IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S CI 2017 02533

VICKI ELIZABETH PULLING — Appellant

v

YARRA RANGES SHIRE COUNCIL — Respondent

JUDGE:	BELL J
WHERE HELD:	Melbourne
DATE OF HEARING:	11 April 2018
DATE OF JUDGMENT:	16 May 2018
CASE MAY BE CITED AS:	*Pulling v Yarra Ranges Shire Council*
MEDIUM NEUTRAL CITATION:	[2018] VSC 248

WORKERS' COMPENSATION – stress-related migraine headaches and chest pains – whether injury arising out of or in the course of any employment – whether wholly or predominantly caused by management action – relevance and admissibility of patient's history in medical reports – whether admissible as exception to hearsay rule as admissible for non-hearsay purpose of providing the basis for medical opinions – whether properly disregarded entirely on grounds that doctors did not have 'full story' – proper consideration of causation test in case of mental injuries – whether magistrate erred in law in rejecting claim for compensation – whether considered whole of employment and all of its incidents – whether considered worker's employment over time and her perception of actual workplace stressors – whether considered whether increased regularity and severity of symptoms represented aggravation of existing injury – whether considered potential overlap between the injury and its symptoms and consequences – 'arising out of or in the course of any employment', 'mental injury', 'wholly', 'predominantly', 'management action' – *Evidence Act 2008* (Vic) s 60(1), *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ss 39(1) and 40(1)(a), *Magistrates Court Act 1989* (Vic) s 109(1).

APPEARANCES:	Counsel	Solicitors
For the appellant	Mr J P Gorton QC with Mr C Hangay	Zaparas Lawyers
For the respondent	Mr S A O'Meara QC with Ms F C Spencer	Thomson Geer

HIS HONOUR:

1 Vicki Pulling was employed as a technical and administrative support officer with Yarra Ranges Shire Council. She contended that, over time, she suffered from a work-related stress injury with symptoms of migraine headaches and chest pains causing her to stop work in August 2015. When the Council refused her claim for weekly payments and medical and like expenses under ss 39(1) and 40(1)(a) of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ('the Act'), Ms Pulling sought an order from the Magistrates' Court of Victoria that it pay her these amounts.

2 The magistrate dismissed her claim. In summary, under s 39(1) of the Act his Honour found that the migraine headaches and chest pains were symptomatic of a long-standing condition that was not work-related. Alternatively, his Honour decided that any injury was not compensable under s 40(1)(a) because it was wholly or predominantly caused by management action which the Council was undertaking, being a review of Ms Pulling's work area.

3 Ms Pulling now appeals against the magistrate's decision on grounds of error of law under s 109(1) of the *Magistrates' Court Act 1989* (Vic).

MS PULLING'S EMPLOYMENT WITH COUNCIL

4 Ms Pulling began working for the Council in 1996. She experienced an episode of work-related stress and anxiety in 2007 which caused her to be off work for six months, from which she recovered.

5 By 2015, Ms Pulling was working for the Council in the Secretariat of the Eastern Transport Coalition, a coalition of several eastern-suburban councils. Leading up to this time, there had been a history of conflict between Ms Pulling and three co-workers. She contended, and the magistrate accepted, that they engaged in disruptive, distracting and annoying behaviour in the workplace. There was an incident in 2011 as a result of which Ms Pulling undertook counselling with a psychologist as part of the Council's Employment Assistance Program. A formal

conciliation occurred at about this time. The dispute was resolved when the co-worker apologised. But the conflict with the co-workers continued and Ms Pulling consulted her general practitioner about stress-related symptoms in November 2014 (she had sick leave for a few days) and again in March 2015 (she worked at home for two weeks).

6 In February 2015, the Council began a review of the work of the staff in Ms Pulling's work area. Upon the basis of what she was informed by management, she thought this would result in the transfer or redundancy of the three co-workers with whom she was in conflict. Her condition stabilised. As it transpired, the review recommended that the roles of the workers be redefined in the direction of multi-tasking, which meant that Ms Pulling would have to continue working with them.

7 On 28 August 2015, Ms Pulling experienced chest pains and anxiety at work. This was the last day of her working for the Council. On 1 September 2015, she attended her general practitioner complaining of stress-related anxiety, saying she could not return to work, and she did not. A certificate of incapacity was issued on that day. She was ultimately dismissed on 13 January 2017.

MS PULLING'S CLAIM FOR WORKERS' COMPENSATION

8 Ms Pulling made a claim for workers' compensation on 9 September 2015. In her claim form she specified the injury to be:

> Chest pain, migraine.

She specified that the injury happened as follows:

> Have had ongoing recurring chest pain for 12 to 18 months as a result of a stressful office environment, also triggering migraine headaches.

The Council health and safety report, which she also filled out, gave the following description of the injury:

> Chest pain due to stressful office environment.

9 In response to her claim for workers' compensation, Ms Pulling was sent by the Council to Dr Ash Takyar, a psychiatrist, who examined her on 28 September 2015. Dr Takyar's report was favourable to Ms Pulling.

10 In the report dated 28 September 2015, Dr Takyar set out the following history:

> The referral, 01.09.2015, indicates that Ms Pulling reported being in a stressful environment for 12–18 months in the context of the 'office environment' and how management is handling the staff. She says her employer is going through a review process at the moment and the way that has been handled is causing her additional stress. She says things came to a head in February as well for the same thing and she worked for two weeks from home at the time. The referral indicates that she 'believes other staff are not doing their role properly causing an increased work load [sic] for her'. The referral indicates that the employer has asked for the claim to be investigated 'as she says the worker's role has recently been made redundant'. It says 'they are currently going through the redundancy process at the moment'.
>
> With regard to these circumstances Ms Pulling stated that difficulties in the workplace have 'probably been going for about 12–18 months, it got ramped up. There are some staff at work, other admin staff that aren't up to par — not very work [efficient] and not managed well, they have a lot of time off work, when they're there they have a lot of time socialising. They're not [well] managed. I am in an administration team — we were two departments that merged, 18 months ago. We were three administration in [my] department and this one person has always been a problem — had to go to mediation before and she has had to apologise'. She named the initials of this person as [S]. She stated that this worker 'doesn't do any work, she would stand in front of me reading the paper while I am [working]'. She then stated that this had been an ongoing situation for some time and not a new situation.

Dr Takyar also referred to the episode of work-related stress that occurred in about 2007:

> She stated that she had suffered workplace stress eight years ago at work under a different directorate. At that time she stated she initially had counselling with the EAP and was referred to a psychologist. She did not think she had been commenced on an antidepressant. She stated this had occurred in the context of a WorkCover claim.

Dr Takyar summarised the position as follows:

> She stated that there had been a change in her mental state over the last 12–18 months in the context of high workload after two administration teams were merged. Within her own team, she described one of the two other staff members as usually being less focussed on work, and distracted by personal tasks. She stated that this type of attitude pervaded the other team and on merger of the two teams she found that her workload had not ceased, and

> that she continued to work in a high stress environment, though she enjoyed her job. She stated that she sought to have minor aspects of her role cleaved off and sent to the other administration staff members, whom she said were often engaged in conversation, reading the newspaper, and other personal non work-related tasks in work time. She stated that they had not been well-managed, and this had been acknowledged by her former manager/director. She described a change in her mental state in the context of this work pressure, and a perceived lack of support. She stated that the change in her mental state had peaked in February of 2015, requiring her to work from home for two weeks, which led to temporary stabilisation. She described a further worsening in her mental state more recently.

Dr Takyar diagnosed Ms Pulling as suffering from an 'adjustment disorder with mixed anxiety and depressed mood'. Of her current condition, he said it:

> appears to be a separate episode of an adjustment disorder in the context of similar circumstances, with symptoms becoming more evident over the last 12–18 months.

11 However, the claim for workers' compensation was rejected on 9 October 2015. The rejection letter stated that Dr Takyar's report

> confirms that your symptoms are at a sufficient level to constitute a diagnosable psychiatric injury. It is further advised that you currently do not have a capacity for work.

This was in effect a decision that s 39(1) of the Act was satisfied. But the letter went on to state that the claim would be rejected under s 40(1)(a):

> The report of Neil Oates and Associates has found that there has been a restructure of the Operations Support Group at Yarra Ranges Council. It has been noted that you were unhappy with the potential changes, specifically the potential changes to your position description. It has been advised that you attended several meetings in this regard.
>
> It has been advised that in February 2015, you were taken to hospital as a result of stress at work. Witnesses advised that you were unhappy about the potential changes as a result of the restructure.
>
> You returned to work after this on a structured return to work plan. You continued to attend meetings in regards to the restructure. It has been advised that you were aggrieved about changes to be made to your positon description and your belief that this did not match what your role actually was.
>
> You ceased work on 28 August 2015 and have not returned. Your first certificate of capacity has been issued on 1 September 2015.
>
> The Victorian workers' compensation legislation states that there is no entitlement to compensation in respect of an injury to a worker if the injury is

> a mental injury caused wholly or predominantly by management action taken on reasonable grounds and in a reasonable manner by or on behalf of the worker's employer or any expectation by the worker that any management action would, or would not, be taken.
>
> CGU has determined that your employer's reasonable actions (including but not limited to) undertaking a restructure of the department you work in and proposing changes to your position description (reclassification) were conducted in a reasonable manner. CGU considers that this is the whole or predominant cause of your condition. Therefore you are not entitled to compensation in the form of weekly payments and medical and like expenses.

A subsequent letter dated 24 November 2015 confirmed this decision.

12 In consequence of this rejection decision, Ms Pulling brought proceedings against the Council in the Magistrates' Court of Victoria.

SUBSEQUENT MEDICAL REPORTS

13 Before the proceeding in the Magistrates' Court was heard, Ms Pulling and the Council obtained other medical reports. These too supported her case. The evidence in these reports was not accepted by the magistrate. In the appeal, Ms Pulling submits that this was an error of law. To support consideration of that ground, it is convenient that I here set out the contents of the reports.

14 On Ms Pulling's side, there were two reports. The first was a report dated 17 June 2016 provided by her general practitioner, Dr Meagan Worthington. The report gave an account of Ms Pulling's work-related stress from 12 November 2014:

> Mrs Pulling consulted Dr Khan on 12/11/14 with workplace stress causing insomnia and an upset stomach.
>
> She required 2 days leave at that time.
>
> She represented on 11/2/15 with a migraine, and then again on 19/2/15, citing workplace stress as the precipitating factor for the migraine. At this consultation she also complained of intermittent chest pains, which were worse when stressed. She decided to work from home to minimise the stress from the conflict at work and the review process that was taking place. She worked from home for 2–3 weeks, before returning to the workplace.
>
> Mrs Pulling represented on 20/8/15 with stress from workplace. She had been taking her own sick leave from time to time to manage her symptoms.

