AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

CITATION: **SUELLEN PATERSON AND PETER CLARKE [2009] ACTDT 3**

DT 7 of 1998

Catchwords: Sexual harassment – Discrimination – Victimisation - Causal link – Proof – Remedy.

Provisions considered

Discrimination Act 1991 (Republication No. 3 (RI), ss. 7, 8, 58, 59, 68 and 102.

List of cases cited

Almassey AND Omari and ACT Multicultural Council Inc. [2008] ACTDT 2
Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
De Domenico v Marshall [1999] FCA 1305.
Duhbihur v Transport Appeal Board [2005] NSWSC 811
Hall v A & A Sheiban Pty Ltd [1989] FCA 72
Kwesius and ACT Health [2008] ACTDT 3
McCormack and Charles Sturt University [2008] ACTDT 4
Michael Firestone v Australian National University [2009] ACTDT 1

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL) NO: DT 7/98

RE: **SUELLEN JOY PATERSON**
Complainant

AND: **PETER MILTON CLARKE**
Respondent

ORDER

Tribunal : Mr R J Cahill, President

Date : 3 August 2009

THE TRIBUNAL ORDERS:

1. That the Tribunal is satisfied that the Complainant's complaint against the Respondent in relation to an incident of sexual harassment on 11 June 1996 has been substantiated and that the Respondent contravened section 59 of the *Discrimination Act 1991* (as it stood at that time).

2. That the Respondent pay $1000.00 to the Complainant as compensation for the loss and damage the Complainant suffered as a result of the Respondent's sexual harassment.

3. That the Complainant's claim that she was discriminated against, and victimised by, the Respondent, in particular, by the Respondent reducing the shifts of work allocated to her or by her making a complaint against the Respondent, has not been substantiated.

4. That the parties bear their own costs.

.....
President

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL) NO: DT 7/98

RE: **SUELLEN PATERSON**
Complainant

AND: **PETER CLARKE**
Respondent

REASONS

Mr R J Cahill, President

3 August 2009

1. On 3 August 2009, I made an order in this matter and delivered my reasons orally. Now, I set out the detailed reasons in writing.

2. This matter concerns a complaint made by Ms Suellen Paterson (the Complainant) against Mr Peter Clarke (the Respondent) under the *Discrimination Act 1991* (also referred to as "the Act").

3. I should mention that the matter had been dormant in the records of the Discrimination Tribunal because at one early stage, some time ago now, Mr Clarke, the Respondent in the matter, left Canberra and has been unable to be located, even by his own solicitor, who was then acting for him.

4. So for some time the matter stayed that way, but due to the fact that this matter, if it was heard today, would come before the ACAT Tribunal, and not the individual Discrimination Tribunal, it is necessary to finalise the matter without Mr Clarke's further involvement. He has not appeared or responded to any notice or any contact we have endeavoured to make of him from the Discrimination Tribunal.

5. The Complainant complained to the ACT Human Rights Office that she was discriminated against by the Respondent in the public area of employment because of sexual harassment and was victimised by him because of her making or supporting a complaint of discrimination. Her complaint was received by the Human Rights Office on 25 March 1997, although she had dated the complaint as 17 March 1996. I take 25 March 1997 as the date of the complaint.

6. The version of the *Discrimination Act* as at the date of the complaint was Republication No. 3 (RI) (Effective: 31 January 1997 – 22 September 1997) (also referred to in these reasons as "the Act").

7. The Respondent ran the Homestead Bistro, a restaurant, at the Tuggeranong Rugby Union & Amateur Sports Club, Wanniassa, under contract from the Club (the Club). The contract was with Eastco Constructions Pty Ltd, of which the Respondent was known to be a director. The Complainant worked in the Bistro as a casual waitress.

8. In her complaint, the Complainant alleged that the Respondent continually subjected her to dirty jokes, and on 11 January 1996, he approached her in the kitchen, that she struggled to get away from him, and that he put his hand down her trousers inside her underpants and pulled down halfway up her back. She complained that she was shocked and felt physically sick.

9. As the offer of the ACT Discrimination Commissioner (of the Human Rights Office) to conciliate the matter was declined by the Respondent, the Commissioner referred the matter, with the consent of the Complainant, to this Tribunal in January 2008.

