her evidence to one or two occasions or to her purchase of a jujitsu uniform for her son from the Worker.
185. The next day on 27 February 2024 the Court was informed that no documents existed of any reports by Ms Bergamin to her employer Gallagher Bassett of the sort suggested by her evidence the previous day. Cross examination of Ms Bergamin then resumed.
186. In her resumed cross examination Ms Bergamin now sought to change the evidence she had given the previous day about reporting her observations of the Worker at the jujitsu studio back to her employer Gallagher Bassett. From transcript page 581.1, the following exchange took place:

Ms Clark: Ms Bergamin, where we left it yesterday as I understood your evidence is that each time you attend jujitsu with Beau you would then report back to your manager at work about the observations you have made of Ms Rust?

Ms Bergamin: To correct myself, no, not every time.

Ms Clark: For the majority of times, that is what you were doing?

Ms Bergamin: I don't even know if it was the majority of the time. But I certainly did report back, yes.

Ms Clark: And you did that frequently?

Ms Bergamin: Initially, yes.

Ms Clark: Well, I suggest you wouldn't have said yesterday that, "You were reporting back on every occasion", if that wasn't the case?

Ms Bergamin: No, and I need to correct myself on that.

Ms Clark: No, it is only because you have been challenged and criticised that you have changed your evidence today?

Ms Bergamin: No.

Ms Clark: Now, in terms of this reporting back, did someone ask you to report back about the observations you had made of Ms Rust? The jujitsu studio?

Ms Bergamin: No.

Ms Clark: How did it come about that you started reporting back?

Ms Bergamin: It was entirely conversational.

Ms Clark: So that was something you did off your own volition?

Ms Bergamin: Yes.

Ms Clark: And it was encouraged?

Ms Bergamin: No.

Ms Clark: Well, where you told not to do it?

Ms Bergamin: No.

Ms Clark: Were you asked for further details when you're providing the information?

Ms Bergamin: No.

Ms Clark: So, you say it is something entirely of your own volition that every now and then you would just pass it back to your manager and it would go no further?

Ms Bergamin: Yes.

187. From transcript on 27 February 2024 from page 581.7 to the end of page 584 Ms Bergamin was cross-examined about conversations and work interactions she had at Gallagher Bassett from about late 2022 concerning the Worker, the Worker's presentation and demeanour in the witness box, and Ms Bergamin's recollection of these matters. Ms Bergamin admitted that she had had conversations touching on these subjects with her fellow employees at Gallagher Bassett but she denied being able to remember any details of any such conversations. When pressed, Ms Bergamin admitted that she was aware of conversations in Gallagher Bassett's office about the Worker's giving of evidence in this proceeding. Ms Bergamin consistently denied any memory of any specifics about internal Gallagher Bassett discussions at which Ms Bergamin was present concerning the Worker Ms Rust.
188. Ms Bergamin was shown the record of her son's attendances at the jujitsu classes between July 2022 and April 2023, and this document was received as **Exhibit W103**.
189. Ms Bergamin's evidence was that she thought her son Beau had attended at Saturday morning jujitsu classes approximately five times until his fifth birthday on 17 July 2024.

After that he had attended the classes held twice each week in the evening for the slightly older children until he ceased his attendances after 7 April 2023. Exhibit W 103 shows that Beau attended the Saturday morning classes on six occasions. Ms Bergamin's evidence at transcript 27 February 2024 at page 588.5 was her husband rather than she had taken Beau to the Saturday morning class "*maybe a couple of times, maybe*".

190. From this I conclude that Ms Bergamin probably took her son Beau to Saturday morning jujitsu classes on four occasions between 15 May 2022 and 17 July 2022, 21 months before she gave her evidence before the Court in February 2024. It is unlikely that she would have a clear memory of her interactions with the Worker and/or of the Worker's interactions with Mr Grumelart during this period based on this limited contact.
191. At transcript 27 February 24 at page 586.3 counsel for the Worker suggested to Ms Bergamin that exhibit W 103 showed that her son Beau attended the evening jujitsu classes on average less than once a week. Ms Bergamin said that the dates in Exhibit W 103 appeared to her to show a consistent twice-weekly attendance.
192. Exhibit W 103 shows that Beau attended the evening jujitsu classes on 42 occasions, the first being on 20 July 2024 and the last being on 7 April 2023. That record shows that there were no attendances between 16 December 2024 and 1 February 2023. On the assumption that there were no jujitsu classes over this approximately six week period to allow for a Christmas and New Year break, this is an overall period of approximately 31 weeks, excluding the break. 42 attendances in 31 weeks is an average of 1.36 attendances in each week.
193. The point of this cross examination was an attempt to demonstrate that Ms Bergamin had a fairly limited opportunity to observe the Worker at jujitsu classes after mid July 2022, and that her observations and evidence after that time were coloured by Ms Bergamin's role in observing the Worker and reporting on her to Gallagher Bassett.
194. I am satisfied and I find that Ms Naomi Bergamin as a witness was firmly in the camp of Gallagher Bassett on behalf of the Employer. I am satisfied and I find she was not a witness of truth in her evidence on 27 February 2024 when she attempted to go back on her evidence before the Court on 26 February 2024, which was that she had been actively reporting to her employer Gallagher Bassett on her observations of the Worker at the jujitsu studio from about July 2022. I am satisfied on the balance of probabilities and I find that the evidence given by Ms Bergamin the previous day on 26 February 2024 on her active and ongoing reporting role was the true position.
195. Because I have found that Ms Bergamin was untruthful in her evidence before me on 27 February 2024 that she had not been actively reporting on the Worker to Gallagher Bassett, I am not prepared to accept the reliability of any of her evidence concerning her observations of the Worker and/or of the Worker's interactions with Mr

Grumelart. I find that her evidence is of no assistance to the Court.

CONCLUSION AS TO THE EXISTENCE OF AN INTIMATE PERSONAL RELATIONSHIP

196. The Worker in her evidence agreed that she had a close personal relationship with Christophe Grumelart. She firmly denied the existence of any intimate personal relationship with him – that is, a romantic or and/sexual relationship. Her evidence was that they were good friends outside the workplace in addition to being close work colleagues.
197. Mr Christophe Grumelart in his evidence firmly denied the existence of any intimate personal relationship with the Worker. He too gave evidence that he and the Worker were very good friends both in and out of the workplace.
198. The Worker's husband John Ellsley rejected the idea of any such relationship between his wife and Mr Grumelart. He regarded Mr Grumelart as his close friend. He saw the relationship between Mr Grumelart and the Worker as one also of close friendship.
199. The CEO of DIPL Mr Andrew Kirkman gave evidence that he had heard of rumours of an intimate personal relationship between the Worker and Mr Grumelart. He himself gave no evidence of direct observations of the relationship between them. Mr Kirkman gave evidence that shortly before 30 July 2021 he had been telephoned by Mr Grumelart's wife Kristen who told him that Mr Grumelart was going to leave her for another woman. However, Kristen Grumelart was not reported as having identified the Worker as that other woman.
200. Mr Dwayne McInnes gave evidence he was the General Manager of the Housing Program Office at DIPL. He had made no direct observations of and was not aware of any rumours about any intimate relationship between the Worker and Christophe Grumelart until early July 2021 – transcript page 457.3.
201. Mr McInnes gave evidence that he had in early July 2021 received complaints on at least seven or eight occasions that the relationship between the Worker and Mr Grumelart “...seemed a bit close for a director and an executive assistant” - transcript page 457.4.
202. Mr McInnes gave evidence that he did make some observations himself at that time. He said: “*I started to notice that the body language, as you say, was a little bit too intimate for the environment*” – transcript 457.6. Other than the evidence from the Worker and Mr Grumelart themselves, this was the first piece of direct evidence before the Court, rather than reports of rumours, of the nature of the relationship between the Worker and Mr Grumelart.
203. Mr McInnes gave evidence that he then telephoned a former supervisor of Christophe Grumelart, Mr John Harrison. Mr McInnes asked Mr Harrison whether he was aware

at an earlier time of any complaints about the relationship between Mr Grumelart and the Worker. Mr McInnes said that Mr Harrison told him: *“Yes, there were concerns previously, and he had had a conversation with Chris and suggested to Chris that he should think about moving Maria on from that role”* - **transcript page 458.9.**

204. There was direct evidence from another third party of the nature of the relationship between the Worker and Mr Grumelart. This was the evidence of Mr Derrick Quang which I have found above was unreliable on this issue and of no assistance to the Court.
205. There was direct evidence from another third party Ms Naomi Bergomin that she had observed the interactions between the Worker and Mr Grumelart at jujitsu on Saturday mornings and she had thought they were a married couple. I have found above that Ms Bergamin’s evidence concerning Ms Rust was not reliable and it was of no assistance to the Court.
206. On the basis of all the evidence before me I am not satisfied on the balance of probabilities of the existence at any time of an intimate personal relationship, in the sense of a romantic and/or sexual relationship, between the Worker and Mr Christophe Grumelart.
207. I am satisfied and I find that the relationship between the Worker and Mr Grumelart was one of very close friends, both at the workplace and outside the workplace. Mr Grumelart was the Worker’s direct boss and manager in the workplace. On the evidence before me I find that it was entirely reasonable for the Employer through Mr Dwayne McInnes and Mr Andrew Kirkman to perceive and to be concerned about a conflict of interest in the workplace arising from this relationship.

THE MEDICAL AND PSYCHOLOGICAL EVIDENCE

EASA

208. The Worker attended on psychologists at the Employee Assistance Service Australia Inc (EASA) on eight occasions after 30 July 2021. The EASA records appear from **page 135 in Exhibit W5.**
209. The first attendance was with psychologist Joanna Thom on 3 August 2021, the second work day after the meeting on 30 July 2021. Ms Thom recorded that the Worker reported that she had had a meeting with the CEO the previous Friday. He had requested that she move to another area because of rumours going around in the workplace about her and her manager “Chris”. She reported that the CEO informed her that she would move or *“he will make her move”*. She reported that the CEO was angry and told her that she was ruining Chris’s reputation. The Worker stated that she felt *“degraded and humiliated”* in the meeting. The Worker described to Ms Thom her relationship with Christophe Grumelart recorded as follows: *“Maria reported that she is friends with Chris. She stated that she does jujitsu with her family and that Chris is the*

instructor”.

210. The second attendance was also with Ms Thom and that occurred on 11 August 2021. The record of that attendance includes the Worker’s concerns with bullying. It then records the following:

“Explored that she was feeling anxious, that she has been staying home and not going out. She reported that she has friends helping take her children to jujitsu and to school. Maria stated that she has been ruminating about the conversation with Andrew and just tells her kids to go away as she cannot switch off”.

211. The third session also with Ms Thom took place on 20 August 2021. Ms Thom recorded the following:

“Session content: Sounded very sick, shingles, cough that is being monitored for pneumonia, hair is falling out, rash on her thighs (stress-related eczema), lost with, sleeping four hours, ruminating (“I just don’t get it”).”