> Again on 28/8/16 she presented with chest pain, and Dr Barton sent her to Emergency Department for assessment. After tests the diagnosis was anxiety.
>
> On 1/9/15, Mrs Pulling felt the stress/anxiety she was suffering, as a direct consequence of the conflict in the workplace, made it impossible for her to go back to the office.
>
> The symptoms of anxiety and subsequent lowered mood led to the diagnosis of depression and anxiety on 1/10/15, and she was commenced on antidepressant medication.
>
> Mrs Pulling has remained away from the workplace and on medication from that time until the present.
>
> The diagnosis is workplace stress causing anxiety and depression.
>
> The condition is considered work related, and the worker's employment has been a contributing factor to the worker's condition.
>
> The worker had a similar occurrence in 2007, where she suffered from workplace stress and subsequent depression and anxiety. This was treated with resolution of workplace conflict, and mediation, with the worker making a complete recovery. It was not considered a pre-existing injury, as the worker was symptom free and on no medication for the 7 years in between episodes.
>
> The worker has no current capacity for work in pre injury employment, as she doesn't believe the conflict issues have been resolved.
>
> She would have some ability for alternate duties if the environment was free of the precipitating issues.
>
> The factor inhibiting Mrs Pulling's ability to perform full and unrestricted work duties is the unresolved office issues.
>
> Mrs Pulling will require ongoing medication for some months, then a reassessment regarding further treatment. She may also benefit from some psychology.
>
> I would assess the prognosis as being extremely positive if Mrs Pulling is able to work in an environment free of major conflict.

15 The second report on Ms Pulling's side was dated 4 October 2016 and provided by Dr David Weissman, a psychiatrist. Dr Weissman gave the following account of Ms Pulling's history:

> The claimant told me that she experienced stress and difficulties working with three particular co-workers named [S], [L] and [C] over a long period of time — at least three years.
>
> In her own words, she told me that they did not really work and that they were very slack. On the other hand, Ms Pulling was someone with a very

hard-work ethic. She told me during the interview that she was a highly regarded employee.

She told me that, initially, she worked right next to those three women (above) and that she was constantly distracted by them.

She also told me that they tried to get her to do work that they should have been doing, although she did a different job to them.

She told me that her team merged with another team.

She told me that she frequently approached management and that management was well aware of what the three co-workers were like, and how this impacted upon Ms Pulling. She reports that management promised 'to do lots' but reportedly 'did nothing'. She told me that she could not concentrate at work and that she resorted to wearing earplugs.

She told me that her direct manager was [M] (who then became director). She told me that she worked very closely with [M] on high-level things. She told me that he also knew what was going on and knew the pressure that she was under.

She told me that she developed symptoms and features of anxiety and stress, as well as chest pain, worsening migraines, sleep disturbance and concentration impairment.

She told me that she started seeing psychologists through the EAP.

She told me that, in or around February 2015, she developed a severe migraine. She saw her doctor, she was sent to hospital and had two days off work. She told me that when she returned to work her coordinator, [C], told her that there was going to be a 'toe-to-toe' meeting. She became anxious about this. She told me that she attended that particular meeting and became light-headed.

In addition to continuing treatment with the EAP, she also consulted a women's health naturopath.

She told me that her last day at work was 28 September 2015. She told me that the day before was very stressful. On 28 September 2015, she was working at her desk writing minutes to a meeting. She developed worsening chest pain. She went to her car. She called her doctor and spoke with the nurse at the medical practice. She was worried that she was having a heart attack.

She told me that she underwent an ECG at her doctor's practice. There were concerns about the ECG and she was sent to hospital by ambulance.

She told me that she last saw the psychologist through the EAP about one or two months before she left work. She told me that she has not been able to afford to see an independent psychologist since then.

Dr Weissman made reference to a report dated 24 October 2015 of Professor Michael Jelinek, who stated that Ms Pulling 'felt threatened and diminished by a planned

amalgamation of two teams' in her work area at the Council. Dr Weissman gave the following diagnosis and analysis:

> There is one prior episode of work-related stress dating back to 2007 when she was working in a completely different building of Yarra Ranges Shire Council, but this fully resolved. I mention it for the sake of completion.
>
> The worker/claimant Ms Vicki Pulling came across as someone with a good solid and sound, premorbid (pre-work-injury) quality of life, level of function, level of activity, occupational capacity and mental health/emotional heath. She came across as a very conscientious, diligent, industrious person with a high work ethic.
>
> Ms Pulling is a 57 year old married mother of two and grandmother of three, who resides with her husband in Wonga Park and who was employed full-time in administration for the Yarra Ranges Shire Council based in Lilydale. She commenced employment there in or around 1996, about 20 years ago.
>
> During the interview today, she described a number of stressors that she experienced during the course of her employment.
>
> Leaving aside her obvious emotional distress, she came across as a very genuine, open, honest, earnest and credible historian and witness.
>
> - She is currently suffering from **moderate, mixed anxiety symptoms; mild to moderate, mixed depressive symptoms; and associated traumatisation features**; directly due to the circumstances of her employment.
>
> - She has lost a lot of self-esteem and confidence and she has significant self-doubt. She is now very socially anxious and withdrawn, which is out-of-character for her.
>
> *Diagnosis*:
>
> - I conducted a psychiatric assessment of the worker/claimant Ms Vicki Pulling and concluded that she is suffering from a **chronic Adjustment Disorder with Anxious and Depressed Mood (more anxiety than depression), associated with traumatisation features, of moderate intensity or severity**, relevant to her employment.

16 On the Council's side, there were two relevant reports. The first was dated 6 June 2016 and provided by Dr Nitin Dharwadkar, a psychiatrist. This report gave the following relevant history:

> Mrs Pulling reported that she was a high level admin officer and she was then allocated to another group team at the end of 2014.
>
> There were 3 other officers who did not really do their own duties.
>
> They also questioned why 'Mrs Pulling would not do their work', as they all had become one team.

> These 3 co-workers would not do their own work.
>
> These 3 co-workers 'would be loud and laughing' in the office and would interfere with her concentration and she would have to work with ear plugs in her ears.
>
> Mrs Pulling complained to her bosses about 2 of those co-workers but no action was taken.
>
> Mrs Pulling was stressed with these 3 co-workers and she developed pains in the chest and migraines and she went to the hospital in Feb 2015.
>
> Later her bosses also agreed that these 3 workers 'were poor performers' and the management tried to get the 3 co-workers to leave via redundancy but these 3 co-workers finally did not accept the 3 redundancies.

Dr Dharwadkar reported at length on the symptoms reported by Ms Pulling since 'about November 2014'. Dr Dharwadkar gave the following summary of her condition:

> She has experienced stress due to excessive workload in the context of her co-workers being poor work performers.
>
> She reported the following since about Nov 2014: depressed mood, periodical chest pains and migraines and headaches (history of migraines since 20 years), lowered motivation, lowered interest, preoccupation with work issues, feelings of anger and frustration, periodical difficulties with concentration and forgetfulness.

Dr Dharwadkar diagnosed Ms Pulling as suffering from a 'Mild Major Depressive Disorder, Recurrent', on the basis of the following symptoms:

> Depressed mood, periodical chest pains, lowered motivation, lowered interest, preoccupation with work issues, feelings of anger and frustration, periodical difficulties with concentration and forgetfulness.

17 The second report on the Council's side was that of Dr Takyar dated 20 March 2017. After re-examining Ms Pulling, Dr Takyar confirmed the contents of his earlier report (see above) and his opinion. With specific reference to a question asked about the onset and progress of her symptoms, Dr Takyar stated:

> The worker described onset of psychiatric symptoms in my original report. At that time she described a change in her mental state fluctuating over time with change perhaps commencing in around February 2015 and building over 8–12 months. This is detailed in my original report.

18 As can be seen, these four reports addressed the build-up and onset of Ms Pulling's condition in the period prior to the commencement of the Council's review into her work area.

19 That brings me to the hearing before the magistrate.

ISSUES IN HEARING IN MAGISTRATES' COURT

20 There was argument in the hearing of the appeal in this court about the scope of the issues in the hearing before the magistrate.

21 In her statement of claim, Ms Pulling pleaded that she suffered a mental injury (including adjustment disorder, anxiety and depression), chest pain and migraines arising out of and/or in the course of her employment with the Council from approximately August 2012 to 28 August 2015, that the injury arose (among other things) as a result of 'working in a stressful work environment', that she has been and remains incapacitated for work and that she is entitled to weekly payments of compensation, and medical and like expenses, from 28 August 2015 and continuing.

22 In its defence, the Council admitted the employment, denied the injury, did not admit the cause of the injury, denied the incapacity for work, contended that any injury was not one to which the employment contributed and relied upon the defence in s 40(1)(a) of the Act.

23 I have examined the transcript of what passed between counsel for the parties and the magistrate in the hearing of the proceeding in the Magistrates' Court. In my view, the issues specified in the pleadings were clarified but not formally reduced in argument before the magistrate.

24 I think a fair summary of the position is that the issues before the magistrate were:

- Was there caused to Ms Pulling an injury arising out of or in the course of her employment with the Council (s 39(1) of the Act)?

- If any such injury was caused, was it caused wholly or predominantly by management action taken on reasonable grounds and in a reasonable manner (s 40(1)(a) of the Act)?

25 The stronger focus of the evidence and the submissions of the parties in the proceeding in the Magistrates' Court was upon the issues arising under s 40(1)(a) of the Act, but the parties left definitely open, and the magistrate made clear he would decide, the issues arising under s 39(1) as well. It will be necessary to later discuss in more detail the legal framework within which these issues had to be resolved.

