ACT CIVIL & ADMINISTRATIVE TRIBUNAL

COMPLAINANT 201908 v COMMISSIONER FOR FAIR TRADING (Discrimination) [2021] ACAT 2

DT 8/2019

Catchwords: **DISCRIMINATION** – irrelevant criminal record – quantum of compensation to be determined – available remedies – reassessment of application for motor vehicle traders licence – where apology sought – damages under the *Human Rights Commission Act 2005* – compensation for non-economic loss – no exemplary damages awarded – compensation for 'loss of chance' – interest

Legislation cited: *Human Rights Commission Act 2005* s 53E
Traders Licensing Act 2016

Subordinate Legislation cited: ACT Civil and Administrative Tribunal Procedures Rules 2020 r 101, 102

Cases cited:
Abraham v Thomas [2020] ACAT 41
Attorney-General v *Commonwealth & Finite Group* 2018 Aus HRC 124
AW v Data#3 [2016] Aus HRC 105
BE v Suncorp Group Ltd [2018] Aus HRC 121
Clarke v Catholic Education Office [2003] FCA 1085
Clinch v Rep (No. 2) [2020] ACAT 68
Complainant 201922 v Barac [2020] ACAT 37
Complainant 201908 v Commissioner for Fair Trading [2020] ACAT 24
Gentleman v Linfox 2017 Aus HRC 113
Goldman Sachs JBWere Services Pty Ltd v Nikolich [2007] FCAFC 120
Green v State of Queensland, Brooker and Keating [2017] QCAT 8
Huntley v State of NSW Department of Police and Justice (Corrective Services NSW) [2015] FCCA 1827
Kidman v Casino Canberra Ltd ACN 051 204 114 [2020] ACAT 50
Kovac v the Australian Croatian Club Ltd (No 2) [2016] ACAT 4
KS and XT v Calvary Health Care ACT trading as Calvary Hospital and Dr Andrew Foote [2018] ACTSC 84

Malec v J. C. Hutton Pty Ltd [1990] HCA 20
Mayer v Australian Nuclear Science & Technology Organisation [2003] FMCA 209
Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559
Qantas Airways Limited v Gama [2008] FCAFC 69
Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82
Smith v Reflex Traffic Systems Pty Ltd 2018 Aus HRC 125
Swan v Monash Law Book Co-operative [2013] VSC 326
Wang v ACT [2016] ACAT 71
Wattle v Kirkland & Anor (No 2) [2002] FMCA 135
Willett v State of Victoria [2013] VSCA 76

Tribunal: Presidential Member H Robinson

Date of Orders: 13 January 2021
Date of Reasons for Decision: 13 January 2021

AUSTRALIAN CAPITAL TERRITORY
CIVIL & ADMINISTRATIVE TRIBUNAL **DT 8/2019**

BETWEEN:

COMPLAINANT 201908
Applicant

AND:

COMMISSIONER FOR FAIR TRADING
Respondent

TRIBUNAL: Presidential Member H Robinson

DATE: 13 January 2021

ORDER

The Tribunal orders that:

1. The respondent must not repeat the unlawful act of taking into account the applicant's irrelevant criminal record in any future licence application made by the applicant for a motor vehicle dealers licence under the *Traders Licensing Act 2016*.

2. The respondent to pay to the applicant:

   (a) General damages of $15,000; and

   (b) $29,600 for loss of opportunity.

   (c) $2166.31 interest.

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Presidential Member H Robinson

REASONS FOR DECISION

1. The background to this matter is set out in the decision in *Complainant 201908 v Commissioner for Fair Trading* [2020] ACAT 24 (**the liability decision**). Briefly stated, the Tribunal determined that the respondent discriminated against the applicant because of his criminal record (**the denial decision**). The parties agree that the applicant is entitled to compensation under section 53E of the *Human Rights Commission Act 2005* (**HRC Act**) for loss, damage or injury sustained because of the denial decision. The only issue before the Tribunal is the assessment of that compensation.

