Federal Court of Australia

Leggett v Hawkesbury Race Club Limited (No 3) [2021] FCA 1658

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| File number(s): | NSD 1554 of 2019 |
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| Judgment of: | **RARES J** |
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| Date of judgment: | 24 December 2021 |
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| Catchwords: | **NEGLIGENCE** – duty of care – employer’s duty to protect employee from reasonably foreseeable risk of sustaining psychiatric injury – *Workers Compensation Act 1987* (NSW)Pt 5 – where CEO bullied and micromanaged employee – where employee complained to CEO about employment conditions and failure to provide safe system of work – where CEO ignored complaints and persisted in conduct – where employee complained to several directors of employer’s board about effect of CEO’s conduct on her health – where board directors failed to act – whether employee displayed signs she was at risk of psychiatric injury to employer’s “agents to know” – whether employee’s descriptions of her state of mind to CEO and board directors would convey to reasonable employer that she was at risk of psychiatric injury – held: employer negligent – employee entitled to work injury damages pursuant to s 151E *Workers Compensation Act*.  **INDUSTRIAL LAW** – adverse action – *Fair Work Act 2009* (Cth) ss 87, 323, 340(1)(c)(ii) – *Long Service Leave Act 1955* (NSW) s 4 – where CEO threatened to performance manage employee in response her complaints about his conduct and failure to provide safe system of work – whether employee’s workplace right to make complaint under s 340(1)(c)(ii) of *Fair Work Act* needed only to be underpinned by an entitlement or right or also had to be based on an instrumental source – where CEO withheld payment of entitlements because employee had exercised workplace right to make a complaint and to take sick leave – where CEO failed to pay annual and long service leave to employee – whether employee could rely on presumption in s 361 of the *Fair Work Act* when it had not been pleaded – found not necessary to plead s 361 in order to rely on presumption.  **CONSTITUTIONAL LAW** – whether Federal Court of Australia has jurisdiction to make orders under *Long Service Leave Act 1995* (NSW) – whether *Long Service Leave Act* “picked up” by s 79 of the *Judiciary Act 1903* (Cth) in matter involving termination of employment relationship and claims of contraventions of the *Fair Work Act 2009* (Cth).  **CONTRACT** – where employee paid by commission – where no express term of contract as to time for payment – where parties had dealt with each other over many years and employer always paid within 14 days of claim for commission – whether estoppel by convention based on course of dealing. |
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| Legislation: | *Evidence Act 1995* (Cth) s 63  *Fair Work Act 2009* (Cth) ss 87, 323, 340, 341, 342, 360, 361, 545, 789FC  *Sex Discrimination Act 1984* (Cth) s 28A  *Long Service Leave Act 1955* (NSW) ss 4, 10  *Workers Compensation Act 1987* (NSW) ss 151E, 151G, 151H, 151I, 151IA, 151L |
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| Cases cited: | *Alam v National Australia Bank Ltd* (2021) 393 ALR 629  *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2000) 204 CLR 559  *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435  *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327  *Cigarette & Gift Warehouse Pty Ltd v Whelan* (2019) 268 FCR 46  *Cohen v iSoft Group Pty Ltd* (2013) 298 ALR 516  *Commissioner for Main Roads v Reed & Stuart Pty Ltd* (1974) 131 CLR 378  *Concut Pty Ltd v Worrell* (2000) 176 ALR 693  *Consolidated Press Ltd v Thompson* (1952) 52 SR (NSW) 75  *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226  *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269  *Hughes v Hill*(2020) 277 FCR 511  *Jones v Dunkel* (1959) 101 CLR 298  *Judiciary Act 1903* (Cth)  *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44  *Kondis v State Transport Authority* (1984) 154 CLR 672  *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361  *Leggett v Hawkesbury Race Club Ltd (No 1)* [2021] FCA 1298  *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471  *PIA Mortgage Services Pty Ltd v King* (2020) 274 FCR 225  *Re Wakim; Ex parte McNally* (1999) 198 CLR 511  *Rumble v Partnership (t/as HWL Ebsworth Lawyers)* (2020) 275 FCR 423  *Tame v New South Wales* (2002) 211 CLR 317  *Whelan v Cigarette & Gift Warehouse Pty Ltd* (2017) 275 IR 285 |
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| Division: | Fair Work Division |
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| Registry: | New South Wales |
|  |  |
| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Number of paragraphs: | 221 |
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| Date of hearing: | 18, 19, 20, 21, 22, 25, 26, 27, 28 October 2021  15, 16, 20, 21, 24 December 2021 |
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| Solicitor for the Applicant: | Gilberts Legal |
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| Counsel for the Respondent: | Mr L. King SC with Mr I. Latham |
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| Solicitor for the Respondent: | The Workplace – Employment Lawyers Pty Ltd |

ORDERS

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|  | | NSD 1554 of 2019 |
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| BETWEEN: | VIVIENNE LEGGETT  Applicant | |
| AND: | HAWKESBURY RACE CLUB LIMITED  Respondent | |

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| order made by: | RARES J |
| DATE OF ORDER: | 24 December 2021 |

THE COURT ORDERS THAT:

1. On or before 10 February 2022 the parties prepare agreed calculations and draft orders to give effect to the reasons for judgment delivered on 24 December 2021 and, failing agreement, file and serve, with differences in mark-up, their disputed calculations and draft orders.
2. The proceeding be stood over to 11 February 2022 to make orders and fix the hearing of the applicant’s claim for penalties.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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REASONS FOR JUDGMENT

RARES J:

1. Vivienne **Leggett**, the applicant, began working for Hawkesbury Race **Club** Limited, the respondent, in January 1991. She was then 28 years of age. She worked at the club until 15 March 2017, when she accepted the Club’s repudiation of her contract of employment. That occurred because Greg **Rudolph**, whom the Club employed as its chief executive officer (**CEO**) in May 2016, bullied and harassed Mrs Leggett from the outset of his role. The joint report of Drs John **Roberts** and Brian **Parsonage**, being the parties’ respective expert psychiatrists, agreed that Mr Rudolph’s conduct towards Mrs Leggett caused her to suffer a significant depressive disorder with anxiety that has left her unemployable since 10 October 2016 until now.
2. Mrs Leggett claims that the Club contravened the *Fair Work Act 2009* (Cth) by taking adverse action against her because she complained to Mr Rudolph in an email on 9 October 2016 about his ongoing behaviour and the effect that it was having on her and asked him to refer her complaint to the Club’s board of directors. Mr Rudolph’s insouciant response was to email her the next day and require her to attend his office the next day “to discuss your work performance”. He also informed her that “you may bring a support person with you if you wish”. When Mrs Leggett sent a medical certificate later that day to say that she was unfit to work for the next week “due to work stress”, Mr Rudolph forwarded the email to his father-in-law with the comment “Dropping like flies…”. Mrs Leggett claims that, in contravention of the *Fair Work Act*, the Club did not pay and, in some respects, still has not paid her all of her entitlements. She seeks compensation and civil penalties in respect of the Club’s contraventions (the ***Fair Work Act* claims**).
3. Mrs Leggett also seeks damages for the Club’s breaches of its obligations under her contract of employment (the **contract claim**) and for its negligence in breaching its contractual obligation and duty in tort to take all reasonable steps to provide a safe system of work, and to take reasonable care, to avoid a reasonably foreseeable risk of her suffering a psychiatric injury (the **negligence claim**).
4. On the first day of the trial, the parties argued whether the reasons of a senior **arbitrator** of the **Workers Compensation Commission**, who made a determination under the *Workers Compensation Act 1987* (NSW) of Mrs Leggett’s claim against the Club in her favour, were admissible and estopped the Club from denying that Mr Rudolph bullied and harassed her in the respects that the arbitrator found. I held that the reasons were admissible and created an issue estoppel that Mrs Leggett sustained her psychological injury as an injury arising out, or in the course, of her employment from May 2016 to 10 October 2016 as a consequence of Mr Rudolph’s bullying and harassing her: *Leggett v Hawkesbury Race Club Ltd (No 1)* [2021] FCA 1298.

# Background

## The terms of Mrs Leggett’s remuneration

1. When she commenced working for the Club in January 1991, Mrs Leggett was a contractor with responsibilities for sponsorship and promotions. Brian **Fletcher** was then the Club’s CEO (or equivalent) and remained in that position until Mr Rudolph replaced him. Until July 2013, several others were engaged as contractors on a similar basis to Mrs Leggett, such as Mrs Joanne **Price**, who was the functions manager. Over the years, Mrs Leggett’s responsibilities and the basis of her remuneration evolved. In June 2005, Mrs Leggett was appointed the Club’s sponsorship and marketing manager, while still a contractor. She remained in that role until March 2017.
2. Mrs Leggett was paid commission on sponsorships that she arranged for the Club’s race meeting calendar of about 22 race days per annum. In June 2005 she agreed with Mr Fletcher (who obtained board approval) that she would be paid an annual retainer of $25,000, 10% commission for cash and contra benefits that the Club earned from her efforts, superannuation and that the Club would pay for her mobile phone account. Mr Fletcher wrote to her confirming this arrangement, save that his letter referred to the commission being payable only for cash that the Club earned. But, Mr Fletcher confirmed in his oral evidence that her entitlement to commission included the value to the Club of “in kind” sponsorship benefits that Mrs Leggett obtained for it. Mrs Leggett invoiced the Club after each race meeting that the Club conducted, based on the value of the sponsorship and other income that she had secured for the Club in respect of that meeting. The other income that Mrs Leggett’s activities generated included the provision of dining or hospitality benefits for sponsors in excess of the minimum package that she negotiated with them for sponsoring a race or a meeting, the creation of one or more advertising signs at the course promoting the sponsor and the provision of prizes and trophies. Mr Fletcher promptly reviewed and approved payment for Mrs Leggett’s and other creditors’ invoices in accordance with his customary practice, so that she (and other creditors) were paid within 14 days.
3. Mrs Leggett’s responsibilities included securing and organising race sponsorship, promotions and necessary advertising entitlements for the sponsor, arranging media partnerships and packages, implementing and completing a full run sheet (to give effect to the arrangements she had made for the relevant race day) for the Club’s management, and arranging on course promotions, entertainment, hiring and advertising for race days. In addition, she attended sponsors luncheons, trade shows, and meetings of the local chamber of commerce and Clubs NSW (to network and engage with sponsors and their guests), met with race sponsors to arrange their race day requirements, met with potential or prospective sponsors on and off course as necessary, wrote any necessary correspondence for bookings and arranged any tickets or wristbands.
4. On 1 July 2013, the Club regularised the employment relationships that it had with persons such as Mrs Leggett and Mrs Price, with whom it had been dealing as contractors. It retrospectively treated these persons as employees based on the advice of the Club’s auditor and acknowledged its liability to pay them any entitlements to superannuation, annual and long service leave over the period of their earlier relationships with the Club as “contractors”.
5. Despite the evolvement of her role, remuneration structure and the Club’s implementation of an employment rather than independent contractor relationship with Mrs Leggett (and other senior employees) in July 2013, the Club did not provide Mrs Leggett (or the other employees) with a written contract of employment. No doubt this was because Mr Fletcher had remained as CEO, ran a reasonably happy senior management team, including Mrs Leggett, and knew what their terms and conditions of employment were. However, when Mr Rudolph assumed his role, this informality presented him with some challenges in comprehending what Mrs Leggett’s remuneration entitlements were.
6. Mr Fletcher said that Mrs Leggett ran the sponsorship and marketing “department for us and she had to report to me… not on a daily basis or anything like that. She was a trusted employee, like many others at the race club”. He said that he did not need to worry about what Mrs Leggett was doing because she did her job well, indicating the substantial degree of responsibility and autonomy she had in her role as sponsorship and marketing manager. He said that, when she negotiated or gained a new sponsorship, she would inform him and, with the larger ones, would ensure that he approved the final terms which he would sign. As he said, the larger sponsors usually wanted to meet the CEO but with “the run of the mill… race day sponsorship… she could do all that… without reporting to me”.
7. In about 2012, the Club recognised Mrs Leggett’s service since 1991 as entitling her to long service leave in accordance with the *Long Service Leave Act 1955* (NSW). Mrs Leggett took most of 2013 and early 2014 as leave and the Club paid her $58,048.66 for 19.58 weeks of long service leave that she took at that time. As at September 2016, the Club’s long service leave ledger recorded Mrs Leggett as having a current entitlement of 2.39 weeks long service leave and made a provision of $7406.09 in its books in respect of it. She was then the longest serving employee of the Club.
8. In April 2014, Mr Fletcher agreed that the Club would pay Mrs Leggett the $500 fee per race day and that she should have a corporate credit card on which she could pay for the expenses of attending meetings at venues other than the Club, buying flowers and other items that the sponsors required or needed to enhance the experience of their guests and her petrol expenses.
9. From August 2014, Mrs Leggett’s remuneration structure comprised the annual retainer of $25,000, a sum of $500 for each race meeting that she attended, 10% commission for cash or in kind benefits for the Club and superannuation guarantee contributions based on the total annual value of all her remuneration (including commissions). The Club paid Mrs Leggett weekly.
10. During Mr Fletcher’s time, Mrs Price’s twin sister, Lea **Porteous**, who was an accountant, was responsible for paying wages and invoices. She processed bookings that Mrs Leggett took and invoiced sponsors, usually based on information that Mrs Leggett provided. Because Mrs Leggett did not work from the Club premises but from home, except on race days, Ms Porteous would answer telephone enquiries from actual or potential sponsors who telephoned the Club. She was in regular daily contact by email and phone with Mrs Leggett about the day to day tasks each needed to cooperate with the other in discharging.
11. Mrs Leggett’s 10% commission entitlement also extended to sponsorships that Mr Fletcher negotiated, such as one with the Penrith Panthers Group (of which Mr Fletcher became CEO in about March 2016, while remaining CEO of the Club as well until May 2016, when Mr Rudolph took up his position. That was because, once the sponsorship contract was made, Mrs Leggett had responsibility for ensuring that the Club provided the services due under it, including arranging dining room services for the sponsor’s invited guests, corporate rooms, sourcing trophies, preparation of the race book, advertising and other tasks, such as internal administration of the arrangements and ensuring the correct invoicing of the sponsor for those services.
12. Mrs Leggett also received an annual bonus in the order of $3000 to $3500 after tax.

## Mr Rudolph commences as CEO

1. Mr Rudolph was about 45 when he commenced as the Club’s CEO on 6 May 2016. He had worked principally as a steward, initially for Queensland Racing until 2000, when he obtained an appointment to the stewards panel of Racing NSW in Sydney. In 2002, Racing NSW appointed him as a deputy chairman of stewards and, in 2006, it made him general manager of racing and commercial operations, where he remained until 2009, when he returned to being a deputy chairman of stewards. He remained in the latter office until 2016. His father-in-law, Ray **Murrihy**, was chairman of stewards until his retirement in June 2016.
2. On 12 May 2016, Mrs Leggett responded to an email from Mrs Price about her superannuation. Mrs Leggett said that, in the last two weeks of June, she would request that her then outstanding commission, which she estimated would be between about $7000 and $8000, be paid into her superannuation fund.
3. When Mr Rudolph commenced work at the Club he began emailing Mrs Leggett with a variety of tasks. On 18 May 2016, Mrs Leggett had her first formal meeting with Mr Rudolph in his office. No one else was present. Mr Rudolph saw Mrs Leggett waiting outside his office in the administration area, where Mrs Price and Ms Porteous sat. He waved his hand, motioning Mrs Leggett to come into his office and, without yet speaking to her, motioned for her to sit in a chair. He remained standing about one metre from her and told Mrs Leggett that she was earning “too much money” and that, if she were at Gosford, she would be earning half of what she was getting from the Club. Mrs Leggett responded that she was not working at Gosford and that she was paid on performance. I do not accept Mr Rudolph’s evidence that “I certainly never have said to anyone that they earn too much money”. Nor do I accept his denial that he acted and spoke in the way that Mrs Leggett described or his assertion that, on this occasion, Mrs Price was present.
4. On 20 May 2016, Mr Rudolph met Kimberley **Talbot**, the chief executive officer of the **Richmond Club** Group at her office. The Richmond Club was a major sponsor of the Club. Ms Talbot was an impressive witness whose evidence I accept. She had been in her position since 2005 and had developed a close professional relationship with Mrs Leggett. After introductions, Mr Rudolph asked her if she knew Mrs Leggett and what she thought of her. Ms Talbot replied that “she’s very good at her job but I have my ups and downs with Vivienne”. Ms Talbot told him that Mrs Leggett was “tenacious – very good at her job”. Mr Rudolph then asked her “why would Vivienne be paid roughly what I’m being paid as marketing and sponsorship manager?”. Ms Talbot said that she understood that Mrs Leggett was paid a base rate and a percentage of what she brought into the Club. Mr Rudolph said that the sponsorships were already in place and asked why he would not be able to do the sponsorship work himself. Ms Talbot replied that it was not just about Mrs Leggett getting the sponsorship, but that she followed through and (in a complimentary sense) “it almost drives me insane with the follow through prior to a race day”. Mr Rudolph responded that “I still don’t think it’s worth around about $180,000”. He also had this exchange with Ms Talbot:

MR RUDOLPH: Do you think there was anything else in the package?

MS TALBOT: What do you mean?

MR RUDOLPH: Like a kickback?

MS TALBOT: Absolutely not.