DECISION OF MAGISTRATE

Main findings

26 The magistrate's judgment dismissing Ms Pulling's claim was expressed in terms of main findings in relation to four matters:

> Therefore, in conclusion I make the following findings: (1), the plaintiff did not suffer any compensable injury arising out of or in the course of her employment by the defendant. I make this finding on a number of grounds: (a), all of her evidence concerning the symptoms of stress were confined to headaches, that is migraine headaches, and chest pains. She agreed that the migraines had occurred intermittently with various severity since she was 17 years old and she is now aged 58, and with some reluctance she had to agree that she had experienced chest pains, also on and off over the years, as recorded in the general practitioner's notes.
>
> I accept that these symptoms increased in regularity and severity in times of stress and I accept that all of the tests from time to time concerning the chest pains excluded cardiac origin and suggested that these pains were stress-related. However, I emphasise and I so find that these episodes were symptomatic of long-standing medical conditions and not injures per se. I emphasise the distinction between symptoms and injury. I feel reinforced in this view by the uncontested evidence that the plaintiff only had a couple of days off work following these symptoms and that there was absolutely no work event which could be temporally linked to the onset of chest pain on 28 August 2015.
>
> Also the plaintiff gave evidence that she has had no migraines since about a week after ceasing work on that date.
>
> This leads to my second finding that even if there was an injury which could

be said to arise out of or in the course of employment, which I reject, it could not be said to have given rise to any incapacity other than for a few days.

Thirdly, if it is suggested that the symptoms of 28 August 2015 resulted from a build-up of stress through 2014 and 2015, I reject this proposition on the basis of numerous answers of the plaintiff concerning the actions of management in relation to the three women who were annoying her, including the mediation and its outcome in February 2014 regarding [S]; and her welcoming of the review which she became aware of at the end of 2014 and which was formally announced early in 2015; together with private assurances to her that it was designed to get rid of the three underperforming woman [sic]; that her job was not in jeopardy and that she was highly regarded as a high performing member of the staff. In this regard I make the comment that I was not particularly impressed by the plaintiff, but I regarded the evidence of [M] and [C] as most impressive and I regarded them as impartial witnesses.

Finally, if I am wrong about all of the above, I find that s.40 of the *Workplace Injury Rehabilitation and Compensation Act* would disentitle the plaintiff to compensation for the following reasons: I find that apart from her complaint about the three workmates, which on her own evidence had been and would ultimately be further addressed to her satisfaction, her real grievance was the review process which she initially thought was to address her concerns concerning the three annoying workmates, and then after the meetings in July 2015 she realised that it would result in a restructure which she was not prepared to accept. In this regard I can accept the firm evidence of [C] that she was not a team player and had, as I quoted before, absolutely no intention of sharing tasks.

I find that the review process was management action within the meaning of the legislation. I find that it was reasonable management action in that management wished to reduce the size of her team from ten persons to seven, which she said she welcomed, and that this involved job sharing and multi-skilling — and they are my words — which in my view was perfectly reasonable. I also find that the action was taken in a reasonable manner; there being numerous meetings, one on one consultations, an invitation for feedback and private reassurances to the plaintiff.

Therefore, I find that the plaintiff's case fails on all or any of the above grounds and the proceeding will therefore be dismissed.

27 As can be seen, the magistrate decided:

(1) Ms Pulling suffered no compensable injury arising out of or in the course of employment, that is, her case under s 39(1) was not made out.

(2) If she did suffer such an injury, it could only have given rise to incapacity lasting a few days.

(3) The symptoms experienced by the plaintiff on 28 August 2015 did not

result from a build-up of stress through 2014 and 2015.

(4) The Council's defence under s 40(1)(a) of the Act was made out.

Non-acceptance of medical reports and Ms Pullen's history therein

28 In reaching these conclusions, the magistrate did not accept the evidence contained in the recent medical reports (see above) based on the history of the plaintiff. In doing so, his Honour relied upon *Ramsey v Watson*[1] to which he had made reference in the course of the hearing. When closing submissions were being made by counsel for Ms Pulling, his Honour said that *Ramsay* stood for the proposition that 'in essence, … histories given to doctors cannot be taken as fact, unless they're backed up by evidence'. Later his Honour said to counsel for the Council that *Ramsay* says that 'the history taken by the doctor can *only* be used for the purposes of the doctor formulating his opinion or her opinion, and if evidence given by persons [doesn't] back up the history the opinion might be flawed' (emphasis added). In the judgment, his Honour expressed himself thus:

> The court book contains a number of more recent medico-legal reports where the doctors' opinions are based on the history of the plaintiff. As a result I cannot be confident about the doctors' opinions. In my view they did not have the full story. In this regard I rely on the High Court of Australia judgment in *Ramsey* … which is authority for the proposition that histories taken by doctors can only be used as the basis of them forming their opinions and cannot be used as evidence of the facts.

29 The magistrate did not here say exactly how this evidence would be disregarded. His Honour did not expressly say whether the entire contents of the reports were inadmissible, irrelevant or without weight; whether parts of the contents were admissible, relevant or had weight for one purpose but not for another purpose; or whether parts of the contents fell into that category but other parts did not. Doing the best I can with his Honour's explanation, I think he did not accept the entire contents in the reports for any purpose. As counsel for the Council conceded in the proceeding in this court, his Honour ultimately excluded the reports entirely from consideration. He definitely did not accept Ms Pulling's statements to the doctors

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1 (1961) 108 CLR 642 ('*Ramsay*').

about her medical history on the ground that 'histories taken by doctors can only be used as the basis of them formed their opinions and cannot be used as evidence of the facts'. Whether this mattered to the conclusions that were reached will be separately considered.

30 There was debate in the proceeding in this court about whether counsel for Ms Pulling in effect conceded the correctness of the magistrate's statements based on *Ramsay*. I do not accept the submissions made for the Council in this regard. The points made by his Honour did not produce any concessions on the part of counsel for Ms Pulling. Indeed in closing submissions, after his Honour again referred to *Ramsay*, counsel resisted his Honour's proposition and said 'Well, there's a little bit more than that, Your Honour'. Specifically, counsel did not concede that, based on the magistrate's understanding of *Ramsay*, his Honour could refuse to accept and entirely exclude the medical reports from consideration because the doctors did not have the 'full story'. After his Honour referred to *Ramsay* during closing submissions, counsel for Ms Pulling took him to *Church v Echuca Regional Health*,[2] which supported consideration of the reports as part of the whole of the evidence in any event (see further below).

31 That brings me to the grounds of appeal.

GROUNDS OF APPEAL

32 The grounds of appeal are specified in the notice of appeal as follows:

> **3 Finding of no mental injury**
>
> (a) His Honour erred by:
>
> (i) failing to consider whether the Appellant had sustained injury arising out of or in the course of employment generally, and instead focusing on whether there was a particular work stress temporally associated with 28 August 2015, being the date upon which the Appellant ceased work.
>
> (ii) failing to have regard to the medical evidence before the Court to the effect that the Appellant had suffered a

[2] (2008) 20 VR 566 ('*Church*').

work-related mental injury.

(b) It was not reasonably open to the learned Magistrate to find that the Appellant had not sustained a mental injury arising out of or in the course of her employment in circumstances where:

(i) the Appellant gave evidence that she was subject to months of stress in her interaction of co-workers, which was independent of any management action, his Honour indicated that this evidence would be accepted, and it was corroborated by evidence called by the Respondent.

(ii) the Respondent's initial decision had not been that there was no injury, but was rather that injury was caused wholly or predominantly by management action taken on reasonable grounds and in a reasonable manner.

(iii) all the medical evidence before the Court was to the effect that the Respondent had sustained a mental injury arising out of or in the course of her employment.

(iv) the Appellant's general practitioner was called to give oral evidence, confirmed her opinion that the Appellant had suffered from anxiety due to workplace stress, and was not challenged in cross-examination on that conclusion.

Application of s 40 of the WIRC

(c) It was not open to the learned Magistrate to conclude that any mental injury sustained by the Appellant was caused wholly or predominantly by management action, in circumstances where the onus was on the Respondent and the Respondent called no medical evidence to that effect.

(d) In considering whether any mental injury sustained by the Appellant was caused wholly or predominantly by management action, the learned Magistrate erred by determining what was the Appellant's 'real grievance' — or the most significant source of stress — rather than, in circumstances where there was more than one source of stress, considering only whether the stress associated with the review was the whole or predominant cause of mental injury.

(e) In finding that any mental injury sustained by the Appellant was caused wholly or predominantly by the review process, the learned Magistrate failed to have regard to:

(i) the evidence of the Appellant, supported by the evidence of the Respondent's [C] and [M], that since at least 2014 she had been subject to stress associated with

her interactions with her co-workers — which stress pre-dated and was independent of the review process.

(ii) the evidence that the Appellant attended her General Practitioner with stress and was given time off work in November 2014, which was before the review process had even commenced.

(f) In finding that the management action was taken in a reasonable manner, the learned Magistrate failed to have regard to the Appellant's evidence, supported (in part) by the evidence of [M], that the duties that were to be expected of her would include the additional duties she had already been performing and went beyond the duties set out in the generic position description provided to her, and that this discrepancy was a source of stress for the Appellant, and to consider whether that was management action taken in a reasonable manner.

Procedural unfairness

(g) Having indicated that he would accept the Appellant's evidence about her stressful interactions with co-workers at T160.16, it was procedurally unfair to the Appellant to then doubt that evidence, or to fail to accept and act upon that evidence, or to draw any inferences against her from the failure to call corroborative evidence when such evidence was available.

Reasons

(h) His Honour erred by failing to identify in his Honour's reasons:

(i) his findings as to the level of stress the Appellant was subject to at work by reason of her co-workers, including what evidence of the Appellant he accepted or rejected or why, and then how those findings justified rejection of the medical evidence called by the parties.

(ii) the medical opinion relied on to support his conclusion that any mental injury was caused wholly or predominantly by management action.

(iii) why the stress associated with the review process was the whole or predominant cause of any mental injury, when there had been long-standing other stressors.