Procedural history

10. The matter was first called over on 10 March 1998. On 14 April 1998, the Tribunal directed the Complainant to file and serve particulars of the complaint, list of witnesses and proofs of evidence on or before 28 April 1998, and for the Respondent to file and serve particulars or defence, list of witnesses and proofs of evidence on or before 28 April 1998.

11. On 27 May 1998, the Tribunal directed that the Complainant comply with the directions of 14 April 1998, by 3 June 1998. After a listing on 18 August 1998, in the hearing on 19 August 1998, the Tribunal directed that the Complainant comply with the direction outstanding by 25 August 1998, and if not leave would be granted to the Respondent to file strike out application.

12. The Complainant filed the particulars on 25 August 1998. The matter was listed on 23 October 1998, 19 November 1998 and 22 December 1998.

13. The Respondent filed its response on 19 November 1998 and on 26 November 1998, filed an affidavit setting out his version of the facts. On 23 December 1998, the Tribunal made an order that the Respondent file further particulars before 22 January 1999. The matter was listed on 9 February 1999.

14. On 6 January 1999, Baxter's Lawyers sent a letter that they took carriage of the matter for the Complainant and Baxter & Butler Lawyers ceased to exist.

15. On 22 January 1999, the Tribunal received the Respondent's further particulars dated 18 January 1999. The matter came before the Tribunal on 4 February 2000, 9 February 2000, 3 March 2000 and 20 April 2000. The Respondent was asked to file and serve list of witnesses by 17 March 2000.

16. On 15 May 2000, an order was made requiring that the Complainant file further submissions by 31 May 2000, the Respondent file further submissions and particulars and serve by 14 June 2000, and the Complainant file any response to the Respondent's submission by 21 June 2000.

17. On 25 September 2000, the Complainant filed further submissions. The Respondent did not comply with the order of 15 May 2000. There was a call over on 23 March 2001.

18. In March 2000, Mr John Wilson, of the lawyers for the Respondent, advised that the Respondent moved to NSW. The Respondent gave evidence at the hearing of 20 April 2000. It appears that thereafter the Respondent's lawyer was unable to contact the Respondent. The Tribunal's letter of 24 April 2001 to the Respondent was not responded.

19. By a letter dated 17 April 2001, Wilson-Legal, acting for the Respondent, advised that they did not have instructions from the client. By an email of 25 September 2003, Christopher Chenoweth, Solicitors, advised that they took over from Baxter & O'Keefe Lawyers, lawyers for the Complainant, as its statutory manager. Chenoweth's letter of 23 August 2004 stated that the Complainant had collected her file and would act personally. Her contact particulars were given.

20. The delay in finalising this matter was due to the parties not taking steps to pursue with the matter.

21. There were Tribunal proceedings on 9 February 1999, 20 April 2000 and 23 March 2001.

Legislative Provisions

22. As I said in paragraph 6 above, the version of the *Discrimination Act* as at the date of the complaint was Republication No. 3 (RI) (Effective: 31 January 1997 – 22 September 1997), which applies to the matter before me.

23. Sexual harassment is defined in section 58 of the Act as follows:

"**Meaning of sexual harassment**

58. (1) For the purposes of this Part, a person subjects another person to sexual harassment if the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person or engages in other unwelcome conduct of a sexual nature in circumstances in which the other person reasonably feels offended, humiliated or intimidated.

(2) A reference in subsection (1) to conduct of a sexual nature shall be read as including a reference to the making of a statement of a sexual nature to, or in the presence of, a person, whether the statement is made orally or in writing."

24. Section 59 which deals with sexual harassment in employment.

"Employment etc.

59. (1) It is unlawful for an employer to subject an employee, or a person seeking employment, to sexual harassment.

(2) It is unlawful for an employee to subject a fellow employee, or a person seeking employment with the same employer, to sexual harassment.

(3) It is unlawful for a principal to subject a commission agent or contract worker, or a person seeking to become his or her commission agent or contract worker, to sexual harassment.

(4) It is unlawful for a commission agent or contract worker to subject a fellow commission agent or contract worker to sexual harassment.

(5) It is unlawful for a partner in a partnership to subject another partner in the partnership, or a person seeking to become a partner in the partnership, to sexual harassment.

(6) It is unlawful for a workplace participant to subject another workplace participant, or a person seeking to become a workplace participant at that workplace, to sexual harassment at a place that is a workplace, or potential workplace, as the case requires, of both of those persons.