Orders sought

2. In his submissions dated 3 June 2020 the applicant set out the orders he seeks against the respondent as follows:

    1. *Re-assessment and re-issuing of any application for a motor-vehicle licence, irrespective of the refusal decision made on 13 December 2018.*
    2. *In the alternative to order 1, not repeat the unlawful act of taking into account the applicant's irrelevant criminal record in any future licence application made by the applicant.*
    3. *Provide a written apology for its error in taking into account the applicant's irrelevant criminal record.*
    4. *Pay reasonable compensation to the applicant, as assessed by the Tribunal at the damages hearing on 27 July 2020.*

3. In relation to the claim for damages, the applicant seeks:

    (a) General damages for exacerbation of a medical condition, pain and suffering, as well as humiliation and distress, caused by the respondent's discriminatory conduct.

    (b) Past economic loss and future economic loss.

    (c) Medical treatment expenses to date, unparticularised.

    (d) A buffer for future medical expenses, unparticularised.

    (e) Interest pursuant to the *Court Procedures Rules 2006* and the ACAT Procedural Rules.

4. In his oral submissions at hearing, the applicant sought general damages of $75,000, and damages for economic loss of $83,659.[1]

5. The applicant did not quantify his claims for medical treatment and medical expenses, and they do not appear to be pressed. No evidence in support of these claims was put before the Tribunal.

6. For its part, the respondent conceded that the applicant is entitled to damages for exacerbation of a pre-existing medical condition but made no submissions on an appropriate sum. The respondent denies that the applicant is entitled to any other kind of compensation, including any compensation for economic loss. In particular, the respondent contends that the applicant's proposed business was too speculative to attract damages for 'loss of a chance' to establish it.

Available remedies

7. As the Tribunal is satisfied that the respondent has engaged in unlawful discrimination, section 53E(2) of the HRC Act requires that the Tribunal make one or more orders:

> *(2) The ACAT must make 1 or more of the following orders:*
>
> *(a) that the person complained about not repeat or continue the unlawful act;*
>
> *(b) that the person complained about perform a stated reasonable act to redress any loss or damage suffered by a person because of the unlawful act;*
>
> *(c) unless the complaint has been dealt with as a representative complaint—that the person complained about pay to a person a stated amount by way of compensation for any loss or damage suffered by the person because of the unlawful act.*

8. Taking each of the applicant's claimed remedies in turn:

[1] Transcript of proceedings 28 July 2020 pages 125 - 131

Re-assessment or reissuing of the licence or an order not to repeat the unlawful conduct

9. Under section 53E(2)(a), it is open to the Tribunal to order that the respondent not repeat the unlawful act – that is, it is open to the Tribunal to order that the respondent not repeat the unlawful act of taking into account the applicant's irrelevant criminal record in any future licence application made by the applicant.

10. It is not within the power of the Tribunal, sitting in this jurisdiction, to stand in the shoes of the decision-maker and remake the denial decision. It is also not within the power of the Tribunal to order that a licence be issued. If the applicant reapplies, that assessment will need to be undertaken under the *Traders Licensing Act 2016* in a manner that is not in breach of the *Discrimination Act 1991*.

11. I will order that that the respondent not repeat the unlawful act.

The written apology

12. The applicant has suffered loss by way of hurt feelings and humiliation and seeks some form of redress. I am satisfied that an apology may be a reasonable act to address that loss and damage, as per section 53E(2)(b). The respondent has agreed to provide the applicant with a written apology.

Compensation for loss and damage

13. In broad terms, section 53E(2)(c) of the HRC Act provides that the Tribunal may order that a respondent pay damages for "any loss or damaged suffered by the person because of [the respondent's] unlawful act".

14. Section 53E(2)(c) of the HRC Act provides that in making an order for compensation under section 53E(3) the Tribunal must consider a range of matters:

    (a) the person's right to equality before the law and the impact of the discrimination on the enjoyment of that right; and

    (b) the inherent dignity of all people and the impact of the discrimination on the person's dignity; and

(c) the public interest in ensuring an appropriate balance between the right to equal and effective protection against discrimination and equality before the law without distinction or discrimination and other human rights; and

(d) the nature of the discrimination; and

(e) any mitigating factors.

15. In order for damages to be awarded to the applicant under this section, he must establish, on the balance of probabilities, that:

(a) He suffered loss or damage; and

(b) That the refusal decision materially contributed to that loss or damage;[2]

The factors in section 53E(3) of the HRC Act should then be considered in determining the quantum.