33 I accept the submissions made by counsel for the Council that an appeal under s 109(1) of the *Magistrates' Court Act* must be on a 'question of law'. An appeal is not permitted on a question of fact. There are very limited circumstances in which an

error of fact can amount to an error of law. Counsel for the Council identified the applicable principles in this connection by reference to my judgment in *Rugolino v Howard*,[3] which was endorsed by Tate and Kyrou JJA and Garde AJA in *Patsuris v Gippsland and Southern Rural Water Corporation*.[4] The relevant passage in *Rugolino* is:

> in *Roads Corporation v Dacakis*,[5] Batt J held 'the question whether there is *any* evidence of a particular fact is a question of law.' Therefore a finding of fact is open to challenge as 'erroneous in law', but only if 'there is no probative evidence to support it'.[6] Similarly, in *S v Crimes Compensation Tribunal*,[7] Phillips JA said making a finding of fact would ordinarily give rise to an error of law only if 'it is shown that the fact-finding tribunal arrived at a finding that was simply not open to it.' His Honour emphasised that the question was not whether the finding was 'reasonably open', for that implied the court on appeal could test the finding against a reasonableness standard, but whether the finding was open at all.
>
> *S v Crimes Compensation Tribunal* has been followed and explained by the Court of Appeal. In *Myers v Medical Practitioners' Board of Victoria*,[8] Warren CJ (Chernov JA and Bell AJA agreeing) held there was no error of law in making a finding of fact unless the finding was 'not open'. After endorsing[9] the decision of Phillips JA in *S v Crimes Compensation Tribunal*, the Chief Justice approved the statement of Kirby P in *Azzopardi v Tasman UEB Industries*[10] that it was 'critical' to making findings of fact that they be based on the evidence, but there would be no error of law 'unless it can be shown that there was no evidence' to support the finding. The decision of Phillips JA in *S v Crimes Compensation Tribunal* was also followed in *ISPT Pty Ltd v Melbourne City Council*.[11] After approving the 'not open' test, Warren CJ, Kellam JA and Osborn AJA referred to *Transport Accident Commission v Hoffman*[12] where Young CJ and McGarvie J said an appeal court, when determining whether a finding of fact was made in error of law, had to determine whether there was 'any evidence' to support it.[13]
>
> In *State of Victoria v Subramanian*,[14] Cavanough J examined these and other authorities. As his Honour held, whether a finding was open on the evidence, or whether there was any or some evidence to support it, are different ways of expressing the same test.
>
> It follows that, if there is any direct evidence in support of the finding of fact which is under challenge, the court cannot interfere with the finding on appeal, even if it

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3 [2010] VSC 590 (17 December 2010) ('*Rugolino*').
4 [2016] VSCA 109 (13 May 2016) [46]–[47].
5 [1995] 2 VR 508, 517.
6 Ibid 520.
7 [1998] 1 VR 83, 90.
8 (2007) 18 VR 48, 59 [44].
9 Ibid [43]–[44].
10 (1985) 4 NSWLR 139, 151.
11 (2008) 20 VR 447.
12 [1989] VR 197, 199.
13 (2008) 20 VR 447, 464 [65].
14 (2008) 19 VR 335, 347–8 [32].

would have made a different finding on the evidence before the magistrate.[15]

I will apply these principles in determining relevant grounds of appeal.

34 As submitted by counsel for the Council, certain submissions made on behalf of Ms Pulling were directed to matters of fact and merit and not law. Submissions that the magistrate had to uphold Ms Pulling's case because the Council did not lead medical evidence fall into this category. Also in this category is the submission that the magistrate had to uphold Ms Pulling's case because he accepted that her co-workers had done things to annoy her. For these reasons, I would reject grounds 3(b), (c) and (f). I would reject grounds 3(g) and (h) for different and, in the case of ground 3(h), also related reasons.

35 I will be upholding grounds 3(a) and (d)–(e) which, in my view, are directed at errors of law made by the magistrate in the application of the provisions of ss 39(1) and 40(1)(e) of the Act, not at errors of fact.

GROUND 3(a): PROPER APPLICATION OF SECTION 39(1) OF THE ACT

How did s 39(1) fall to be properly applied?

36 Section 39(1) of the Act provides:

> If there is caused to a worker an injury arising out of or in the course of any employment, the worker is entitled to compensation in accordance with this Act.

37 It was Ms Pulling's contention before the magistrate that there had been caused to her an injury arising out of or in the course of her employment which gave rise to an entitlement to compensation under s 39(1). Ms Pulling bore the onus of establishing compensable injury and therefore of establishing the causal connection between her stress-related symptoms of migraine headaches and chest pains on the one hand and her work with the Council on the other.

38 To discharge that onus, Ms Pulling gave evidence herself, intended to call but did not call a co-worker (see below), led oral evidence from Dr Worthington and

[15] [2010] VSC 590 (17 December 2010) [10]–[13].

produced medical evidence in the form of a court book, which contained the four medical reports referred to above, including that of Dr Worthington, as well as the notes of the psychologist who provided counselling in 2001. Ms Pulling placed considerable reliance upon the medical reports (which were all favourable to her), especially because the Council did not require Dr Weissman for cross-examination and did not call Dr Dharwadkar or Dr Takyar, who were not required for cross-examination by Ms Pulling. The proper application of s 39(1) required all of this evidence to be taken into account.

39 On the way the case was run and on the evidence that was presented, the proper application of s 39(1) also required the magistrate to consider:

- what (if any) stressors were experienced at work by Ms Pulling *over time*; and
- in that regard, what she *perceived* about her co-workers' conduct.

Further, because the magistrate chose to consider the case in an alternative way (see below), it was necessary to consider whether the increasing regularity and severity of her symptoms established that an existing injury had been *aggravated*, as to which it was necessary to consider the potential *overlap* between the injury, symptoms and consequences in cases where the injury is a psychiatric one.

40 It was necessary to consider what stressors Ms Pulling experienced *over time* because worker's compensation under s 39(1) of the Act arises where there is 'a causal connection between the employment or its incidents',[16] that is, all of the employment and all of the incidents, and the injury. It was necessary to consider what Ms Pulling *perceived* about her co-workers' conduct because, having regard to the no-fault nature of the workers' compensation system, that causal connection can be established by a subjective perception that has a real connection with the workplace

16 *Kavanagh v Commonwealth* (1960) 103 CLR 547, 556 (Dixon CJ); *Zlateska v Consolidated Cleaning Services Pty Ltd & NRMA Workers Compensation (Vic) Ltd* [2006] VSCA 141 (7 July 2006) [7] (Maxwell ACJ, Eames and Redlich JJA).

whether or not it is objectively correct.[17] It was necessary to consider the issue of *aggravation* because the worsening of symptoms of an existing psychiatric injury can amount to a compensable injury.[18] In that connection, it was necessary to consider the potential *overlap* between injury, symptoms and consequences because, in the case of psychiatric injuries, as distinct from physical injuries, there may not be a bright line between them.[19]

41 Having regard to those introductory remarks, I will consider the issues arising in relation to ground 3(a) under the following headings:

- Medical evidence
- Employment and all of its incidents
- Ms Pulling's subjective perception of real workplace stressors
- Aggravation and overlap of psychiatric injury, symptoms and consequences

Medical evidence

Relevance and admissibility

42 As already noted, the magistrate identified the medico-legal reports that he did not accept by reference to the court book, which contained the reports of Dr Worthington, Dr Weissman, Dr Dharwadkar and Dr Takyar. The reports of the last three, who were not treating practitioners, were based on the history provided by Ms Pulling about her medical condition in the past. The report of Dr Worthington, who was Ms Pulling's treating general practitioner, stood in a different category. Dr Worthington's reports contained her medical opinion but also a record of what Ms

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17 *St Mary's School v Askwith* (2011) 206 IR 414, 418 [12] (Ashley JA, Warren CJ and Kyrou AJA agreeing) ('*St Mary's School*'); *State Transit Authority of NSW v Fritzi Chemler* [2007] NSWCA 249 (18 September 2007) [37]–[40] (Spigelman CJ, Bryson AJA agreeing), [68]–[69] (Basten JA) ('*Fritzi Chelmer*').

18 *Federal Broom Company Pty Ltd v Semlitch* (1964) 110 CLR 626, 634 (Kitto J) ('*Semlitch*').

19 *Semlitch* (1964) 110 CLR 626, 634 (Kitto J), 636–7 (Windeyer J); *Katanas v Transport Accident Commission* (2016) 76 MVR 161, 165–6 [11] (Ashley, Osborn and Kaye JJA) ('*Katanas*'); *Transport Accident Commission v Katanas* (2017) 34 ALR 191, 200 [29] (Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ) ('*Transport Accident Commission*').

Pulling said about her health at the time of the consultations. For example, the report states that Ms Pulling consulted Dr Khan (when Dr Worthington was unavailable) on 12 November 2014 with workplace stress causing insomnia and an upset stomach.[20] She required two days' leave (see above).

43 This evidence of Dr Worthington was not evidence of historical but rather of Ms Pulling's contemporaneous symptoms and their cause. I think it was wholly admissible, not only of her opinion but including those parts, under s 66A of the *Evidence Act 2008* (Vic), which provides:

> The hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

In the doctor/patient setting, the application of the principle behind this provision was explained by Hunt CJ at CL (Newman J and Bell AJ agreeing) in *Welsh*:[21]

> Where the history consisted of statements made by the patient concerning his or her state of health at the time when the history was taken or within a short period beforehand, evidence that such statements had been made were direct evidence as to the truth of what was said and not hearsay.[22] The history given to a psychiatrist was equally admissible as direct evidence in this way.[23]

As it happens, it does not matter in this case that this evidence of Dr Worthington was treated as being in the same category as the other three doctors and I need not discuss this matter further. The analysis that follows concerns the evidence of all four doctors as a single category.

44 By s 55(1) of the *Evidence Act*, evidence is relevant in a proceeding if it 'could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'. Except as otherwise provided, evidence that is so relevant is admissible (s 56(1)). The statements made by Ms Pulling to the doctors about her medical history were relevant to the claim under s 39(1) of the Act because they could rationally affect the assessment of the probability

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20 No objection was taken to the hearsay nature of this evidence in the hearing before the magistrate.

21 (1996) 90 A Crim R 364, 367.

22 *Ramsay* (1961) 108 CLR 642, 647 (Dixon CJ, McTiernan, Kitto, Taylor and Windeyer JJ); *Batista v Citra Constructions Pty Ltd* (1986) 5 NSWLR 351, 354–6 (Hope JA); *Watson v The Queen* (1989) 166 CLR 283, 288–9 (Mason CJ), 300–1 (Wilson, Dawson and Toohey JJ).

23 *Gordon v The Queen* (1982) 41 ALR 64, 64 (Gibbs CJ, Mason, Murphy, Aickin and Brennan JJ).

of the existence of a fact in issue in the proceeding. That fact in issue was whether she had suffered a work-related stress injury arising out of or during the course of her employment with the Council prior to 2015. The statements were also relevant to the Council's defence under s 40(1)(a) of the Act because they tended to show that her injury and symptoms were not recent in origin and therefore not wholly or predominantly caused by her reaction to the workplace review that was being conducted by Council management.