212. The fourth session took place with a different psychologist, Ms Anita Vilcins on 28 September 2021. Ms Vilcins recorded the following:

“Maria advised that she is not back at work yet, and her emotions are constantly in flux – going from happy to crying in an instant. She advised that she is also very anxious, and has only left her house four times since July due to experiencing panic attacks when she tries. She avoids all outings, and has distanced herself from her kids and husband. Currently on antianxiety meds, and also antidepressants, however the ADs cause side-effects so she does not take them – visiting GP this week for a different script.

Currently waiting on feedback from lawyer, as workplace HR has been completely unhelpful, and appears to be friends with the people against whom she is making a case. Also discussed possibility of WorkCover due to extensive stress, bullying and sexual harassment over the years.

Discussed her normal coping strategies – is avoiding jujitsu, and most of her leisure activities revolved around that.

Discussed reasons for avoidance of activities, possible fear and lack of feelings of trust towards anyone, and situations where she is not completely in control of the company and her interactions”.

213. The fifth session took place on 11 October 2021, also with Ms Vilcins. Ms Vilcins recorded the following:

“Maria advised she is still up and down from day-to-day, changed AD meds again and seems to have helped. Return to jujitsu on Saturday after “nagging” from family, felt good but declined to go next session, maybe will do once per week for now. Report from ACPE came back, very contradictory, did not acknowledge reason for complaint in next steps, recommendations, causing great frustration in M.

Discussed triggers for when she has a good/bad day, always work-related, making her feel emotional.

Created a worry list: being treated badly, what will happen next, lack of communication, being ganged up on/victimised, lies, colleagues wanting her to quit, second-guessing motivations of others, trust, letting people down, alienating family.

Discussed physical panic sensations when thinking about/trying to go into work. Explained 4 F’s of FOS, tendency towards Freezing. Floated back with sensations, panic in previous roles with abusive/nasty colleagues, FIRST felt panic in previous abusive relationship.

Next session: unpack thoughts/feelings re past abuse, self soothing”

214. The sixth session took place on 18 October 2021, also with Ms Vilcins, who recorded the following:

“M has been meeting colleagues in person at coffee shops for meetings lately, however GM called and put a stop to it, as it was discouraging M from returning to the office. Still feels excluded from workplace, is a hostile environment.

M panics whenever receiving calls from GM, as she is not sure what will happen.

Has spoken with lawyer and OCPE about report, but OCPE has advised department to investigate internally – unethical and corrupt.

M spoke previously with Jo about grounding/self soothing, but advised that it was ineffective for her. She currently listens to music or watches TV, she feels as though she is unable to switch her brain off.

Discuss current use of diazepam when panicked, current ADs do not seem to be working very well. Suggested discussing SSRIs with GP, in order to help quiet thoughts to be more manageable and able to be dealt with”.

215. The seventh session took place on 25 October 2021 with Ms Vilcins who recorded the following:

“Maria advised that her boss sent her an email on Saturday evening (she gets push notifications as she uses it to contact husband” very upset over something trivial, and it ruined her evening and she had to leave the party she was at. She feels targeted and that this particular boss wants her out, and will not be happy until she is gone. M refuses to back down or leave, and she doesn’t want to leave her direct report in the lurch.

Discussed M going to party and attending jujitsu last week, felt as though she was guilty by her husband, and went out of obligation rather than really wanting to.

M has stopped caring about the feelings of family and friends, total apathy and anhedonia. Says her current life motto is “zero fucks given”, even at work.

Last break was years ago, every holiday she has had, she has worked from home or taken a laptop/phone on holiday and worked. Feels currently unable to holiday due to feeling guilt over letting down her direct report. Discussed options in current redundancy system (if she gets hit by a bus), and that it’s not her problem if they haven’t planned for this.

Currently recruiting for support person.

M has been given new tricyclic ADs (Endep). Reschedule for three weeks, long enough to hopefully see a difference in mood”.

216. The eighth and final session took place on 17 November 2021 again, again with Ms Vilcins. Ms Vilcins recorded as follows:

“Maria advised her GP gave her the ADs as she requested, but she hasn’t taken them as she does not want to become “dependent on meds”. Struggles with sleep issues, has meds for this but tries not to take them. Discussed instances when okay to take – when she is triggered by work and can’t sleep because she is angry. Other times, she just can’t sleep because “her brain won’t be quiet”, and she will stay awake all night.

OCPE investigation found fault on part of CE, but nothing has been/will be done. Discussed what she hopes to get out of complaints – made a list of wants for when a sit down eventually happens, including flexible working arrangements as she still cannot go into the office (did not wish to discuss concern re this any further). Refuses to resign as “that means they win”.

Hoping to hear back from union, lawyer et cetera and go from there”.

217. I find that the Worker attended for treatment from a psychologist as early as 3 August 2021 and reported that the meeting on 30 July 2021 had made her feel “degraded and humiliated”. Thereafter she consistently reported symptoms of emotional and

psychological distress associated with the workplace and the Employer. She reported symptoms of being reluctant to leave the house except when her husband and family “*guilted*” her to do so.

218. The Worker’s recorded complaints with EASA about her psychological symptoms and her feelings associated with the workplace and the Employer, and her medical treatment and her erratic taking of medication are all consistent with the evidence she gave before the Court. This is a contemporaneously recorded history. It started on 3 August 2021, on the second working day after the meeting on 30 July 2021, and then the next two appointments took place on 11 August 2021 and 20 August 2021. These first three appointments took place before the Worker lodged her Work Health claim on 26 August 2021 – **page 2 in Exhibit W4**.

GP HISTORY

219. The date pleaded for the injury was Friday 30 July 2021. The Worker first sought medical treatment apparently in respect of the injury on Monday 2 August 2021, the next business day after 30 July 2021.
220. The Worker’s pre-injury GPs’ notes and records with the Palmerston Medical Clinic were available before me covering almost 8 years and 10 months being the period 10 September 2012 to 23 July 2021 (“the pre-injury period”) - **Ex W5** pages 308 to 335. These record that the Worker attended on her GPs on 62 occasions over the pre-injury period. This is arithmetically an average of just over 7 attendances each year. These attendances were recorded as being for a wide range of different medical issues.
221. The Worker attended on her GP on 10 September 2012 complaining of insomnia. She attended once more on 16 July 2013 complaining of insomnia. These two were the only occasions over the pre-injury period when she was recorded as complaining of insomnia.
222. The Worker attended on her GP on 15 May 2013 complaining of symptoms of depression. That was the only occasion over the pre-injury period when she was recorded as complaining specifically of depression or generally of mental health or mood-related symptoms. I note that the record shows that the Worker was pregnant at that time.
223. The Worker was not recorded as ever complaining to her GPs of work stress or any other work-related issues over the pre-injury period.
224. The Worker’s post-injury notes and records with the Palmerston Medical Clinic as tendered before the Court cover the period 2 August 2021 to 5 May 2023 – **Ex W5** pages 144 to 190.
225. On 2 August 2021 the Worker had a telephone attendance on GP Dr Lynn Yuang at

Palmerston Medical Clinic. The GP's notes record complaints of recent insomnia and "a lot of stress at work, has been bullied at work". There is no record of the precise nature of the complaint of bullying, either on 2 August 2021 or on the next two consultations, also by telephone, on 6 August and then 9 August 2021. Both these later consultations also involved complaints of work stress and insomnia. On 2 August 2021 the Worker had requested and was granted a medical certificate to work from home.

226. The Worker attended on Dr Young in person on 10 August 2021. On that occasion the Worker sought a medical certificate clearing her to attend at work the following day to attend "a meeting with the CEO". On that occasion Dr Young recorded a more specific history:

"Insomnia due to workplace bullying, CEO wanted to move her to other Department that she didn't want to (Reason - for her best interest). Will have a meeting with the CEO tomorrow".

227. The consultation on 10 August 2021 records that the Worker on that occasion told Dr Young she was now seeing a psychologist and further, that she had consulted "fairwork" and a lawyer about her situation.
228. The Worker is recorded as having further telephone consultations with Dr Young and other GPs at Palmerston Medical Clinic to complain about insomnia and stress symptoms reported to be work-related over the next three months on 11 occasions, namely 15, 17 and 26 August 2021, 7, 8, 9 and 23 September 2021, 7 and 24 October 2021, and 12 and 17 November 2021.
229. The Worker continued to consult Dr Young and other GPs at this clinic for her reportedly work-related stress and mental health symptoms on a regular basis thereafter, the last such attendance in evidence before me being on 15 March 2023, not long before I commenced to hear this matter on 5 June 2023.

GP DR YAUNG

230. Dr Lynn Young is a General Practitioner who had been working in that capacity at the Palmerston Medical Clinic at all material times until 18 February 2024. He gave evidence before the Court on 20 February 2024. Dr Young did not provide a *curriculum vitae* but he gave evidence of his qualifications and experience - transcript 20 February 2024 page 93.5 to page 94.4.
231. Dr Young obtained his primary qualification as a medical practitioner in Myanmar in 2014. He practised in Myanmar working in a hospital and also as a General Practitioner for more than five years before he moved to Australia in 2019. In Australia he worked in hospitals for two years and then commenced to work in the general practice setting from 2021. He completed his formal General Practitioner training in 2022. He became

a Fellow of the Royal Australian College of General Practitioners in May 2023.

232. There was no dispute as to Dr Yaung's expertise. I am satisfied and I find that Dr Yaung is an expert in the field of General Practice medicine.
233. Dr Yaung was the primary treating General Practitioner of the Worker from 2 August 2021. He provided her with medical certificates from 2 August 2021 and ongoing. His first two medical certificates dated 2 August 2021 and 6 August 2021 certified her as unfit to continue her usual occupation at the office however as fit to work from home, over the period 2 August 2021 to 13 August 2021. Dr Yaung and other GPs at the Palmerston Medical Clinic subsequently provided medical certificates certifying the Worker as continuing to be fit to work from home, but for less than full-time hours.
234. Dr Yaung provided the Worker's first formal workers' compensation medical certificate dated 26 August 2021. This identified the date of the injury as 30 July 2021. Dr Yaung recorded the Worker's description of the injury as "*workplace bullying, affecting mental health - insomnia, anxiety, depression, stress induced rashes, hair loss*". He certified her as being fit to return to work on restricted duties described as follows: "*Management of hours: can work more or less the nominated hours depending on her moods, currently working from home*" over the period from 23 August 2021, to be reviewed on 2 September 2021. These certificates all appear in the Court Book being exhibit **W 5 pages 336 to 359**.
235. By medical certificate dated 30 March 2022 Dr Yaung certified the Worker as totally unfit for work. At transcript 20 February 2024 at page 97.5 Dr Yaung stated that he certified her as unfit for work "*Because she is not fit for work, to go back. She is not fit to go back to work*". He went on to explain that this was "*Because of the ongoing anxiety and depression. All the stress that she's facing*".
236. In cross examination Dr Yaung clarified that he had been informed by the Worker that the Employer would not permit her to work from home as at the end of March 2022. Dr Yaung's evidence was that in his opinion the Worker was totally unfit for work in the workplace at that time due to her psychological condition. In his opinion the Worker could probably still have performed some of her work duties from home, but she could not have worked at all in the workplace. Further in cross examination on this point, Dr Yaung said he did not know whether the Worker would have been able to work in another workplace in a different employment at that time. His evidence was that she would have had to try it and see how she managed.
237. Dr Yaung provided a report dated 12 May 2022 to the Worker's solicitor. That report appears at **page 133 of the Court Book, Exhibit W 5**. The report records that Dr Yaung had prepared his report based on information provided to him by the Worker and information in documents provided to him which he listed as follows:
- i. Transcript of 30/07/2021 meeting between Maria and the CEO Andrew

Kirkman – 30/07/2021

- ii. Audio recording of meeting – 30/07/2021
- iii. Maria EASA Medical records
- iv. Dr Gregory Goodluck 26/03/2022 & 01/07/2022
- v. Dr Antonella Ventura 12/08/2022
- vi. Dr Dinesh Arya 03/07/2022, 02/10/2022, 23/10/2022 & 17/03/2023

238. In this report Dr Yaung diagnosed the Worker as suffering from “*Major depressive disorder, severe, secondary to work-related stressors*”. He was asked two questions to which he provided two answers as follows:

1. *Do you believe Maria sustained a psychological injury in the course of her employment arising out of her meeting with the CEO on 30 July 2021?*

- *Yes, from the information provided by Maria and the documents & reports available to me. It’s clear that the work-related stresses that Maria experienced since 2021.*

2. *If Maria has sustained a work-related injury, do you believe that she was incapacitated for work by reason of the injury from 17/08/21 – 08/03/2022 due to the injury from which she commenced to suffer from 30/07/21?*

- *Yes”.*

239. Dr Yaung participated in a telephone conference with counsel for the Worker on 31 May 2023. Notes of the telephone conference were signed by Dr Yaung on 2 June 2023 and that became **Exhibit W 92** before the Court.