1. I reject Mr Rudolph’s denial of this account of the conversation he had with Ms Talbot. Ms Talbot regarded the conversation as memorable but did not tell Mrs Leggett or her own board about it until after Mrs Leggett left the Club. She said that this was because, earlier, she had regarded it as none of her business to discuss such matters with either of them and to do so may have affected the close relationships that the two organisations’ boards had with each other. However, the performance of the Club in servicing the Richmond Club’s sponsorships was not of the same quality after Mrs Leggett left. As Ms Talbot said, “Mrs Leggett made sure that the delivery of what was said, especially in an $11,000 sponsorship, was delivered each time; everything was delivered as promised”.
2. On 1 June 2016, Mr Rudolph emailed Mrs Leggett about his review of her staff credit card expenses for the previous month. He noted her expenses of $72 for fuel, $17 for dry cleaning and queried “$15 parking?” incurred at Hawkesbury City **Chambers**. He wrote that she did not then have a written contract and asked “what was the previous arrangement for fuel expenses?” He also said that “for proper auditing procedures, receipts will be needed now to accompany statements for end of month reconciliations”. Mrs Leggett replied the same day saying that she already gave Mrs Price her receipts. She explained that the parking fee was to attend meetings for networking and the dry cleaning was for the satin tablecloth for trophies. She said that the petrol was a monthly expense to defray the cost of driving to meetings and visiting sponsors back and forth from the Club.
3. On 3 June 2016, Mr Rudolph emailed back saying that he did not understand what the Hawkesbury City Chambers meeting was for and told Mrs Leggett that she could pay for dry cleaning from petty cash when required. He said that she could claim tax deductions for driving her car and if she wanted reimbursement she had to document and obtain authorisation for the expense. He told her that he was cancelling all existing Club credit cards. Mrs Leggett replied with more detail answering his enquiries and said that she would document her driving to see sponsors. She explained that the parking fee was for meetings with the Chamber members both for breakfasts and after 5:00pm “purely for networking purposes” and that she then had a full race day proposal before the Chamber for consideration.
4. Later on 3 June 2016, Mr Rudolph responded saying that Mrs Price had “checked and our membership with the Chamber does not require us to pay”. That was news to Mrs Leggett, who replied on the same day that everyone paid but, if what he told her was right, perhaps Mrs Price could just ask for a refund.
5. On 17 June 2016, Mr Rudolph next responded and asked Mrs Leggett for “an idea as to how many times you have attended and if we have therefore paid unnecessarily, we can check the membership entitlements”. Mrs Price then emailed back saying that the Club was entitled to four free breakfast meetings per annum and had to pay for the rest. Mrs Leggett said that she had received and used four free breakfast cards (including attending at 7:00am on the previous day).
6. Mr Rudolph’s overbearing micromanagement style emerged in those emails. Mrs Leggett answered his almost trivial queries only to be told that she was not to have a credit card, even though she provided receipts and clear explanations. When pressed in cross examination about his return to questioning Mrs Leggett’s attendances at the Chambers on 17 June 2016, Mr Rudolph said “the membership would have been renewed… at the end of the month. So it wasn’t a big deal to me”. I do not accept his evidence that “it wasn’t a big deal” to him. That answer bellied his dogged interrogation of Mrs Leggett about trivial expenses. She was a senior and effective executive, who had provided her receipts to Mrs Price with her credit card statement. Those expenses were not “a big deal” except for the mountain Mr Rudolph had chosen to make out of the molehill.
7. At its meeting of 27 June 2016, the board approved Mr Rudolph’s recommendations of bonuses for Mrs Leggett and the other senior staff. The approval included $2000 for Mr Rudolph that he said was suggested by Ken **Quigley**, the then chairman of the Club’s board. From about 2006, Mrs Leggett had received an annual bonus and she expected to receive one at the end of June 2016. She said that, in terms of sponsorships and promotions, the 2015–2016 financial year had been a very good one for the Club. Indeed, as Mr Rudolph and Mr Quigley later recorded in the Club’s annual report, its net profit was up 60% to almost $700,000 and its total revenue had increased 6% to about $13.78 million.
8. On 29 June 2016, Mrs Price informed Mrs Leggett that she could not receive superannuation guarantee payments on her salary sacrifice contributions and already had been credited for all her then superannuation entitlements. Mrs Leggett and Mrs Price exchanged emails about when she could be paid the money she had intended would be added to her superannuation account. Mrs Leggett asked her to speak to Mr Rudolph about being paid what she was owed. Mrs Price wrote back at about 8:00pm and said that she would speak to Mr Rudolph in the morning. She said that she agreed that Mrs Leggett should have been paid earlier and such matters should not have been left to the end of the financial year.
9. During the afternoon and evening of 29 June 2016, Mr Rudolph and Mrs Price exchanged emails about the bonuses that the Club would pay staff on 30 June 2016. He asked her to prepare two formats for letters to staff, one that advised of an immediate payment and one that gave an immediate payment and held out the prospect of an additional bonus after a further review of the employee’s performance in three months. As at 10:58pm on 29 June 2016, he said that only Mrs Leggett and Ms Mitchelhill would receive $1500 and a review, while the rest of the staff would be paid their full bonuses.
10. At 7:16am on 30 June 2016, Mr Rudolph emailed Mrs Leggett:

Viv,

So I can be appraised of this situation regarding your salary payments including previous arrangements regarding bonuses, allowances, super contributions and Fringe benefits, **please advise by close of business today**:

* what arrangements, if any, are currently in place for calculation of your aforementioned payments. For example, how are they determined and on what formula.
* What documentation is used to support the figures? (e.g.Contracts, sponsorship revenue etc)
* where documented,have the aforementioned payments been approved and by whom ( eg Chairman, Board or CEO?) –Where documented, did your employment status changed from that as a contractor –What status your current employment is as you understand it
* What provisions for you to work from home are in place with respect to insurance liabilities, your personal cover ( eg home and contents)and what is covered by the club.

I require these matters to be addressed for the purposes of having standard contracts of employment in place if they are not currently, as well as four our annual auditing purposes, which are currently being undertaken in accordance with our statutory obligations. **The auditor quite rightly, has expressed concerns with any lack of transparency with regards to the calculation of your payments and how they are paid and this urgently needs to be reviewed going into the new financial year.**

Furthermore, I also require your job description as Sponsorship and Marketing Manager, including roles and responsibilities. Staff will be shortly be required to undertake a performance appraisal for the next financial year in order to get an overview of everyone’s respective roles.

Regards,

Greg

(emphasis added)

1. While this was the first time that Mr Rudolph had asked Mrs Leggett to provide details of her salary, he had asked her about her job description at their initial meeting on 18 May 2016.
2. Mr Rudolph agreed in cross examination that his email had set Mrs Leggett “no small task” but asserted this was on face value and that “to someone who had been there for so long it would have been readily apparent that they could easily be provided in that timeframe”. He agreed with my question that they had discussed this already and that he was “going through the whole thing again”. Later in his evidence, he asserted that, at this time, “it was foremost in my mind to sort out this superannuation amount” in trying to explain his email to Mrs Price at 8:29am on 30 June 2016 in which he instructed her to put on hold drafting the letter to Mrs Leggett about her bonus “**in light of her demands** and my recommendation that she now gets reviewed in October”. He asserted that he waited to sort out Mrs Leggett’s contract in the next financial year and that “it was in my mind that **it didn’t matter to Viv when I paid her that**, whether it was in July or August or September or October” and that bonus would be reflected in a further package “and that this would be better for the staff and the Club as a whole”. I do not believe that evidence. It is patent that Mr Rudolph had decided to deny Mrs Leggett her annual bonus because he was irritated by “her demands”, as his email said, and had set her a repetitive, substantial task to complete with an unreasonable deadline of close of business that day, regardless of whatever Mrs Leggett might be doing, to make her dance to his tune. Her “demands” were to have the money then due to her paid, being what she had requested on 12 May 2016, either to her superannuation account or, when that did not occur, to her bank account. No employer could honestly think that “it didn’t matter to Viv when I paid her”.
3. Mr Rudolph never explained to Mrs Leggett why she was not paid a bonus. Mrs Leggett busied herself on 30 June 2016 and responded in detail to Mr Rudolph’s queries shortly before 4:00pm in a letter of more than four closely typed pages. She noted that she had received bonuses, as decided by the board, net of tax of between $3000 and $3500 each year. She also explained that Mr Fletcher had agreed in April 2014 that she should have a credit card to pay for client meetings not held at the Club, flowers for sponsors, whatever was needed for functions and petrol once a month. She affirmed that the card “was never abused as I am sure you can see from the statements”.
4. I accept that Mr Rudolph and the Club’s auditor may have had a conversation about the need to record the basis of Mrs Leggett’s contract and remuneration. However, there is no reason to think that that request was so urgent that Mrs Leggett needed to reply by the end of the day. That requirement was imposed by Mr Rudolph to exert his authority and overbear Mrs Leggett. And, as Mr Rudolph observed, Mrs Leggett’s “was the most extraordinary employment agreement that I had ever come across”. But he could, and did, check from the Club’s records that what she asserted in her detailed explanation was correct.
5. In early July 2016, Mrs Leggett met with Mr Rudolph in his office with Mrs Price present. Mrs Price recalled that the meeting was in late July 2016. Mrs Price explained that Mr Rudolph called her into meetings at the last minute if he was meeting with another female employee and “I was there, again, not to say anything”. Mrs Price did not make notes and did not appear to take much interest in what was discussed. Mrs Leggett said that Mr Rudolph told her that he wanted to re-do her contract and told her “you are not a contractor. You are not an employee. You are a nothing”. Mrs Price recalled Mr Rudolph saying words to the effect “you aren’t a contractor, you aren’t an employee, you’re sitting in this grey area”. Mr Rudolph said, referring to Mrs Leggett’s version of his statement, that “I strongly disagree. Those words were never said”.
6. I reject Mr Rudolph’s evidence. Mrs Price’s account, allowing for her general lack of interest in what was being said, is close to Mrs Leggett’s. Moreover, Mrs Leggett herself had expressed some puzzlement about her role in her letter of 30 June 2016, saying “My current employment status as I know it to be – well, I don’t really know what it is”. She noted that, after being told in 2013 that she was no longer a sole trader or contractor and was an employee, she had lost some of the financial benefits of her former role. Mr Rudolph said that, at the meeting in early July 2016, he told Mrs Leggett that he would prepare a draft written contract of employment for her within about three weeks. He told her that he wanted to restructure her position and bring in someone fresh out of university to develop the Facebook and social media marketing of the Club.
7. Mr Rudolph never prepared, let alone presented, a draft contract for Mrs Leggett, despite his focus on demanding detail of her work responsibilities and expenses and his supposed concern about “a lack of transparency” for the auditor. That was also despite his engaging, by mid‑July 2016, the solicitors who still act in this litigation for the Club, to assist him drafting his emails to Mrs Leggett. This lack of interest in preparing a draft contract was consistent with Mr Rudolph’s generally unsettling treatment of Mrs Leggett that, in my assessment, was calculated to, and did, make her feel uncomfortable and insecure. Indeed, as Mrs Leggett said, the discussion of her contractual arrangements in front of Mrs Price made her feel “quite embarrassed and humiliated”.
8. By 18 July 2016, Mr Rudolph had begun to send emails he had received from or drafted for Mrs Leggett to the Club’s solicitors for legal advice. On 19 July 2016, he began asking Mrs Leggett questions about the cost of winners’ sashes in a series of emails and sought legal advice in respect of emails in this chain dated 20 and 25 July 2016. Mrs Leggett told him that the sashes cost $30 plus GST and postage and, on behalf of the Club, she charged owners $77. She also answered his queries about trophies. At 7:41am on 20 July 2016, he emailed Mrs Leggett another series of detailed questions, again demanding answers by the close of business that day. For example, he asked “who came up with the $77 fee for additional sale of sashes and how have you, **if indeed you have**, advised Lea [Porteous] or Joanne [Price] for accounting purposes?”. The tone of that question was calculated to suggest some impropriety or irregularity about sales that Mrs Leggett had been effecting regularly for the benefit of the Club. She responded, as required, at 9:14am that day, saying:

Greg

The fee for any additional sashes ordered by owners was priced by myself and Brian to cover the costs of admin, postage and make a profit for the club.

Brian never raised a concern about this costing.

An invoice was generated or a credit card payment made at the time of the order.

…

We have always believed in a more personal approach in dealing with sponsors and members of the community. Never has Brian asked for a formal agreement and has always been aware of my sponsorship activities.

**Greg, I feel that you don’t trust me in performing my sponsorship duties that I have carried out for the last 25 years with the full disclosure with Brian and the board.**

I am happy to come in and talk through any issues that need clarification **however I am losing sleep and constantly thinking about these emails and other questions you are raising.**

**I need to focus totally on securing sponsorship for the club** as the next six months is extremely time consuming.

Many thanks

Viv Leggett

(emphasis added)

1. I infer that Mr Rudolph perceived that Mrs Leggett had reacted significantly enough in her email for him to seek legal advice. Her email conveyed in clear terms to a reasonable person in the position of the CEO that his demands were causing Mrs Leggett distress and loss of sleep and a feeling that she was not trusted in a role that she had faithfully performed for the past 25 years. Yet Mr Rudolph never raised with her or the board that he had been surprised and concerned, as he suggested in his evidence, that Mrs Leggett was losing sleep. He sought to explain his questioning of her about the sashes as conveying:

Well is there a better way than charging $77 for a bit of ribbon that essential hangs over a stable door? **And that was the extent of my question to that effect. I didn’t feel that they were particularly difficult questions**, bearing in mind that the previous day, Tuesday, the 19th, Vivienne had answered these during the course of the day and, to me, that was a normal email exchange of staff. **So, I was surprised that on the 20th that she indicated she was losing sleep**.

(emphasis added)

1. He said that he understood Mrs Leggett’s email to convey that she felt he was asking questions for some reason other than ensuring, what he asserted, “that our statutory obligations were covered” and that “commercially, was this the best way of servicing sponsors”. I do not believe his explanation. Mr Rudolph’s attitude to Mrs Leggett was revealed, two years later, in his email of 17 June 2018 to Noel Mayfield-Smith, who had alerted him to a report of the dismissal of the Club’s appeal from the Workers Compensation Commission decision that created the issue estoppel in relation to his bullying. Mr Rudolph told Mr Mayfield‑Smith that the then chief executive officer of Racing NSW “[Peter] V’Landys, will either appeal or cut her off from the payout. He doesn’t want to waste industry money **on a fraudster**. **Between her and BF** [Brian Fletcher]**, they were taking the club for a ride… to the tune of millions over the years**”.
2. There was no evidence or suggestion in this proceeding that Mrs Leggett or Mr Fletcher had engaged in any improper, let alone fraudulent, activity. Mr Rudolph was prepared to tailor his evidence to what would not cast him in an unfavourable light. This is illuminated by his assertion when cross examined on his email of 17 June 2018, that “I wasn’t asserting that she had”, as he wrote, “taken the Club for a ride to the tune of millions of dollars”. When asked why he wrote what he did, he asserted that he was “frustrated by the result of the… case” and “what I believed were her lies that she had made against me and to the point between 20 July and 9 October [2016] on **not one occasion that we had where I saw her at work** did she express any discontent to me regarding the state of her alleged condition”. He asserted of Mrs Leggett “**you may be able to hide depression, but you can’t hide trauma and it simply didn’t make sense that Mrs Leggett undertook this course of conduct**. And in anger and frustration, I used the words that in hindsight may have been too strong”. He also gave this evidence:

It’s the case, isn’t it, sir, that you formed this opinion that you express in your email to Mr Noel Mayfield-Smith on 17 June 2018 well before that date? --- **No, it was not,** **Mr Best, and I have gone at pains over the last five days to express that.**

(emphasis added)

1. I disbelieve that evidence. Mr Rudolph was at pains in the hearing to portray his own conduct in a favourable light. I am satisfied that he was conscious from no later than 20 July 2016 that he had bullied Mrs Leggett and ignored her expressed statements of distress, as in her email of that day. And, instead of immediately seeking to allay her clearly expressed anxiety and distress, he said nothing to her, but sought legal advice before responding with an email five days later at 4:44pm on Monday 25 July 2016. That email read:

Thanks for the information in your email. As the relatively new CEO of the Club, it is vital that I get an understanding of all legal and commercial matters relating to the Club and its operations (amongst other things). **My questions of you are not unreasonable given your tenure and knowledge of the Club and your responsibility for sponsorship and marketing.**

I have been brought on board to guide the strategic direction of the Club moving forward and will be relying heavily on your co-operation and assistance over the next few months in order to fulfil my mandate. We have obligations with regards to not only our Constitution, but also to Racing NSW, who in turn have statutory obligations.

Can you please make yourself available to discuss the above and **any other concerns**, on Wednesday morning this week, at 9:30am?

(emphasis added)

## Mrs Leggett tells directors of the Club about Mr Rudolph’s treatment of her

1. Importantly, on 20 July 2016, after she had replied to Mr Rudolph’s email, Mrs Leggett rang a director of the Club, **Sid Kelly** OAM. She told him that Mr Rudolph was “micromanaging me. I just can’t believe why he would be micromanaging me. I feel like he doesn’t trust what I’m doing or what I’ve been doing for 25 years. I feel like he’s just, like, put me in a box and won’t let me do anything”. She told Mr Kelly that she could not get her work done for the major turf race day on the coming Sunday because of Mr Rudolph’s constant demands to answer his emails and said “I just can’t work properly because he’s constantly harassing me”. She said that she did not know why Mr Rudolph was doing this to her. Mr Kelly said “just remember Bubs, you’ve done nothing wrong”. At this point, Mrs Leggett was overcome with emotion and began crying. Mr Kelly said that he would speak to Mr Rudolph to see if he could stop micromanaging her as much and that she should “leave it to him to see what he could do”.
2. Mr Rudolph did not give any evidence in chief about any conversation with Sid Kelly, who is not to be confused with the eponymous manager of the Club’s motel and restaurant, **Ken Kelly**, with whom Mr Rudolph was also having issues at this time. The Club did not call Sid Kelly to give evidence.
3. Also, at a race day in July 2016, Mrs Leggett spoke with another director of the Club, Gerry **Commerford**, in the winner’s bar after a sashing presentation. She told him “I’m just so stressed out the way Greg keeps treating me”. Mr Commerford asked her what she was referring to and she told him “about all the emails that had come through and all the end all the expectations to have it done by that day”. She told him that “**I couldn’t think anymore and I just had constant anxiety and I wasn’t sleeping well. I cry all the time now and I’m just very emotional**”. Once again, the Club did not call Mr Commerford to give evidence.