16. Compensation under the HRC Act is designed to place the applicant in the position he would have been in had there not been an unlawful act of discrimination against him.[3] While the principles of tort provide a guide, the damage is primarily statutory and determined by reference to the scope and purpose of the HRC Act.[4] The considerations in section 53E(3) of the HRC Act in particular distinguish compensation under the Discrimination Act from that available in tort.

17. Aggravated damages may be awarded where the defendant behaved "high handedly, maliciously, insultingly or oppressively in committing the act of discrimination."[5] The applicant's lawyer submitted that the respondent's conduct during the hearing exacerbated his injury and I have considered that claim below.

18. As noted above, one of the more complicated aspects of this case is that it includes a claim for economic loss arising from the applicant's loss of a chance to establish a successful second-hand car sales business. Assessing this compensation requires the Tribunal to determine, on the balance of

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[2] *Kovac v The Australian Croatian Club Ltd (No 2)* [2016] ACAT 4 at [45]-[55], [56]; *Maritime Union of Australia v Fair Work Ombudsman* [2015] FCAFC 120 at [28]

[3] *Kovac No 2* at [37]

[4] *Human Rights Commission Act 2004* section 53E(2)(c), 53E(3)

[5] *Hall v Sheiban* (1989) 20 FCR 217; *Kovac No 2* at [24]

probabilities, what would or might have occurred, but which can no longer occur because of the contravention,[6] and assign an amount of compensation that reflects that loss. This requires some degree of prognostication.

19. I will deal with the claim for compensation for non-economic loss, and particularly compensation for exacerbation of a medical condition, and then turn to the question of economic loss.

The applicant's claim for compensation for non-economic loss

20. The applicant seeks damages for aggravation of his medical condition, pain and suffering and humiliation and distress.

21. It is no easy task to put a value on mental injuries or emotional pain, particularly where the medical evidence is limited in scope. However, to deny the applicant damages simply because of the impossibility of demonstrating the correctness of any particular figure would be to visit injustice on him.[7] The Tribunal must do the best it can on the evidence before it.

22. Helpfully, the parties have agreed that the applicant suffered an aggravation of a pre-existing medical condition, and that the refusal decision made a 50% contribution to that. The characterisation of that injury and the compensation payable was left to the Tribunal.

23. To assist with this assessment, the Tribunal has before it two medical assessments.

24. The first is a report by Dr Saboisky, psychiatrist, dated 6 September 2019 (**Saboisky report**). Dr Saboisky opines that the applicant suffered, at the time of the report, from an adjustment disorder with mixed emotional features, depression, anxiety, and anger. Dr Saboisky considered that the refusal decision had a significant effect on the applicant, and that:

> *There has been a significant psychological impact on him since the refusal in December 2018. He is very focused on getting justice. He ruminates excessively about what has happened. He feels helpless, worthless and hopeless. His concentration and focus have diminished. He*

[6] *Kovac No 2* at [24]
[7] *Hall v Sheiban* (1989) 20 FCR 217 at 256 per Wilcox J

> *cannot sleep properly. He said he feels like a vegetable. He eats excessively and drinks alcohol excessively on weekends.*

25. Dr Saboisky considered the applicant's prognosis "positive if there can be a satisfactory settlement."

26. The second report is that of Dr Kasinathan, based on an assessment of 3 October 2019. He observed:

> [The applicant's] *affect (his external expression and mood) was generally flat and restricted with a few small appropriate smiles. He did not evince lability or irritability, though at one point was highly tearful and unable to speak for 2 minutes when describing his feelings about Fair Trading. His mood was reported as "depressed, anxious". Objectively he appeared depressed.*

27. Dr Kasinathan diagnosed the applicant as suffering from major depressive disorder (recurrent, major depressive episode), alcohol use disorder and benzodiazepine use disorder, caused by a range of matters.

28. While the diagnoses differ, I do not consider it necessary to determine whether the applicant suffered a major depressive episode or an exacerbation of his adjustment disorder. Which it is does not make any significant difference to the calculation of damages. Because the manner in which the medical condition affected the applicant's day to day life is more or less consistent between the reports and is the relevant consideration for the calculation of damage.