240. In Exhibit W 92 Dr Yaung set out in numbered paragraph 7 the history he received from the Worker about the workplace bullying involving the CEO, and being told by the CEO that she needed to move to another department. Dr Yaung stated in numbered paragraph 8:

“8. It is my opinion that Ms Ellsley’s psychological condition developed as a result of the bullying that is referred to in the previous paragraph. In my opinion there has not been any recovery from this”.

241. In numbered paragraphs 12 and 13 of Exhibit W 92 Dr Yaung set out his diagnosis as follows:

“12. I completed the worker’s compensation first certificate on 26 August 2021. At the time, my clinical diagnosis was that Ms Ellsley had developed anxiety and depression. She had symptoms of anxiety and depression.

“13. A K10 assessment is a tool that is used to assess the severity of depression. We ask the patient to fill out the form having regard to the symptoms they had

over the previous four weeks. Ms Ellsley returned to see me on 9 September 2021 for a Mental Health Treatment Plan consultation. As part of that assessment, Ms Ellsley completed a K10 assessment. Her score was 42/50. A score of 42/50 indicates severe depression. It reinforced her diagnosis to me”.

242. Dr Yaung was cross-examined about the role of the K10 assessment. He agreed that it was a self-assessment rather than an objective measure.
243. Dr Yaung participated in a second telephone conference with counsel for the Worker on 13 February 2024. Notes of that telephone conference were signed by Dr Yaung on 13 February 24 and that became **Exhibit W 93** before the Court.
244. In the last two dot point paragraphs of Exhibit W 93 Dr Yaung expressed his expert opinion concerning the Worker’s condition and its cause as follows:

“I remain of the opinion that Ms Ellsley has not recovered from the psychological condition she developed on 30 July 2021 as a result of the matters set out in paragraph 7 of my note of conference of 31 May 2023 (signed on 2 June 2023) (my note of conference).

“It is my opinion that Ms Ellsley remains totally incapacitated for work due to the psychological injury which she developed on 30 July 2021 as a result of the matters set out in paragraph 7 of my note of conference and that she has been totally incapacitated for work since 30 March 2022”.

245. Dr Yaung provided a medical certificate dated 12 February 2024 certifying the Worker as totally unfit for work over the period 12 February 24 to 25 March 2024 inclusive because of *“ongoing anxiety and low mood/depression insomnia low self esteem”*. That certificate became **Exhibit W 94** before the Court.
246. Counsel for the Employer cross-examined Dr Yaung on the reliability of the Worker’s presentations to him. Dr Yaung freely admitted that he relied on the truthfulness of the Worker’s presentations to him in arriving at his conclusions about her health and his diagnosis of her health problems.
247. Dr Yaung was cross-examined about the impact on the Worker’s mental health of stressful events in her life which arose after the date of the injury on 30 July 2021. These included her involvement in an Anti Discrimination process and a Fair Work process. Dr Yaung agreed that his notes recorded an increase in the Worker’s stress levels associated with these matters. In re-examination Dr Yaung was asked about the role of these other stressful events, in the following exchange at transcript 20 February 2024 at page 148.9 to 149.1:

“Ms Clark: Doctor, you were asked about a number of other stressful situations that Ms Rust had reported to you. What was the main stressor that had been

reported to you by Ms Rust during the treatment of her?

Dr Yaung: Okay. So nothing other than the case that's been bullied by the workplace employer. That's the main stress that she is reporting to me."

248. Further in re-examination Ms Clark sought to ask Dr Yaung whether the Worker's ongoing mental health problems were due to these subsequent stressful events or whether they were still due to the original event on 30 July 2021. The following exchange took place at transcript 20 February 2024 at page 149.5 to 149.6:

"Ms Clark: Doctor, do you think any of these other stressful situations that Mr Lindsay asked you about have taken over what's been the cause of her condition?"

Dr Yaung: Sorry, can you....

His Honour: Is there a new cause for her present mental health problems because of later developments or is it still the original?"

Dr Yaung: Still the original one".

249. Counsel for the Employer cross-examined Dr Yaung on the regularity of the Worker's attendances at jujitsu and her activities there of assisting training children, sitting at the front desk and greeting people and selling drinks and so forth. He asked Dr Yaung whether this history was consistent with the Worker's presentation to him. Dr Yaung answered: "Not consistent just based on that presentation".

250. Counsel for the Employer then had the following related exchange with Dr Yaung at transcript 20 February 2024 pages 136.4 to 137.1:

"Mr Lindsay: If it's true that those things that I put to you - if it's true that Ms Rust has been capable of doing those things and is doing them, that is more than she has told you?"

Dr Yaung: I think that's totally different situations. So Ms Rust that she is - went through, we call as an adjustment disorder or the situation and depression or situation anxiety. So, like, the main stress, the main anxiety came through is from the workplace. So whenever she have contact with the workplace, like, whatever email, whatever call, all her anxiety went up. But in a different situation, she might be fine.

Mr Lindsay: She hasn't told you that she's been going to jujitsu and taking children's classes, has she?"

Dr Yaung: She told me. Like, that's my advice to her. To encourage her to get involved in that sort of activities.

Mr Lindsay: Let's deal then with that incapacity issue that you raise. Is it your opinion that what incapacitates her is contact with her former workmates?

Dr Young: Yes, correct.

Mr Lindsay: She hasn't lost any physical capacity?

Dr Young: Okay, that's another thing. Physical capacity related to that workplace, yes. Not to the other thing.

Mr Lindsay: Not outside the workplace?

Dr Young: Not outside the workplace.

Mr Lindsay: She hasn't lost the capacity to perform work that she is suited to in another workplace?

Dr Young: That hard to say. I cannot give you the answer to that one.

Mr Lindsay: Why not?

Dr Young: Because, like, we haven't tried, like - and she hasn't tried in the new workplace. Like, given that the stress going on like - whenever the email coming, whenever the call coming, that might make her anxiety get worse, even though in the new situation".

251. Counsel for the Employer played to Dr Young the video of the Worker at a jujitsu competition sitting in front of the judge's desk. The following exchange took place at transcript 20 February 2024 page 134.7 to page 135.6:

"Mr Lindsay: She was sitting in front of what appeared to be the judge's desk?

Dr Young: Yes.

Mr Lindsay: You agree with me that she was active and engaged in the event?

Dr Young: Yes, based on the video. Yes.

Mr Lindsay: What I wanted to ask you is, that presentation you see there, is that consistent with the way Ms Rust presented to you in 2022?

Dr Young: Yes.

Mr Lindsay: Is that consistent, Ms Rust behaving like that in an event like that is

that consistent with how she's presented to you?

Dr Yaung: It can be.

Mr Lindsay: In what way?

Dr Yaung: It hard to say because like, if someone who have anxiety, depression or low mood, it cannot be 24/7. So that's the thing that we encourage Ms Rust to go outside. Hang out with her friends, family members, spend her time and then to distract her and then to make sure, like, she's been socialising. That's the way that we encourage her to get better.

Mr Lindsay: Is it your understanding that Ms Rust has been doing that?

Dr Yaung: I believe so.

Mr Lindsay: That is, it's your understanding that she has been out and about socialising, following your advice?

Dr Yaung: Sometime she say yes. Sometimes she says she cannot outside because of the level of stress and her level of anxiety. So it's been changing day by day. I cannot give you, like, yes or no answer on that one

Mr Lindsay: Has she reported to you that she goes out and, for example, meets friends?

Dr Yaung: She's – yes, she reported to me that I encourage her to go outside, like, drop the kids at the school and then she said that she did. And then she went for, like, shopping or something like that but at one stage she told me that because of, like, when she saw her colleague or co-worker at, like, outside, like, when she doing shopping and they being, like, the way that she look at her and the way that she speaking to her, that she didn't like it. Lately, she said she doesn't want – she didn't want to go outside. And whenever she go outside she met a lot of people from her work. That make her feel uncomfortable”.

252. Counsel for the Employer cross-examined Dr Yaung about the Worker's engaging in a cleaning business after 30 July 2021. At transcript 20 February 2024 from page 138.9 to page 139.2 the following exchange took place:

“Mr Lindsay: And in giving that answer, you don't know anything about Ms Rust's skills or experience at work. Did you know that she was conducting a cleaning business?

Dr Yaung: I don't know.

Mr Lindsay: Is it – in your opinion, is it within Ms Rust’s capacity to send out invoices for cleaning work, to do minor paperwork for a cleaning business?

Dr Yaung: I didn’t know (inaudible).

Mr Lindsay: I understand you didn’t know that?

Dr Yaung: Yep.

Mr Lindsay: My question was, is that within her capacity on the way she has presented to you?

His Honour: From what you understand about her symptoms, is that something you’d expect she could do?

Dr Yaung: She can do that”.