(7) In this section—

"place" includes a ship, aircraft or vehicle;

"workplace" means a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant;

"workplace participant" means any of the following:

(a) an employer or employee;

(b) a commission agent or contract worker;

(c) a partner in a partnership."

25. Section 7 of the Act provides for the grounds of discrimination. Section 8 provides for what constitutes discrimination. Sexual harassment is an unlawful act under the Act but is not a ground of discrimination unless it is discrimination on the ground of sex. In this matter there is no issue of discrimination on the ground of sex.

26. Victimisation in the present context is where a person is subjected to detriment because a person has made a complaint against the other person, reasonably asserted rights under the Act, is believed to be proposing to take such steps and the like. Section 68 provides for victimisation.

> **"Victimisation**
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> 68. (1) It is unlawful for a person to subject another person to any detriment on the ground that the other person has—
>
> (a) made a complaint under this Act;
>
> (b) instituted proceedings against any person under this Act;
>
> (c) given information or produced a document to a person exercising a power or performing a function under or in relation to this Act;
>
> (d) given information, produced a document or answered a question when required to do so under this Act;
>
> (e) reasonably asserted any rights that a person (including that other person) has under this Act; or
>
> (f) alleged that a person has committed an act which is unlawful under this Act;
>
> or on the ground that the first-mentioned person believes that the other person proposes to do such an act.
>
> (2) Paragraph (1) (f) does not apply in relation to an allegation that is false and is not made in good faith."

Facts

27. As I stated in paragraph 5 above, in her complaint to the Human Rights Office, the Complainant alleged that she was discriminated against in employment by sexual harassment by the Respondent and was victimised because of making or supporting a complaint of discrimination.

28. In her Particulars of the complaint to the Tribunal dated 25 August 1998, the Complainant contended that she was sexually harassed by the Respondent. She did not refer to discrimination or victimisation. She relied on section 58 for her complaint but the Tribunal regards the correct provision is section 59. Section 58 defines sexual harassment, and section 59 makes it unlawful for a person to subject another person to sexual harassment in employment. The Complainant's submission of 4 September 2000

also referred only to the issue of sexual harassment not to discrimination and victimisation. Nevertheless, I have considered whether the events had also given rise to discrimination and victimisation.

29. The facts that gave rise to the complaint are set out in paragraphs 7 and 8 above.

30. The Complainant reported the incident of 11 January 1996 to the Club and the Club's Human Relations Manager, Mr Barry Masters, arranged for the Complainant and the Respondent to enter into an agreement dated 1 August 1996, in which both parties agreed to settle any differences, problems or misunderstandings arising from the alleged sexual harassment claim by the Complainant against the Respondent.

31. The terms included that the Complainant be continued to be employed, be given equal employment opportunity with other employees, the Complainant not pursue the alleged sexual harassment claim provided the Respondent does not do anything similar to the alleged incident which offends the Complainant and the parties discuss with Mr Masters if they feel the agreement has been broken. I must say, that was an attempt at mediation by the Club operation and that does not represent conciliation under the Discrimination Act, or a conciliation agreement, but it is indication of an attempt by the Club to solve the difficulties between the parties.

32. Sometime later, the Complainant appeared to have written to the Club to the effect that the Respondent reduced her shifts thereafter. From 4 September 1996, she ceased to work in the Bistro. The Respondent denied the allegations and claimed that his business was going down but the Complainant's shifts were the same as any other casual waitresses and that all waitresses work to the roster. I must say, as I mentioned later on, it seems to me that those things occurred and it was evident that the business of the Complainant was going downwards appears to be evident.

33. On 10 September 1996, the Respondent wrote to the Complainant about her declining to attend a meeting that was said to have been arranged to discuss certain employment issues, and advised his inability to offer employment until some issues were discussed. It appears that the issues related to a complaint by the Complainant to the Club about an attempt to implicate her in a drink set up.

34. In her affidavit, the Complainant stated that after the sexual harassment, she suffered anxiety, vomiting, diarrhoea, loss of confidence and feeling of insecurity, and that her physical and emotional health suffered (see, T-document 8b).