45 Based on his understanding of *Ramsay*, the magistrate did not accept any of the evidence in the reports. I take his Honour to be referring to that part of the judgment of Dixon CJ, McTiernan, Kitto, Taylor and Windeyer JJ which states that statements made to an expert witness are evidence of the foundation of the expert's opinion but

> such statements are not evidence of the existence in fact of past sensations, experiences and symptoms of the patient. Hearsay evidence does not become admissible to prove facts because the person who proposes to give it is a physician. And, if the man whom the physician examined refuses to confirm in the witness box what he said in the consulting room, then the physician's opinion may have little or no value, for part of the basis of it has gone.[24]

46 His Honour's discussion of the evidentiary value of the historical contents of the medical reports did not taken into account s 60(1) of the *Evidence Act*, which provides:

> The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.

Section 60(1) states an exception to the hearsay rule in s 59(1), which provides:

> Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

In the doctor/patient setting, the application of s 60(1) was explained by Hunt CJ at CL (Newman J and Bell AJ agreeing) in *Welsh*:

> As a result of [this provision], evidence by a doctor of the history given to him or her by the patient and upon which the doctor bases his or her expert opinion is therefore

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24 *Ramsay* (1961) 108 CLR 642, 649 (Dixon CJ, McTiernan, Kitto, Taylor and Windeyer JJ).

now evidence of the truth of that history. [25]

That the provision so operates in relation to historical statements made by a patient to a doctor is accepted in a leading text.[26]

47 Ms Pulling's statements to the doctors were relevant (see above) evidence of previous representations[27] by her about her medical condition and its symptoms and causes in the past. They were admissible and admitted as relevant for the non-hearsay purpose of establishing the basis for the medical opinions of the doctors (although the basis was ultimately found to be wanting and the evidence was not accepted in its entirety). By the exception in s 60(1), they were not covered by the hearsay rule in s 59(1) and were relevant and admissible of the facts stated. It was an error of law in the application of s 39(1) of the Act for the magistrate not to treat this historical evidence as relevant and admissible and not to take it into account as part of the evidence. As with the other errors of law that were committed in relation to the application of s39(1) (and also in relation to s 40(1) (see below)), it is no answer to this error of law to point to his Honour's finding that Ms Pulling was not an impressive witness.

Non-acceptance of evidence in medical reports

48 Quite apart from the magistrate's failure to appreciate the formal relevance and admissibility of the evidence in the medical reports, there is the question of whether the magistrate otherwise failed properly to apply s 39(1) of the Act by not accepting and taking it into account.

49 As already noted, the magistrate did not accept this evidence because he considered that the doctors 'did not have the full story'. That 'full story' was the Council's review of Ms Pulling's work area in 2015, which was her 'real grievance'. His Honour found that Ms Pulling was not prepared to accept the proposed restructure

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25 (1996) 90 A Crim R 364, 369.

26 JD Heydon, *Cross on Evidence* (LexisNexis Butterworths, 11th ed, 2017) 1431 [35440].

27 The dictionary to the *Evidence Act* defines a 'previous representation' to be 'a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced'.

as she was not a team player (see above). In so finding, he rejected Ms Pulling's primary case that her work-related stress preceded the review by years and that the review represented a new contributing cause of that continuing stress. The medical reports supported that case.

50 The authorities establish three relevant propositions. First, in an application for workers' compensation, the court must examine the whole of the evidence, including the medical evidence. This obligation applies even where the weight of particular medical evidence has been undermined by other evidence, including evidence that the worker might not have been fully frank with a doctor. Secondly, in considering what weight should be given to medical evidence in this category, the court cannot speculate about what opinion the doctor may have expressed if given the missing information. The opinion may or may not change in consequence. Thirdly, care needs to be taken when examining medical reports, particularly in relation to the account given by the doctor of the history provided by the patient.

51 In relation to the need to consider the whole of the evidence, including medical evidence, in *Allsmanti Pty Ltd v Panagiota Ernikiolis*[28] it was contended that the judge determining a serious injury application was bound to dismiss certain medical evidence when two doctors, having seen surveillance videos which other doctors had not seen, expressed conclusions adverse to the worker. Ashely JA (Maxwell P and Neave JA agreeing) held that this 'did not follow' and the judge was not 'bound to dismiss all the other evidence adduced at trial, and to conclude that the [worker] had not made out a case…'[29] The question was: 'What was the burden of all the evidence in the case?'[30] The employer's appeal against the judge's finding in favour of the worker, which was reached upon consideration of the whole of the evidence despite the surveillance evidence, was dismissed. It is true that 'the opinions of medical experts are to a considerable extent dependent upon the accuracy of the claimant as historian…'; therefore the judge's assessment of the claimant's credibility

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28 [2007] VSCA 17 (7 February 2007) (*'Allsmanti'*).
29 Ibid [49].
30 Ibid [50].

may be important when 'the judge comes to evaluate the lay and expert evidence that has been given'.[31] But such considerations do not absolve the court from the obligation properly to engage in that evaluation, which must be of the whole of the evidence.

52 In relation to avoiding speculation about what doctors possessing more information might opine, this too was discussed in *Allsmanti*. The judge had said that it was 'almost impossible for [him] to speculate as to what the doctors might have said if there had been no conscious exaggeration and if they had seen the films'. On appeal, this reasoning was criticised by the worker for not properly taking into account the evidence of the doctors who had not seen the surveillance films. Ashley JA (Maxwell P and Neave JA agreeing) rejected this criticism, stating that the judge's reasoning contained no element of speculation, which was not permissible. In his Honour's view, the judge was 'saying that the evidence constituted by the reports remained evidence in the case, but its persuasive strength had to be weighed against the fact that the [worker] … had exaggerated her presentation'.[32]

53 In *Church* (to which counsel for Ms Pulling referred his Honour), the worker succeeded in an appeal against a judge's finding that she had not suffered a serious injury. This was another case in which surveillance films were not shown to doctors who had examined the worker. The judge did not accept the evidence of the doctors, which Ashely JA (Buchanan JA and Pagone AJA agreeing) found was an error of law. His Honour held:

> The judge explained the opinions away by holding, in effect, that the [worker] had not given frank and accurate accounts to the doctors. But whether any of the doctors would have expressed such a conclusion [adverse to the worker], having been shown the films, is speculative.[33]

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31 *Mobilo v Balliotis* [1998] 3 VR 833, 836 (Brooking JA, Winneke P, Ormiston, Phillips and Charles JJA agreeing), cited with approval in *Kathleen Mason v Transport Accident Commission* [2014] VSCA 267 (24 October 2014) [100]–[101] (Whelan JA, Warren CJ and Ashely JA agreeing).

32 *Allsmanti* [2007] VSCA 17 (7 February 2007) [51].

33 (2008) 20 VR 566, 586 [100].

54 In *Allsmanti*, Maxwell P criticised the employer for failing to ask its doctors to revise their opinions after viewing the surveillance films.[34] In *Church*, Ashley JA noted that this was often done but had not been done in that case. His Honour also noted that 'no doctor had labelled the [worker] as being other than genuine' and their 'opinions stood'.[35] In the present case, the Council did not ask its doctors to revise their opinions in the light of full information about the review and Ms Pulling's reaction to it. Nor did they require Dr Weissman for cross-examination on this subject. Dr Worthington gave oral evidence and was cross-examined, but not on the review and its effect. It was not put to her that she did not have the full story.

55 In relation to taking care when assessing medical reports, Ashely JA (Warren CJ and Nettle JA agreeing) said in *Franklin v Ubaldi Foods Pty Ltd* that consideration of

> the question what history was given to a doctor potentially [raises] questions both as to what the history-giver said, and what the history-taker recorded. To assume an inevitable monopoly of right on one side or the other would run counter to experience.[36]

Citing this judgment, Kaye AJA (Tate and Whelan JJA agreeing) in *Woolworths Limited v Warfe*[37] drew attention to certain potential limitations in presentation of historical content in medical reports in personal injury cases:

> [These] histories are an important part of the information, upon which the medical practitioner forms a view as to matters such as the diagnosis and prognosis in relation to the plaintiff's injuries. However, rarely, do the histories, contained in medical reports, purport to be a verbatim record of what the plaintiff has said to the medical practitioner on examination. They are often, at best, an approximate paraphrase or précis of the account given by the plaintiff to the medical practitioner. Sometimes, the discrepancy, between the account recorded by the medical practitioner, and the evidence of the plaintiff, cannot be adequately explained, even taking into account the limitations which attend the recording by a medical practitioner of the history given to the practitioner by the plaintiff. Nevertheless, it is important to bear in mind the nature and purpose of the history, recorded by medical practitioners in their reports, and of the limitations on their accuracy which I have just described.[38]

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34 [2007] VSCA 17 (7 February 2007) [69].
35 (2008) 20 VR 566, 586 [100].
36 [2005] VSCA 317 (21 December 2005) [22] n 5.
37 [2013] VSCA 22 (19 February 2013) '(*Woolworths'*).
38 Ibid [112] (footnote omitted).

This approach was recently reaffirmed in *Philippiadis v Transport Accident Commission* by Redlich and Kyrou JJA and Ginnane AJA, who said:

> We accept that courts need to exercise care in relying on the records of medical practitioners. Such records usually contain a selective summary in the doctor's own words of what the patient tells the doctor and cannot be treated as a verbatim transcript of the entire medical attendance.[39] The records may be inaccurate through miscommunication or misleading through omission. However, notwithstanding their limitations, very often clinical notes constitute highly probative evidence because they are independent and contemporaneous and deal with matters within the author's area of expertise.[40]

56 Applying these principles to the present case, the magistrate did not take the evidence in the medical reports into account as part of the whole evidence. His Honour did not accept the contents of the reports in any respect and essentially treated their evidentiary value as zero. This may well have implicitly involved the impermissible speculative conclusion that, given information about the Council's review of Ms Pulling's work area, the doctors would not have maintained their opinions in favour of Ms Pulling. It is not necessary for me to decide that question. His Honour did not exercise care in his examination of the contents of the reports, deciding not to accept the evidence at all upon the basis of the bare finding (without the doctors being required to give evidence on the subject) that they had not been told the full story by Ms Pulling. The contents of the reports indicate that such an examination would have revealed that the doctors were aware of the review to an extent that would have been relevant when determining how much weight should be given to their reports.

57 According to Dr Takyar:

- Ms Pulling told him that the Council was 'going through a review process' and 'things came to a head in February [2015]';
- the referral on behalf of the Council asked for Ms Pulling's claim to be investigated and it was 'currently going through [a] redundancy

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39 See further *Woolworths* [2013] VSCA 22 (19 February 2013) [112] (Kaye AJA, Tate and Whelan JJA agreeing).