PSYCHIATRIST – DR ARYA

253. On 1 June 2022 the Worker requested GP Dr Yuang to refer her to a psychiatrist. She had up until then regularly been consulting a psychologist. Dr Yuang referred her to psychiatrist Dr Dinesh Arya.
254. Dr Arya’s *curriculum vitae* was before the Court as **Exhibit W28**. This records that Dr Arya first qualified as a psychiatrist in India in 1990, 32 years before he commenced to treat the Worker in 2022. He subsequently became a Member of the Royal College of Psychiatrists in the United Kingdom in 1993, and then a Fellow of the Royal Australian and New Zealand College of Psychiatrists in 1999. There was no dispute as to his expertise. I am satisfied and I find that Dr Arya is an expert in the field of psychiatry.
255. The Worker consulted Dr Arya by videoconference on three occasions. The first occasion was on **3 July 2022**, the second occasion was on **2 October 2022** and the third occasion was on **17 March 2023**.
256. Dr Arya provided five (5) reports which came before me respectively as **Ex W 5 h.** dated 3 July 2022 and addressed to Dr Yaung, **Ex W 5 j.** dated 22 October 2022 addressed to Dr Yaung, **Ex W 5 k.** dated 23 October 2022 and addressed to the Worker’s lawyer Ms Caroline Scicluna, **Ex W 5 l.** dated 17 March 2023 and addressed to Dr Yaung and **Ex W 29** which was a record of a telephone discussion between Dr Arya and the Worker’s counsel Ms Clark conducted on 1 June 2023. I also received as **Ex W 30** a letter dated 17 October 2022 from Ms Scicluna to Dr Arya eliciting his report of 23 October 2023. Dr Arya gave evidence in this matter by video conferencing from Canberra on 8 June 2023.
257. Dr Arya’s opinions are first set out in **Ex W 5 k.** at pages 6 and 7. In his expert opinion,

the Worker had sustained a Major Depressive Disorder, severe, secondary to work-related stressors. Question 1 on page 7 of that report asked:

“Do you believe Maria sustained a psychological injury in the course of her employment consequent upon her meeting with the CEO on 30 July 2021?”

Dr Arya replied:

“Yes. From the information available, it is clear that the work-related stressors that Maria experienced in 2021 and the meeting with the CEO on 30 July 2021 have precipitated deterioration in Maria’s mental state”.

258. In the record of his telephone discussion with Ms Clark on 1 June 2023 – **Ex W 29** – Dr Arya expressed his opinions in paragraphs 10. and 11. as follows:

“10. In my opinion, Ms Rust has a severe major depressive disorder. This means that she fulfils the full criteria for major depressive disorder and her symptoms were quite severe and are impacting on her level of functioning.

*“11. In my opinion, Ms Rust’s severe major depressive disorder is secondary to work-related stressors. The meeting that occurred on 30 July 2021 was a critical meeting and it was a significant factor in terms of precipitating her symptoms. **In terms of the chronology, this meeting was the identifying stressor that resulted in symptoms which were so severe that her capacity for work was impacted** (my emphasis)”.*

259. In his report dated 23 October 2022 – Exhibit W5j – at page 7 Dr Arya considered that the Worker was totally incapacitated for work after 30 March 2022. In his telephone discussion with counsel on 1 June 2023 – **Exhibit W29** - Dr Arya considered the Worker was still totally incapacitated for work when he last saw her on 17 March 2023. At paragraphs 13. and 14. of Exhibit W29 Dr Arya said:

*“13. **When I last saw Ms Rust in March 2023, I considered that she was totally incapacitated for work** (my emphasis). The severity of her symptoms were quite severe. By symptoms, I mean her depression, anxiety and associated symptoms. She was so anxious that she struggled to go to public places. She thought people were looking at her all the time and following her and so on. That was because of her anxiety. She was also afraid of leaving home.*

“14. The meeting of 30 July 2021 is a significant factor in terms of the cause of her incapacity for employment”.

260. On 8 June 2023 Dr Arya was cross-examined generally about the Worker’s mental condition and its cause. It was not put to Dr Arya in cross examination, either directly or indirectly, that the Worker had not suffered any mental injury at all.

261. Dr Arya was shown some short surveillance footage of the Worker in the course of cross-examination. This footage was of three discrete occasions. It appeared to show the Worker interacting socially with her family at a New Year's party at home, and twice attending as an observer at jujitsu classes, and on those three occasions being apparently in a positive and even in an upbeat mood. Dr Arya's evidence was that this was not inconsistent with either the Worker's psychiatric history or her diagnosed condition. Dr Arya's evidence was that depressive illness does not involve feelings of depression or low mood all of the time – transcript 8 June 2023 at page 374.5.

262. Dr Arya agreed in cross examination that he had largely relied on the subjective history provided to him by the Worker. However, he said that he had also relied on his observations of the Worker during their consultations. The following exchange took place at transcript 8 June 2023 page 365.3 to 365 .6 between Dr Arya and Mr Lindsay SC, counsel for the Employer:

“Mr Lindsay: Okay. And in your clinical assessment, Doctor, I think as you say in your report, you are relying on the subjective history of the patient?”

“Dr Arya: Yes.

“Mr Lindsay: And you're also relying, I suggest, on such objective signs as you may glean in the videoconferencing?”

“Dr Arya: Yep, that's true.

“Mr Lindsay: And in the case of Ms Rust, that was very little?”

“Dr Arya: There was subjective information provided by Ms Rust and obviously, I was making observations during that assessment.

Mr Lindsay: Yes. My question was, as to the objective part of it, when I say “objective”, I mean your observations, as opposed to Ms Rust's history to you, can I suggest to you that there was little that you are able to glean from your assessment of Ms Rust's demeanour during the videoconferencing?”

*“Dr Arya: It is possible to do that objective assessment and it is mostly the demeanour, facial expressions, body movement; **that is quite informative** (my emphasis).*

“Mr Lindsay: I'll come to the detail of that when I need to, Doctor, thank you. And in arriving at your diagnosis, as you ultimately did – I withdraw that. In consulting with Ms Rust, did you have in mind the criteria in DSM 5 for diagnosing depression?”

“Dr Arya: Yes, always do”.

263. Dr Arya agreed in cross-examination that the Worker was his only informant. He had not conducted any neuropsychological tests as part of his assessment and treatment of her. I note however that when he prepared his report dated 23 October 2023 to Ms Scicluna, Dr Arya recorded he had available to him a number of records and reports which I am satisfied probably assisted him in arriving at or confirming his opinions as subsequently expressed. These were the following:
1. transcript of meeting between Maria and Mr Kirkman – 30/07/2021.
 2. Audio recording of meeting – 30/07/2021.
 3. Maria’s EASA medical records – 3/8/2021 – 17/11/2021.
 4. Palmerston Medical Clinic records – 3/8/2021 – 13/07/2021.
 5. Dr Gregory Goodluck’s report – 26/03/2022.
 6. Dr Antonella Ventura’s report – 12/08/2022.
264. The Employer’s case as pleaded is that the Worker did not suffer any injury as a consequence of the events of 30 July 2021, or at all. The Employer has not pleaded that the Worker has suffered an injury because of some other cause. It did not run its case on this basis.
265. Mr Lindsay cross-examined Dr Arya on the possible impact on the Worker’s mental health of other stressors arising after 30 July 2021. I allowed this cross-examination over objection because it was relevant to whether the events of 30 July 2021 had caused any and if so what injury, and what incapacity. However, I disregard this cross-examination on the separate question of potentially identifying any other cause for or perpetuation of the Worker’s mental injury after 30 July 2021.
266. Dr Arya’s answers to this area of cross-examination conceded that various stressors put to him by Mr Lindsay had the capacity to cause or exacerbate or prolong a mental injury. I am satisfied and I find that Dr Arya did not concede specifically that any one or more of any such stressors had in fact impacted in any such way on this Worker’s mental health – transcript 8 June 2023 pages 376.9 to 378.2. and later on pages 380.8 to 381.2.

PSYCHIATRIST – DR VENTURA

267. The Employer referred the Worker to psychiatrist Dr Antonella Ventura for a medico-legal assessment on **3 August 2022**. Dr Ventura provided her report dated 12 August 2022 to Hunt & Hunt Lawyers for the Employer. That report came before me as **Exhibit W5i**. Dr Ventura subsequently had a telephone interview on **1 June 2023** with Ms Clark, counsel for the Worker, and the transcript of that interview came before me as **Exhibit W67**.
268. Dr Ventura’s *curriculum vitae* was tendered as **Exhibit W65**. Additionally, in **ExW67**

Dr Ventura states that she has been a Fellow of the Royal Australian and New Zealand College of Psychiatrists since 1996, a period of 26 years at the time she examined the Worker in 2022. There was no dispute as to her expertise. I am satisfied and I find that Dr Ventura is an expert in the field of psychiatry.

269. In her report of **12 August 2022** Dr Ventura provided the following opinions in her answers to questions 2 to 5 on page 5 and question 9 on page 6:

"2. Please advise if you believe the Worker is suffering from a diagnosable mental injury or disease, and if so, please advise your opinion as to the cause or causes of the mental injury or disease. Please address specifically whether or not it arose by a gradual process.

"Ms Rust is suffering from a diagnosable condition. In my opinion the cause of the mental injury was the interview she had with the CEO Andrew on 30 July 2021. The mental injury did not arise by a gradual process, it was a sudden onset (my emphasis).

"3. If the worker is suffering from a mental injury or disease, please provide a diagnosis and your reasons for your diagnosis.

"The diagnosis is major depressive disorder with anxious distress. Ms Rust feels depressed most of the time, she lacks enjoyment in everyday activities, her appetite is disrupted, her sleep is disrupted, she has low energy, low motivation. She described cognitive difficulties.

"4. Please advise if the worker is incapacitated for work as a result of the mental injury or disease.

"Ms Rust is incapacitated for work as result of her mental injury because of her cognitive difficulties, increased interpersonal sensitivity and lack of energy and motivation.

"5. If the worker is incapacitated for work, please advise if the worker is totally or partially incapacitated for work? If the worker is totally unfit for work, please advise how long she is likely to remain totally incapacitated.

"Ms Rust is totally incapacitated for work (my emphasis). It is difficult to anticipate how long she will remain totally anticipated but given the intensity and duration of her symptoms she is likely to remain incapacitated for at least three months.

"9. As appropriate, please provide your prognosis for the worker and any other comments or observations you may have with respect to her injury and her claim in this matter.

“The prognosis is guarded (my emphasis). She has had symptoms for over one year and her recovery has been slow”.

270. Dr Ventura’s report was responding to a letter dated 26 July 2022 from the solicitor for the Employer. That letter was before the Court as **Exhibit W66**. That letter recorded that Dr Ventura had been supplied with the following materials before her assessment of the Worker and the preparation of her report:

“Annexure A: Text message from Worker to GM re: management strategy for conflict-of-interest (sic)

Annexure B: Recording of meeting between Mr Kirkman and Worker 30 July 2021

Annexure C: Mr Goodluck report 1 July 2022

Annexure D: Dr Arya report 3 July 2022

Annexure E: Medical Certificates”.

271. In her telephone interview on **1 June 2023** with Ms Clark, counsel for the Worker, Dr Ventura is recorded in **Exhibit W67** as having expressed the following further opinion:

*“7. While there were events that took place prior to the meeting that caused Ms Rust distress, she was functioning and it was a normal level of distress. The meeting brought about a sense of unfairness and left Ms Rust feeling that she had been discriminated against. **If it were not for the meeting and the behaviour in the meeting, she would not have developed a psychiatric condition** (my emphasis).*

*“8. I was provided with a recording of the meeting by the Employer’s solicitors. I listened to the recording. After listening to the recording, I was **convinced that kind of interaction was enough to trigger a psychiatric response** (my emphasis)”.*

272. In cross-examination Dr Ventura was shown a number of short video recordings of the Worker. One of these was of the Worker attending at a New Year’s Eve function at her own home in company with mostly her family members and some friends. The others showed her briefly at the jujitsu premises at different times. Dr Ventura’s evidence in response to these was that they were not inconsistent with a diagnosis of Major Depressive Disorder – transcript 19 October 2023 pages 130.9 and 131.1, 131.9 and specifically at 132.1. Dr Ventura’s evidence concerning the footage at the jujitsu premises was that observing a mother attempting to interact with her children and possibly experiencing some joy in that *“...is not contradictory of a major depressive disorder...”* transcript 19 October 2023 page 132.5.