35. It appears that after these events, the Complainant filed a complaint with the Human Rights Office.

Particulars of the complaint

36. In the Particulars of the complaint, it is alleged that on 11 June 1996, the Respondent kissed the Complainant on the back of the neck after raising her hair (at around 7 pm – according to the Complainant's reply), and later that evening put his hands down the back of the trousers the Complainant was wearing and placed his hands inside her underpants (at around 7:45 pm and 8 pm – according to the Complainant's reply).

37. The Complainant claimed that this was a contravention of the *Discrimination Act 1991*, in particular, it constituted "unwelcome conduct of a sexual nature in circumstances in which the other person reasonably feels offended, humiliated or intimidated". That is the definition of sexual harassment, rather than any discrimination. Because of the above incidents, she claimed that she was forced to leave her employment.

38. Of course, it is interesting that that occurred before the mediation attempts by the club when the parties attempted to come to some agreement. The Complainant also alleged she was the subject of jokes and attempts at behaviour which was of a sexual nature from the Respondent. It is interesting to note those matters did not occur in the original complaint, and thus would, to some extent, could fall foul of the *De Domenico* decision (see, *De Domenico v Marshall* [1999] FCA 1305), or alternatively, could be said to be the background to the principal incident involving the touching under her pants.

39. The Respondent has always denied the allegations.

Causal link and proof

40. In relation to complaints of discrimination, sexual harassment or victimisation, under the Discrimination Act, the onus lies with the Complainant to prove the allegation to the reasonable satisfaction of the Tribunal (see *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336).

41. The standard of proof required is set out in *Kwesius and ACT Health* [2008] ACTDT 3 (paragraph [75]) as follows:

> "In proceedings before the Tribunal the allegations of discrimination made by the Complainant are required to be proved to a proper standard based upon proper evidentiary material (see De Domenico v Marshall (unreported)

> [1999] ACTSC 1 (3 February 1999)). It is not necessary that the allegations be proved beyond reasonable doubt but there must be a comfortable degree of satisfaction that they have been proved by evidence which is sufficiently robust to justify the conclusion arrived at rather than inexact proofs, indefinite testimony or indirect inferences (see Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336)." (per M H Peedom, Deputy President)

42. Hall J in *Duhbihur v Transport Appeal Board* [2005] NSWSC 811 at [63] said that, "the [*Briginshaw]* standard of proof, or more particularly, its application varies according to the seriousness of the matter in question. It has been said in relation to findings of criminal conduct the subject of civil proceedings that findings in relation thereto must be based on evidence that is strong and cogent. This merely reflects the principle that the nature of the issue necessarily affects the process by which *"reasonable satisfaction"* is attained: see **Briginshaw** (at 363)" (*words in square brackets added*).

43. To make this Tribunal to be "reasonably satisfied" of the allegation, the complainant must have some evidence in favour of the complaint for the Tribunal to give the highest in its favour. As stated in *McCormack and Charles Sturt University* [2008] ACTDT 4 (at paragraph [41]), namely, "[i]n order for the complaint to be substantiated there would need to be some evidence favourable to the Complainant's contentions which, taken at their highest in favour of those contentions, would render them seriously arguable (see Legal Aid Commissioner (ACT) & Ors v Grundy [1999] ACTSC 318)."

44. In regard to discrimination, the Complainant must establish the causal link between the Respondent's act or omission and the relevant attribute of the Complainant under section 7 of the Act. I said in my recent decision in *Michael Firestone v Australian National University* [2009] ACTDT 1 [at paragraph 177] (which case related to discrimination on the ground of disability) as follows:

> "It is not always easy to prove discrimination on the ground of disability within the meaning of the Act to the "reasonable satisfaction" of this Tribunal, in particular, with the requirement to establish the causal link between the alleged act or omission and the disability. While it is very difficult to know the intention or motive of a person who is alleged to have unlawfully discriminated against another, the Tribunal has the responsibility to find the true reason principally on the basis of the objectively ascertainable evidence presented to it."

Issues

45. This Tribunal considered the following issues:

(1) Whether there were sexual harassment incidents alleged by the Complainant.

(2) Whether the Respondent discriminated against, or victimised, the Complainant because she had complained to the Tuggeranong Rugby Union & Amateur Sports Club.