29. Both reports date from late 2019. There is no evidence before the Tribunal of ongoing treatment, and nor is there any evidence as to the applicant's medical condition as at the date of the hearing, or indeed at any time after he met with Dr Kasinanthan in October 2019. Dr Saboisky suggests any illness is likely to continue until the dispute is resolved, but on the applicant's evidence he did not have any counselling or seek any treatment. In the circumstances, I cannot conclude that he continues to suffer from a diagnosable condition. As such, in considering damages, I have taken into account that the medical evidence relates to a fixed period of between 13 December 2018, when notified of the decision, and 3 October 2019, after which there is no evidence of continued illness, although nor is there evidence of resolution.

30. The lack of medical evidence is not, however, fatal to any claim for compensation for pain, suffering, humiliation or stress, and the applicant gave direct evidence as to the continuation of some of those emotions throughout 2019 and 2020. This is evidence of the impact of the discrimination on the applicant's dignity, and is a relevant consideration under section 53E(3)(b) of the HRC Act even without a clear diagnosis.

31. The applicant's evidence as to how the denial decision affected him was as follows:

> *Since my licence application was denied I have been under severe stress, fear, and have been under constant depression and anxiety. I regularly experience panic attacks, paranoia and fear. I have also been forced by Access Canberra's conduct to relive my past and I am having the emotions of shame, hurt and regret. Since the refusal of my licence application, I have been unable to cope with my day to day life.*
>
> *I feel like I am no longer worthy of applying for a job or a licence that requires police checks because, regardless of the relevant laws that may apply, my criminal convictions will be used as means to blanket discriminate against and exclude me. I have not been able to re-apply for a job since I left the APS… I have no confidence and feel hopeless because I fear I will be treated unfavourably regardless of my inherent character and my extenuating circumstances.*

32. This evidence was not seriously challenged. I accept the submission of the respondent that some of the applicant's shame, hurt and regret was because of the fact of the criminal convictions, rather than the refusal decision per se, but no doubt the denial decision re-enlivened or heightened those feelings.

33. In terms of calculating the amount of compensation that should be awarded for this loss, the applicant relied upon the decisions of the Full Court of the Federal Court in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 (***Richardson***) and the decision of the Federal Circuit Court in *Huntley v State of NSW, Department of Police and Justice (Corrective Services)* [2015] FCCA 1827.

34. The respondent argued that these cases are distinguishable on their facts. In particular, the medical and other evidence does not suggest that the applicant suffered symptoms as severe as the plaintiffs in either of those cases.

35. *Richardson* concerned proven allegations of sexual harassment of the applicant by a co-worker. The applicant had been subjected to a "humiliating series of slurs, alternating with sexual advances, which built up into a more or less constant barrage of sexual harassment."[8] She was subsequently diagnosed as suffering from a chronic adjustment disorder with mixed features of anxiety and depression. While this was "not insignificant" it did not prevent her from working and earning a living. The Court at first instance awarded $18,000, which was consistent with awards in similar cases at that time. On appeal, the Full Court overturned the award of $18,000 and instead awarded $100,000 in general damages, and $30,000 for loss of opportunity of increased wages.

36. In overturning the first instance decision, Justice Kenny noted that the previous history for awards for such injuries was between $12,000 and $20,000 but went on to say that:

> *...in the context of damages for personal injury, there is reason to believe that community standards now accord a higher value to compensation for pain and suffering and loss of enjoyment of life than before.*[9]

37. The Court went on to consider a number of other cases, albeit mainly in Victoria. In *Willett v State of Victoria* [2013] VSCA 76 (***Willett***), the Victorian Supreme Court replaced a finding of damages in the amount of $108,000, with $250,000, in respect of damages for pain and suffering and loss of enjoyment of life caused by exposure to bullying and harassment in her workplace. Significantly:

> *Ms Willett's injuries were serious. At the time of the trial, she was undergoing treatment in a psychiatric hospital following an attempted suicide: Willett v Victoria at [13].*[10]

38. Ms Willet had a major depressive disorder and was permanently incapacitated and unable to work. Neither the facts of *Richardson*, nor those of the complainant in the present case, demonstrate an injury of that magnitude.