273. Dr Ventura also gave evidence that some improvement in the Worker’s mental state around the time she assessed her and following, which included some of the video

recordings, was not surprising. This was because “... I must also add that by that stage she had been, for a number of months, on a decent dose of an antidepressant medication. Her mental state may have changed, so it really does not inform my opinion in any way” - transcript 19 October 2023 at page 133.5.

274. Again in cross-examination, Dr Ventura gave evidence that she had assessed the Worker as being totally unfit for work because her Major Depressive Disorder meant she was not able to concentrate on tasks adequately – transcript 19 October 2023 page 136.5. Additionally, she was extremely fragile “... tending to be more sensitive to other people’s comments, and therefore potentially getting into negative interactions in the workplace. Perceiving criticisms to be greater than what they should be. Becoming tearful in the workplace, that kind of fragility” – transcript 19 October 2023 page 136.9.
275. In re-examination Dr Ventura was asked about whether the Worker might have faked her presentation and demeanour at her assessment by Dr Ventura. The following exchange took place from transcript 19 October 2023 starting at page 137.7 and going through to page 138.8:

“Ms Clark: Thank you, doctor. Doctor, how important is your mental state examination, in your overall assessment when diagnosing a psychiatric condition?”

Dr Ventura: It’s very important. It – I guess particularly if you have been around for over 30 years, you get a – attuned to what kind of mental state goes with the symptoms. And what doesn’t. It’s – I mean unless someone is a – you know, Hollywood actress, it is often very difficult to fake that kind of emotional lability (my emphasis). It’s very hard to say, the aspect – the aspect part of – of the mental state examination. The appearance is often quite important. Of course, the heading of thought content, you know, can be – can be at times unreliable, because they’re based on the history. But mainly the (inaudible) fairly objective observations, rather than relying on the history.

Ms Clark: Yes, and just picking up on your comments about aspects. At page 4 of your report, you report that ‘Ms Rust’s mood was depressed and her aspect was labile’. How do you make these sorts of assessments, and what sort of things do you take into consideration?”

Dr Ventura: So clearly the report of the mood is important, but is not sufficient. I have come across, you know, many people who talk about being depressed. When they talk they are quite animated. They report they don’t enjoy those activities, and so it – you know, this meant to be a demonstration of pervasiveness in that mood. (Inaudible) depressed mood. And the lability of affect was manifested by her being calm at times, being able to give a history, and you know being ragged at times, and then completely (inaudible)

clinical and struggling with giving a history.

Ms Clark: And how important is your mental status examination when you're providing an opinion about a person's capacity for employment?

Dr Ventura: It's very important. And that's where I'm talking - where I spoke about the interpersonal sensitivity. The way she presented. I thought she would really struggle to maintain interactions in the workplace. She was so preoccupied and suspicious of people that she would be - you know, that would get in the way in the workplace. And you know, the - the amount of containment that I had to do to take that - that history, would possibly not - probably not be tolerated by an employer.

Ms Clark: What you mean by that, the amount of containment that you had to take that history would not be tolerated by the employer?

Dr Ventura: Well for example, the history needs to be taken over a certain period of time, it's about an hour. And the way she presented with that lability, in order to get the history, I - I needed to kind of interrupt her, soothe her over, and then get on with the task. That's what I meant by containment.

Ms Clark: Thank you. You gave some evidence that you check to see if the history matches the mental state at the examination. How do you go about that?

Dr Ventura: So it - it's essentially about the presentation. So the way we can sort - particularly with depression, you look at not as much is what - will obviously you do look at what they tell you, and that's a self-content, and that's very important. But when I think about the potential genuineness of the history, I look at their presentation. Whether they had - there was any evidence of self-neglect. So that - that kind of matched. There was evidence of self-neglect in the presentation. The mood appeared to be pervasively depressed, and the aspect. So the expression, the - you know, the external manifestation of the mood was the tearful eyes, and the preoccupation reflected the content of the history.

Ms Clark: And talking about appearance, you made some comments in your cross examination about Ms Rust appearing unkempt. What is the significance of that?

Dr Ventura: It's about lack of self - sorry, it's about paying less appearance - less attention to one's appearance. It goes to lack of motivation and lack of energy".

PSYCHOLOGIST MR GREGORY GOODLUCK

276. Mr Gregory Goodluck is a psychologist in private practice in Darwin. He gave evidence before me on 19 October 2023. Mr Goodluck's *curriculum vitae* was tendered as **Exhibit W69**. From that document and from his evidence before the Court I am satisfied that Mr Goodluck became a fully registered psychologist in 2009. Additionally, he is a qualified social worker and he had worked in that field from the year 2000. There was no dispute as to his expertise. I am satisfied and I find that Mr Goodluck is an expert in the field of psychology.
277. The Worker was referred to Mr Goodluck by her treating GP Dr Lynn Yaung on 3 March 2022. Mr Goodluck first saw the Worker for the purpose of psychological treatment on **5 March 2022**. He continued to see her and treat her from time to time up to and including at least 23 June 2023.
278. Mr Goodluck prepared four written reports concerning the Worker. These were all tendered before the Court. The first is his letter dated 26 March 2022 to Dr Yaung and this is located at **page 93 in Exhibit W5**. The second is a 12 page report dated 1 July 2022 provided to the Worker's solicitor Ms Carolyn Scicluna and this is located at **page 96 in Exhibit W5**. The third is a transcript of a telephone conference on 2 June 2023 between Mr Goodluck and the Worker's counsel Ms Clark and this is **Exhibit W 70**. The fourth and final document is another transcript of a telephone conference, this time on 16 October 2023, between Mr Goodluck and Ms Clark and this is **Exhibit W 71**.
279. Mr Goodluck's report of 1 July 2022 records that he had available to him the EASA Employee Assistance counselling notes over the period 3 August 2021 to 17 November 2021; the transcript of the meeting on 30 July 2021 between the Worker and Mr Andrew Kirkman; and a medical referral and Mental Health Care Plan from GP Dr Lynn Yaung dated 3 March 2022.
280. Mr Goodluck concluded in his report of 1 July 2022 and in his two telephone conferences with Ms Clark and in his evidence before the Court that the Worker was suffering an Adjustment Disorder with mixed Anxiety and Depressed Mood within the meaning of DSM - 5.
281. Mr Goodluck's report of 1 July 2022 in its Summary and Discussion starting on page 7 is expressed somewhat floridly and hyperbolically such that, when considered in isolation, it gives the impression that he was not as professionally objective in his treatment relationship with the Worker as one might expect. By way of example, at page 7.4 Mr Goodluck expressed himself as follows:

"It is clear that Ms Rust has experienced a fall from grace, through no apparent fault of her own, and that she perceives that as outrageous, highly unethical, unjust, personally affronting, and damaging to her reputation and

career. And that she perceives this disgraceful demoralisation as being carried out harshly and cruelly through no fault of her own. She has been unrelenting in her quest for natural justice and then legal recourse, proceedings of which are also a source of stress which is taking a toll on her mental and emotional health and well-being. This is notwithstanding that the effects of the initial injury are quite substantial and sufficient to bring about extreme anxiety, depression and considerable adjustment issues worthy of a DSM diagnosis without the compounding effects of her current battles. However, had she not fought for her reputation and her career she would highly probably have sunken (sic) into existential despair and major depression over the injustices she is experiencing, because she is a strong believer in natural justice and fairness, and proper treatment of innocent victims of wrongdoing, and is quite shocked about what is happening to her for standing up to the truth and fairness when she was being wronged”.

282. The remainder of Mr Goodluck’s report of 1 July 2022 is expressed mostly in more objective terms. In particular, Mr Goodluck’s descriptions of his formal psychometric testing and clinical interviews with the Worker starting on page 3.5 of the report and going through to page 5.9 of the report are appropriately objectively expressed.
283. In cross-examination Mr Lindsay SC for the Employer firmly tested Mr Goodluck’s opinions and conclusions as set out in his report of 1 July 2022. At transcript 19 October 2023 starting at page 165.6 through to about page 168.5 Mr Lindsay in summary suggested that some of Mr Goodluck’s opinions were not objective. Mr Goodluck did not accept this, but in my view the language and tenor of the identified parts of his report speak for themselves and demonstrate some lack of objectivity.
284. I am satisfied and I find that the Worker’s treating psychologist Mr Gregory Goodluck was less than professionally objective in his expression in some parts of his report of 1 July 2022 and in some of his evidence before the Court. However, I do not therefore disregard the entirety of his evidence.
285. At the time Mr Goodluck wrote his report of 1 July 2022 he had already interviewed and counselled the Worker **on nine occasions** – page 3.5. He set out his Results of Clinical Interview in suitably objective terms at page 4.6.
286. Mr Goodluck had separately assessed the Worker through seven separate forms of psychometric assessment testing as described at pages 3.7 to 4.6. He reported on her Test Behaviour at page 5.3 and he set out his Test Results and his Interpretation of results starting at page 5.5 and concluding at page 7.3. The tests and test results are reported on in suitably objective terms. Most of the Interpretation of results is expressed in appropriately objective terms but the last paragraph at page 6.8 is unfortunately expressed to some degree in terms of the Worker’s subjective experience.

287. I am assisted by Mr Goodluck's evidence of his psychometric testing of the Worker and his conclusions at page 6 of his report of 1 July 2022, excluding the last paragraph. These conclusions include his diagnosis of Adjustment Disorder with Anxiety and Depression. I am satisfied that the evidence of these tests and their results is essentially objective in nature and I take it into account in my overall assessment of Mr Goodluck's opinions and my assessment of the Worker's credibility and of her psychological condition.
288. I do not have regard otherwise to Mr Goodluck's opinion as to the Worker's credibility, as expressed in cross-examination in the transcript of 19 October 2023 at page 161.8. This is because of the lack of professional objectivity I have remarked on earlier in these Reasons.
289. Mr Goodluck concluded in numbered paragraph 21 in the telephone conference **Exhibit W 70** on 2 June 2023 that: "*In my opinion, the vast majority of her incapacity has arisen because of the crisis of meaning and value that she experienced as result of the sentinel event. The injury began when the sentinel the event occurred. The impact of that started on the day of the meeting. It has not concluded and it continues to this day*". The "sentinel event" referred to was identified by Mr Goodluck earlier in **Exhibit W70** and was the meeting between the Worker and Mr Kirkman on 30 July 2021.
290. In numbered paragraph 20 in **Exhibit W 70** Mr Goodluck expressed the opinion that the Worker was "... not in any fit state to work". He went on in **Exhibit W 71**, the transcript of the telephone conference with Ms Clark on 16 October 2023, to express the opinion that the Worker's psychological condition had deteriorated further since June 2023.