40 [2016] VSCA 1 (11 February 2016) [105].

process'; and

- Ms Pulling told him that her change in mental state occurred over the last 12–18 months 'after two administrative teams were merged'.

58 According to Dr Worthington:

- in 2015, Ms Pulling had decided to work from home 'to minimise the stress from the conflict at work and the review process that was taking place'.

According to Dr Weissman:

- Ms Pulling told him that 'her team had merged with another team'; and

- another Council medical report (that of Professor Jelinek) had referred to a 'planned amalgamation of two teams'.

59 According to Dr Dharwadkar:

- Ms Pulling told him that she had been allocated to 'another group team' at the end of 2014.

60 The magistrate did not take those or any other matters into account in terms of 'the burden of all the evidence in the case', to restate the words of Ashley JA in *Allsmanti*. His Honour did not accept the reports in any respect and excluded them entirely from evidentiary consideration. This was an error of law in the application of s 39(1) of the Act.

Entirety of employment and all of its incidents

61 As regards the need to consider the entirety of the employment and all of its incidents, Ms Pulling's case was that she had experienced the stress-related symptoms of migraine headaches and chest pains at various points in the course of her employment since 2007. More recently, she had experienced those symptoms in

about 2011, and especially running up to and since November 2014, by reason of the way she was treated by the co-workers. While there were periods in which she was well, the continuous pattern over many years, especially in recent years, was one characterised by periods of illness due to work-related stress.

62 The incidents of Ms Pulling's employment over the entirety of the relevant period required careful examination. She had recovered from the stress-related event of 2007. That was in the background but not otherwise relevant. On Ms Pulling's pleaded case (see above), the relevant period was from August 2012 until she stopped work in August 2015. But there was evidence of the work-assisted mediation and counselling in 2011, which arguably pushed the relevant date back a year. On any view, she was relying upon work-related stress in a period significantly predating the Council's workplace review of 2015. As to whether Ms Pulling suffered a compensable injury in that period, an important part of the evidence from her point of view consisted of the four medical reports whose contents the magistrate did not accept and excluded entirely from consideration.

63 The magistrate's failure to take into account the contents of the medical reports necessarily meant that his Honour did not properly consider the entirety of Ms Pulling's employment and all its incidents as required by the application of s 39(1) of the Act, which was an error of law.

Worker's subjective perception of real workplace stressors

64 As regards the need to consider how Ms Pulling *perceived* the stressors to which she was subjected, especially how she was treated by the co-workers, this was a consequence of the no-fault nature of the workers' compensation scheme that the magistrate was applying. As was submitted for Ms Pulling, it is not for the court in a no-fault compensation application to determine where the truth lies in terms of alleged ill-treatment of an employee once it is satisfied that the employee perceived and was affected by stressors actually arising from the situation in the workplace.

65 Under s 39(1) of the Act, workers are entitled to compensation where there is caused

to them an injury arising out of or in the course of any employment. An injury may be so caused by reason of a worker's subjective reaction to events and circumstances actually occurring in the workplace, provided that the reaction 'has a real connection [with those events] — as distinct from an event [that the worker] simply imagined was connected with [the] employment'.[41] When making those remarks in *St Mary's School v Askwith*, Ashley JA (Warren CJ and Kyrou AJA agreeing) referred[42] to the judgment of the New South Wales Court of Appeal in *State Transit Authority of NSW v Fritzi Chemler*.[43] In that case, Spigelman CJ (Bryson AJA agreeing) discussed the worker's 'perception' of events occurring in the workplace and emphasised that whether an injury arose out of or in the course of any employment 'gave rise to a test of causation'.[44] The Chief Justice went on to say that:

> Employers take their employees as they find them. With respect to psychological injury, there is a 'eggshell psyche' principle which, like the equivalent 'eggshell skull' principle is a law of compensation not a liability.[45]

Basten JA cited[46] the judgment of Windeyer J in *Federal Broom Company Pty Ltd v Semlitch* that an 'incident which precipitated or stimulated, however irrationally, the worsening of [the worker's] condition could be regarded as a factor contributing to it'.[47] Applying that reasoning, Basten JA also emphasised that compensation for injury depended upon causation and 'to focus on the concept of "perception" may obscure the real issue'.[48] His Honour held:

> If conduct which actually occurred in the workplace was perceived as creating an offensive or hostile working environment, and a cognisable injury followed, it was open … to conclude that causation was established.[49]

66 It was submitted for Ms Pulling in the appeal that the focus of the magistrate's analysis was not upon her subjective perception of real stressors in the workplace. I cannot accept this submission. I discern no error in his Honour's reasoning in this

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41 *St Mary's School* (2011) 206 IR 414, 418 [12] (Ashley JA, Warren CJ and Kyrou AJA agreeing).
42 Ibid.
43 [2007] NSWCA 249 (18 September 2007).
44 Ibid [37].
45 Ibid [40].
46 Ibid [68].
47 (1964) 110 CLR 626, 642.
48 *Fritzi Chemler* [2007] NSWCA 249 (18 September 2007) [69].
49 Ibid.

connection. His focus was upon Ms Pulling's subjective reaction to stress. The findings was the stress and her reaction to it were not work-related but part of 'long-standing medical conditions'. While I have decided that the magistrate committed an error of law so finding, it was not that his Honour allowed his focus to stray away from Ms Pulling's perception of real events in the workplace.

Aggravation and overlap of psychiatric injury, symptoms and consequences

67 On the Council's case, Ms Pulling's migraine headaches and chest pains were symptoms pre-dating her employment with the Council and were not evidence of an injury arising out of or in the course of that employment. In this connection, the Council relied on evidence that Ms Pulling had suffered from migraine headaches and chest pains prior to working for the Council.

68 In deciding that Ms Pulling had not established that she had a work-caused injury (finding (1) under s 39(1)), the magistrate found that her symptoms increased in times of stress, but not due to such an injury, or indeed any injury (because they were 'not injuries per se'). To repeat, his Honour said in his reasons for decision:

> I accept that these symptoms increased in regularity and severity in times of stress and I accept that all of the tests from time to time concerning the chest pains excluded cardiac origin and suggested that these pains were stress-related. However, I emphasise and I so find that these episodes were symptomatic of long-standing medical conditions and not injures per se. I emphasise the distinction between symptoms and injury.

This was the magistrate's own approach (for which I do not criticise his Honour, for on his findings the issues here considered were open). Ms Pulling had not put her case upon the basis of aggravation of an existing psychiatric injury. As senior counsel for Ms Pulling explained in submissions to this court, it was not part of her case that the migraine headaches and chest pains were underlying conditions that were caused by her work. It was put much more simply that the evidence established that these were symptoms of work-caused anxiety, as the doctors had diagnosed.

69 On the evidence, two inter-connected issues of fact and law were necessarily raised by his Honour's alternative approach. One concerns the assessment of aggravated psychiatric injury claims. The other concerns the assessment of psychiatric injury, symptoms and consequences, which potentially overlap. I will state the legal propositions, then relate these to the magistrate's decision.

70 A claim for workers' compensation under s 39(1) of the Act can succeed upon the basis that a pre-existing psychiatric condition has been exacerbated by work-related stress where the symptoms, also pre-existing, have been so exacerbated. This follows from *Semlitch*,[50] where a worker with a history of functional mental illness pre-disposing her to delusions sustained a muscular strain in the course of her work. It was held that she was eligible for worker's compensation in respect of continuing incapacity resulting from a delusional condition following upon the physical condition. In the words of Kitto J, endorsing the judgment of Moffitt JA in the New South Wales Court of Appeal:

> Once it was established, as it was established beyond question before the Commission by the evidence of the psychiatrists who were called, that the incident of 1st December 1960 acted upon a pre-existing condition of mental illness (a disease) to produce a delusion causing incapacity for work, the respondent had made a clear case of exacerbation of her mental disease, according to the ordinary meaning of the word. Moffitt J was right, I think, in saying: 'There is an exacerbation of a disease where the experience of the disease by the patient is increased or intensified by an increase or intensifying of symptoms. The word is directed to the individual and the effect of the disease upon him rather than being concerned with the underlying mechanism'. Accordingly if salt be applied to an open wound, making the wound no worse but causing it to smart as it had not smarted before, it is proper to say that there is an exacerbation of the wound. Equally, where an untoward occurrence in a worker's employment causes a pre-existing mental disorder to manifest itself in a new delusion, it seems to me proper to say that there is an exacerbation of the mental disorder.[51]

Clearly, if the case for Ms Pulling had been put upon the basis of aggravation, it would have been submitted on her behalf that the 'affliction had become more serious', and these authorities would have been relied upon.

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50 (1964) 110 CLR 626.

51 Ibid 634.

71 When considering this aspect of the case, the magistrate emphasised 'the distinction between symptoms and injury' (see above). But in *Semlitch*, Windeyer J drew attention to the difficulty of making a 'rigid separation of a disease from its symptoms … in the field of psychosomatic and neurological ailments', one that his Honour thought was impossible with a 'purely functional mental disorder'.[52] Because it was not possible to conceive of a mental disorder 'as distinct from its manifestations', the question whether an existing mental disorder has been aggravated by a work-related cause simply 'depends upon whether for the sufferer the consequences of his affliction had become more serious'.[53] In Ms Pulling's case, the migraine headaches and chest pains did not have an organic cause and were diagnosed as being stress-related. While they were not described by the doctors as 'functional' in nature, they arguably came within that or an analogous category.

72 In *Katanas v Transport Accident Commission*, Ashley, Osborne and Kaye JJA drew attention to the same difficulty of distinguishing between injury, symptoms and consequences in the case of mental disorders.[54] Contrasting that kind of injury with a physical injury, their Honours said:

> In the case of physical injury, distinctions may readily be drawn between injury, symptoms and consequences. A person suffers spinal disc protrusion. Thus, injury. The disc protrusion is productive of sciatica. Thus, a symptom. The sciatica causes sleeplessness. Thus, a consequence. But in the case of a mental disorder, any such differentiation becomes, we think, much more problematic, and the utility of differentiation is likely to be the less. In the first place, the diagnosis of the disorder will almost certainly be heavily informed by the history which is given, so far as it is accepted, of symptoms and consequences. Second, assessment of the severity of the disorder will almost certainly be significantly informed by what is accepted as being the extent of those symptoms and consequences. Third, to speak of symptoms and consequences itself suggests the existence of a bright line separating them which may, but will not always, exist.[55]

On appeal on *Transport Accident Commission v Katanas*, Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ said this was an 'important point' and that, 'in the case of

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52 Ibid 636.
53 Ibid 637.
54 (2016) 76 MVR 161.
55 Ibid 165–6 [11].

mental disorder or disturbance, symptoms and consequences more often elide'.[56] Again, if the case for Ms Pulling was put upon the basis of aggravation, it would have been submitted that focus should be on the injury, the symptoms and the consequences as a potentially overlapping complex, not as necessarily separated elements. By contrast, the magistrate emphasised 'the' distinction between symptoms and injury.