39. Their Honours also referred to another Victorian Supreme Court case, that of *Swan v Monash Law Book Co-operative* [2013] VSC 326. In that case the

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[8] At [7]
[9] At [96]
[10] At [100] per Kenny J

applicant, Ms Swan, suffered a mental 'breakdown' as a consequence of the harassment. The judge in that case, Dixon J, found (at [246]) that Ms Swan suffered an "adjustment disorder/depressive condition, continuing anxiety and depression", but also a range of other serious conditions and was "substantially compromised in most aspects of her life". Again, that case is more severe than the present one.

40. A further case considered was that of *Nikolich v Goldman Sachs JB Ware* [2007] FCA 784. Mr Nikolich suffered a diagnosed psychiatric injury as a consequence of workplace bullying and harassment and a failure by the workplace to comply with its own policies in relation to the management and investigation of grievances. This delay was at least partially responsible for Mr Nikolich's psychological injury and that this psychological injury was foreseeable. Mr Nikolich received $80,000 in general damages. Wilcox J observed at [341]:

> *Assessment of general damages is necessarily a matter of judgment. Mr Nikolich was extremely distressed and disturbed by the way in which he was treated by GSJBWS's employees. This caused him to suffer a mental illness from which he has yet to fully recover. His psychological condition appears to have been a major factor in the break-up of his marriage and separation from his children. It must have adversely affected his professional reputation. On the other hand, as I read the expert evidence, there is no reason to suppose that Mr Nikolich's psychological disability will be permanent. Although it may take him some time to do so, there is every prospect that he eventually will obtain employment and return to normal life.*

41. Having considered these, and other cases, and noted some of the damages awarded, Justice Kenny observed that damages for sexual harassment had:

> *...scarcely altered since 2000 and does not reflect the shift in the community's estimation of the value to be placed on these matters. The range has remained unchanged, notwithstanding that the community has generally gained a deeper appreciation of the experience of hurt and humiliation that victims of sexual harassment experience and the value of loss of enjoyment of life occasioned by mental illness or distress caused by such conduct.*[11]

42. Her Honour awarded considerable damages to Ms Richardson to reflect the changed community standards and acknowledgement of the emotional damage caused to the victims of sexual harassment.

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[11] *Richardson* at [117]

43. Significantly, however, in *Richardson* damages were awarded for both psychological and reputational damage, and there is no evidence of significant reputation damage in the present case. The Full Court also held that Ms Richardson was entitled to compensation for the detriment the harassment caused to the sexual relationship with her partner. *Richardson* marks the upper level of damages awarded, and the evidence in this case does not point to damage to the applicant of a level directly comparable to that suffered by Ms Richardson.

44. Nonetheless, the applicant contended that similar considerations to those set out by her Honour in *Richardson* should apply in this case. That is, there is now a deeper understanding of the consequences of discrimination by government agencies and the serious consequences denial of equal treatment can have for a mental health. While I agree, ultimately I am satisfied that such considerations are in any case reflected in the HRC Act itself, and particularly in section 53(3)(c), which requires that in considering compensation the tribunal must take into account the person's right to equality before the law and the impact of the discrimination on the enjoyment of that right. Moreover, the Tribunal has already recognised that the reasoning in *Richardson* applies beyond sexual harassment cases.[12]

45. Before turning to quantum, it is useful to consider another case relied upon by the applicant, the case of *Huntley v State of NSW Department of Police and Justice (Corrective Services NSW)* [2015] FCCA 1827 (***Huntley***). This matter concerned a claim for disability discrimination. The applicant suffered from a number of serious medical conditions that "restricted her ability to travel without immediate access to a bathroom".[13] This meant she was unable to attend to the full range of work she was required to do in her substantive position of Probation and Parole Officer.