## Mr Rudolph’s conduct after 25 July 2016

1. Mr Rudolph asserted in cross examination that his reference to “any other concerns” in the last paragraph of his 25 July 2016 email was a response, albeit not specific, to Mrs Leggett’s complaints about losing sleep, constantly thinking about answering his emails and that she felt he did not trust her. He said “those matters were, in my mind, going to be discussed” at the meeting on 27 July 2016. I do not accept that he intended his reference to “concerns” to encompass Mrs Leggett’s position, as opposed to a new barrage of inquiries that he had in mind to put to her in exploring his (unfounded) suspicions of impropriety. He had no recollection of discussing any of those serious matters raised by Mrs Leggett at the meeting of 27 July 2016. Indeed, in a draft email that he prepared, but did not send, to summarise the discussion on 27 July 2016, not only did he not refer to Mrs Leggett’s state of mind, but instead drafted allegations that she had received deliveries from Harvey Norman to her house for purchases in the past and that he needed to approve any such conduct in the future. He sought legal advice about the matters he discussed at that meeting and, I infer, what he drafted in that unsent email.
2. Mrs Leggett said that, in the meeting of 27 July 2016, Mr Rudolph wanted to know about all of the contracts that she had negotiated to June 2017. She said that he took away her authority to agree a fee of $165 to paint a sign that would be shown on a Sky Channel broadcast of races with a sponsor who was paying $16,500 and that, with Mrs Price present, she felt humiliated.
3. I accept Mrs Leggett’s summary of the conversation on 27 July 2016 that Mr Rudolph was again micromanaging her on that occassion, stating “how I wasn’t to do anything myself – virtually not think for myself… I had to ask him for every approval of a sign to be painted… **everything that I would normally do within the parameters of my job were taken from me**”. That evidence is consistent both with the draft 27 July 2016 email and Mrs Price’s evidence of Mr Rudolph’s manner at the earlier meeting in July 2016 as “steward like”, being to “ask a lot of questions… particularly, if there was an objection to a race” to obtain information. Mrs Price said “that was his style of management, to obtain information by asking a lot of questions”. She had no recollection of the 27 July 2016 meeting.
4. On 1 August 2016, Mr Rudolph sent Mrs Leggett the final version of the email that he had drafted on 27 July 2016 after he obtained legal advice on its contents. He sought her agreement about five matters that they discussed. The email made no reference to Mrs Leggett’s state of mind. It set out prescriptive parameters that considerably limited Mrs Leggett’s ability to negotiate pricing, signage and advertising with sponsors without his express permission. He wrote, among other matters:

Bookings are to be paid for, prior to ticketing for all race day and non-race day functions. **The only exception to this general rule will be when I have given express permission to alter that arrangement**. I reiterate my advice that payment of your commissions from bookings **will not be forthcoming, until we receive payment** from those bookings in the first instance.

…

Purchases of items as prizes are **to be approved by me** as to what items, for what function and as to how they are to be paid and where they are delivered, so as to reconcile for accounting purposes. **If items have been previously delivered to your residence, that is no longer to happen**.

(emphasis added)

1. That paragraph marginally toned down the positive assertion in the 27 July 2016 draft email that Mrs Leggett had had items delivered to her home. He said that, at the meeting on 27 July 2016, he only had asked Mrs Leggett if Harvey Norman had delivered goods to her home and “I didn’t accuse her”. Mrs Leggett did not give evidence that Mr Rudolph made an accusation about the delivery of goods to her home. However, in her application to the Fair Work Commission for an order to stop bullying under s 789FC of the *Fair Work Act*, filed on about 17 February 2017, Mrs Leggett alleged that Mr Rudolph had made that accusation. In the Club’s filed response, it asserted that “the CEO merely questioned the Applicant as to where these goods were delivered and never accused her of having them delivered to her home”. I consider that Mr Rudolph’s contemporaneous draft email of 27 July 2016, summarising the conversation, is likely to have accurately recorded that he had made a direct accusation that “if items have been delivered to your residence, **which I am advised they have**, that is no longer to happen”. However, because Mrs Leggett did not give direct evidence about this, it is appropriate only to use Mr Rudolph’s draft email and oral evidence in evaluating his state of mind at the meeting (as opposed to the effect of his behaviour on Mrs Leggett). On this basis, I find his state of mind was suspicious and he intended to limit Mrs Leggett’s existing contractual authority to make contracts and arrangements on behalf of the Club in any way he could.
2. On 2 August 2016, Mrs Leggett responded outlining her concerns in detail about Mr Rudolph’s proposals in his 1 August 2016 email. In it, she said “I do take offence to you suggesting I may have had goods delivered to my property. I have never had goods delivered to my property that have been ordered through the race club”.

## Ms Mitchellhill

1. During 2015, difficulties developed in the working relationship between Mrs Leggett and Nicole **Mitchellhill**, who was responsible for coordinating and hosting tables in the Club’s **Ted McCabe** function centre. In essence, Mrs Leggett did not think that Ms Mitchellhill was setting out the tables and flowers and presenting the table cloths and chair covers in a way that reflected the standard that she desired. Ms Mitchellhill complained to Mr Fletcher that Mrs Leggett was bullying her or making it hard to work with her. He convened a meeting with the two women in March 2015.
2. Matters seemed to resolve until late in the year when Mrs Leggett perceived that Ms Mitchellhill’s standards were slipping again. She tried to raise the issue but Ms Mitchellhill began avoiding her, so that Mrs Leggett had to ask the employees who worked under Ms Mitchelhill to fix or attend to the issues with the room preparation she was raising. Matters did not improve, so on 3 April 2016 Mrs Leggett complained to Mr Fletcher that Ms Mitchellhill was bullying her.
3. As Mrs Leggett agreed in cross examination that, by April 2016, she was aware that she could make a complaint of work place bullying. She told Mr Rudolph in May 2016 of the incident with Ms Mitchellhill. He said that he formed the view after meetings with each of them that they were happy to continue working with each other, until Ms Mitchellhill left in August 2016, having gone on leave in June 2016.
4. Mr Rudolph raised the dispute at the 27 June 2016 board meeting. He later told the 29 August 2016 board meeting that he had terminated Ms Mitchellhill’s employment on 26 August 2016 for serious misconduct, including her failing to return from extended leave. In cross examination, Mr Rudolph denied the accuracy of the board minute, saying “it says terminated. I can assure you she resigned”. I do not accept that evidence. As CEO, Mr Rudolph was responsible to ensure that the board minutes were accurate.

## Mrs Leggett again raises her feelings with directors

1. On about 2 or 3 August 2016, Mrs Leggett telephoned Sid Kelly. She was crying and said:

I can’t take this anymore, Sid. I can’t …cope. I’m constantly I **just I can’t stop crying. I haven’t stopped crying for a week. I can’t do my work. I’m so stressed. I can’t eat. Can’t sleep. I’m just completely just not myself.** I’m just gone from, I don’t know,being a confident sort of person to just nothing.

(emphasis added)

1. Mr Kelly told her that he would ask Mr Rudolph to speak to her with more respect and she had done nothing wrong. She said that she was crying “too much” while they spoke, and told him “I’m just going to have to resign because… I just couldn’t take his treatment of me anymore”. Mr Kelly told her that he would talk to the other directors.
2. Just before the beginning of a race meeting in about mid-August 2016, Mrs Leggett spoke to Mr Commerford. She had been setting up and was getting tickets for the sponsors’ guests. Mr Rudolph had called her into his office as she was passing and, in her words, “berated me about more things he didn’t like” until his phone rang. He told her that he had to answer the call and walked off. She waited a few minutes for him and, because the guests were waiting for her to return, she left the office and then encountered Mr Commerford. She thought that he saw her “looking pretty upset” and he asked her “what’s up?”. She said:

**“I can’t take this shit any more, Gerry**... I’m just so over this, the way I’ve been treated, and I feel sick to the guts. I feel …like a bit of gum on his shoe, is how I felt, **I can’t sleep. I can’t do nothing.** Do you know anything of what’s happening?”… He said, “You need to be careful because they’re talking about you up in the boardroom, and it was noted that… they should get rid of both of you”.

1. Also in August 2016, Mrs Leggett went to the furniture shop at the Richmond Centre that another director of the Club, Greg **Stevens**, owned. She had a longstanding friendship with Mr Stevens and his wife, who was then suffering from brain cancer. Mrs Leggett was organising a race day in November to support her. After discussing Mrs Stevens’ condition, Mr Stevens asked how things were at the Club. Mrs Leggett told him that they were not good. She told him about the different emails, said that Mr Rudolph was not treating her well and that she could not cope anymore, was having trouble sleeping, trying to do her work and with her ability to think properly. She asked him if he knew anything about her situation. He said that he had not been to many meetings because of his wife’s circumstances.
2. In mid to late September 2016, Mrs Leggett called into Mr Stevens’ store again. During their discussion she told him that things had become worse and that she was being completely ignored. She said to him that she had been harassed and was not coping, unable to sleep, could not work and was feeling mentally drained. He again told her that he had not been to many meetings because of his wife’s condition.
3. On 20 September 2016, Mr Rudolph emailed Mrs Leggett, again interrogating her with an opening line: “Viv, **if as you say**… why…?” He instructed her not to enter into any new written contracts until he provided a new template.
4. Despite his conduct towards her, in his report for the Club’s 2015–2016 financial results, Mr Rudolph referred to Mrs Leggett being “instrumental in continuing the relationships with sponsors… and due credit must be given to her for her continued service”. He agreed in cross examination that up to when he received her email of 9 October 2016, he regarded Mrs Leggett as competent.

## Events in late September and early October 2016

1. On 22 September 2016, at the Leukaemia **Foundation** Race Day, Mrs Leggett, Mr Rudolph, the person responsible for managing the Foundation’s sponsorship, Gail Ladner, and the racecourse curator, Jeff Haynes, were having a conversation while watching a race. Mrs Leggett remarked that in her 25 years at the Club she had never been to the starting **barriers** because she always had to be with a sponsor and be back at the area where the sashing occurred for the winning horse and owners. On Mrs Leggett’s account, Mr Rudolph said “Really? You can go whenever you want” and she replied “Great”.
2. According to Mr Rudolph, he was with Mrs Leggett in the administration office on 22 September 2016. Mrs Leggett said that she would like to go to the barriers because in all the time she had worked at the Club she had never been there. He gave evidence that he responded “Viv, you are free to go to the barriers, but I will take you with me”. He said that he told her that he would take her at a time convenient “to both you and me and the operations of the Club”. He volunteered in chief “and, in fact, **I wanted to take her** because I’m well experienced… behind the barriers”. He disputed Mrs Leggett’s version of the discussion.
3. I do not believe Mr Rudolph’s account. Had he told Mrs Leggett that he would take her, as he said in evidence, she would have been terrified to have defied him by going, as she did, on her own initiative on 9 October 2016. By that time, Mrs Leggett was very conscious of not doing anything that Mr Rudolph could see as a challenge to his control. I infer that, in a conversation in front of third parties, Mr Rudolph would not have been, or wished himself to be seen as being, controlling of Mrs Leggett. In giving his evidence, he was intelligent and adept at seeking to create a good impression, such as by the interpolation of his wanting to take Mrs Leggett to the barriers, despite thinking, as his email of 17 June 2018 showed, that she was a fraudster. It would have been an uncharacteristically generous act of his toward Mrs Leggett to spend time giving her a treat.
4. On 28 September 2016, the Club invoiced the Richmond Club $17,600 (inclusive of GST) for its sponsorship of the 20 October 2016 Richmond Club Charity Race Day and its right to bring 100 guests. The invoice was payable within seven days and in any event two weeks prior to race day. Mrs Leggett was entitled to a 10% commission once the Richmond Club paid, as it did before the race day. As will appear, Mr Rudolph deliberately withheld payment of that commission despite her contractual entitlement, her rights under s 323(1) of the *Fair Work Act* and his statement in his email of 1 August 2016 (see [49] above).

## Were there issues as to Mrs Leggett’s work performance as at 9 October 2016?

1. Mrs Leggett agreed in cross examination that she was aware, prior to 9 October 2016, that the proprietor of the Clarendon Hotel had told the Club that she and her family had used meal vouchers in the hotel restaurant that were meant to be distributed to patrons of the racecourse. There was no evidence about the circumstances and Mrs Leggett was not further cross examined on this matter.
2. She was also aware, prior to 9 October 2016, that Mr Rudolph considered her responsible for the award of a prize from a “**chocolate wheel**” that should have been displayed on the wheel as a $50, not $500, prize. The Club had to pay out the extra $450. This had occurred in early June 2016. Mrs Leggett said that the promotion had been taken out of her hands by Mr Rudolph and Mrs Price had been given responsibility for it. In re-examination, Mrs Leggett said that she had denied Mr Rudolph’s attribution of the error being her responsibility. However, after he accused her, she phoned Mrs Price or Ms Porteous and asked her to take $500 out of her pay because she was worried and felt intimated that she might lose her job. She said that the $500 was, in fact, deducted from her pay.
3. Mr Rudolph said in chief that he had asked Mrs Leggett to check the prizes on the wheel and that he was present when the second $500 prize, that should have been $50, was won. He said that he was unaware that Mrs Leggett repaid $500 to the Club and volunteered “and can I say that there would have been no expectation that Viv repay that money either”. Mr Rudolph said that this incident was a factor he considered in making his recommendation for the board meeting on 27 June 2016 and in deferring Mrs Leggett’s bonus after it. In March 2017 he had said, in his evidence to the arbitrator, that the issue about the chocolate wheel had resolved itself and there were no ongoing issues about the incident after early June 2016, following his having dealt with it after the race day. However, he said in re-examination before me that the chocolate wheel incident was relevant to whether, having regard to her overall performance Mrs Leggett should be given a bonus and that if she “had cost the Club money… hundreds of dollars, then that would be a consideration as to their overall performance”.
4. Mrs Price first denied that she had responsibility for the chocolate wheel, but then said “I dragged the promotion out of the storage and that was the end of it”. She said that she did not recall the details or Mrs Leggett telling her that, although she was not responsible for the wrong prize being offered, she wanted Mrs Price to deduct the amount of the loss from her entitlements. I accept Mrs Leggett’s evidence. I infer that Mr Rudolph required Mrs Price to take charge (or “drag the promotion out of storage”) and that she did not check the prizes being offered. Mrs Leggett could not give Mrs Price instructions; those had to come from Mr Rudolph.