Issue (1)

46. Two witnesses for the Complainant testified to having seen the incident on 11 June 1996. Ms Deborah Terry said that she saw at 7:30 pm by the dishwasher, the Respondent raised the Complainant's hair and kissed her on the neck. Ms Terry's employment was terminated by the Respondent allegedly because of her having wiped her nose on her sleeve. She said that the Respondent took two extra staff and reduced her shifts. It seemed that Ms Terry had some disagreements with the Respondent as well.

47. Mr Kevin Gunton, who moved to Queensland in 1996, provided a written statement (unsigned at that time) about the incident at the request of the Complainant. In his evidence given to the Tribunal, he stated that at 7:30 pm on 11 June 1996 he saw that by the dishwasher the Respondent raised the Complainant's hair and kissed her neck and opened her vest and perved at her breasts, without approval. Of course, the latter incident was not suggested by the Complainant at any time before she gave evidence at the Tribunal.

48. Mr Gunton also stated that at about 9 pm closing time the Respondent walked up to the Complainant and put his hands on her shoulders and slipped on hand inside her pants and laughed.[1] In cross examination, Mr Gunton said that the latter incident did not happen at 7:45 pm or 8 pm. There are some discrepancies there, but the thrust of the "hand in the pants" incident, if I may describe it that way, is still supported by him.

49. The Complainant in her evidence said that the Respondent licked her neck and did not kiss. In her original complaint, she did mention only about the incident of the Respondent putting his hands down her pants but stated in the Tribunal about the other two incidents.[2] One other witness Ms Leisja Jordan said that other staff mentioned few weeks after about the first incident.[3]

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[1] Proceedings of 9.2.99, pp.62 and 63.
[2] Proceedings of 20.4.00, pp.8-10.
[3] Ibid, p.42.

50. The Complainant stated that there were no incidents after 1 August 1996 – that is, after she signed the agreement following the mediation conducted by the club. Under cross examination, she denied that she took proceedings because of reduced shifts.[4]

51. Witnesses for the Respondent gave evidence generally about his character and were not eye-witnesses to the alleged incidents. At the same time, witnesses for the Complainant did not seem to have had good relationship with the Respondent and it seems that they all had grievances against him for various matters they said he had done about them. Even though there was some inconsistency in the evidence presented by the Complainant's witnesses, they were not substantial enough to detract from the general credibility of the witnesses.

52. The fact that the purpose of the agreement the parties signed on 1 August 1996 was to settle the allegation of sexual harassment points to the incident that the Complainant complained of, that is, the fact that the Respondent was willing to take place in that mediation, although not admitting that the incident occurred.

53. I regard the kissing incident and the joking incident, not as separate acts of the sexual harassment, but rather giving the ambience and the environment of which the touching underneath the pants occurred.

54. I have, in this connection, had regard to the consequences of an adverse finding against the Respondent. I agree with Hall J's statement in *Duhbihur* case [at 66] that "[a]n allegation of sexual harassment plainly involves a serious allegation and the consequences of an adverse finding against an employee ..... are potentially grave indeed. Such a finding impugns the integrity and reputation of a person subject to such a finding." [*Duhbihur* case involved sexual harassment by a fellow employee.]

55. In applying the objective standard to this evidence and the evidence given by the eye-witnesses, the Tribunal is reasonably satisfied that the Respondent subjected the Complainant to sexual harassment on the night of 11 June 1996, at least by the incident of the Respondent putting his hand inside the underpants of the Complainant. The other alleged sexual harassment incidents would appear to be in the broader scope of the proven incident of "hand in the pants". Evidence presented by the Respondent does not disprove the incident of 11 January 1996.

56. Therefore, the formal finding of the tribunal is that the Respondent contravened section 59(1) of the *Discrimination Act*. The

[4] Ibid, p. 49.

Complainant referred to section 58(1), which defines sexual harassment. Section 59(1) is the one that gives grounds for the finding of sexual harassment in employment.

57. However, the Tribunal is not satisfied that the Complainant's claim that she was the subject of jokes and other attempts at humourous behaviour which may have been of a sexual nature from the Respondent, was established. It seems that was very vague, and a background issue. Evidence available before the Tribunal in relation to that particular claim is not specific enough to give weight to it.

Issue (2)

58. As I said before, the Complainant had not alleged discrimination or victimisation by the Respondent. The form of complaint to the Human Rights Office, completed by the Complainant, included sexual harassment and victimisation as the basis of discrimination and the Complainant ticked them off. This Tribunal considers that the evidence presented to it in relation to reduced shifts of work given to the Complainant after she made the complaint to the Club, would warrant consideration of whether the change in the shifts amounted to discrimination or victimisation of the Complainant.