46. The applicant initially negotiated an informal arrangement with modified duties for six months, but the agreement affected her colleagues' duties as well. At the end of the six month period, the respondent advised the applicant that the

[12] *Kovac No 2* at [43], [78]
[13] At [21]

informal arrangement could not continue due to the "constraints that it placed on the operations in the workplace".[14] This was done without consultation or a workplace assessment and without identifying for her the nature of the constraints. The applicant was referred to a medical examiner and determined to be unfit for duties. She obtained another position on a temporary placement, but was required to take further sick leave. Her circumstances were the subject of internal discussions within the agency, and those discussions were not disclosed to the applicant. The applicant commenced action due to the employer's refusal to make reasonable accommodation. She was awarded $75,000 compensation despite a pre-existing condition. In reaching that decision, Nicholls J acknowledged the fine balancing act involved, but concluded the difficulty of the task did not excuse a failure to provide reasonable adjustments.[15]

47. *Huntley*, again, represents one of the more significant compensation awards. However, Ms Huntley experienced multi-faced discrimination in the workplace for around four years. That discrimination exacerbated an existing condition and impaired her recovery and resulted in symptoms significantly more complex and serious than those experienced by the applicant in this case.

48. A third case of interest is that of *Green v State of Queensland, Brooker and Keating* [2017] QCAT 8. In that case, an initial award of $18,000 for non-financial loss was increased to $100,000, on the basis that previous awards for non-financial loss in sexual harassment cases – in the range between $12,000 to $20,000 – were no longer in line with current community standards. The case is a useful overview of compensation payments awarded in the wake of *Richardson.*

49. In *Green,* Member Gordon reviewed *Huntley*, as above, in addition to the following other like cases as follows:[16]

> *In Ingram v QBE Insurance (Australia) Ltd (Human Rights) [2015] VCAT 1936 it was found that the complainant had been discriminated against because of her disability in the provision of goods and services. The complainant had not suffered any recognised psychological injury arising*

[14] *Huntley* at [27]
[15] *Huntley* at [259] – [261]
[16] At [234] - [237]

from this but had caused her to feel upset, angry and frustrated and made her feel like a second rate citizen. She had felt stigmatised about her disability and had feelings of hopelessness, and caused her to contemplate a former period of illness. Evidence was given that the complainant had been in tears. One factor had been that the proceedings had taken three years to come to trial so that these feelings had persisted over that time. An award of $15,000 was made for non-financial loss. It is clear from the report that this level of award was influenced by Richardson.

In Power v Bouvy and Bouvy v Power [2015] TASADT 2, the complainant was subjected to a tirade of homophobic abuse and threats on the telephone. After the call the perpetrator rang back at least 18 times and on each occasion, left messages that were offensive and humiliating and used abominable and disgusting language. This was found to be direct discrimination on the basis of sexual orientation and also sexual harassment. The conduct caused the complainant to be anxious and fearful and under considerable strain. He suffered anxiety attacks and continual nightmares, and was in fear of leaving his property and going shopping alone. He had been prescribed anti-depressants. He was unhappy, depressed, anxious and lost weight. Explaining that Richardson had radically affected the quantum of compensation that is appropriate in anti-discrimination matters, the tribunal awarded the complainant $25,000 as compensation for non-financial loss.

In Collins v Smith (Human Rights) [2015] VCAT 1992 there were a series of incidents of sexual harassment at work by the complainant's direct supervisor over a period of three months which caused the complainant who was a particularly vulnerable employee, shock embarrassment and humiliation. She left her job which she loved because of it. She suffered severe psychological injury diagnosed as a chronic post-traumatic stress disorder, major depressive disorder and anxiety disorder. The complainant's personality profile had been significantly adversely impacted to the effect that her social relationships were inhibited and her marital relationship had come under severe stress. This had required continued treatment and counselling which would continue. The complainant was not fit for work despite trying to retrain. The injury was similar to that in Willett but less severe than in Swan. In giving her reasons Judge Jenkins, Vice President of VCAT described Richardson as a significant milestone in the articulation of the proper approach to the assessment of damages in sexual harassment cases. The award was $180,000 for non-financial loss plus $20,000 for aggravated damages.

In Kovac v The Australian Croatian Club Limited (No. 2) (Discrimination) [2016] ACAT 4, three years before the hearing on liability in 2014, the complainant had been denied membership of a club because of his political conviction. The complainant had become depressed and anxious, lost enjoyment from certain usual pleasures, had become withdrawn, found it difficult to concentrate, had fleeting suicidal thoughts, had become forgetful, was moody and irritable, had difficulty sleeping, and had put on weight. He had felt humiliated, distressed and ostracised and had difficulties arising from the events with his relationships in his community, friends and family. He was diagnosed as

> *suffering from a chronic adjustment disorder with anxiety and depressed mood. He was taking time off work sick. Influenced by Richardson and other recent awards, an award of $30,000 was made for non-financial loss.*

50. Member Gordon concluded that compensation awards had increased in the wake of *Richardson*, but not to the same degree as in that case.