CONCLUSION AS TO THE WORKER'S CREDIBILITY AND OVERVIEW

291. I have found that the Worker was not open and forthcoming in some aspects of her evidence before the Court and specifically that she was knowingly dishonest in her cross-examination in two areas. These were her knowledge of and involvement in the loan to Mr Grumelart, and her attempt to avoid providing documents to the Employer and then to the Court and then the evidence relevant to her cleaning business in financial year 2021/2022.
292. These findings do not automatically mean that I reject all of the Worker's evidence as a whole. I need to consider her remaining evidence in the light of all of the evidence before the Court.
293. In preparing these Reasons I have reviewed 106 exhibits tendered before me in the course of the hearing. I have read through 16 days of transcripts of evidence before me at the hearing, and I have reviewed my contemporaneous notes made in the course of the hearing.

294. In addition to this I have considered the following careful and detailed submissions on the evidence and the law:
1. 20 March 2024 – the Worker’s Submissions jointly prepared by her counsel Ms Jessica Clark and her solicitor Ms Caroline Scicluna;
 2. 28 March 2024 – the Employer’s Submissions prepared by its counsel Mr Alan Lindsay SC; and
 3. 5 April 2024 – the Worker’s Reply to the Employer’s Submissions Dated 28 March 2024 jointly prepared by her counsel Ms Jessica Clark and her solicitor Ms Caroline Scicluna.
295. In considering all of the above I have necessarily focussed on a great deal of detail. It is of assistance now to review the tenor of the evidence as a whole.
296. The Worker worked in the Northern Territory Public Service as an executive assistant to senior personnel, commencing in 2008 and continuing over approximately 13 years until the injury on 30 July 2021. She worked on a full-time basis, other than over one to two years in total following the births of two of her children when she was at home on maternity leave.
297. On the evidence before me from the Worker herself and from her direct work manager Mr Grumelart, I am satisfied and I find that prior to 30 July 2021 the Worker was well regarded as an efficient and effective employee.
298. I have in evidence before me the Worker’s contemporaneously recorded medical history with the Palmerston Medical Clinic over the pre injury period of about eight years and 10 months prior to 30 July 2021. That history records that the Worker had no significant history of any psychological problems or mood disorders for which she had sought medical attention over this period, until her presentation on 2 August 2021.
299. I have in evidence before me the Worker’s contemporaneously recorded medical history after 30 July 2021. The Palmerston Medical Clinic’s records show a change on and after Monday 2 August 2021, the first business day after Friday 30 July 2021. From that time forward, the Worker frequently attended on her GPs and consistently complained of various recorded symptoms of psychological distress. She was certified as fit to work from home but not at the workplace from time to time because of these symptoms, sometimes on a part-time basis and sometimes on a full-time basis. She was eventually certified by her GPs as totally unfit for work because of these symptoms.
300. I have in evidence before me the reports and opinions of the Worker’s treating GP

from the Palmerston Medical Centre.

301. I have in evidence before me the Worker's initial presenting history to the counselling service EASA which contemporaneously records an early complaint about her experience at the meeting on 30 July 2021 and her ongoing psychological symptoms from 3 August 2021 to 17 November 2021.
302. I have in evidence before me the reports and opinions of a treating psychiatrist and a treating psychologist.
303. I have in evidence before me the report and opinion of a medico-legal psychiatrist originally retained on behalf of the Employer.
304. The evidence of the two psychiatrists, the GP and the psychologist is of a formal psychiatric disorder arising from the meeting at work on 30 July 2021, which in the independent opinions of all four expert witnesses has totally incapacitated the Worker for work from at least late March 2022 to the present time, and continuing.
305. Both psychiatrists gave evidence that they were able to derive relevant and significant information from the Worker's demeanour and appearance when they assessed her, and they testified that they relied on this and on medical records as well as on the history which the Worker provided to them at those assessments, in arriving at their opinions and diagnosis.
306. Medico-legal psychiatric witness Dr Ventura was cross-examined on whether the Worker might have been faking her symptoms and demeanour when Dr Ventura assessed her. Dr Ventura was clear in her independent expert opinion that the Worker had not been doing this.
307. The evidence of the Worker, of Mr Grumelart and of the Worker's husband Mr Ellsley about the Worker's mood, behaviour and lifestyle since 30 July 2021 was all consistent and to the same effect. This was that since the meeting on 30 July 2021 the Worker no longer left her home very much, other than to attend jujitsu and even then requiring encouragement, and that her personality and lifestyle had changed for the worse after 30 July 2021.
308. On the basis of the foregoing there is a great deal of evidence before me, including expert evidence, of a deterioration in the Worker's psychological health adversely affecting her life within days of the meeting on 30 July 2021. The expert evidence is unanimous in identifying the Worker's meeting with the CEO of DIPL on 30 July 2021 as the cause of this change. There is no expert evidence to the contrary.
309. The foregoing then needs to be considered in the light of my adverse findings that the Worker has exaggerated and lied in some relevant areas of her evidence.

310. I have found that the Worker in November and December 2021 and again in late March 2022 presented herself to the Employer as able to perform her work duties at those times if permitted to do so at home. In her evidence in June and October 2023, respectively 15 and 19 months after late March 2022, she claimed to have been effectively totally incapacitated shortly after those occasions. The options are that the Worker was unreliable either in her contemporaneous documents, or in her later evidence before the Court. I am satisfied on the balance of probabilities and I find that the Worker was unreliable in her evidence on this subject before the Court.
311. I have found that the Worker lied about her knowledge of the personal loans she and her husband made to Christophe Grumelart. I have found that she lied in her purported explanation for not having a clear knowledge of these loans.
312. 18. I am satisfied the Worker was dishonest in not coming forward with documentation relevant to her cleaning business in financial year 2021/22. I have found that she lied to the Court about the existence of these documents. I am satisfied this documentation evidences her running a cleaning business, and that was inconsistent with her evidence that she was totally incapacitated for work from 22 December 2021 to 8 March 2022 and again from 31 March 2022 to 30 June 2022, the end of that financial year.
313. The Employer submits that because of the inconsistencies in the Worker's evidence as discussed earlier in these Reasons, the Worker's histories and presentations to medical experts and to a psychologist and her evidence of her symptoms and incapacity over about two years at the time she gave her evidence before me, are unreliable and should not be accepted. The Employer submits that the Worker has not suffered a psychiatric injury as she has contended, or at all.
314. This submission necessarily requires the conclusion that the Worker at or very shortly after the meeting on 30 July 2021 by 2 August 2021 knowingly adopted a plan of action to pretend to be psychologically injured. It requires the conclusion that the Worker has persisted in this pretence to the present time.
315. This submission requires the conclusion that the Worker has maintained such a pretence of psychological injury to either or both of Mr Grumelart and her husband Mr Ellesly or alternatively, that either or both of them have knowingly conspired with her in that pretence.
316. This submission goes too far. It is inconsistent with the weight of the evidence. On the basis of all the evidence before me and of my findings of what happened at the meeting on 30 July 2021, I do not accept any reasonable likelihood that between that meeting and her GP presentation three days later on Monday 2 August 2021, and her presentation to EASA on 3 August 2021, the Worker decided to and then did concoct symptoms of a psychological injury arising from that meeting. On the same basis, and additionally on the objective evidence of Mr Goodluck's psychometric testing of the Worker, I do not accept any reasonable likelihood that the Worker decided to and then

did concoct and maintain any such symptoms at a later time.

317. I do not accept any reasonable likelihood that either or both Mr Grumelart and the Worker's husband Mr Ellesly have knowingly concocted and falsely presented their evidence as to their respective observations of the Worker's changed mood and emotional state on and after 30 July 2021.
318. I do not accept the above submissions of the Employer. The evidence and the overwhelming weight of the evidence is all to the effect that the Worker's psychological state has deteriorated since and because of the meeting on 30 July 2021. The evidence from the Worker, her close friend and former boss Mr Grumelart, her husband Mr Ellsley, from the Worker's treating health service providers and from one independent medico-legal psychiatrist, is all to the same effect. That is that the Worker suffered an injury at or shortly following the meeting on 30 July 2021, and that injury has adversely affected the Worker's emotional state and caused her to suffer some incapacity for work.
319. The Employer submits in the alternative that if the Worker has suffered a psychiatric injury then it has not impacted her life to the extent the Worker contends, and that she is not incapacitated for work totally or at all because of any such injury. I consider this alternative submission later in these Reasons.

B. Did the Worker Suffer Any and if so What Injury?

320. I am satisfied on the basis of both the medical/expert evidence and the lay evidence before me and I find that the Worker suffered an injury on or shortly after 30 July 2021, namely a Major Depressive Disorder, severe, with anxious distress.

C. Was the Injury Caused by the Meeting on 30 July 2021?

321. I am satisfied on the basis of the same evidence and also of the evidence of the recording and I find that the injury was caused by the Worker's meeting with Mr Andrew Kirkman, the CEO of DIPL, on 30 July 2021. I find that it was caused primarily by Mr Kirkman's manner in his dealing with the Worker at that meeting.
322. I find that the injury arose out of the Worker's employment with the Employer.
323. I find that the injury was a mental injury within the meaning of the Act.

D. Was the Injury a Mental Injury Caused Wholly or Primarily by Reasonable Management Action?

324. Although I have found that the Worker suffered a work-related mental injury, she will have no entitlement to compensation under the Act for that injury if the Employer succeeds in establishing the statutory defence of reasonable management action under

subsection.3A(2) of the Act. The Employer bears the onus of establishing that defence.

325. Subsection 3A(2) of the Act provides:

“(2) Despite any other provision of this Act, a mental injury is not considered to be an injury for this Act if it is caused wholly or primarily by one or more of the following:

(a) management action taken on reasonable grounds and in a reasonable manner by or on behalf of the worker’s employer;

(b) a decision of the worker’s employer, on reasonable grounds, to take, or not to take, any management action;

(c) any expectation by the worker that any management action would, or would not, be taken or any decision made to take, or not to take, any management action”.

326. For the purposes of subsection 3A(2)(c) of the Act, there was no evidence before me that the Worker had any expectation before 30 July 2021 that the meeting between Mr Christophe Grumelart and Mr Andrew Kirkman on that date would involve her or her role in the workplace.

327. I am satisfied on the Worker’s evidence and I find that the advice to the Worker on 30 July 2021 by Mr Grumelart following his meeting with Mr Kirkman that same day, that she would be moved from her role in the workplace, was a surprise to her. I find that the advice was unexpected rather than contrary to an expectation.

328. I am satisfied on the Worker’s evidence and I find that the Worker had no expectation on 30 July 2021, before learning of the outcome affecting her of the meeting that day between Mr Andrew Kirkman and Mr Christophe Grumelart, that the Employer would or would not take any management action, or that it would or would not decide to take any management action, in respect of her generally or her role in the workplace specifically.

329. I am satisfied on the Worker’s evidence and on the recording of the meeting and I find that when the Worker sought and then attended the meeting with Mr Andrew Kirkman later on 30 July 2021 she did so in the belief that the Employer through Mr Kirkman had already made the decision to take a management action, namely to move her from her role in the workplace.