59. It is evident that the reason why the Complainant made the complaint to the Human Rights Office was because she was given reduced shifts after the agreement of 1 August 1996 and regarded that as not providing her equal employment opportunity in terms of the agreement. However, in the Tribunal proceedings the Complainant denied that being the motive for the complaint.

60. From the evidence, the Tribunal finds that from August 1996, the Complainant was given reduced shifts of work compared to other staff.[5] The Respondent's evidence was that all staff had reduced shifts of work and this was due to downturn in his business. Eventually, a short time later, he left Canberra in any event. He has not been really seen or heard of since 2001.

61. The Complainant has not discharged the onus of proving to the satisfaction of this Tribunal that the reduced shifts of work she was given by the Respondent was discrimination against her. There must be causative relationship for that specifically to occur. As I said before, neither in her complaint to the Human Rights Office nor in her Particulars filed with this Tribunal, had the Complainant specifically alleged discrimination on account of reduced shifts. In fact, in her evidence, she denied that that was the motivation she was using.

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[5] Ibid, p.62.

62. In relation to a discrimination claim, a Complainant must establish that the Respondent treated or proposed to treat the Complainant unfavourably because of the Complainant's attribute referred to in section 7 of the Act, or imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging the Complainant because of the Complainant's attribute (see, section 8(1) of the Act).

63. Sexual harassment is not a ground of discrimination under the Act unless it amounts to discrimination on the ground of sex [see, *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72.] In the matter before me, there is no issue of discrimination on that ground.

64. It appears from the Complainant's response filed with the Human Rights Office (T-document 11) that what prompted her to move towards ceasing employment was the Respondent's non-cooperation in meeting with her to discuss certain issues. The issue seemed to be a set up she suspected the Respondent arranged to make her drink alcohol while on duty. There is no evidence to support that it was a matter that she alleged.

65. The Respondent stated that the proposed meeting was to discuss certain employment issues and that it was the Complainant who had not turned up for the meeting. It is this event that she seemed initially to regard as the breach of the agreement.

66. For the above reasons, I am satisfied that this event is not a relevant issue for this Tribunal's consideration.

67. There is no evidence presented to satisfy the Tribunal that the Complainant was discriminated against on the ground of sex. There is also no evidence to satisfy the Tribunal that she was victimised by the Respondent, in particular, by being given reduced shifts because of her having made a complaint against the Respondent to the Tuggeranong Rugby Union & Amateur Sports Club. In my view, just because the two things followed does not mean there is causative relationship as required for discrimination of that sort to be established.

Remedy sought

68. The Complainant's submission dated 4 September 2000 sought that pursuant to section 102(2)(b)(iii) of the Discrimination Act the Tribunal make an order for compensation to be paid by the Respondent to the Complainant.

69. The Complainant submitted that the Complainant suffered physical distress such as migraines, vomiting and diarrhoea until she

left her employment at the Bistro. She also alleged that she was confused and felt that her employer breached the trust.

70. The Complainant's claim is that her main source of income was from her shifts at the Bistro. She claimed her loss to be at least $3120.00 for the six-month period following the incident. This was said to be based on the loss of an average three-four hour shifts a week for this period. She also submitted that she found other work in the hospitality industry.

71. She also claimed costs.

72. No supporting expert evidence, such as medical history, was presented to the Tribunal to substantiate physical and mental distress the Complainant alleged she suffered. The Tribunal is not satisfied that there is causative relationship in this case between her financial loss and any discrimination or victimisation.

73. Giving the highest in favour of the evidence presented on behalf of her in relation to the "hand in the pants" incident, the Tribunal is prepared to accept that it was reasonable that the Complainant suffered as a result of the incident. However, without proof, I am not prepared to accept that her suffering was substantial.

74. The Complainant's continued employment with the Respondent after the event, albeit on reduced shifts, and the Respondent not harassing her after the 1 August 1996 agreement demonstrate that her distress would have been minimised.