73 On these authorities, if the magistrate was to adopt this alternative approach, examination of Ms Pulling's increasingly regular and severe symptoms in times of stress had to be considered in a particular context. The particular context was whether, on the facts, an increase in the symptoms in response to work-related stress represented a work-caused aggravation of an existing psychiatric condition.[57] The examination had to be considered in that context because if this question was answered in the affirmative, the injury was compensable under s 39(1), subject to s 40(1)(a). The examination of these questions could not be undertaken by making a bright-line distinction between the injury and the symptoms because, with psychiatric injuries or mental disorders, these potentially overlap. The magistrate did not examine the issues in this way, which was an error of law in the application of s 39(1).

GROUND 3(d)–(e): PROPER APPLICATION OF SECTION 40(1) OF THE ACT

74 Section 40(1) of the Act relevantly provides:

> (1) There is no entitlement to compensation in respect of an injury to a worker if the injury is a mental injury caused wholly or predominantly by any 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;

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56 (2017) 34 ALR 191, 200 [29].

57 There was some evidence of this in the first report of Dr Takyar, who opined that Ms Pulling's current condition appeared to be 'a separate episode of an adjustment disorder in the context of similar circumstances, with symptoms becoming more evident over the last 12–18 months' (see above). This opinion was part of a medical report that the magistrate erred in law in not accepting and excluding entirely from consideration.

(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.

75 The term 'management action' is defined in s 40(7) to include a range of actions taken by employers in relation to a worker in respect of their employment. There is no dispute in the present case that the Council's review of Ms Pulling's work area constituted 'management action' as so defined.

76 The term 'mental injury' is not defined. The term 'injury' is broadly defined in s 3 of the Act to mean '*any* physical or mental injury' (emphasis added). There is no dispute in the present case that Ms Pulling's stress-related condition, which has been medically diagnosed and described in various ways (see above), constitutes a 'mental injury'.

77 Entitlement to compensation in respect of otherwise compensable injury is only defeated under s 40(1) in the case of *mental* injury, which gives some insight into the purpose of the provision. That purpose is to protect the employer from liability where the mental injury is not caused by the ordinary incidents of the worker's employment but wholly or predominantly by management action taken by the employer in relation to the worker, as long as it is taken on reasonable grounds and in a reasonably manner (to use s 40(1)(a) as an example). Section 40(1) does not apply where the otherwise compensable injury is a physical injury.

78 Section 39(1) creates an entitlement to compensation in accordance with the Act where there is caused to a worker an injury arising out of or in the course of any employment. The onus of establishing this entitlement is upon the worker. Section 40(1) operates to defeat this entitlement where the injury that would otherwise be compensable is a mental injury caused wholly or predominantly by (relevantly)[58] management action. The onus of establishing that this entitlement is so defeated is upon the employer. Taking s 40(1)(a) as an example, this means that the employer must establish that the mental injury was wholly or predominantly caused by the

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58 Section 40(1)(d) specifies a different kind of cause, being an application under s 81B of the *Local Government Act 1989* (Vic), or a proceeding thereunder, in relation to a worker who is a councillor.

management action; that the employer's action was 'management action' as defined; and the management action was taken on reasonable grounds and in a reasonable manner by or on behalf of the employer.

79 Under s 40(1)(a), the entitlement to compensation is defeated if the injury is a mental injury caused 'wholly or predominantly' by the management action. These words specify a test of causation in terms of whether the management action is the whole cause or the predominant cause of the injury. 'Wholly' means 'entirely; total; altogether …', 'to the whole amount, extent etc' and 'so as to comprise or involve all'.[59] Therefore management action can only be wholly the cause where it is the only cause of the injury. The adverb 'predominantly' comes from the adjective 'predominant', which means 'having ascendancy, power, or influence over others; ascendant' and 'prevailing'.[60] Therefore management action can be the predominant cause where other causes contribute to the injury but that cause is still the predominant cause. As there can only by one predominant cause of management action, a cause that is equally important to another cause or other causes is not a predominant cause. To be the predominant cause, that cause must exceed the other or all other causes combined in power and influence

80 Whether management action is the predominant cause of the injury where multiple causes are in issue depends upon an evaluation of the proportionate contribution made to the injury by management action on the one hand and the other cause or causes on the other. This evaluation is not carried out in any technical or formal way but by applying common sense to the facts of the particular case.[61] It has been held that 'value judgments and policy have a part to play in causation analysis', and the same is true in a proportionate cause analysis.[62] As has been authoritatively held in an analogous context:

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59 *Macquarie Dictionary* (Macquarie Dictionary Publishers, 7th ed, 2017) vol 2, 1715.
60 Ibid 1181.
61 *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 516 (Mason CJ).
62 *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2012) 217 CLR 613, 634 [43] (French CJ,. Hayne and Kiefel JJ).

> A finding on a question of apportionment is a finding upon a 'question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds': *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197, 201. [63]

81 The protection afforded by s 40(1)(a) does not cover all kinds of management action that might conceivably fall within the prerogative of the employer. The management action must be taken on objectively 'reasonable' grounds, which refers to the ends of the action, and in an objectively reasonable manner, which refers to the means of the action. Because both the ends *and* the means must be objectively reasonable, it may be necessary to evaluate whether the chosen means are a reasonably proportionate way of achieving a reasonable end.

82 In the present case, the first question arising for consideration by the magistrate under s 40(1)(a) of the Act was whether the Council had established that Ms Pulling's mental injury had been caused wholly or predominantly by management action. I will determine the grounds of appeal relating to this issue. In the appeal, counsel for Ms Pulling raised issues about whether the management action constituted by the review had been taken in a reasonable manner. It will not be necessary to determine these issues.

83 In finding (4), the magistrate determined that s 40(1)(a) disentitled Ms Pulling to compensation. On the fundamental issue of causation, his Honour gave only bare reasons, which I here repeat:

> Finally, if I am wrong about all of the above, I find that s.40 of the *Workplace Injury Rehabilitation and Compensation Act* would disentitle the plaintiff to compensation for the following reasons: I find that apart from her complaint about the three workmates, which on her own evidence had been and would ultimately be further addressed to her satisfaction, her real grievance was the review process which she initially thought was to address her concerns concerning the three annoying workmates, and then after the meetings in July 2015 she realised that it would result in a restructure which she was not prepared to accept. In this regard I can accept the firm evidence of [C] that she was not a team player and had, as I quoted before, absolutely no intention of sharing tasks.

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63 *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492, 493–4 (Gibbs CJ, Mason, Wilson, Brennan and Deane JJ).

84 This finding was expressed in the alternative ('if I am wrong about all of the above'). I reject the criticisms advanced on behalf of Ms Pulling about the magistrate proceeding in this alternative way. As submitted for the Council, his Honour was entitled to formulate and determine the issues in the proceeding in an alternative way.

85 However, applying s 40(1)(a) in this alternative way did require a certain analytical rigour. It required his Honour to identify what in his previous findings he would assume to be incorrect (that is, assume to be correct for these purposes), including the nature of the injury, which was a foundational consideration. This was necessary because the causation test in s 40(1)(a) required him to evaluate the proportionate causes of that injury for the purpose of identifying whether Council's review of Ms Pulling's work area was the predominant one.[64] If the assumed facts under the alternative approach were that Ms Pulling had suffered from a work-related stress injury for some time prior to the commencement of the review, which was her main case and the one that was rejected in finding (3), this would clearly operate in her favour in terms of that evaluation. Therefore, on those assumed facts, there was a significant proportionate cause evaluation to carry out, especially having regard to the found increase in the regularity and severity of Ms Pulling's stress symptoms of migraine headaches and chest pains.

86 In the passage from the reasons for decision relating to s 40(1)(a), the magistrate did not identify what in his previous findings he would assume to be incorrect. Consequently there is no identification of the nature of her injury as a foundation for the evaluation. There is no identification of the various contributing causes that were in issue, no analysis of the proportionate contribution that these causes may have made to the injury and no balancing and weighing of different considerations. There is rather a statement that Ms Pulling's 'real grievance' was not her relationship with her co-workers but the review process. This statement is certainly consistent with his Honour's rejection of Ms Pulling's main case in finding (3). But it is not

64 It was clearly not a case where the management action was the whole cause and his Honour did not contemplate that outcome.

necessarily consistent with an assumption that that finding was incorrect. To assume that that finding was incorrect is to assume that Ms Pulling's 'symptoms of 28 August 2015 resulted from a build-up of stress through 2014 and 2015'. His Honour did not bring this assumed state of affairs into the frame of the proportionate cause evaluation.

87 In my view, the errors of law made in the magistrate's decision under s 39(1) also vitiated his Honour's decision under s 40(1)(a). When applying s 40(1)(a), his Honour was required to consider all of the relevant evidence, which he did not do because he excluded the four medical reports from consideration entirely. His Honour was required to consider the entirety of the employment and all of its incidents, which he did not do for the same reason. His Honour was required to consider the issue of aggravation of an existing mental injury and the overlap between such an injury and its symptoms and consequences, which he did not do. The alternative approach adopted by his Honour did not involve assuming a state of affairs that overcame these errors such as to provide a proper foundation for his analysis under s 40(1)(a). The result was that his Honour did not carry out the proportionate cause evaluation that was required by that provision, which was an error of law embraced by ground 3(d)–(e).

GROUND 3(g): PROCEDURAL UNFAIRNESS

88 It was submitted for Ms Pulling that the magistrate erred in law by denying her procedural fairness. This submission was put upon the basis that his Honour drew an adverse inference against Ms Pulling for failing to call evidence from co-workers. It was also put upon the basis that findings (1)–(4) should not have been made in the light of an indication given to counsel for Ms Pulling.

Adverse inference for failing to call evidence from co-workers

89 All that the magistrate said expressly about this subject was that '[t]he plaintiff called no other viva voce evidence' (that is, no oral evidence other than her own evidence). That was a simple statement of fact. His Honour was just describing what the

evidence was. His immediate next reference to Ms Pulling tendering the court book and to other evidence fell into the same category.