### The events of 9 October 2016

1. Sunday 9 October 2016 was the Club’s Flavours of the World Race Day. Alan **Benson** was the assistant starter for the Club and in 2016 had been in that role for five years. He said that the starter asked all staff at the Club to come to see what occurs at the barriers, but Mrs Leggett was the only one who had never been there. He said that, on 9 October 2016 while he was in the Club’s office between 11:00am and 11:30am, he invited Mrs Leggett to come down to the barriers for what (Mrs Leggett recalled) was the start of a 2000 metre race late in the afternoon. The starter, Bernie **Evans**, was there too, as were other office staff. Mr Benson said that if the staff member was in the office, he would collect them, walk 50 metres to where his car was parked and drive on the back road straight to the starting area, which took two or three minutes. Mr Benson said that Mrs Leggett mentioned that she had sashing duties at the end of each race and he and Mr Evans both told her “we will be back in time for you to do anything like that”. That was because, once the horses had jumped, the trip back to the winners’ enclosure or sashing area was only two or three minutes.
2. Mrs Leggett gave a very similar account to Mr Benson. She said that, on 9 October 2016, when he offered to take people to the barriers she looked at her book and saw that there were no external sponsors for the last race. Mrs Leggett said that she asked Ms Porteous if she could do the sashes, if she were not back in time. Mr Benson said that Ms Porteous would not need to because it was (Ms Porteous recalled) an 1800 metre race and as soon as the horses started, they would get her back to the winners’ enclosure in plenty of time. Mrs Leggett then told Ms Porteous not to worry as she would be back in time.
3. Mr Benson said that, when she went to the barriers with him on 9 October 2016, he showed Mrs Leggett what the starters needed to do to place the horses in the starting gates and she was absorbing the details. As she said, she was really excited, talking, laughing and enjoying herself. However, she got a phone call. Mrs Leggett said that Mr Rudolph was on the line and asked her, without saying hello, “are you at the barriers?”. She said she was. He said “you get back here right now and do your own sashing… I have to go through the bars to collect the money and Lea can’t leave the office. You get back here right now and don’t ever do that without my approval again”. After the call, Mr Benson recalled that she said to him and Mr Evans “I’ve got to go back in. Greg wants me back in”. Someone replied, as a joke, “Yes, we all have got to go back”. Mr Benson recalled that Mrs Leggett was visibly upset. Mrs Leggett recalled that she said “no, no, Greg has told me I have to get back straight away. I’ve got to get back now”. At that point, Mr Evans drove her back.
4. Mr Benson said that, when staff came with the starters to the barriers, they stayed with him or Mr Evans at all times. He said that no one from the Club’s management had given him instructions about what ought to occur when office staff went to the barriers on those regular occasions. Nothing happened to Mr Benson as a result of his having taken Mrs Leggett to the barriers on 9 October 2016.
5. Ms Porteous did not have a clear memory of the events of 9 October 2016. She recalled Mrs Leggett asking if she could do the sashing if she were not back “and she seemed to assure me that she could get back”. When Ms Porteous saw that Mrs Leggett had gone to the barriers, I find that she became confused because she had misunderstood or forgotten Mrs Leggett’s assurance, based on what Mr Benson had said to them both that morning, and worried that Mrs Leggett would not be back in time to do the sashing.
6. At the time of the last race, Ms Porteous said that Mrs Price came into the office and Ms Porteous asked her sister if she could stay in the office while she went to do the sashing. But Mrs Price said that she could not because she had to ring off all the tills in the bars around the race course. Mr Rudolph came in, overheard the two sisters’ conversation and said that Mrs Leggett needed to get back from the barriers. Ms Porteous said that he phoned Mrs Leggett and said, in an authoritative voice, “Viv, you need to get back here right now. The girls have got work to do and you need to do your job”. As Ms Porteous said, she was concerned, when she and Mrs Price were talking, that if Mrs Leggett did not get back in time for the sashing, the office would be unattended if she had to perform the sashing.
7. Mr Rudolph said that Ms Porteous came into his office, concerned that the office would be empty if she went to do the sashing. He called Mrs Leggett and asked if she was at the barriers, When she said she was, he said that he told her “I need you to come back here please. **You don’t have permission to go to the barriers.** Lea cannot leave the office”. He said that he told her Mrs Price had left the office to do her duties and that “I need you to return, please, so that Lea can stay in the office because I have other duties to attend to”. He said “I never used a raised voice and I never said ‘Get back and do your own sashing’”. He denied Mrs Leggett’s version of the telephone conversation.
8. I prefer Mr Benson’s and Mrs Leggett’s version of the events concerning her visit to the barriers that I have set out above. I think that Ms Porteous is likely to have been confused on 9 October 2016 and had forgotten that Mr Benson and or Mrs Leggett had told her in the morning that she would be back in time, as Mr Benson’s evidence confirmed. In Mr Rudolph’s version of the conversation, he did not state why he needed Mrs Leggett to come back immediately, except for his telling statement “You don’t have permission to go to the barriers”.
9. That revealed just how overbearing and controlling of Mrs Leggett he was. As Mr Benson said, anyone in the office was free to and do go to the barriers without permission. And, I am satisfied that Mr Rudolph knew that there was ample time, once the long, last race started, for Mrs Leggett to get back in time to do the sashing. It is likely that, as Ms Porteous said, he overheard her and Mrs Price talking and jumped to his own “steward-like” conclusion that he should bring Mrs Leggett to heel. His response to Mrs Leggett’s email later that day ignored its content and engaged in a further overbearing of her as will appear below.
10. When Mrs Leggett got back to the winners’ enclosure, another director of the Club, John **Gollan**, was there to do the presentation. He said to her “I thought you were at the barriers”, because she had told him earlier in the day that she would be. She said that she had been but Mr Rudolph had told her to come back. Mrs Leggett then had to interact with sponsors and their guests in the Ted McCabe function centre for about 15 minutes following the last race.
11. Next, Mrs Leggett then went out to the car park about 40 metres away, saw her husband there, hugged him and began sobbing. While she was distressed, Mr Gollan came up to them and asked what was wrong. Mrs Leggett restated to him that Mr Rudolph had called her back from the barriers and said “Do you know how humiliating and embarrassing that was for me in front of the stewards and starters and everybody behind the barriers, to be yelled at and spoken to so badly?”.
12. Mr Gollan said “I wouldn’t have picked up the phone. I would have told him to fuck off”, which he repeated several times. Mr Gollan told Mr Quigley later that afternoon that he (Mr Gollan) had told Mrs Leggett “to tell him [Mr Rudolph] to get fucked”.
13. Because Mr Gollan was unavailable, the Club tendered under s 63 of the *Evidence Act 1995* (Cth) a statement that he made on 31 October 2017. There he recorded that Mrs Leggett seemed not to be happy when they spoke at the winners’ bar about Mr Rudolph calling her back from the barriers. He said that he later saw her and her husband, Gary, at the car park where both said that they were not happy about Mr Rudolph’s conduct. He claimed to have told them “Look, if you’ve got a problem, he’s your boss, he’s the CEO; you best go down and see him, face to face and sort it out. **Really, it’s got nothing to do with the directors**”. He said that the Leggetts’ approach to him “was not taken by me as a formal complaint about what happened or against Greg. To me… they were just venting something”.
14. I do not accept Mr Gollan’s version of the conversation in the car park. Mr Quigley’s evidence demonstrated that, *first,* Mr Gollan had understood just how upset Mrs Leggett was and how apparently inappropriate Mr Rudolph’s command to her was. Mr Gollan was no doubt familiar with the length of the last race and how easily Mrs Leggett would have been able to return, once the horses had started, in time to do the sashing without being ordered back immediately. That is why, when Mr Gollan spoke that night to both the Leggetts and Mr Quigley, he used and repeated his graphic admonition that he thought Mrs Leggett ought to have used in response to Mr Rudolph when he recalled her.
15. However, Mr Gollan, like Mr Quigley, wanted to wash his hands of a director’s responsibilities to ensure that a senior employee, such as Mrs Leggett, whom he knew had a problem or conflict with the CEO to whom she reported, could go to the board with a workplace complaint.

### Mrs Leggett’s email of 9 October 2016 and Mr Rudolph’s response

1. At 8:47pm on 9 October 2016, Mrs Leggett emailed Mr Rudolph (the **9 October email**). She copied in Ms Porteous so that someone else in the office knew what had happened. The email read as follows:

Greg

I refer to your phone call today when you ordered me back from the barriers.

I was very embarrassed to be placed in a situation in which I had to ask the stewards and attendants to take me back to the enclosure before the race started.

**I felt that you were rude with this demand**, as I did not have an opportunity to explain to you (before you hung up on me) that I would be back before the end of the race. This fact I had already checked on before going to the barriers with Alan.

**I am very upset you used the tones you did** as I recall that you encouraged me last Raceday in front of Jeff and race sponsors that I could go to the barriers.

I don’t know why you needed to speak to me so harshly over this issue as the race did not even have a sponsor. This being the reason I used this opportunity and took your advice to go.

**The issue today has compounded many other situations which I have felt down trodden, excluded and questioned unreasonably as I carry out my duties as Sponsorship and Marketing Manager.**

**I feel like we are reaching an untenable situation which needs to be resolved.**

**Please advise the board of these issues.**

(emphasis added)

1. Mr Rudolph’s reply of 9:17am on 10 October 2016 was (the **10 October email**):

Viv

Please meet me in my office tomorrow morning at 9am with Joanne Price, **to discuss your work performance.**

**You may bring a support person with you if you wish.**

(emphasis added)

1. Mr Rudolph’s 10 October email ignored all that Mrs Leggett had written. He copied it to Ms Porteous and Mrs Price. At that time, Mr Rudolph had no issues going to Mrs Leggett’s work performance of which there was any evidence. *First*, as he admitted, as at 9 October 2016 he regarded her as competent (see [62] above) and *secondly*, the only issues to which the Club or he pointed were, by then, dead letters and of no moment, as I have found at [67]–[70] above.
2. When Mrs Leggett received Mr Rudolph’s email of 10 October 2016, Mrs Leggett felt even more distressed, emotionally drained and began vomiting. She felt broken. She went to her general practitioner, Dr Minh **Tran**, who gave her a medical certificate that she was unfit to do any work or answer calls or emails until 17 October 2016 due to stress.
3. At 5:37pm on 10 October 2016, Mrs Leggett emailed the medical certificate to Mr Rudolph telling him that she was now on medication and would see Dr Tran again on 16 October 2016. Mr Rudolph wrote back acknowledging receipt of the medical certificate and, after saying “I hope your condition improves shortly”, despite the certificate’s wording added “could you please send through bookings for all future race meetings up to December 11, starting with next Thursday”.
4. Mr Rudolph asserted that he wrote the 10 October email to Mrs Leggett because he was concerned about her welfare. This assertion can be contrasted with his gloating to his father-in-law later that day – “dropping like flies” – when he forwarded to Mr Murrihy Mrs Leggett’s email to him with the medical certificate informing him that she was on stress leave. A genuinely concerned person would not have behaved in this manner. Rather, Mr Rudolph’s true colours came out in his triumphal statement that reflected what he had been doing for months, namely, trying to force Mrs Leggett out of her job without dismissing her, because he knew that there was no basis to do so. He gave the following evidence to questions I asked:

When you sent your father-in-law this email and referred to dropping like flies, you said you were frustrated? --- Yes.

Where would I be able to understand the expression “dropping like flies” forwarding this email to reflect a state of frustration? How would I understand that in the expression? --- Your Honour, it was it was simply on …**receipt of that advice from Viv on the 10th that I was frustrated that another staff member had effectively gone or left the club, and it was just in exasperation** that we had been discussing some matters of difficulty of coming into a new administration where there was apparent some deficiencies and **some staff had compounded that by leaving**.

Well, she hadn’t left. She was going on sick leave? --- **Well, yes, leaving the course of their duties to go on sick leave. And in hindsight, your Honour, it was an error of judgment and I shouldn’t have done it and I regret doing that and I can’t undo it, but it reflected how I felt at the time.**

Well, one way one might read that is as a triumphal statement that you had achieved what you wanted, isn’t it, to get rid of her? --- No, that - - -

Would that be a fair reading? --- **It could be, your Honour, but it was certainly not my reading. I felt quite deflated at the time.** And, you know, to the point that I was running the reception at the motel.

(emphasis added)

1. Later in the week he responded to an email from Louise **Duff**, the managing director of a marketing and branding company. He wrote that he thought Ms Duff should have some opportunities to work on a few projects for the Club “as soon as I have my ducks in a row with some staff issues. Just this week, Viv Leggett, Marketing Manager, **was to come in for a chat with me and pulled the ‘stress leave’ certificate the night before**”.
2. When cross examined on this, Mr Rudolph accepted that it conveyed a negative view of Mrs Leggett, but implausibly denied that he was informing Ms Duff that Mrs Leggett had “pulled the ‘stress leave’ certificate” to avoid a chat in the context of staff issues. He again asserted that he felt “exasperated”. Mr Rudolph was not exasperated, but was getting his “ducks in a row” and his bullying behaviour towards Mrs Leggett took on a new dimension as he manoeuvred subsequently to force her resignation.
3. Mrs Leggett was cross examined to suggest that, in contrast with her evidence, she had not mentioned in her email of 20 July 2016 or to the doctors whose reports are in evidence that she had been crying uncontrollably in the carpark or earlier when speaking to Sid Kelly or Mr Commerford. She was not cross examined about any discussions with Mr Stevens. She disagreed with the suggestion that she might only have begun crying for the first time in connection with her relationship to Mr Rudolph as CEO after being called back from the barriers on 9 October 2016. I accept her evidence.
4. The Club did not call Sid Kelly, Mr Commerford or Mr Stevens and Mr Gollan’s written statement was inconsistent with both Mr Quigley’s and Mrs Leggett’s version of her encounter with him in the car park. As she said in cross examination, she would have told the doctors that she had been crying before 9 October 2016 “if they asked me”. The medical reports of Dr Glen **Smith** dated 23 March 2017 (to Racing NSW), Dr Parsonage dated 24 July 2017 (to Mrs Leggett’s lawyers) and Dr Roberts dated 18 January 2019 (to the Club’s lawyers) focussed on her breaking down *after* the events of 9 and 10 October 2016.
5. In his report dated 24 July 2017, Dr Parsonageopined that Mrs Leggett’s psychological health was progressively eroded from mid-2016 to 9 October 2016 by at least her perception of Mr Rudolph’s unreasonable behaviours towards her and his ongoing bullying and intimidation of which the incidents on 9 and 10 October 2016 were the last straws. In his report of 18 January 2019, Dr Roberts expressed a similar opinion and referred to her crying on 9 October 2016. The histories that they recorded from Mrs Leggett concentrated on the breakdown she had on 9 and 10 October 2016 and her subsequent condition. Dr Smith recorded that Mrs Leggett had reported that she was “upset” when she spoke to Sid Kelly on 3 August 2016 and “upset with these issues”, being difficulties with Mr Rudolph before 9 October 2016, but had not had time off work or psychological therapy at that stage.
6. Drs Parsonage and Roberts agreed that Mrs Leggett perceived that Mr Rudolph was bullying and intimidating her during the period since he started as CEO and that the incidents of 9 and 10 October 2016 were “the last straw”. It was not necessary for them to detail the history of all the earlier manifestations of her feelings to express their opinions. She may or may not have mentioned the fact that she was crying on earlier occasions to the doctors but I do not consider that, reading their reports as a whole, they were concerned to record in them all of the individual incidents or detail leading up to their diagnoses of her becoming incapacitated for any work as at 10 October 2016 as a result of the “last straw”. Additionally, I found Mrs Leggett to be a generally truthful and reliable witness.

#### Why did Mr Rudolph send the 10 October email?

1. Mr Rudolph said in his statement of 3 March 2017 in the Workers Compensation Commission proceeding that his “request” for a meeting in his email of 10 October 2016 was in response to Mrs Leggett’s email of 9 October 2016 about the events surrounding her reaction to him calling her back from the barriers “to her work obligations at the winners’ area”.
2. In cross examination, he asserted that he had advised the board of the issues that Mrs Leggett had raised in her email and regarded it as a serious matter that required the board’s attention. However, there was no documentary evidence to support his claim that he had informed any member of the board of any of her concerns. Mr Rudolph asserted that he had informed each board member by phone or when he came into the Club. I do not believe Mr Rudolph’s evidence that he ever told any board member what Mrs Leggett wrote in her email. *First*, Mr Rudolph could easily have forwarded her email to the board, but he did not. *Secondly*, Mr Quigley gave emphatic evidence that he had no idea that Mrs Leggett had any psychological or psychiatric condition or even was feeling upset until he attended a hearing at the Fair Work Commission, during which Mrs Leggett had to leave to attend an appointment with a psychiatrist (as I explain in [122] below). Mr Quigley gave a radically different account (to that of any other witness) of what he understood, based on what Mr Rudolph had told him, Mrs Leggett’s conduct had involved. *Thirdly*,Mr Rudolph said that “**I didn’t see them as a complaint**. I saw them as a matter that she wanted to resolve with me”. He said that he did not see her email as a complaint because “I don’t believe that Mrs Leggett’s version of events happened”. He then gave this evidence when I asked him:

When you say it was her seeking to meet with you, she was asking you to advise the board about these things, so where do you get the request to meet with you to sort this out before that happened? --- Well, your Honour, I would simply refer to the second-last line of her email which says that: “I feel like we’re reaching an untenable situation that needs to be resolved.” So at the earliest opportunity I wanted Vivienne and I to be able to sit down and do that, **like I was shocked at her version of events and I was concerned as to how she was feeling on Sunday night and I wanted to do that as quickly as possible** and, as I said yesterday morning, I wasn’t able to do it the following morning because of the absence of Ms Price. So the first opportunity to do it after that was on Tuesday, 11 October. But I was quite taken aback regarding the tenor of that email relative to Mrs Leggett’s version of events that took place on Sunday afternoon and… what actually happened, **because I deliberately had that conversation in front of Ms Porteous**.

(emphasis added)

1. No person in Mr Rudolph’s position who had any genuine concern for Mrs Leggett as to how she was feeling on 9 October 2016 when she wrote her email, would respond with the email he sent requiring her to attend his office “to discuss your work performance” coupled with the statement that she could bring a support person. Mr Rudolph was and is not a fool; he is an intelligent, savvy person who knew exactly what he was doing, as emerged in the following evidence he gave, when I sought to understand why he wrote the 10 October 2016 email as he had phrased it:

What I’m asking you is what do you think asking an employee, when you’re the CEO, to come in and discuss her work performance conveys to the employee, inviting her to bring a support person at the same time, with your experience as an executive? --- **It would suggest to me that there would be issues relating to the employee’s work and performance of her duties that the employer may wish to discuss or the CEO may wish to discuss with her.**

And they weren’t issues that were going to reflect well on her performance. Is that your understanding of what an employee in her position getting this email? --- **I agree**, your Honour, **that an employee could take that view, yes**.

Well, given you’ve told me how concerned you were about her welfare, I’m just curious as to why there’s not a word of concern in this email and its structured in this quite formal way? --- Yes. Your Honour, in hindsight, **it didn’t fully reflect the intention of my meeting with Vivienne**. And those brief words **perhaps poorly chosen in the context of such an important issue that she raised on the Sunday night may have been perceived to be different from what I intended the meeting to be**.

Yes. Thank you. Sorry? --- And I accept now in hindsight that **if I was to receive that type of email, it may cause me concern as an employee**.

1. I do not believe that evidence. In my opinion, his “dropping like flies” comment demonstrated his untruthfulness that he had any concern about Mrs Leggett’s welfare. He was deliberately seeking to create an impression (that he knew was baseless) in Mrs Leggett’s mind that there were significant issues about her work performance that she was required to attend the meeting to address. He had no concern for her welfare.
2. Mr Quigley said that he had never seen Mrs Leggett’s email of 9 October 2016 and in his view it was not a matter for the board because “it’s between the CEO and the staff and we left it at that”. He acknowledged that Mrs Leggett raised with some board members issues that she had with Mr Rudolph “**but it wasn’t brought up officially in the board papers. It was spoken of outside**”, including by Sid Kelly and Mr Gollan.