75. With regard to awards of damages under anti-discrimination laws, I stated in *Almassey AND Omari and ACT Multicultural Council Inc.* [2008] ACTDT 2, as follows:

> "39. In *Hall v A & A Sheiban Pty Ltd & ors*,[11] the full Federal Court discussed the principles applicable to awards of damages under anti-discrimination laws. French J stated that the measure of damages was to be found in the words of the statute and not through the principles applicable to damages in tort. His Honour continued:[12]
>
> It may be that while there are events for which the conduct complained of is a sine qua non, they would not be recognised in any practical sense as arising "by reason of" it. Exclusion principles analogous to concepts of remoteness, and failure to mitigate may then be seen to operate. In the end, however, these are to be subsumed in a practical judgment of cause and effect.
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> 40. Lockhart J took a similar approach to French J. His Honour stated that it would be "difficult" and "unwise" to prescribe an

> inflexible measure of damages in discrimination cases; "in particular, to do so exclusively be reference to common law tests in branches of the law that are not the same, though analogous in varying degrees, with anti-discrimination law".[13] Nevertheless, Lockhart J accepted that the measure of damages in tort was the closest analogy and one that "in most foreseeable cases" was a "sensible and sound" test:[14]
>
> Generally speaking, the correct way to approach the assessment of damages ... is to compare the position in which the complainant might have been expected to be if the discriminatory conduct had not occurred with the situation in which he or she was placed by reason of the conduct of the respondent."

76. In *Marshall, Margot and Discrimination Commissioner De Domenico (Party Joined)* [1998] ACTAAT 287, the Administrative Appeals Tribunal took the view that "[w]hile the award of damages in tort cases may provide a useful analogy, it must always be kept in mind that the entitlement to compensation in discrimination cases arises from the statute and the extent of damages must be governed by the language of the statute - Hall & Others V A & A Sheiban Pty Ltd & Others."

77. The views referred to in paragraphs 75 and 76 apply in relation to the complaint of sexual harassment under the Act. I am prepared to accept that the Complainant was subjected to embarrassment, pain and suffering, and am prepared to order damages for that of $1,000 as compensation for her loss and damage. That is in relation to hurt feelings and things of that nature arising from the "hand in the pants" incident of sexual harassment but is not in relation to economic loss. The Tribunal, as I have said, is not satisfied with the claim for loss of earnings. That claim is based on a loss from reduced shifts for an expected period of six months. The Complainant has not substantiated that the reduced shifts were because of her making the complaint about the sexual harassment. It is obvious that the business was on a downturn in any event.

78. Evidence presented by the Respondent testified to his good character. Witnesses for the Complainant seemed to have had strained relationship with the Respondent, but that did not avoid this Tribunal giving weight to their evidence about an incident of sexual harassment, which was to some extent supported by the agreement the parties entered into.

79. The Tribunal cannot find that sexual harassment, discrimination or victimisation was a reason for the Complainant ceasing to leave work. She may have felt that she wanted to leave work, but the causative element such as required is not there. Hence,

the Tribunal considers that the compensation it orders in paragraph 82 below for her for the distress she is taken to have suffered by the incident is adequate to reflect her damages.

80. In view of the above, the Tribunal orders that the parties bear their own costs.

81. In this case, there was some evidence generally supporting the Complainant's contention, but basically related to the "hand in the pants" incident. I have also found that the surrounding circumstances of the kissing or licking on the neck, as the Complainant described it, were background material not giving rise to sexual harassment of a separate nature, but rather taken into account in awarding the loss she suffered.

82. I order the Respondent pay $1,000 to the Complainant as compensation for the loss and damage the Complainant suffered by the Respondent's sexual harassment. That is restricted to pain and suffering and feelings. I specifically reject the Complainant's complaint that she was discriminated against and victimised by the Respondent. I find that the fact that the Respondent reduced her shifts of work allocated to her in view of her making a complaint against the Respondent, is not substantiated.

AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

APPEARANCE DETAILS

FILE NO: DT 7 OF 1998

COMPLAINANT: SUELLEN PATERSON
RESPONDENT: PETER CLARKE

APPEARANCE:

COMPLAINANT: Mr Warwick Baxter, Baxter's Lawyers

RESPONDENT: Mr J S Wilson, Barker Gosling

TRIBUNAL MEMBER: MR R J CAHILL, PRESIDENT

DATES OF HEARING: 9 February 1999, 20 April 2000 and 23 March 2001

DATE OF DECISION: 3 August 2009