330. I do not agree with the submission by counsel for the Employer that “*expectation*” as used in subsection 3A(2)(c) of the Act can include the Worker’s general expectation that there would be no change to her role, in the absence of some indication known to the Worker before 30 July 2021 that a change to her role was being contemplated by the Employer.

331. I rule that subsection 3A(2)(c) has no application in these circumstances.
332. Mr Lindsay SC for the Employer has submitted that the meeting on 30 July 2021 between Mr Andrew Kirkman and the Worker involved a decision of the Employer to take a management action within the meaning of subsection 3A(2)(b) of the Act, namely to change her role in the workplace (“the decision”). He has submitted that this decision was taken on reasonable grounds. He has submitted that a decision of this nature is not required by the subsection to be taken in a reasonable manner.
333. It is my interpretation of subsection 3A(2)(b) of the Act and I rule that the “*decision*” referred to therein means the process of an employer’s arriving at the decision and the arrival at the decision. Because a worker’s mental injury must have been “...*caused wholly or primarily...*” by the decision, the worker must know of it. The subsection therefore includes a worker’s learning of the decision.
334. An employer is required by subsection 3A(2)(b) of the Act to arrive at the decision “*on reasonable grounds*” but it is not additionally required to do so “*in a reasonable manner*”.
335. I am satisfied and I find that the meeting on 30 July 2021 between the Worker and Mr Kirkman was not the occasion when the decision was reached. I am satisfied and I find that the decision had been reached by Mr Kirkman at some unknown time but clearly before he informed Mr Grumelart of the decision at their meeting on 30 July 2021, before the Worker’s meeting with Mr Kirkman later that day.
336. Additionally, I am satisfied and I find that the meeting on 30 July 2021 between the Worker and Mr Kirkman was not the occasion when the Worker learned of the decision. I have found that she had been informed of it by Mr Grumelart earlier that day.
337. In my view any subsequent actions by an employer in respect of a decision once reached and transmitted, such as justifying or defending that decision or taking steps to implement that decision, or modifying that decision, would be separate, additional actions which would also be “*management action*” as defined in section 3 of the Act.
338. In this matter I rule that the actions of Mr Kirkman at the meeting between the Worker and him on 30 July 2021, namely confirming to her his decision to change her role in the workplace, explaining the background to and the reasons for his decision, justifying, defending and maintaining the decision, counselling her about the adverse impact on Mr Grumelart of their perceived relationship, counselling her against commencing any grievance procedure, and then giving her the opportunity to devise a plan to minimise the rumours, were none of them simply a “*decision*” within the meaning of subsection 3A(2)(b) of the Act. Rather, I am satisfied and I rule that each action was a separate “*management action*” within the meaning of subsection 3A(2)(a) of the Act (“the management actions”). As such, each had to be “...*taken on reasonable grounds and in a*

reasonable manner by or on behalf of the worker's employer".

339. If I am not correct in my ruling on the ambit of subsection 3A(2)(b) of the Act I am nevertheless satisfied on the balance of probabilities and I have found above that the injury was not caused wholly or primarily by the decision of the Employer to change the Worker's role in the workplace. I have found that the injury was primarily caused by the manner of Mr Kirkman's dealing with the Worker at the meeting on 30 July 2021.
340. For the reasons set out in paragraphs 59, 60 and 61 above of these Reasons, I am satisfied and I find that none of the management actions of Mr Andrew Kirkman taken at the meeting on 30 July 2021 was taken in a reasonable manner. Because of this finding, I am not required to consider further whether the management actions were taken on reasonable grounds.
341. I rule that the Employer has failed to discharge its onus to prove any statutory defence pursuant to subsection 3A(2) of the Act.

E. Has the Worker Been Incapacitated at all for Work as a Consequence of the Injury?

i. Generally

342. The evidence of the Worker, of her husband and of Christophe Grumelart and all the medical/expert records and evidence together establish on the balance of probabilities, and I find, that the Worker has been incapacitated for the employment to some degree as a consequence of the injury on Friday 30 July 2021 on and after Monday 2 August 2021. This is the date that the Worker first presented to her GP requesting a certificate to work from home as a consequence of recorded symptoms which I find were attributable to the injury – certificate of Dr Yaung dated 2 August 2021 **at page 336 of Exhibit W5.**
343. The Worker did not necessarily suffer some loss of earning capacity at all times on and after 2 August 2021.
344. The Worker pleads that the injury and the resultant incapacity first led her to suffer some loss of earning capacity on and from Tuesday 17 August 2021 to and including 23 December 2021. This is the period over which the Worker was certified both as needing to work from home and for working a reduced or varying number of hours per day depending on her symptoms and mood – the 7 certificates of various GPs at the Palmerston Medical Clinic from pages **338 to 349 of Exhibit W5.**
345. The Worker was first certified as totally incapacitated for the employment from 22 December 2021 – certificate of Dr Yaung dated 22 December 2021 **at page 350 of Exhibit W5.** This cut short the previous certificate which had certified her as partially

incapacitated up to and including 23 December 2021.

346. I am satisfied on the evidence on the balance of probabilities and I find that the Worker was partially incapacitated for the employment on and from 2 August 2021 to and including 21 December 2021 and that she first suffered some loss of earning capacity as a result of the injury on 17 August 2021. This loss of earning capacity is represented by the Worker's having to access sick pay or any other form of leave to top up her fortnightly payments in fortnights when she worked fewer than her normal hours because of the injury.
347. However, this first loss of earning capacity lasted only until 29 August 2021. The Worker lodged her Work Health claim with a supporting medical certificate which certified her as partially incapacitated for work from 30 August 2021. The Employer deferred its response to the claim until it eventually disputed the claim on 29 October 2021. Between 30 August 2021 and 29 October 2021 inclusive the Employer paid the Worker her normal pay because of this deferral ("deferral payments"). There was therefore no loss of earning capacity over this period.

ii. The Initial Period – Section 64

348. Section 64 of the Act deals with a worker who is totally or partially incapacitated for work because of an injury over an initial period. **Subsections 64(2)(a) and (b)** establish an entitlement to payment of weekly benefits over this initial period. This initial period commences to run from the date a medical practitioner first certifies an incapacity for work because of an injury.
349. **Subsection 64(5)(a)** caps this initial period of entitlement at 26 weeks, which does not have to be a continuous period. It can be made up of more than one period of weeks.
350. **Subsections 64(5)(b) and (c)** require that a medical practitioner must certify the worker as totally or partially incapacitated and that this is because of the injury. **Subsection 64(5)(d)** requires that the worker has suffered actual economic loss in that time in order to be entitled to payment of weekly benefits.
351. The many medical certificates issued in respect of the Worker on and after 2 August 2021 are not all in the workers' compensation format. Those not in this format say no more than that the Worker was incapacitated for work for a period of time. They do not provide a diagnosis or any cause of the incapacity. They do not link the incapacity to the injury. For these reasons those certificates do not provide the information necessary to comply with subsections 64(5) (b) or (c) of the Act.
352. Given the Worker's pleading is limited to total incapacity after 21 December 2021, it is necessary for me to identify compliant certificates between 17 August 2021 and 21 December 2021 whether for partial or total incapacity. I will then have to identify

compliant certificates after 21 December 2021 limited to total incapacity. I will have to identify the first 26 weeks – 182 days – within which the section 64 entitlement to weekly benefits operated.

353. 17 There is no compliant certificate covering the period from 17 August 2021 to 22 August 2021.
354. The first compliant certificate is dated 26 August 2021 and it certifies the Worker was partially incapacitated for work because of the injury from 23 August 2021 to 2 September 2021– **page 340 Exhibit W5**. I find that the first date from which the Worker was entitled to be paid compensation pursuant to subsection 64(2) of the Act was therefore **23 August 2021**. However, there was no loss of earning capacity over the period 23 August 2021 to 2 September 2021 because of the deferral payments.
355. The initial 26 week period calculated from 23 August 2021 elapsed 182 days later, on **20 February 2022**.
356. The second compliant certificate is dated 9 September 2021 and it certifies the Worker was partially incapacitated for work because of the injury from 3 September to 1 October 2021– **page 342 Exhibit W5**. There was no loss of earning capacity over this period because of the deferral payments.
357. The third compliant certificate was dated 23 September 2021 and it certified the Worker was partially incapacitated for work because of the injury from 23 September to 21 October 2021. The relevant days here in addition to the preceding certificate are 2 October to 21 October 2021– **page 344 Exhibit W5**. There was no loss of earning capacity over this period because of the deferral payments.
358. The fourth compliant certificate was dated 24 October 2021 and it certifies the Worker was partially incapacitated for work because of the injury from 22 October to 22 November 2021 – **page 346 Exhibit W5**. I find that there was a potential loss of earning capacity from 30 October 2021 to 22 November 2021, a period of **24 days**. This is because the deferral payments ceased on 29 October 2021.
359. The fifth compliant certificate was dated 17 November 2021 and it certified the Worker as partially incapacitated for work because of the injury from 23 November to 23 December 2021, a period of **31 days** – **page 348 Exhibit W5**.
360. There are no compliant certificates after 17 November 2021 until the sixth compliant certificate which was dated 29 January 2022. This certified the Worker as totally incapacitated for work because of the injury from 1 February 2022 to 8 March 2022 inclusive, 36 days – **page 354 Exhibit W5**. The initial 26 week period pursuant to section 64 of the Act came to an end on 20 February 2022 and so the relevant number of days pursuant to this certificate is **20 days**.

361. The foregoing periods of days when there may have been some loss of earning capacity together with certification of some incapacity caused by the injury come to a total of **75 days**.
362. I find that the Worker's potential entitlement to payments of weekly benefits pursuant to section 64 of the Act commenced on 23 August 2021 and it came to an end on 20 February 2022 and it is limited to the above three identified periods totalling 75 days when there was both certification as required pursuant to subsections 64(5)(b) and (c) of the Act and also some potential loss of earning capacity.
363. The Worker's normal weekly earnings within the meaning of the Act have been agreed in the sum of **\$2,009.52** as at 30 July 2021 – numbered paragraph 2 in Annexure 1 to the Employer's Submissions dated 28 March 2024 – and I so find.
364. The Worker's entitlement to payments of weekly benefits pursuant to section 64 of the Act in these three identified periods will depend on what she was in fact paid by way of hours worked in each of those periods. If she was paid less than \$2,009.52 gross per week in respect of any of these three periods then she is entitled to be paid 100% of any shortfall.

iii. The Vaccination Issue

365. The Employer has pleaded at paragraph 12.b. of its Defence that the cause of the Worker's not working from 22 December 2021 to 11 February 2022 was not any injury-related incapacity. It was rather due to her being barred from the workplace because of not having received her second Covid vaccination, pursuant to the Chief Health Officer's Direction no. 55. This Direction did not apply where a person had a certificate exempting him or her from being vaccinated.
366. The best evidence on this issue is to be found in the contemporaneous notes of Dr Yaung and his fellow GPs whom the Worker consulted at the Palmerston Medical Clinic.
367. The Worker consulted GPs at this Clinic over this period on nine occasions, namely 22 December 2021, 2 January 2022, 6 January 2022, 11 January 2022, 14 January 2022, 17 January 2022, 19 January 2022, 25 January 2022 and 31 January 2022.
368. The first record of any mention of Covid was on 17 January 2022, the Worker's 6th consultation in this period. She consulted GP Dr Roy Abraham who recorded that the Worker then tested positive to Covid. Dr Abraham recorded he consulted the Corona Virus National Hotline which advised deferring any Covid vaccination until 6 months after testing positive to Covid.
369. On 31 January 2022, the 9th and final consultation over the relevant period, the Worker consulted GP Dr Yaung. Dr Yaung recorded that he provided the Worker

with a certificate of exemption from receiving a Covid vaccination until 29 May 2022, on the basis of the Worker's having tested positive to Covid. For this reason Direction no. 55 could not apply to the Worker on and after 31 January 2022.