## Mr Rudolph withholds Mrs Leggett’s commissions

1. On 19 October 2016, Mr Rudolph emailed Mrs Leggett in response to her next medical certificate that said she would still be unfit to work until 24 October 2016. He asked her to meet with Ms Porteous to provide her with information about upcoming meetings that the latter did not have already. He noted that Mrs Leggett had been providing Ms Porteous with information while on sick leave. He said that her commission payments were up to date and “your payment for sick leave will revert to your base salary (inclusive of your race day fee) as per the NES. Joanne [Price] is therefore copied in to facilitate this payment”. He wished Mrs Leggett to get well soon.
2. Importantly, Mr Rudolph was purporting, unilaterally, to change her entitlement to remuneration under her contract of employment in that email. Mrs Leggett responded thanking him for his email, stating that she felt “very stressed about the whole situation” but felt passionate about her work and was trying to assist Ms Porteous and other staff with upcoming events.
3. On 19 October 2016, Mr Rudolph also emailed David **Kean**, the Club’s auditor, noting that Mrs Leggett and Ken Kelly were both on sick leave using up their entitlements, which would expire in December 2016. He asked Mr Kean to work out payout figures for both employees on the assumption that they would not return.
4. On 20 October 2016, the Club held the Richmond Club Charity race day, which Mrs Leggett had organised as I noted at [66]. Because the Richmond Club would have paid the Club’s invoice for the day, Mrs Leggett was entitled to be paid her commission soon after the race day. However, on 26 October 2016 she received a payslip and payment for $635.24 net of tax. Mrs Leggett phoned Mrs Price to ask about when she would receive her commission for the 20 October 2016 race day. Soon after, Mrs Price emailed Mrs Leggett and said “unfortunately I was advised after our conversation today – that I am not to pay your commission whilst on sick leave”. She set out the calculation used to generate the pay slip and told Mrs Leggett that the race day fee for 20 October 2016 was included “to ensure you received a base wage to meet the minimum wage requirement in accordance with the National Employment Standards. **I have asked when your commission will be paid, and was advised that it will be sorted out in due course**”.
5. Mrs Price’s instructions came from Mr Rudolph. He was due to meet Mrs Leggett and an industrial advocate with the Club Managers’ Association Australia, Peter **Cooper**, the next day. Mr Rudolph gave evidence in chief that the reason Mrs Leggett ceased being paid commissions after she went on sick leave was because she “was to be paid commission on the booking to the race club. And, as Mrs Leggett was not taking those bookings, there was no commission to be paid to her”. He agreed that Mrs Leggett had taken the Richmond Club booking and bookings for the Ladies Day meeting on 3 November 2016, including contra or in kind sponsorship on which she was entitled to be paid commission. In cross examination, Mr Rudolph was shown Mrs Leggett’s calculation of her claim for entitlement to commission for bookings that she had arranged for the 20 October 2016, 3, 18, 26 November 2016, 4 and 11 December 2016 race days, totalling $63,495.81 (on gross revenue and or in kind sponsorship, such as advertising on Smooth FM and trophies she had obtained). He agreed that all of those, including expenses to the Club for trophies, “were matters upon which Mrs Leggett was entitled to commission – that had been the arrangement, yes”. Yet, as I explain below, he withheld payment to her for those commissions until 7 February 2017 when he caused a partial payment to be made.
6. On 28 October 2016, Mr Rudolph emailed Mrs Leggett instructing her not to do any work while on sick leave except for matters that could not wait until her return.
7. In about late October or early November 2016, Mrs Leggett emailed Sid Kelly a detailed statement outlining her role at the Club over her 25 years, her difficulties with Mr Rudolph and his suggestion at the 27 October 2016 meeting with Mr Cooper of a mutually agreed separation.
8. On 31 October 2016, Mrs Leggett emailed Mr Rudolph a detailed sheet with information about the Ladies Day race day to be held on 3 November 2016.
9. On 7 November 2016, the board met and delegated authority to Mr Rudolph to “handle the negotiation of the approach by Viv Leggett to resign”. He wrote to her the next day, informing her that he was contacting her to negotiate a deed of release for her “intended resignation”. He wrote that the board had confirmed “that it will not get involved in those negations, delegating that authority to me, being an operational matter”.
10. On 22 November 2016, Mr Rudolph wrote to Mr Kean saying that Mrs Leggett would have expected to earn $41,910 from the last five meetings of 2016 from commissions for sponsorships and bookings “if she had been working and not on stress leave”. However, he said that he was not going to offer her that because others had had to do her work since she went on sick leave.
11. On 7 December 2016, Mr Rudolph emailed a letter on Club letterhead to Mrs Leggett under the heading “Alleged Misconduct”. He accused her of saying to Ms Porteous when they met at a bank on 28 November 2016 “it’s all-out war. I will go to every sponsor and tell them they’re not paying me”. He accused her of having made similar remarks to a sponsor. He required a response by 9 December 2016.
12. Mrs Leggett rang Sid Kelly immediately after receiving the letter. She told him that she had been negotiating with Mr Rudolph. She said Mr Cooper had made an offer on 30 November 2016 that expired on 7 December 2016 and that Mr Rudolph’s letter appeared to be his response.
13. On 8 December 2016, Mrs Leggett replied to Mr Rudolph’s letter saying “I was astounded by the content and can assure these allegations as stated are incorrect”. Despite the seriousness of his allegation, Mr Rudolph did not inform the board of it at its meeting on 7 December 2016 where he recommended offering Mrs Leggett $80,000.
14. Ms Porteous said in evidence that she recalled that Mrs Leggett said at the bank that she was extremely unhappy with Mr Rudolph, hoped to discredit him and maybe even let sponsors know she had gone on sick leave because of what he had done to her. However, Ms Porteous made a statement on 3 March 2017 for the Workers Compensation case and said there:

**I am not aware about the sponsor’s threat**. I cannot recall any conversation along those lines about her making any threat about the sponsors… in the bank… the conversation she had with me was **more about what money she should be getting leaving more than anything else. She said ‘he needs to pay what’s owed to me’.** I wouldn’t call it bagging Greg. It was more along the lines of “I’m owed what I’m entitled to; it’s not fair”, and so on.

(emphasis added)

1. Ms Porteous said that her current recollection was “sketchy” and agreed that her 3 March 2017 statement was more likely to be accurate. I agree, and find that her 3 March 2017 statement was correct.

## The early 2017 negotiations

1. By 25 January 2017, Mrs Leggett had engaged **Shaddicks** Legal Pty Ltd as her solicitors. Shaddicks wrote on 25 January 2017 to the Club claiming commission in Mrs Leggett’s detailed schedule of $63,496 plus 9.5% superannuation for the period from October 2016 to 11 December 2016 (to which I referred at [106] above), future commission and accrued long service leave. The letter stated that her commissions were payable within seven days of the relevant race meeting. The letter noted that Mr Rudolph had instructed Mrs Leggett not to work.
2. On 6 February 2017, Mr Rudolph responded to Shaddicks. He said that the Club denied that Mrs Leggett had any long service leave owing. He asserted that she had been overpaid more than $15,000 for long service leave in the past, which the Club was prepared to waive. He said that she was only entitled to $40,262.77 gross for commissions from October 2016 to date. He asserted that her gross future commission claim to 11 June 2017 (sic) had to be reduced because of all the work associated with the sponsorships that others now would have to do in Mrs Leggett’s place. He alleged that the Club had been contacted by some sponsors and advised that Mrs Leggett “has disparaged the Club to such an extent that some sponsors have withdrawn”. Mr Rudolph acknowledged that, as Shaddicks had said, Mrs Leggett’s commission was paid after the relevant race meeting. Mr Rudolph made an *ex gratia* offer but rejected her claim for any future commission in full.
3. On 7 February 2017, the Club paid Mrs Leggett $40,262.77, as Mr Rudolph had foreshadowed in his letter of the previous day.
4. On 17 February 2017, Mrs Leggett began the proceeding in the Fair Work Commission for an order to stop bullying.
5. Mr Quigley attended a meeting at the Fair Work Commission on 10 March 2017 and said that Mrs Leggett had to leave early for an appointment with a psychiatrist. Mr Quigley “thought it was a funny time to bring it up because it was so late”. He said that, as he understood matters, Mrs Leggett had never before raised any issue about her mental health and this was the first time she was doing so. Indeed, he was almost giggling when he gave evidence about this incident at the trial. He said, unlike the evidence of any other witness before me, that, based on what Mr Rudolph had told the board, he understood that Mr Rudolph had had a conversation with Mrs Leggett after a race meeting. He said that during that race meeting she had failed to carry out her duties and instead did work for Graham **Collis**, a person in the turf farm business, by running a function for Mr Collis in the Ted McCabe function centre that was incompatible with her duties to the Club. Mr Quigley said that Mr Collis had arranged the race day for turf farmers. He said that Mr Rudolph had told him that, because Mrs Leggett was otherwise engaged with Mr Collis’ function, it “took two girls out of the office to look after the sponsors”. Mr Rudolph also told him that Mrs Leggett had taken sick leave, but Mr Quigley did not ask why she had done so.
6. Mr Quigley was unaware, even when giving evidence, of the nature of Mrs Leggett’s psychiatric illness. He first learnt of it at the 10 March 2017 meeting and thought it reflected that “**her solicitor realised that the case wasn’t going her way and I thought this was pulled out of the blue**” and was unbelievable.
7. When asked what he, as a director of the Club, understood its obligations were to its employees, he said:

… **it comes under the CEO. He is responsible for the staff to work, and we want a good working area.** We were happy to have staff. We had no trouble with any of our staff. The only two people that have left the Hawkesbury Race Club were Mrs Leggett and Mr Kelly, and that’s in that was in 20 years that I’ve been on the board.

Was that something that disturbed you? Two employees had left who had been there for quite a while? --- Well, your Honour, to tell the truth it surprised me**, but we did** **get we did get information from Mr Rudolph for the reasons why this occurred**.

…

Were you not concerned that a longstanding employee had gone on extended sick leave, as a longstanding director yourself? --- **Your Honour, to me, if a person had** **been taken us to the Fair Work Commission first of all and then going on long service leave, I felt that she wasn’t performing the duties for the Hawkesbury Race** **Club,** so I was waiting to tell the truth, I was waiting for her to come back to work. The Hawkesbury Race Club did not did not make Mrs Leggett resign. We didn’t ask her to resign and we were waiting for her to come back to work when all this sick leave end. Everything, you know, was over.

(emphasis added)

1. He understood that the Club, as an employer, had an obligation to provide a safe system and place of work, including for Mrs Leggett. He understood that an employer had obligations to ensure bullying and harassment of an employee should not occur. But he could give no content to how this could be achieved except by saying it was to be achieved only through the CEO. He said that he had never had cause to instigate an investigation into an allegation of bullying or harassment while chairman until he stepped down in May 2020.
2. However, after the hearing was adjourned part heard during his cross examination, the complaint dated 25 July 2019 that Ms Porteous made to a board member came to light. She accused Mr Rudolph of micromanaging, bullying and creating a toxic work environment over the previous 12 months. She noted that, since Mr Rudolph’s appointment, the Club had experienced a high amount of both involuntary and voluntary staff turnover that “should raise a red flag” and instanced Mrs Leggett’s bullying finding by the Workers Compensation Commission and her own sister’s “9 years’ service… job opportunity came up but was unhappy with the CEO”.
3. Mr Quigley said that Ms Porteous’ complaint had led to an investigation by an external human resources facilitator, following which the board asked Mr Rudolph to resign, which he did “not without a fight”. Mr Quigley said that he received an oral report of the investigation that concluded there were not grounds enough to sack Mr Rudolph but his conduct with a female staff member of a non-bullying nature was decisive for the board.

## Mrs Leggett accepts the Club’s repudiation of her employment contract

1. On 15 March 2017, Mrs Leggett’s new solicitors, **Gilberts** Legal, who still act for her, wrote to the Club instancing a deliberate pattern of behaviour by Mr Rudolph since he became CEO that made it difficult, if not impossible, for her to fulfil her duties. The letter asserted that a term of her employment was that she would be paid commission and entitlements within seven days of a race meeting and that on and from 26 October 2016 the Club had withheld payments to her of what she was due up to 11 December 2016, until the partial payment on 7 February 2017. It noted that the Club had made no further payments despite receiving revenue generated by sponsorships she had arranged for the meetings between 25 January 2017 and 13 March 2017. It said that her name had been removed from the race book and staff and sponsors had been advised she would not be returning to work. The letter said that the conduct of the Club toward Mrs Leggett evinced an intention not to be bound by her contract of employment and accepted, on her behalf, that conduct as a repudiation. It said that Mrs Leggett would soon commence proceedings for breach of contract and asked for her to be paid all her statutory entitlements.

# *Fair Work Act* claims

## The statutory scheme

1. Relevantly, the *Fair Work Act* provided at the relevant times:

**87 Entitlement to annual leave**

*Amount of leave*

(1) For each year of service with his or her employer, an employee is entitled to:

(a) 4 weeks of paid annual leave; or

(b) 5 weeks of paid annual leave, if:

(i) a modern award applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or

(ii) an enterprise agreement applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or

(iii) the employee qualifies for the shiftworker annual leave entitlement under subsection (3) (this relates to award/agreement free employees).

Note: Section 196 affects whether the FWC may approve an enterprise agreement covering an employee, if the employee is covered by a modern award that is in operation and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards.

*Accrual of leave*

(2) An employee’s entitlement to paid annual leave accrues progressively during a year of service according to the employee’s ordinary hours of work, and accumulates from year to year.

Note: If an employee’s employment ends during what would otherwise have been a year of service, the employee accrues paid annual leave up to when the employment ends.

…

**323  Method and frequency of payment**

(1)  An employer must pay an employee amounts payable to the employee in relation to the performance of work:

(a) in full (except as provided by section 324); and

(b)  in money by one, or a combination, of the methods referred to in subsection (2); and

(c)  at least monthly.

Note 1: This subsection is a civil remedy provision (see Part 4‑1).

Note 2: Amounts referred to in this subsection include the following if they become payable during a relevant period:

(a)    incentive‑based payments and bonuses;

(b)    loadings;

(c)    monetary allowances;

(d)    overtime or penalty rates;

(e)    leave payments.

**340 Protection**

(1) A person must not take adverse action against another person:

(a) because the other person:

(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right; or

(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

Note: This subsection is a civil remedy provision (see Part 4-1).

**341 Meaning of workplace right**

*Meaning of workplace right*

1. A person has a workplace right if the person:

…

(c) is able to make a complaint or inquiry:

…

(ii) if the person is an employee—in relation to his or her employment.

**342 Meaning of *adverse action***

(1) The following table sets out circumstances in which a person takes *adverse action* against another person.

|  |  |  |
| --- | --- | --- |
| **Meaning of *adverse action*** | | |
| **Item** | **Column 1**  ***Adverse action* is taken by ...** | **Column 2**  **if ...** |
| 1 | an employer against an employee | the employer:  (a) dismisses the employee; or  (b) injures the employee in his or her employment; or  (c) alters the position of the employee to the employee’s prejudice; or |

**360  Multiple reasons for action**

For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.

**361  Reason for action to be presumed unless proved otherwise**

(1)  If:

(a)  in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b)  taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2)  Subsection (1) does not apply in relation to orders for an interim injunction.

**545 Orders that can be made by particular courts**

*Federal Court and Federal Circuit Court*

(1) The Federal Court or the Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.

Note 1: For the court’s power to make pecuniary penalty orders, see section 546.

Note 2: For limitations on orders in relation to costs, see section 570.

Note 3: The Federal Court and the Federal Circuit Court may grant injunctions in relation to industrial action under subsections 417(3) and 421(3).

Note 4: There are limitations on orders that can be made in relation to contraventions of subsection 65(5), 76(4), 463(1) or 463(2) (which deal with reasonable business grounds and protected action ballot orders) (see subsections 44(2), 463(3) and 745(2)).

1. Without limiting subsection (1), orders the Federal Court or Federal Circuit Court may make include the following:

…

(b) an order awarding compensation for loss that a person has suffered because of the contravention;

…

*When orders may be made*

*…*

(4) A court may make an order under this section:

(a) on its own initiative, during proceedings before the court; or

(b) on application.

1. A person who contravenes the *Fair Work Act* is liable to a pecuniary penalty by force of s 546(1).
2. The *Long Service Leave Act* provided as at March 2017 in s 4(1) that an employee is entitled to long service leave payable on ordinary pay in respect of his or her service with an employer. Under s 10(1) an employer who contravenes that Act is liable to a penalty not exceeding 20 penalty units.

## Applicant’s submissions

1. Mrs Leggett claimed that the Club had taken adverse action because:
2. Mr Rudolph wrote the 10 October email requiring her to attend his office to discuss her work performance and so injured, or threatened to injure her, in her employment in contravention of s 340, because she had exercised her workplace right to make the complaint in her 9 October email (the **first s 340 claim**);
3. Mr Rudolph caused the Club to withhold payments of her entitlements in respect of all race meetings held between 20 October 2016 and 11 December 2016 and again between 25 January 2017 and 13 March 2017, removed her name from the race books for those meetings and informed staff and sponsors that she would not be returning to her job, because, *first*, she had exercised her workplace right to take sick leave and, *secondly*, had complained about Mr Rudolph (the **second s 340 claim**).
4. Mrs Leggett also pleaded that the Club contravened the *Fair Work Act* by not paying her annual and long service leave and commissions and that this, in addition, was in contravention of ss 87 and 323. As well, she claimed at the trial that the Club had contravened s 4 of the *Long Service Leave Act* by not paying her accrued long service leave at the time that she accepted the Club’s repudiation of her contract of employment.

## The Club’s submissions

1. The Club argued that Mrs Leggett had not pleaded and therefore could not rely on the presumption in s 361(1) of the *Fair Work Act* in support of her claims that the Club had taken adverse action against her. The Club argued that Mr Rudolph’s evidence should be accepted and that he did not take adverse action for any of the reasons Mrs Leggett relied on for both the first and second s 340 claims. It contended that counsel for Mrs Leggett had not put directly to Mr Rudolph that he had acted because she had exercised her workplace rights, as she alleged, and that therefore no adverse finding could be made against the Club. It submitted that Mrs Leggett’s 9 October 2016 email was not a complaint “underpinned by an entitlement or right to make it” as held in *PIA Mortgage Services Pty Ltd v King* (2020) 274 FCR 225 at 229–230 [13]–[14]. It argued that her complaint was “entirely untethered to any identifiable source or entitlement”. It contended that Mr Rudolph did not know of any bullying allegation and that Mrs Leggett’s description of herself as “downtrodden” was too general and could describe indiscriminately emotions or feelings of any degree that an employee might experience.
2. While the Club accepted that the calling of the performance meeting could constitute adverse action, as could the failure to pay commission, it argued that merely because Mr Rudolph had sent the 10 October email did not entail that he had taken adverse action because of Mrs Leggett’s alleged complaint. It argued that his evidence was “unchallenged” that he sent his email because he wanted to discuss how she was feeling and ascertain examples of why she believed that she had been questioned unreasonably.
3. In relation to the second s 340 claim, the Club accepted that the taking of sick leave can be a workplace right. But, it contended, Mr Rudolph’s evidence explained that the reason he caused Mrs Leggett not to be paid commission was because she “was not taking those bookings, there was no commission to be paid to her” and he was still trying to understand how her commission ought to be calculated. The Club submitted that, on the facts, Mr Rudolph did not make the deliberate decision not to pay commission because Mrs Leggett was on sick leave, but because he thought, rightly or wrongly, that she had not taken the bookings.