90 His Honour did not refer to the submission made for the Council that an adverse inference be drawn against Ms Pulling for failing to call certain evidence and the contrary submissions of counsel for Ms Pulling on that subject (see below). If his Honour had intended to draw such an inference, he would have referred to such submissions. Further, he gave a certain indication to counsel for Ms Pulling (see below), one that was inconsistent with drawing any such inference.

91 His Honour referred to Ms Pulling 'towards the end of 2014 … having a problem with three of her workmates', to 'particular conflict that occurred early in 2014 which was ultimately resolved by mediation' (the mediation was in fact in 2011)[65] and to 'the review process [of 2015] which she [Ms Pulling] initially thought was to address her concerns concerning the three annoying workmates'. His Honour did not here refer to any adverse inference being drawn and the discussion of these matters in the reasons for decision is not consistent with any such inference being drawn. He was accepting certain evidence of Ms Pulling's in this respect, consistently with his indication to her counsel.

92 For these reasons, I conclude that his Honour drew no such adverse inference.

Indication given to counsel for Ms Pulling

93 Ms Pulling's case before the magistrate was that she had suffered work-related mental injury by reason of stress experienced over a period of time preceding the review of 2015. In support of this case, she gave evidence of how three other workers treated her in the workplace. Counsel for Ms Pulling was cross-examining a Council witness in relation to how the co-workers treated her when the magistrate indicated that he accepted this evidence:

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65 His Honour also referred incorrectly to 'the mediation and its outcome in February 2014'. Counsel for the Council informed his Honour that the Council accepted that 'there [was] an issue in 2011 where one of the three named co-employees … was required to apologise' to Ms Pulling.

MR HANGAY: All right. Let me say, (to witness) so when the plaintiff says that they were doing things like making noise that was distracting, you wouldn't dispute that?---We work in an open plan office, everybody makes noises of various types being on the phone. It's a busy office environment. If there's any allegations of noise, it's not like they were jumping up and down and singing and dancing and so on.

HIS HONOUR: Mr Hangay, if it helps you I'm prepared to accept what the plaintiff said about the things that they were doing that annoyed her.

Later in the hearing, counsel for Ms Pulling informed his Honour that he had a co-worker from whom he intended to lead evidence. The evidence in the proceeding in this court is that Ms Pulling's solicitors had instructions to call this witness, who was available. Her statement of evidence, which was in their possession, read:

I worked at the Shire of Yarra Ranges for 10 years before retiring in May 2013.

During this time I worked in an administrative role which amongst other things included preparing the Council Agenda which is where I interacted with Vicki most.

Vicki's role included backing up the PA ([D]) to the Director of Environment and Engineering ([M]). Vicki was often under pressure to meet deadlines for the Council Agenda whilst [D] was either on leave or overloaded with work and she confided in me that she had no support from other staff members in her team during this time. During these times Vicki also had to complete her usual tasks, as well as answering phones etc for staff members who were either chatting or not in the office for various reasons. This became an incredibly stressful time for Vicki and I often witnessed the lack of support when she was under such pressure.

At these times the job she was doing needed complete concentration in proofreading, compiling pages of attachments etc for a report to appear in the Council Agenda. It was virtually impossible for her to concentrate fully with team members around her chatting and talking on personal phone calls around her as well as answering their phones when they did not. I remember being at her desk and helping her with some problems with putting a report for the Council Agenda together, and Vicki was constantly interrupted by other staff shouting across the office, asking questions, and not answering their phones. Vicki told me she complained to Management on several occasions, but staff behaviour did not improve and the staff were not kept in line by Management. This reinforced Vicki's lack of support form team members.

Vicki also advised me of occasions she had spoken confidentially to [M] about the poor performing, distractive staff and that on one occasion he had said to her that it was very hard to get rid of poor performing staff.

Vicki talked to me about not having any support, and the whole team not talking to her for about 12 months, as well as [S] spreading rumours about Vicki (which were overheard by [M]), and she didn't know why. She later found out that managers had given confidential information about a

> proposed staff restructure to the other members in her team of which she had no knowledge.
>
> Vicki told me she was very distressed at how uncomfortable it was at work and she spoke to [M] who said he would speak to [G] (Executive Officer to the team). Apparently this never happened.
>
> When discussing this Vicki told me that without her knowledge, some of her work was given back to [S]'s area so Vicki could concentrate more on assisting [M]. When complaining to [M] about the office environment and how staff were treating her, [M] told Vicki that he had given the work to the others to do, but Vicki had not been informed about it which had further increased the animosity of the staff.
>
> At team meetings, other team members kept querying what work Vicki actually did. Vicki's manager asked her to write a list of her duties but Vicki couldn't understand why he didn't just let them know her duties whilst at the team meeting.
>
> During part of my time at the Council, [L] was my Executive Officer therefore I knew her quite well. Vicki told me that when [L] was transferred to Vicki's department she met with Vicki and Vicki expressed her concerns on where the team was going and also about the problem staff. [L] told Vicki not to worry, she was aware of the problems within the team and she intended to fix them. Unfortunately this did not happen and the situation did not change.
>
> Over the years Vicki and I spoke often of the problems she was facing within her department. I had great empathy as I faced similar problems at times, and the only solution Management had was for me to have counselling and the 'poor performer' was never reprimanded. I was actually lucky — my department mentioned a restructure and I was first to put my hand up to take a redundancy. I had been planning on retiring in 6 months anyway, so getting a redundancy was good for me. Vicki has many years of her working life left before retirement so this would not be an option for her.
>
> After my 10 years with the Council I am definitely of the opinion that there is a culture within Management that anyone who complains is a problem — give them counselling. Poor performers are either shuffled from one department to another, or ignored.

This statement supported Ms Pulling's case that, over a period of time, she had suffered a stress-related injury by reason of the way she has been treated at work by the co-workers. It is to be noted that the witness was speaking of the ten-year period before she (the witness) resigned in May 2013, which well preceded the review of 2015. Counsel for Ms Pulling did not call the witness to give this evidence because of his understanding of what the magistrate meant by saying that he accepted Ms Pulling's evidence about what the co-workers did to annoy her.

94 In closing submissions in the proceeding before the magistrate, counsel for the Council was critical of the case presented on behalf of Ms Pulling in certain respects. In particular, it was submitted that corroborating evidence from other workers would have been led on behalf of Ms Pulling if it had been available. Counsel for Ms Pulling was also criticised for not putting to Council witnesses that the working environment leading up to November 2014 was 'toxic', which was Ms Pulling's evidence. He invited the magistrate to draw an adverse inference (which I have concluded his Honour did not do).

95 Counsel for Ms Pulling responded by reminding the magistrate of what he had said:

> Mr HANGAY: …I was criticised by Mr Batten [for] not putting matters like 'toxic work environment' to the employers. I cut short my puttage to Mr Varmalis because of your Honour's indication that you accepted that her — the plaintiff's history of what had happened leading up to November 2014 was the case …
>
> HIS HONOUR: I wouldn't worry too much about that, no.

As can be seen, his Honour reaffirmed his position and reassured counsel for Ms Pulling.

96 Counsel for Ms Pulling proceeded upon the basis that his Honour had accepted 'the plaintiff's history of what had happened leading up to November 2014', that is, the build-up case ultimately rejected in finding (3). That was his understanding of what his Honour meant in saying that he 'wouldn't worry too much about that'. I think his Honour was referring back to his earlier statement that he accepted Ms Pulling's evidence about what the co-workers did to annoy her, which is different.

97 In the proceeding in this Court, it was submitted for the Council that it was doubtful whether counsel for Ms Pulling did not call the witness who was at his disposal by reason of the magistrate's indication about accepting certain evidence of Ms Pulling's. I reject this submission. The evidence in the appeal establishes that counsel for Ms Pulling conducted the case upon the basis of his understanding of what the magistrate said in this regard. The witness's evidence was not led and certain questions were not asked by reason of that understanding.

98 Resolution of this issue is affected by my earlier discussion of what the issues were in the proceeding before the magistrate. Counsel for Ms Pulling in the appeal emphasised that the real issues arose under s 40(1)(a) and not s 39(1) of the Act. That was also the standpoint adopted by counsel for Ms Pulling in the proceeding before the magistrate. I think counsel in that proceeding viewed what his Honour said through that lens. The submissions made in the appeal in relation to his Honour's indication were reflected this view.

99 For the reasons I have already given, the magistrate made it very clear that the issues were whether there had been caused to Ms Pulling an injury arising out of or in the course of her employment with the Council (s 39(1)) and, if any such injury was caused, whether it was caused wholly or predominantly by management action taken on reasonable grounds and in a reasonable manner (s 40(1)(a)). Both the substantive entitlement to compensation and the statutory ground for defeating that entitlement were definitely in issue, and counsel for Ms Pulling should have understood that.

100 I accept that counsel for Ms Pulling genuinely understood that, by the indication, the magistrate was saying that Ms Pulling's entire build-up evidence was accepted. I also accept that the co-worker's evidence was not called because of that understanding. But it was not an accurate understanding of what the magistrate said. Once it is accepted, as I think it must be, that the magistrate had made clear that both s 39(1) and s 40(1(a)) were in issue, the indication was only that his Honour accepted Ms Pulling's evidence about what the co-workers did to annoy her. Whether that gave rise to a compensable injury, and whether it was one that was not wholly or substantially caused by management action, was a different matter.

101 This ground of appeal is therefore rejected.

GROUND 3(h): REASONS

102 Ms Pulling submitted that the magistrate committed an error of law by failing to supply adequate reasons for decision. It was submitted that the reasons his Honour supplied did not allow the court or the parties to determine why he made the decision that he did or whether it was made by applying the correct legal principles.

103 I reject this submission and accept the submission made by counsel for the Council that his Honour's reasons for decision were legally sufficient.

104 As developed in written and in oral submissions, this ground of appeal was another way of putting grounds of appeal otherwise made. I have been able to determine those grounds because his Honour's reasons for decision are generally intelligible, disclose the path of reasoning that he adopted and reveal that errors of law were made. In certain other respects, the submissions made under this ground take issue with findings of fact that were made by the magistrate, which is not permissible.

105 This ground of appeal is also rejected.

CONCLUSION

106 Ms Pulling has established that, in deciding to reject her application for workers' compensation, the magistrate made errors of law in the application of both s 39(1) and s 40(1) of the Act. Therefore the appeal will be upheld, the decision of his Honour will be set aside and the proceeding will be remitted back to the Magistrates' Court for rehearing according to law by a different magistrate.