370. There were no other references to Covid in the remaining seven contemporaneous records of the Worker's attendances on GPs over this period. At each of those seven consultations the Worker was recorded as complaining of combinations of symptoms of stress, anxiety, low mood, insomnia, panic attack and anger.
371. On the basis of these medical records I am satisfied and I find that over the period 22 December 2021 to 11 February 2022 the Worker overwhelmingly consulted her treating GPs for mental health issues and not solely or mainly in respect of a Covid vaccination or exemption. I find that the Employer has not discharged its onus to prove that over the period 22 December 2021 to 11 February 2022 the real reason for the Worker's inability to work was because of a failure to comply with the Chief Health Officer's Direction no. 55.

F. Has the Worker been totally incapacitated for work as a consequence of the injury?

Incapacity after 20 February 2022 – Section 65

372. A worker's entitlement to be paid weekly benefits in respect of a work injury after the initial 26 weeks period in section 64 of the Act is to be found in **section 65** of the Act. Section 65 of the Act does not require the same certifications by a medical practitioner as are required in subsections 64(5)(b) and (c) of the Act.
373. For the period 21 February 2022 to date and continuing I am able to be satisfied as to the Worker's pleaded total incapacity, on whether it was caused by the injury, and on the period or periods of any such total incapacity, on the whole of the evidence before me. I am not limited to those periods covered by medical certificates in evidence before me certifying total incapacity that was caused by the injury.
374. Because of the Worker's own records of her hours worked shortly before 22 December 2021, because of her email on 29 March 2022 that she had the capacity to work from home at that time, and because of her involvement in her cleaning business over the whole period from 1 July 2021 to 30 June 2022, I find that the Worker was not totally incapacitated for work by the injury at any time up to 30 June 2022.
375. There is no evidence before me of any events after 30 June 2022 which might have caused the incapacity to have become total after that date. I am aware on the evidence that the Worker was suspended from the employment in April 2022 and subsequently dismissed from the employment in June 2022. However, I have no evidence of the circumstances of these two events. None of the expert witnesses before the Court expressed any opinion about these two events or any impact they might have had on

the Worker's capacity to work.

376. The Worker bears the onus of proving that she has been totally incapacitated for work at any time because of the injury. I have found that the Worker was not totally incapacitated up to 30 June 2022. There is no evidence or opinion before the Court about any cause of or trigger for any deterioration in the Worker's condition arising out of the injury after 30 June 2022.

377. The opinions of the expert witnesses are based in part on the Worker's presentations and contemporaneous reports of her symptoms. The experts relied on the Worker's credibility in her presentations and reports in arriving at their opinions that she has been totally incapacitated for work since 30 March 2022 to date.

378. The Worker did not tell any of her treating experts about her cleaning business. None of them took it into account in arriving at their opinions about her capacity to work after 30 March 2022. Dr Yaung said he had not known about it. The following exchange then took place at **transcript 20 February 2024 at page 138.10**:

Mr Lindsay: ...Did you know that she was conducting a cleaning business?

Dr Yaung: I don't know.

Mr Lindsay: Is it – in your opinion, is it within Ms Rust's capacity to send out invoices for cleaning work, to do minor paperwork for a cleaning business?

Dr Yaung: I didn't know (inaudible).

Mr Lindsay: I understand you didn't know that?

Dr Yaung: Yep.

Mr Lindsay: My question was is that within her capacity on the way she has presented to you?

His Honour: From what you understand about her symptoms, is that something you'd expect she could do?

*Dr Yaung: **She can do that** (my emphasis)".*

379. On the basis of my foregoing findings as to the Worker's credibility in the above identified areas, I am satisfied that the Worker was not fully open and honest in reporting her circumstances and how her symptoms affected her capacity for work to her treating experts at any time before 30 June 2022. This necessarily raises the question of whether the Worker was fully open and honest in her reports of these matters to her treating health service providers after that date.

380. On all the evidence before me and on the basis of my foregoing findings as to her credibility, I am not satisfied that the Worker was fully open and honest in this way with her treating health service providers after 30 June 2022.

381. The Worker has not discharged her onus. I am not satisfied on the balance of probabilities that the Worker has been totally incapacitated for work because of the injury at any time after 30 July 2021 to the present time.

MEDICAL EXPENSES

382. The parties did not adduce much evidence in support of medical expenses during the hearing. Counsel for both parties were confident that these would be agreed between them. This was not quite achieved. The Worker tendered a schedule of her claimed medical expenses on this basis – **Exhibit W 87**. The Worker now submits that if she is successful in these proceedings she should be paid medical expenses totalling \$17,094.60 as itemised in this exhibit.
383. Exhibit W 87 includes claims for the following categories of treatment which the Employer in its Submissions dated 28 March 2024 paragraphs 492 to 494 now objects to:
- i. Counselling by psychologist Mr Gregory Goodluck;
 - ii. Body transformation by Ms Beata Goodluck;
 - iii. iii) massage, deep tissue massage and remedial massage by Kerry’s body therapy; and
 - iv. Physiotherapy by Darwin Health Group.
384. Subsection 73(1) of the Act relevantly provides that an employer is liable to pay an injured worker as follows:
- “...any costs **reasonably** (my emphasis) incurred by the worker as a result of that injury for any one or more of the following:*
- (a) medical, surgical and rehabilitation treatment...”.*
385. Mr Goodluck was the Worker’s treating psychologist. It was entirely reasonable that he should provide counselling to her in respect of the injury. I will allow the medical expenses claimed in Exhibit W87 for counselling by Mr Goodluck.
386. “Body transformation” was explained by Mr Goodluck in **transcript 19 October 2023 at page 168.5**. He described this treatment as “*deep tissue myofascial release*”. He agreed that they were a form of tension-releasing massage treatments. These treatments were carried out by Mr Goodluck’s wife Beata Goodluck. Mr Goodluck said he had not prescribed these treatments but he had recommended them. The following exchange took place:
- “Mr Lindsay: It’s not recognised treatment, is it?
Mr Goodluck: It’s recognised by some people”.*

387. The Worker bears the onus of proving that these body transformation treatments were costs reasonably incurred within the meaning of subsection 73(1)(a) of the Act. I do not have sufficient evidence before me to be satisfied as to that. I will not allow the expenses claimed for body transformation in Exhibit W87.
388. Massage was recommended by the treating GP Dr Yaung. He said in his note of the telephone conference with Ms Clark on 13 February 2024 - **Exhibit W93** - as follows:
- " Massage is often recommended for patients with anxiety and depression such as Ms Ellsley. Patients with anxiety and depression often get tension headaches and neck pain and massage helps with that. It also helps with physical relaxation..."*
389. I am satisfied that the costs incurred by the Worker for massage, deep tissue massage and remedial massage were costs incurred upon the recommendation of her treating GP Dr Yaung. I am satisfied by Dr Yaung's explanation why it was reasonable for him to recommend such treatment in respect of the injury. I will allow the medical expenses claimed in Exhibit W 87 for these three types of massage.
390. Neither the Worker's submissions nor the Employer's submissions deal in any detail with the claim for physiotherapy expenses. The evidence before the Court did not deal with the need for physiotherapy expenses arising out of the injury. The Worker bears the onus of proving that these physiotherapy expenses were costs reasonably incurred within the meaning of subsection 73(1)(a) of the Act. I do not have sufficient evidence before me to be satisfied as to that. I will not allow the expenses claimed for physiotherapy treatments in Exhibit W 87.
391. The total claimed for medical expenses in Exhibit W 87 is \$17,094.60. From this I will deduct the 7 items for body transformation totalling \$1,400, and I will further deduct the claim for physiotherapy totalling \$540, to leave a balance of \$15,154.60.
392. The Worker's medical costs pursuant to section 73 of the Act are allowed in the total sum of **\$15,154.60**.

COSTS

393. The Worker has essentially been successful on every issue raised on the pleadings and before me at the hearing, with one significant exception. That exception is her total incapacity for work at any time after 30 July 2021. The Worker pleaded and she ran her case solely on the basis of total incapacity after 21 December 2021. I have not been satisfied on the balance of probabilities that the Worker was totally incapacitated for any periods after that date.
394. This means that there has been a mixed outcome of these proceedings to this extent.

395. Additionally, Rule 23.03(3) provides that in exercising its discretion in relation to costs the Work Health Court must have regard to the matters referred to in section 110 of the Act. I have no evidence before me of any such matters.
396. I propose to afford the parties the opportunity to provide written submissions to me on the question of costs and also on the question of any of the matters referred to in section 110 of the Act. I order as follows:
1. The Worker by 15 July 2024 file and serve any affidavit by her legal representative on which she wishes to rely evidencing the matters referred to in section 110 of the *Return to Work Act*.
 2. The Worker by 15 July 2024 file and serve her written submissions on the question of costs.
 3. The Employer by 22 July 2024 file and serve any affidavit by its legal representative on which it wishes to rely evidencing the matters referred to in section 110 of the *Return to Work Act*.
 4. The Employer by 22 July 2024 file and serve its written submissions on the question of costs.
 5. The question of cross is otherwise adjourned *sine die*.

FINAL ORDERS OTHER THAN COSTS

397. I make the following rulings and Orders:
- 1.1 A ruling that the Worker suffered an injury namely a Major Depressive Disorder, severe, with anxious distress, on or shortly after 30 July 2021.
 - 1.2 A ruling that the injury arose out of or in the course of the Worker's employment with the Employer.
 - 1.3 A ruling that the Worker's normal weekly earnings in the employment at 30 July 2021 were \$2,009.52 gross.
 - 1.4 An order that the Employer pay the Worker any arrears of weekly benefits arising in the two periods 30 October 2021 to 23 December 2021 inclusive and 1 February 2022 to 20 February 2022 inclusive being any shortfall between \$2,009.52 gross per week and the Worker's actual gross earnings in those periods.

- 1.5 An order that the Employer pay the Worker interest pursuant to section 89 of the Act on any such arrears of weekly benefits, calculated respectively from 30 December 2021 to the date of payment and from 27 February 2022 to the date of payment, at the interest rate fixed from time to time on Supreme Court judgment debts.
 - 1.6 An order that the Employer pay the Worker medical and like expenses pursuant to section 73 of the Act to the date of order in the sum of \$15,154.60.
 - 1.7 An order that the Employer pay to or on behalf of the Worker medical and like expenses pursuant to section 73 of the Act arising after the date of order, in accordance with the Act.
-