## Consideration

1. I reject the Club’s argument on the first and second s 340 claims.
2. It is not necessary to plead the effect of s 361 of the *Fair Work Act*. *First*, all that s 361 requires is that the applicant allege that a person took, or is taking, action, for a particular reason or with a particular intent, and that taking the action for that reason or with that intent would constitute a contravention of Pt 3-1 of the Act. Once such an allegation is made, s 361(1) creates a presumption that the action was, or was being taken, for that reason or with that intent “unless the person proves otherwise”. The material fact that s 361(1) requires to be pleaded is the allegation that the person took action for a particular reason, or with a particular intent, and that to do so would constitute a contravention of Pt 3-1. The section does not require the pleading of the presumption that it creates once the material fact has been alleged, namely that the action was taken for a reason or with an intent that would constitute the contravention. Thus, once the applicant makes such an allegation, he or she has no onus to prove it. *Secondly*, s 361(1) also creates an evidentiary onus on the person alleged to have taken action for a particular reason, to negate the existence of that reason forming any substantive part of his decision to take the action. In other words, the applicant’s allegation will be presumed true unless the respondent proves that it is not. *Thirdly*, the parties fought this case well understanding that Mrs Leggett was relying on the presumption and the Club did not suggest that it would have acted differently if s 361(1) had been pleaded.
3. In *Rumble v Partnership (t/as HWL Ebsworth Lawyers)* (2020) 275 FCR 423, Rares and Katzmann JJ said at 430–431 [33]:

The High Court observed that the Parliament intended ss 360 and 361 to provide a balance between the parties to a workplace dispute by, *first*, **establishing a presumption in favour of an employee who alleges that an employer had taken, or is taking, adverse action against him or her because of a particular circumstance or fact of the kind specified** in any of ss 340, 346, 351 or 354 and, *secondly*, **enabling the employer to rebut that presumption** (*Barclay* 248 CLR 500 at [61] per French CJ and Crennan J, [103]-[105], [127]-[128] per Gummow and Hayne JJ). **The presumption and onus that ss 360 and 361(1) create are necessary because the employee cannot know or prove what was in the decision-maker’s mind when he or she took the adverse action**. The court must enquire into, and make findings about, the mental processes of the decision-maker for taking the adverse action complained of (at [44]-[45], [62], [101], and per Heydon J at [140]).

(emphasis added)

1. The critical issue is about the person’s conscious mental processes in forming the reason or intent for taking the action: i.e. why was the adverse action taken? The Club’s argument was without substance.
2. Mr Rudolph’s evidence that he was shocked about Mrs Leggett’s version of events and “concerned as to how she was feeling on Sunday night” was implausible. His credibility generally was squarely challenged in cross examination. There was no expression of concern in his reply of 10 October 2016. He had been taking legal advice in responding to some of Mrs Leggett’s communications since her email of 20 July 2016. Once again, that earlier *cri de coeur* received not a word of empathy or concern about her wellbeing. A requirement that she attend a discussion about work performance is the antithesis of a communication of concern for Mrs Leggett’s welfare. I do not believe Mr Rudolph’s evidence that he did not understand the 9 October email, requesting him to raise it with the board, as a complaint. The email was clearly a complaint about his behaviour towards and treatment of her. What else, one must ask, was the “untenable situation which needs to be resolved” by referring the matter to the board?
3. In *Alam v National Australia Bank Ltd* (2021) 393 ALR 629 at 658 [97], White, O’Callaghan and Colvin JJ held that the correct construction of s 341(1)(c) is that applied by Greenwood, Logan and Derrington JJ in *Cigarette & Gift Warehouse Pty Ltd v Whelan* (2019) 268 FCR 46 at 55–56 [28], who endorsed as “unremarkable and correct” what Collier J had held at the trial in *Whelan v Cigarette & Gift Warehouse Pty Ltd* (2017) 275 IR 285 at 298 [33]–[34]. In *Alam* 393 ALR at 653 [81], the Full Court identified the construction of s 341(1)(c) at which Rangiah and Charlesworth JJ arrived in *PIA Mortgage* 274 FCR 225 at 229–230 [13]–[14] as requiring a complaint within the meaning of s 341(1)(c) to be “underpinned by an entitlement or right” derived from an instrumental source. The Full Court held that this was inconsistent with the *ratio decidendi* of *Whelan* 268 FCR 46 at 55–56 [28], that did not require that an instrumental source underpin the right or entitlement to complain: *Alam* 393 ALR at 653 [81]. White, O’Callaghan and Colvin JJ held that they should follow *Whelan* 268 FCR 46 so that the right or entitlement to make a complaint or inquiry under s 341(1)(c) did not need to be based on an instrumental source: *Alam* 393 ALR at 652 [78], 653 [81], 658 [97]–[98].
4. Accordingly, as Collier J held in *Whelan* 275 IR at 298 [33]–[34], while the right of an employee to make a complaint or inquiry is not at large in relation to his or her employment, it must be founded on a source of entitlement “whether instrumental or otherwise”, including where the employer may have failed to create or provide for a benefit, such as an incentive bonus scheme.
5. As I have explained, Mr Rudolph intended to make Mrs Leggett “drop like flies” and his conducted evinced that intention. If he had intended to acknowledge or explore Mrs Leggett’s concerns, as he asserted in evidence, he would not have described their manifestation as he did in emailing Ms Duff that Mrs Leggett “was to come in for a chat with me and pulled the ‘stress leave’ certificate the night before”. He regarded her feelings contemptuously, as his use of quotations marks around “stress leave” showed. Accordingly, the Club has not proved that Mr Rudolph’s reasons for sending the 10 October 2016 email did not include the reason that she made a complaint in relation to her employment.
6. Moreover, the complaint in her 9 October email was, in substance, that her employer, the Club, was not providing her with a safe system of work, because of Mr Rudolph’s conduct as she described. A reasonable person would have understood that description of his conduct to suggest bullying: rudeness, harsh tones in speaking to her, failing to ask or wait for an explanation, past instances of her feeling “downtrodden”, excluded and excessively questioned in the context or the very senior role she had and had performed successfully for the Club for 25 years.
7. The **Safe Work Australia “*Guide*** *for Preventing and Responding to Workplace Bullying*” described workplace bullying as “repeated and unreasonable behaviour directed towards a worker… that creates a risk to health and safety”. It said that such behaviour includes abusive comments, aggressive or intimidating conduct, unjustified criticism or complaints, setting unreasonable timelines and changing work arrangements to deliberately inconvenience a particular worker.
8. Mrs Leggett was asking that Mr Rudolph’s conduct be referred to the board. That was a pellucid indication that she could no longer deal with his behaviour, being what she described as reaching “an untenable situation that needs to be resolved” by the board.
9. The second s 340 claim asserted that Mr Rudolph deliberately withheld payment to Mrs Leggett of her commissions because she had either taken sick leave or made the complaint in the 9 October email or both. Although his email of 19 October 2016 foreshadowed that she would be paid sick leave, it was only on 26 October 2016 that Mrs Price revealed that Mr Rudolph was going to sort out her commission payments for the Richmond Club race day “in due course”, despite Mrs Leggett having done the bulk of the work in putting that event together. As I noted at [106] above, this was not an accident, because Mr Rudolph was to meet Mrs Leggett and Mr Cooper the next day and her entitlements, were she to leave, were bargaining chips for him.
10. It was an agreed fact that Mrs Leggett claimed $2773.18 as commission for the 20 October 2016 race day and was not paid anything for that day until March 2020 when the Club paid $2306.46. As Mr Rudolph wrote to Mr Kean on 22 November 2016, despite what Mrs Leggett expected to earn from the last five meetings in 2016 (including 20 October 2016 and 3 November 2016) he was not going to offer her that amount in the negotiations because, he asserted, others had to do her work while she was on sick leave. However, she had done a lot of the work to generate the sponsorships and revenues for those five race days, as he knew, and he was withholding all payment from her because she was exercising her workplace right under s 97(a) of the *Fair Work Act* to personal leave because of her illness and because of her complaint of 9 October 2016.
11. I reject Mr Rudolph’s evidence that he withheld those, and the later, payments of commission because she was not taking the bookings. That answer is in the teeth of his admission that Mrs Leggett’s claim (made through Shaddicks’ letter of 25 January 2017) for $63,495.81 and 9.5% superannuation in respect of the last five meetings in 2016 “were matters upon which Mrs Leggett was entitled to commission – that **had been the arrangement, yes**” (see [107] above). I am positively satisfied that Mr Rudolph acted as he did in his email to her on 10 October 2016 requiring her to attend the meeting and in withholding Mrs Leggett’s commissions for reasons that included her making the complaint on 9 October 2016, because she had “pulled the ‘stress leave’ certificate” and exercised her right under s 97(a) to take sick leave.
12. The Club agreed that it underpaid Mrs Leggett’s entitlement to annual leave at the time of the termination of her contract, but has since paid it and the parties have agreed the amount of interest due.
13. In final submissions, the Club abandoned its argument that Mrs Leggett had no right to long service leave. It had raised an untenable argument that this Court had no jurisdiction to make orders under the *Long Service Leave Act* despite this claim being part of the matter concerning Mrs Leggett’s rights against the Club, as explained in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2000) 204 CLR 559. Because the *Fair Work Act* applied to the employment relationship between Mrs Leggett and the Club, the whole of the dispute was in federal jurisdiction. Accordingly, s 79 of the *Judiciary Act 1903* (Cth)“picked up” the State *Long Service Leave* Act. As Gleeson CJ, Gaudron and Gummow JJ said in *Edensor* 204 CLR at 588 [59] (and see too at 612 [137], 613 [141] per McHugh J, 637 [213] per Hayne and Callinan JJ):

It should be emphasised that **the law of a State cannot withdraw from** this Court federal jurisdiction conferred by s 75 of the Constitution, nor **the federal jurisdiction which a court (State or federal) otherwise may exercise under a conferral or investment of jurisdiction by a law made under s 76** or s 77 of the Constitution; nor **may a State law otherwise limit the exercise of federal jurisdiction**.

(emphasis added)

1. The Club accepts it is liable to a penalty for its now cured failure to pay Mrs Leggett’s long service leave.
2. The Club argued that there was no contractual term providing for any time within which Mrs Leggett should be paid commission. I think it accepted in argument that s 323(1) of the *Fair Work Act* required payment of amounts payable to her in relation to the performance of work in full at least monthly. Thus, the withholding of her commissions for months and, in some cases, years, contravened s 323 in respect of each race day after 9 October 2016, for which Mrs Leggett has claimed. As I have found, Mr Rudolph accepted in cross examination (at [107]) that her claims made in Shaddicks’ letter of 25 January 2017 accorded correctly with what she was due. However, the agreed facts reveal that the Club has not yet paid her a total of $19,382.97 for those claims in breach of both its contractual obligation to do so and s 323(1) of the *Fair Work Act*.
3. Mrs Leggett also claimed that the Club still owes her a total of $4099.98 for commission between 25 January 2017 and 13 March 2017. However, there is no evidence as to how that sum was calculated to prove her entitlement. I am not satisfied that she has proved this claim, even though the Club only paid her what it admitted was due for the period, namely, $11,646.36 on 8 November 2019, and so was also in breach of s 323(1) in respect of that sum.
4. I reject the Club’s argument that Mrs Leggett did not have a contractual right to payment of her commission within any particular time. *First*, it was an agreed fact that from 1991 to October 2016 she invoiced the Club for commission due, relevantly, after each race day and was paid soon after that meeting. As I have found, Mr Fletcher ensured, for nearly 25 years, that she, like other creditors, was paid within 14 days of rendering an invoice. Accordingly, it was a term of Mrs Leggett’s contract of employment that she would be paid within 14 days of rendering an invoice or claim for commission, or clarifying any reasonable request or query to justify any such claim. Mr Rudolph inherited that system and knew that it applied to Mrs Leggett’s commission. Indeed, Ms Porteous said that, when she was a contractor, once Mrs Leggett presented her invoices, she was paid soon after. Once she became an employee, the Club, through Ms Porteous or Mrs Price, analysed Mrs Leggett’s spreadsheets and paid her promptly after any questions were addressed. That is why Mr Rudolph told Mrs Price on 26 October 2016 to inform Mrs Leggett that she was not to pay Mrs Leggett commission whilst she was on sick leave.
5. The Club argued that there was no express or implied term of the contract of employment relating to the time for payment and so what it did, through Mr Rudolph withholding payment, indefinitely as he did, was not a breach of contract. I reject that argument. The obligation of an employer under a contract of employment is to pay the employee at the agreed rate for work done, or for being available to do work: cf: *Consolidated Press Ltd v Thompson* (1952) 52 SR (NSW) 75 at 79 per Street CJ; *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 463–464 per Dixon J. Dixon J said (at 465):

A contract for the establishment of the relation of master and servant falls into the same general category of agreements **to pay in respect of the consideration when and so often as it is executed**, and is, therefore, commonly understood as involving no liability for wages or salary unless earned by service, even though the failure to serve is a consequence of the master's wrongful act.

(emphasis added)

1. Dixon J also said “they also serve who only stand and wait” (72 CLR at 466). Here, Mrs Leggett was entitled to payment soon after the relevant race day. Even without the 25 year course of dealing she and the Club had, the law would imply that she be paid within a reasonable time of rendering her calculation of commission and s 323(1) required that this be no later than monthly. In addition, the course of the parties’ dealings created a conventional basis that both were estopped from denying. Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ held in *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 244 that:

Estoppel by convention is a form of estoppel founded not on a representation of fact made by a representor and acted on by a representee to his detriment, but **on the conduct of relations between the parties on the basis of an agreed or assumed state of facts, which both will be estopped from denying.**

(emphasis added)

1. Here, if I were wrong in finding the contract had a 14 day term, the Club is estopped from denying that it had to pay Mrs Leggett within that time. The conventional basis of their relationship was that Mrs Leggett would be paid commission calculated on her invoices or, later as an employee, her spreadsheets, once the claim was checked within 14 days.

# Repudiation

1. Based on my findings above, after 19 October 2016, the Club was paying Mrs Leggett her commission as and when it chose. Mr Rudolph decided to withhold all commissions, including ones for 20 October 2016 and 3 November 2016 for which Mrs Leggett had done the work and in respect of which he also asked her to help Ms Porteous with whatever needed to be done, as Mrs Leggett did.
2. In *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327 at 351-352, Fullagar J, with whom Dixon CJ, Williams, Webb and Kitto JJ agreed, discussed the situation where a building owner took a number of decisions inconsistent with his building contract (see too, *Commissioner for Main Roads v Reed & Stuart Pty Ltd* (1974) 131 CLR 378 at 384 per Stephen J, with whom Gibbs and Mason JJ agreed). Fullagar J explained how a party can commit more than one breach of a contract to the point where, although an individual breach, taken by itself, may not have justified the innocent party exercising a right to terminate, cumulatively the totality of the conduct of the party in breach did justify it doing so. He said:

A reasonable man could hardly draw any other inference than that the building owner does not intend to take the contract seriously, that he is prepared to carry out his part of the contract only if and when it suits him. **The intention must be judged from acts**: *Robert A. Munro & Co., Ltd. v. Meyer*[[1930] 2 KB 312 at 331]. The intention “evinced” here is an intention not to be bound by the contract. When such an intention is shown, the other party is entitled to rescind the contract. Mr. Berriman thought that such an intention had been shown, and he acted accordingly. In my opinion, he was justified in the view which he took, and acted as he was legally entitled to act.

(emphasis added)

1. In my opinion, Mr Rudolph made plain to Mrs Leggett, through Mrs Price’s email of 26 October 2016, that her commissions would not be paid when due but would “be sorted out in due course”. There was no contractual basis for the Club to withhold, *first*, any commissions earned from 10 October 2016 until 7 February 2017, or the balance of those commissions until March 2020, or, *secondly*,the commissions due for the race days on 25 January 2017, 9 and 21 February 2017, before 15 March 2017. Indeed, the latter were not paid until 8 November 2019 with the commissions for the 2 and 13 March 2017 race days. By 15 March 2017, the Club was evincing an intention not to be bound by the contract of employment that Mrs Leggett was entitled to accept as a repudiation through her solicitors’ letter of that day.
2. She is entitled to substantial damages for the Club’s breach of contract. However, those damages must be assessed taking into account Mrs Leggett’s psychiatric injury and s 151E(3) of the *Workers Compensation Act 1987* (NSW).

# The work injury damages claim

## The legislative context

1. Relevantly, the *Workers Compensation Act* provides in Pt 5 for common law remedies in respect of compensating an employee (or worker) for an injury. Division 3 of Pt 5 modifies the amount recoverable as an award of damages in respect, relevantly, of an injury to an employee caused by the negligence or other tort of his or her employer, including, as s 151E(3) provides, if the claim is based on the employer’s breach of contract. The only damages that can be awarded in an action in respect of such an injury are damages for, *first*, past economic loss due to loss of earnings and, *secondly*, future economic loss due to the deprivation or impairment of the workers’ earning capacity (s 151G(1)). There is no dispute that because she has been found to have a permanent impairment of at least 15%, within the meaning of s 151H, Mrs Leggett is able to maintain her claim for work injury damages, as these are styled. The Court must disregard, by force of s 151I(1), the amount, if any, by which the injured worker’s earnings, but for the injury, would have exceeded the maximum amount of weekly payments of compensation payable under s 34 (which prescribes a sum that is adjusted by an indexation mechanism in that Act). Section 151I(2) somewhat delphically provides:

**151I Calculation of past and future loss of earnings**

(2) The maximum amount of weekly payments of compensation under section 34 for a future period is to be the amount that the court considers is likely to be the amount for that period having regard to the operation of Division 6 of Part 3 (Indexation of amounts of benefits).

1. In addition, s 151IA limits an award for future economic loss to the period in which the injured worker could have worked until he or she reached pension age (being currently 67 years of age). In addition, the Court must consider what steps the worker has taken, or could take, to mitigate his or her damages in accordance with s 151L, the onus of proving that he or she has taken all reasonable steps being cast on the injured worker by s 151L(3).

## The Club’s submissions

1. The Club argued that Mrs Leggett gave no manifestation, such as crying, that would have indicated to a reasonable employer, prior to 10 October 2016, that she was at risk of a psychiatric injury. It contended that, as in *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, until her breakdown on the night of 9 October 2016, to all outward appearances, Mrs Leggett was doing her job and doing it well, including answering the CEO’s questions and attending meetings. It submitted that her failure to refer to the crying to the three directors, about which she gave evidence, when speaking to the expert psychiatrists suggested that this claim was inaccurate. It argued that mere manifestations of stress, such as Spigelman CJ noted in *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471 at 484 [57]–[60] would not be enough to enable a reasonable employer to appreciate that there was risk that the employee might suffer a psychiatric injury. It emphasised that a complaint about stress is a normal feature of work and cannot be a sufficient basis by itself on which to find an employer liable in negligence.
2. The Club argued that Mrs Leggett led no medical evidence to suggest her behaviours and statements of her condition ought reasonably to have been seen as a precursor to her injury. It contended that she gave evidence that there was a major change to her condition on 9 October 2016 and that this change was not reasonably foreseeable from what she had said, done and exhibited beforehand.
3. It contended that because she had not made a “formal” complaint to any of the three directors to whom she spoke before 9 October 2016, the Club did not have to call them to give evidence. It argued that her interactions with them were in the nature of a conversational “whinge” and she was a fairly forceful woman whom the directors could expect to be able to stand up for herself.
4. The Club also argued that its conduct after she began sick leave, between 10 October 2016 and 15 March 2017, did not constitute bullying on Mr Rudolph’s part. It argued that neither Mrs Leggett nor her representatives complained that he was conducting the negotiations with her and there was no evidence that his presence harmed her. It noted that the experts agreed in the joint report that the loss of her job was a factor in her condition, but she was already ill then. It contended that there was no evidence that if the board had taken an active role, any different outcome would have occurred for her.

## Consideration

### Legal principles

1. In *Koehler* 222 CLR 44, the High Court discussed the application of the principles for determining the circumstances in which an employer, who owes an employee a duty of care to take all reasonable steps to provide a safe system of work, might need to take steps to avoid a reasonably foreseeable risk of psychiatric injury. McHugh, Gummow, Hayne and Heydon JJ discussed the content of the employer’s duty. They began their analysis by noting the obligations that each party (employer and employee) owed the other, *first*, under the contract of employment, *secondly*, that equity would enforce as arising from their relationship, and *thirdly*, under any applicable statutory provisions, including enterprise or other industrial agreements or instruments and laws of general application, such as anti-discrimination legislation (222 CLR at 53 [21]). This consideration may be apposite in determining whether those obligations affect an employer’s duty of reasonable care to avoid psychiatric injury by modifying the work that the employee has to perform. Critically, they said of that question (at 54 [22]):

No doubt other questions may arise. It is, however, neither necessary nor appropriate to attempt to identify all of the questions that could arise or to attempt to provide universal answers to them. What is important is that **questions of the content of the duty of care, and what satisfaction of that duty may require, are not to be examined without considering the other obligations which exist between the parties**.

(emphasis added)

1. Their Honours’ recognised that a modification of the obligations that the parties to an employment relationship owe each other, including through any change to the employee’s duties, hours of work, pay and position, is a function of the law of contract that requires a variation of their bargain: cf: *Concut Pty Ltd v Worrell* (2000) 176 ALR 693 at 698–699 [18]–[19] per Gleeson CJ, Gaudron and Gummow JJ; *Cohen v iSoft Group Pty Ltd* (2013) 298 ALR 516 at 526–527 [35]–[36] per Rares, Cowdroy and Kerr JJ.
2. The contractual position between the parties and any relevant statutory provisions are critical in giving appropriate content to the duty of an employer to take reasonable care to prevent a reasonably foreseeable risk of an employee suffering a psychiatric illness (*Koehler* 222 CLR at 55 [24]). McHugh, Gummow, Hayne and Heydon JJ held in *Koehler* 222 CLR at 55 [26] that, there, the employee “did not prove that the employer ought reasonably to have foreseen that she was at risk of suffering psychiatric injury **as a result of performing her duties at work**” and that this was because of two reasons (at 55 [27]), namely:

First, the appellant agreed to perform the duties which were a cause of her injury. Secondly, **the employer had no reason to suspect that the appellant was at risk of psychiatric injury**.

(emphasis added)

1. There, the employee changed her role from a full time to a part time sales representative consequent on a restructure. She accepted her new position but, when told on her first day of the scope of her duties, she said that she could not perform them in the time required. Her supervisor told her to try it for a month and, if she felt that she could not cope, she should tell him. She agreed to this and began the work. Although she subsequently complained that she had too big an area and too many stores to visit in the part time role, she never complained that she was experiencing any effect on her health (222 CLR at 50–51 [7]–[10]). Thus McHugh, Gummow, Hayne and Heydon JJ analysed her claim in negligence against her employer on the basis that the parties had agreed that her work would comprise the tasks that she performed (222 CLR at 55–57 [28]–[31]).
2. McHugh, Gummow, Hayne and Heydon JJ held that the scope of the duty of care owed to the particular employee must be assessed in the context of his or her employment relationship, the nature of the work performed and, importantly, any signs that the employee gave as to whether a risk of psychiatric harm was reasonably foreseeable (at 57 [35]). They said that an employer was entitled to assume “**in the absence of evident signs warning of the possibility of psychiatric injury**” that the employee considers himself or herself able to do the job (at 57 [36]). That is why they analysed whether the employer had a duty to modify the operation of the contract, that the parties had agreed, as a result of information that the employer subsequently acquired about the vulnerability of the employee to psychological harm (at 57–58 [36]–[38]).
3. Importantly, their Honours described the nature of the employee’s complaints in that case as being (51 [10]):

…**directed to whether the work could be done; none suggested that the difficulties she was experiencing were affecting her health**. She told management that there were two ways to solve the problems she was encountering: to reduce the number of stores she was to visit, or to have her work a fourth day.

(emphasis added)

1. That is the context in which they concluded (at 58–59 [40]–[41]):

Nor is it necessary to decide this case on the basis that the appellant’s agreement to perform the duties which were a cause of her injuries is conclusive against her claim. **The identification of the duties for which the parties stipulated would require much closer attention to the content of the contractual relationship between them than was given in the evidence and argument in the courts below.** For present purposes, it is sufficient to notice that **her agreement to undertake the tasks stipulated (hesitant as that agreement was) runs contrary to the contention that the employer ought reasonably to have appreciated that the performance of those tasks posed risks to the appellant’s psychiatric health**.

…she made many complaints to her superiors but **none of them suggested (either expressly or impliedly) that her attempts to perform the duties required of her were putting, or would put, her health at risk.** She did not suggest at any time that she was vulnerable to psychiatricinjury or **that the work was putting her at risk of such an injury**. Noneof her many complaints suggested such a possibility. As the Full Courtsaid, her complaints may have been understood as suggesting anindustrial relations problem. **They did not suggest danger to her psychiatric health**.

(emphasis added)

1. In *Naidu* 71 NSWLR 471, the Court of Appeal of the Supreme Court of New South Wales discussed the issue of when an employer (**ISS** Security Pty Ltd) and or, in that case, a third party at whose premises an ISS employee worked as a security **guard** (**Nationwide** News Pty Ltd), could be liable in negligence for causing psychological injury by bullying and a harassment of the guard. There, a Mr **Chaloner**, a senior employee of Nationwide, bullied and harassed the guard over several years. As Spigelman CJ noted, a person in a supervisory position in a corporation has duties that encompass receipt of relevant knowledge and can be found to have a duty to communicate and act on that knowledge (71 NSWLR at 480–481 [41]). He held that the only senior persons in Nationwide, apart from Mr Chaloner, who received any information about his behaviour towards the guard “did not know enough to require them to act” (at 481 [44]). He made the point that generalised statements about whether a duty of care in an action for negligence has been breached are unhelpful and that, rather, in any particular case, the whole of the circumstances, including any failure of the employee to complain, have to be considered (482 [47]).
2. There, the guard manifested to his work colleagues, but not to senior persons who were the employer’s “agents to know”, two signs of mental disturbance, namely, crying and a significant change in his personal behaviour over several years. He had cried only once in front of a senior officer of his actual employer, ISS. While Spigelman CJ recognised that these signs suggested an adverse effect on the employee’s mind, he reasoned (71 NSWLR at 484 [57] – [60]):

However, **what is required is foreseeability of a recognised psychiatric illness**. The signs suggestive of psychiatric illness, rather than psychological disturbance, satisfy the not far-fetched and fanciful test of foreseeability. However, they do not, in my opinion, reach the level of possibility which would require the employer or surrogate employer to intervene.

Workers are subject to stress in both their working and personal lives which can affect their mental health. Changes in personal behaviour over a period of years may occur for many reasons. So may the response of crying. These responses did not, in my opinion, **indicate psychiatric illness** to the degree that required a response from the actual or surrogate employer.

An employer, like ISS, or a surrogate employer, like Nationwide News, is not, in my opinion, required to have in place systems of inquiry and/or response, to manifestations of mental disturbance in order to determine whether or not the disturbance is work related and, if so, to remedy the situation. In the present case, at least via Mr Chaloner, both ISS and Nationwide News can be taken to be aware of the systematic course of conduct by him which created the possibility that the disturbance may be work related. **They did not, however, have sufficient information about Mr Naidu’s response, even via Mr Chaloner, that the disturbance could be a recognised psychiatric illness requiring intervention.**

(emphasis added)

1. It is not clear what test the Chief Justice was applying. As the last sentence in [60] of his reasons reads, his Honour appears to be saying that information that would lead a reasonable person in the position of the employer to recognise that there was a foreseeable risk of psychiatric injury is insufficient: rather, he said that the information had to be “that the disturbance [of the employee] could be a recognised psychiatric illness”. His analysis appears to focus on, *first*, the employer recognising the fact of the employee having developed already, as opposed to the appreciation that there was a reasonably foreseeable risk that the employee might develop, a psychiatric illness and, *secondly*, a time after the illness has developed as opposed to the anterior time when an employer ought to have appreciated that the circumstances gave rise to a reasonably foreseeable risk that, if the conduct or situation continued, the employee could develop a psychiatric illness.
2. Beazley JA noted that Nationwide contended that it did not owe a duty of care to the employee or, if it did, it did not breach it (at 490 [99]). Her Honour found that Mr Chaloner was, relevantly, Nationwide, and he had the responsibility for supervising the ISS employee. She held (at 505–506 [237]–[238]):

When that position is reached, **the question of reasonable foreseeability for the purposes of establishing the existence of a duty of care, resolves itself in this case fairly readily**. Nationwide News, as embodied by Mr Chaloner, perpetrated conduct on Mr Naidu that was prolonged, abusive, intimidating and physically threatening. It was bullying in an extreme form. Bullying has been described in a different context as a “serious and insidious form of violence”: see J Elvin, “The duty of schools to prevent bullying” (2003) 11 *Tort Law* *Review* 168 at 169. **This is not cutting edge psychology. Any person could reasonably foresee that the conduct engaged in by Mr Chaloner carried with it the risk of psychological or psychiatric harm. But in any event, Mr Naidu exhibited signs of such harm to Mr Chaloner.** He was observed to cry and to be scared when Mr Chaloner directed such conduct towards Mr Naidu and threatened him with the loss of his job. In addition, he was observed by others at the workplace to change over a period of time from a happy person to one who appeared depressed. Accordingly, this was not a case like *Koehler v* *Cerebos (Australia) Ltd* where the plaintiff gave no outward signs of her emotional state.

It follows that there was a reasonably foreseeable risk of psychiatric injury arising from Mr Chaloner’s conduct to Mr Naidu.

(emphasis added)

1. Basten JA noted that Nationwide did not challenge on appeal the trial judge’s finding that Mr Chaloner’s conduct was “so brutal, demeaning and unrelenting that it was reasonably foreseeable that, if it continued for a significant period of time… it would be likely to cause significant, recognisable psychiatric injury” (at 529 [397]). Accordingly, he analysed the issue as involving only whether Nationwide could be liable for Mr Chaloner’s conduct (at 529 [397]). Basten JA found that Nationwide and Mr Chaloner were concurrent tortfeasors to the extent that any of his conduct was outside the scope of his employment and upheld the trial judge’s finding that both were liable in full for the employee’s damages (at 529 [397], 532 [409]). His Honour did not discuss whether Nationwide owed a duty of care to the employee and only discussed whether Nationwide was liable for the tort of intentional infliction of harm. However, Basten JA found that ISS (whose senior employee had seen the bullied employee cry on one occasion) neither had, nor ought to have had, knowledge of circumstances which would give rise to a reasonably foreseeable risk of cognisable psychiatric harm to the employee (at 534–535 [424]).
2. All three of the judges agreed that Nationwide was liable for Mr Chaloner’s intentional infliction of harm. Spigelman CJ said that Nationwide was not negligent, Beazley JA said that it was and Basten JA did not make a finding on the issue. Thus, in *Naidu* 71 NSWLR 471 there was no *ratio decidendi* on the negligence issue.
3. In *Tame v New South Wales* (2002) 211 CLR 317 at 329 [5], Gleeson CJ explained that the concern of the law in dealing with situations of ordinary life to which the tort of negligence may apply is not only to compensate a person who has suffered an injury but also to address, at policy level, the effect of imposing liability upon the person who is accused of responsibility for the injury. He said that the law must take into account “the effect of [imposing] such liability upon the freedom and security with which people may conduct their ordinary affairs”. His Honour developed this reasoning in *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 276 [9] saying:

just as advances in medical knowledge have made us aware of the variety of circumstances in which emotional disturbance can trigger, or develop into, recognisable psychiatric injury, so they also make us aware of the implications, for freedom of action and personal security, of subjecting people to a legal requirement to anticipate and guard against any risk to others of psychiatric injury so long as it is not far-fetched or fanciful. In the context of a question of duty of care, **reasonable foreseeability involves more than mere predictability. And advances in the predictability of harm to others, whether in the form of economic loss, or psychiatric injury, or in some other form, do not necessarily result in a co-extensive expansion of the legal obligations imposed on those whose conduct might be a cause of such harm. The limiting consideration is reasonableness, which requires that account be taken both of interests of plaintiffs and of burdens on defendants**. Rejection of a “control mechanism”, such as the need for direct perception of an incident or its aftermath, originally devised as a means of giving practical content to that consideration, does not involve rejection of the consideration itself.

(emphasis added)

1. Gummow and Kirby JJ added, as did Hayne J (at 304 [98]), that reasonable foreseeability of mental harm is not the only condition of the existence of a duty of reasonable care (*Gifford* 214 CLR at 295 [67]). They also pointed to the importance of identifying the interests that will be sufficient to attract the protection of the law in any given field as a condition apposite to the determination of whether a duty of care will exist in any given situation (at 300–301 [88]). They said that an employer had a duty of care in tort and a contractual obligation (either express or implied), to so order its affairs as to avoid causing injury (including psychiatric injury) or death to its employees. And, they said that the law would more readily impose a duty (or contractual obligation) of care where the employer’s conduct constitutes an infringement of otherwise recognised rights of the employee.
2. Hayne J (at 302 [90]–[92]) reasoned that the test for the imposition of a duty (or obligation) of care needs to include a control mechanism, saying (at 304 [99]):

Control mechanisms developed in this way may have wider applications than just cases of psychiatric injury. But it may also be that, as knowledge about the causes of psychiatric injury and the effects of traumatic events increases, control mechanisms based on that knowledge may become evident and could be applied to claims for damages for psychiatric injury.

1. Hayne J also held that the employer owed a duty to take reasonable care to avoid harm to an employee because, as Mason J had held in *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687–688, the employer controlled the work of the employee, and how, where and when he or she did it (214 CLR at 305 [103]).
2. Gleeson CJ explained that negligence involves “a failure to protect the interests of someone with whose interest a defendant ought to be concerned”. He said that reasonableness was the essential concept to define the ambit of a legal obligation of overriding a person’s proper concern for others, the breach of which sounds in damages: *Tame* 211 CLR at 330 [8] (see too at 383 [196] per Gummow and Kirby JJ, with whom Gaudron J agreed on this issue at 339 [44]). He also said that reasonableness is judged in the light of current community standards (at 332 [14]). Thus, the question in such a case is whether the relationship between the parties is such as to make it reasonable to require a defendant to have in contemplation a risk or danger of psychiatric injury to the plaintiff in the circumstances (at 336 [29], [33], 385 [201], 386 [203], 399 [241]).
3. In *Tame* 211 CLR at 339 [44], Gaudron J agreed with Gummow and Kirby JJ (see at 382 [193]) that damages are recoverable in negligence only for a recognisable psychiatric injury, but not for emotional distress. She also considered that something more than mere foreseeability of the likelihood of harm must be present in the relationship of the parties for there to be a duty to take care to avoid a risk of pure psychiatric injury (at 339 [45]).
4. Gummow and Kirby JJ said in *Tame* 211 CLR at 379 [185]:

**Protection of mental integrity from the unreasonable infliction of serious harm**, unlike protection from transient distress, answers the ‘‘general public sentiment’’ underlying the tort of negligence that, in the particular case, there has been a wrongdoing for which, in justice, the offender must pay (See *Donoghue v Stevenson* [1932] AC 562 at 580; *Caltex Oil (Australia) Pty Ltd v* *The Dredge “Willemstad”* (1976) 136 CLR 529 at 575; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 242-243 [171]). Moreover, **the assessment of reasonableness**, which informs each element of the cause of action, is **inherently adapted to the vindication of meritorious claims in a tort whose hallmark is flexibility of application. Artificial constrictions on the assessment of reasonableness tend, over time, to have the opposite effect**.

(emphasis added)

1. They held that the particular psychiatric illness need not be reasonably foreseeable, so long as an injury within the class of recognised psychiatric illness was (at 386 [203]).
2. Hayne J said that the consideration of the control that an employer exercises over the workplace creates a duty to take reasonable care about the place and system of work so as to avoid psychiatric injury (at 413 [281]; see too per Callinan J at 436 [357]). He discussed the difficulties in distinguishing between mental distress and psychiatric injury (at 415–418 [293]–[296]). He accepted that the law recognised only a duty to take reasonable care to prevent a recognised psychiatric injury, although he applied a test that the majority rejected, namely that the plaintiff should be a person of ordinary or reasonable fortitude (at 417–418 [296], 419 [304]).
3. Of course, in the ordinary course of life, the defendant will not be a qualified psychiatrist equipped with the training and expertise to appreciate whether the nature of a plaintiff’s reasonably foreseeable reaction will or may be a particular, or any, recognised psychiatric illness. The law cannot set a standard of care that is of such specificity. The reasonable foreseeability of the risk of psychiatric injury must be of an injury that the plaintiff is at risk of suffering of such severity that it would cause a psychiatric condition to develop or occur or warrant psychiatric treatment; that is an injury that goes beyond mere stress, mental distress or emotional upset.

### Was the Club negligent?

1. Here, Mrs Leggett was an employee of the Club. She had written to Mr Rudolph on 20 July 2016 informing him that his management of her made her feel that he did not trust her in performing her duties. She said that she was happy to discuss his concerns but “I am losing sleep and constantly thinking about these emails and other question you are raising”. He did nothing to address her communication of her distress, including that she was losing sleep; indeed, he ignored it, sought legal advice, sent his email of 25 July 2016 and then met with her and Mrs Price on 27 July 2016.
2. Mrs Leggett was a very senior, long serving employee with a significant job that she had been performing competently for 25 years. Of course, neither she nor Mr Rudolph could expect that their relationship would be the same as that between Mr Fletcher and her. They had to understand each other and, initially, Mr Rudolph was not unreasonably curious to understand the unusual and largely unwritten contractual remuneration structure that Mrs Leggett had to reward her for her role. However, by June 2016 he knew what that structure was, how Mrs Leggett put in and justified her claims for commission and other entitlements and how those claims were verified and paid. Thus, by 20 July 2016 he was conscious from Mrs Leggett’s email of that day that his behaviour towards, and treatment of, her was causing her significant problems, including loss of sleep, that could be reasonably expected to affect her psychiatric wellbeing if these conditions persisted.
3. As Mr Rudolph’s initial draft, that he created on 27 July 2016 and, after alterations, sent on 1 August 2016 revealed, he appeared to have serious doubts, which I find had no reasonable basis, about Mrs Leggett’s probity. In my opinion, the tone of the draft reflected the manner in which Mr Rudolph treated Mrs Leggett, namely, he demeaned and humiliated her, questioning her every act, including spending $15 to park her car when attending a meeting with a sponsor to promote its support of the Club. His assertions of the need for an audit trail were fatuous, given that he was making them with the benefit of the documents, including receipts, that Mrs Leggett generated and provided.
4. The fact that Mr Rudolph sought legal advice in relation to how he should respond to Mrs Leggett’s email of 20 July 2016 is telling. Her email revealed that there was a significant and real problem developing and that it was affecting her psychiatric wellbeing. She told him that she was losing sleep, constantly thinking about his demands and feeling she was not trusted, a feeling that Mr Rudolph’s behaviour only reinforced, consistently with his state of mind over the next months. In that context, Mr Rudolph, as the CEO, was the Club.
5. As Mr Quigley made clear, the board left everything to Mr Rudolph as the CEO, even though Mrs Leggett complained, beginning on 20 July 2016, about Mr Rudolph’s conduct towards her, to three directors personally, explaining to them, while crying, how she was feeling. As I have recounted, by mid-August 2016, Mrs Leggett had broken down crying twice when complaining to Sid Kelly about Mr Rudolph’s conduct. She had told Mr Commerford twice that his pressuring conduct was causing her constant anxiety, loss of sleep and to cry all the time. She had also told Mr Stevens that she was not coping, having trouble sleeping and performing her work because of Mr Rudolph’s behaviour ([59]–[60]). By mid-August 2016, Mr Commerford told her, as Mr Quigley’s evidence confirmed, that members of the board were discussing her situation and relationship with Mr Rudolph ([58], [197]). By late September 2016, Mrs Leggett had told Mr Stevens that things had become worse, she was not coping, could not sleep or work and was being completely ignored ([60]).
6. Objectively, Mr Rudolph’s behaviour was demeaning of and, at best, insouciant towards, Mrs Leggett. Prior to 9 October 2016, the board was discussing Mrs Leggett’s complaints, as Mr Quigley said “outside” its formal meetings, but had shut its eyes completely to the problem. *First*, despite Mrs Leggett’s expressed distress to three directors, the board did not raise with Mr Rudolph any issue about Mrs Leggett or what was occurring between them. *Secondly*, Mr Gollan’s asserted reaction, which I consider was false (given the congruent evidence of Mr Quigley and Mrs Leggett about what Mr Gollan actually told her), to Mrs Leggett’s distress in the carpark on 9 October 2016 was of a piece with Mr Quigley’s evidence, namely they thought “it’s got nothing to do with the directors”. Both directors said that it was for Mr Rudolph to work things out, even though Mrs Leggett was telling them, in clear terms, that he was the source of her loss of sleep, anxiety and feelings that reflected an appearance of having been bullied ([81]–[82], [125]).
7. I infer that any evidence that Sid Kelly, Mr Commerford and Mr Stevens could have given would not have assisted the Club’s case: *Jones v Dunkel* (1959) 101 CLR 298; *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at 385 [64] per Heydon, Crennan and Bell JJ. Mrs Leggett’s statements to members of the board from 20 July 2016 demonstrated she was feeling more than ordinary stress. The fact that she could not stop crying, felt so stressed that she could not eat, sleep or do her work as she explained to them individually, would have caused a reasonable person in their positions to consider that, if Mr Rudolph’s conduct continued, she was at risk of suffering a psychiatric injury. The Club, through its directors as well as its CEO, had a duty in tort and contractual obligation to take reasonable care to provide a safe system of work and workplace environment for its employees, including to take steps to prevent, and to address, workplace bullying. By late September 2016, Mrs Leggett’s descriptions, and her displays of emotion, to each of the three directors actually conveyed, and would have conveyed to a reasonable director in their positions, that she perceived that Mr Rudolph was directing repeated and unreasonable behaviour towards Mrs Leggett that was creating a real and foreseeable risk that she would suffer psychiatric injury if it continued: cf: [#144].
8. Mr Rudolph’s conduct was in increasingly intense and, in my opinion, intentional, for the reasons I have explained. By the time that Mrs Leggett spoke to Sid Kelly, Mr Commerford, and Mr Stevens in August 2016, they were already discussing, with Mr Quigley outside the board meetings, Mrs Leggett’s state of mind and the information she gave them about her serious level of distress, inability to sleep, and feeling that the pressure that Mr Rudolph placed on her by his demands and micromanagement was unreasonable, as objectively it was. He had unjustifiably questioned her integrity, including about having goods delivered to her house and continued to make excessive demands of her. When Mrs Leggett sent her first sick leave certificate on 10 October 2016, Mr Rudolph’s instant reaction was to boast to his father-in-law “dropping like flies” and to make his comment to Ms Duff that Mrs Leggett had “pulled the stress leave certificate”. That reaction indicates, as I have found, that his behaviour was intentional; that is, he intended to force her out of her position by making her job unbearable to her.
9. In my opinion, from and after late July 2016, the continuing of such conduct was calculated to and, in any event, a reasonable person in Mr Rudolph’s position of CEO would have perceived that the conduct did, create a reasonably foreseeable risk that Mrs Leggett, as the employee subjected to that treatment, would suffer serious psychiatric injury as a result. Mr Rudolph was attempting to strip Mrs Leggett’s authority, senior status and autonomy from her. As he said, and I accept, he told her when he telephoned her at the barriers on 9 October 2016 that, “You don’t have permission to go to the barriers”. No other employee needed Mr Rudolph’s permission to accept the starters’ routine invitations to go with them to the barriers that Mr Benson described. Mr Rudolph knew that his 10 October email response to Mrs Leggett’s 9 October email would convey to her that she had committed some breach of her employment obligations, an allegation which he knew was baseless.
10. I am of opinion that Mrs Leggett’s descriptions of her state of mind in her email to Mr Rudolph of 20 July 2016, and on the occasions prior to 9 October 2016 to each of the three directors, were warning signs that would convey to a reasonable employer, in the context of her employment relationship, the nature of the work she, up to then, had performed, Mr Rudolph’s micromanagement of her and his attempts to restructure her job without her agreement by exerting his authority, that there was a reasonably foreseeable risk that she would suffer psychiatric injury if Mr Rudolph’s bullying and demeaning behaviour towards her went unchecked.
11. This position is distinguishable from the situation in *Koehler* 222 CLR at 55 [27]. There, the employer had no reason to suspect that the employee was at risk of psychiatric injury. It was not necessary for Mrs Leggett to call medical evidence about that risk. Gleeson CJ pointed out in *Tame* 211 CLR 317 at 329 [5], the concern of the law is to deal with situations in ordinary life to which the tort of negligence must apply. As the Chief Justice said, the limiting consideration is reasonableness, which requires that account be taken both of the interests of plaintiffs and of burdens on defendants in determining whether a duty of care exists and, if so, its extent, in any particular context. An employer has a duty to provide a safe working environment and, as the Safe Work Australia *Guide* explained, to ensure that this environment does not include the reasonably foreseeable risk or potential for bullying of employees that could inflict psychological or psychiatric injury on them.
12. In my opinion, the Club was in breach of its duty of care owed, and contractual obligation, to Mrs Leggett to take reasonable care to prevent her being exposed to the risk of psychiatric injury. This breach occurred from the time of Mrs Leggett’s email to Mr Rudolph on 20 July 2016, or alternatively, after August 2016, by which time she had spoken to three directors about how distressed she was feeling and the basis for those feelings, being the conduct of Mr Rudolph, so as to convey to each of them that, if that conduct continued, there was a reasonably foreseeable risk that she would suffer psychiatric injury in the course of performing her duties at work.
13. She had been placed in an intolerable position by the way Mr Rudolph had been treating her. The expert psychiatrists agreed, in Dr Parsonage’s words:

Mrs Leggett's **psychological health was progressively eroded from mid-2016 to 9 October 2016** by at least her perception that she was being treated unfairly, that her integrity was being questioned **and that the CEO was deliberately creating circumstances in which she would either be forced to leave or he would have grounds to remove her from her position**.

(emphasis added)

1. As I have found, Dr Parsonage’s description of Mrs Leggett’s perception reflected the fact of Mr Rudolph’s behaviour towards her. It would have been reasonably foreseeable to a reasonable employer in the Club’s position that an incident, such as occurred on 9 and 10 October 2016, would be “the last straw” and she would break down with a psychiatric injury. Sustained bullying is well understood in the community as capable of causing psychiatric injury to its victim.
2. Accordingly, I find that the Club is liable to Mrs Leggett in negligence and in breach of its contractual obligation to take reasonable care to prevent her suffering the reasonably foreseeable risk of psychiatric injury of the kind she suffered on 9 and 10 October 2016.

# Compensation

1. The Club submitted that Dr Roberts’ suggestion in the joint report that, because Mrs Leggett had not had all available treatments, there was a prospect that her condition may improve, meant that a larger allowance in any award of damages ought be made for vicissitudes.
2. The Club contended that Mrs Leggett’s damages in tort were limited by the *Workers Compensation Act* and that the correct figure to use in the calculation for s 151I(2) was the current figure for the maximum weekly earnings, as adjusted by consumer price index increases of 2% per annum to the present time, of $2282.90 representing her gross agreed maximum entitlement under that Act in respect of earnings from June 2016. Mrs Leggett argued that I should apply a figure arrived at by using the same increase as had occurred in the past and applying only the ultimate indexed figure she would be earning in the year before she turns 67.
3. Mrs Leggett argued that her future economic loss under the *Workers Compensation Act* should be calculated using a discount of 15% for the vicissitudes of life.
4. Both parties otherwise agreed on the manner of calculation of work injury damages once the figures for s 151I(2) future loss calculations and vicissitudes are known. They agreed that Mrs Leggett had been paid $46,610 for a degree of impairment of 19% as assessed in respect of her general disability under s 66 of the *Workers Compensation Act*.
5. The parties were at issue as to the sum to be used as the multiple for the purpose of s 151I(2) of the *Workers Compensation Act*. It is likely that, ordinarily, Mrs Leggett would have been able, and would have continued, to work until she was 67, earning an income in the nature of what she was earning as at October 2016. The *Workers Compensation Act* contemplates in s 34 and Division 6 of Pt 3 that there will be regular indexation increases of the maximum amount in the future of weekly compensation that is presumably $2282.90. I am of opinion that, under s 151I(2), the Court must take into account that indexed increases in the maximum weekly amount will occur during the period for which the award of damages for future economic loss is being made.
6. In such a case, one calculus might be the use of a net present value figure to reflect the anticipated increases over the period for which the future loss component of the damages is payable. In my opinion, the amount of damages should be calculated on the basis either of yearly rests increasing by the anticipated indexed increases over the period or a mid-point of the present and estimated ultimate indexed maxima, provided that the calculations mathematically come to the same result. The parties did not present calculations using these methodologies.
7. One of the difficulties in evaluating what might happen to a person’s state of mind in the future is, of course, the uncertainty of how life will develop. I have taken into account Dr Parsonage’s opinion that Mrs Leggett’s condition is well entrenched, and unlikely to change in the foreseeable future and the fact that Mrs Leggett did not feel any sense of apparent vindication sufficient to cure, or ameliorate, her condition when she won successive victories in the Workers Compensation Commission. It may be that the judgment of this Court could have a better impact. While Dr Roberts left open the possibility that, with different treatment, were she to undertake it, Mrs Leggett might improve, I think that Dr Parsonage’s view is more likely to be correct.
8. I am of opinion that I should apply a discount of 17.5% for vicissitudes of life on the uncapped damages component for her future loss of income under s 151I(2) of the *Workers Compensation Act*.

## Compensation under s 545 of the *Fair Work Act*

1. As I noted earlier, s 151E of the *Workers Compensation Act* constrains common law damages both in contract and tort in respect of an injury to a worker caused by the negligence or other tort of the workers’ employer or its breach of a contractual duty of care.
2. However, in the present case, s 545(1) and (2)(b) of the *Fair Work Act* enable the Court to make orders that it considers appropriate if satisfied, as I am, that the Club has contravened a civil penalty provision and also order compensation for a loss that a person has suffered, such as underpayments before her injury that Mrs Leggett had proved. The Court also can award penalties for the Club’s contraventions of the *Fair Work Act* and the *Long Service Leave Act*. In addition, the Court is entitled to award compensation for the adverse action to which Mrs Leggett was subjected that I have found.
3. The Parliament did not limit the Court’s powers to award compensation under s 545(2)(b) or make orders that it considers appropriate under s 545(1). The Parliament contemplated that claims to the Fair Work Commission for an order to stop bullying can be made under Pt 6-4B of the *Fair Work Act* that will attract the remedies from the Commission that Pt 6-4B provides. The federal Act is not constrained in respect of the compensation that can be awarded by the separate operation, in a different sphere, of the State *Workers Compensation Act*.

In my opinion, the Club’s conduct, through Mr Rudolph, effectively destroyed Mrs Leggett’s life. She cannot work and, as the joint experts agreed, is permanently incapacitated from doing so because of Mr Rudolph’s and the Club’s conduct. That conduct caused a very serious psychiatric illness that may never be cured, or ameliorated to any significant degree. That injury occurred in no small part because Mrs Leggett’s breaking point was Mr Rudolph’s treatment of her on 9 and 10 October 2016. That included his reaction in his 10 October email that he sent to her because she exercised a workplace right. He subsequently acted to drive the nail home later, as I found on the second s 340 claim, by persisting in his bullying conduct throughout the balance of Mrs Leggett’s employment, ignoring the Club’s contractual and statutory obligations to her and taking adverse action against her because she had both taken sick leave and exercised her workplace right to make a complaint about his behaviour. As Perram J, with whom Collier and Reeves JJ agreed, asked rhetorically in *Hughes v Hill*(2020) 277 FCR 511 at 521 [47], in a case of sexual harassment contrary to s 28A of the *Sex Discrimination Act 1984* (Cth), “what is the ruin of a person’s quality of life worth?” (see too at 521 [47]–[48]).

1. I am of opinion that Mrs Leggett should be awarded $200,000 pursuant to s 545(1) and (2)(b) of the *Fair Work Act* for the loss she has suffered by reason of the Club’s contraventions of the Act and in all of the circumstances..

# Conclusion

1. For these reasons, Mrs Leggett is entitled to be paid her unpaid entitlements under the *Fair Work Act* and her contract of employment. She is also entitled to recover work injury damages for the Club’s negligence in failing to protect her from the risk of psychiatric injury and compensation for its multiple contraventions of the *Fair Work Act*. There will need to be a further hearing to fix penalties for the Club’s contraventions of the *Fair Work Act* and *Long Service Leave Act*.
2. The parties should prepare some draft calculations so that I can evaluate whether either method that I have suggested for calculation of Mrs Leggett’s future economic loss claim under s 151I(2) of the *Workers Compensation Act* would be appropriate. They should also prepare calculations of the other amounts of commissions and leave entitlements, and any work injury damages, in order to quantify the past economic loss today due to Mrs Leggett under s 151I(1), based on my findings, together with prejudgment interest.

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| I certify that the preceding two hundred and twenty-one (221) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rares. |

Associate:

Dated: 2 February 2022