51. Of relevance to this Tribunal, Member Gordon then considered the importance of consistency in Tribunal decisions:[17]

> ***The importance of consistency.*** *The Tribunal reminds itself that the objects of the QCAT Act include requirements to promote the quality and consistency of tribunal decisions and to enhance the quality and consistency of decisions made by decision makers. It is a function of the Tribunal to ensure that like cases are treated alike.* [emphasis in original]
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> *One reason for consistency is so that parties or their lawyers can calculate with reasonable accuracy the likely award should the claim succeed. This promotes settlement of the case. This means in turn that the Tribunal should be clear which path it will follow in the light of Richardson.*
>
> *Another reason for consistency is fairness. It may be unfair for the system to offer to a successful complainant and require an unsuccessful respondent to pay, an award which varies considerably between possible venues.*
>
> [footnotes omitted]

52. Similar principles apply here, although considerations of consistency must also consider community expectations as per *Richardson*, the development of case law in jurisdictions other than this Tribunal, and past decisions within the Tribunal.

53. This Tribunal has made surprisingly few awards of damages, and generally the awards have been toward the lower end of the spectrum.

54. The most significant awards were in *Kovac v the Australian Croatian Club Ltd (No 2)* [2016] ACAT 4 (***Kovac No 2***) and in *Wang v ACT* [2016] ACAT 71 ***(Wang No 1)***.

55. In *Kovac No 2* the applicant had suffered from a medical condition of chronic adjustment disorder with anxiety and depressed mood as a consequence of racial

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[17] *Green* at [241] – [243]

discrimination, in the form of his exclusion from a social club. The amount awarded for non-economic loss was $30,000. Significantly, in *Kovac No 2*, the Tribunal considered that (as in *Richardson)* the evidence established that the respondent engaged in conduct that was calculated and cruel and this contributed to the applicant's injury.

56. In *Wang No 1* the Tribunal awarded compensation of $40,000 for anxiety, embarrassment and humiliation (falling short of a mental injury). The case concerned an allegation of racial discrimination, where the applicant was denied entry into a course due having completed his medical qualification in a foreign country. Liability was overturned on appeal, but no comment was made by the Appeal Tribunal on the compensation awarded.

57. Other cases have resulted in more modest awards.

58. In *Abraham v Thomas* [2020] ACAT 41 the respondent was found to have directly discriminated against the applicant by requiring her to work hours beyond that contracted without compensation and participate in a cash back scheme because of her immigration status. The Tribunal awarded $13,320.68 in general damages for embarrassment, humiliation and stress.

59. In *Complainant 201922 v Barac* [2020] ACAT 37 the applicant, who was disabled with limited mobility, was subjected to intimidating and humiliating treatment, including being locked in a room. He received $1,000 for pain, suffering and humiliation. The compensation payment awarded was what the applicant sought, and was notably modest.

60. In *Kidman v Casino Canberra Ltd ACN 051 204 114* [2020] ACAT 50 the applicant was the subject of a workplace investigation that was attributable to his industrial activity and that might have had serious consequences and that caused him personal distress, stress and sleepless nights. There was no evidence of a mental illness. He was awarded general damages is the amount of $4,000.

61. *Clinch v Rep (No. 2)* [2020] ACAT 68 involved unlawful vilification of the applicant on the basis of her gender identity. The applicant was awarded $10,000 in general damages for physical and psychological injuries and

humiliation. The sum also reflected the ongoing nature of the harm by reason of having to progress the matter to hearing.

62. None of the aforementioned cases involve a case of discrimination based on criminal record or conviction. For this form of discrimination, some guidance may be found in a recent review of the recent federal decisions of the Australian Human Rights Commission (**AHRC**) containing recommendations for non-economic loss awards of damages for criminal conviction discrimination. A review of these cases suggests that the recommended damages awards have been modest, and seemingly lower than those recommended or awarded in other cases of discrimination. For example:

(a) In *Gentleman v Linfox* 2017 Aus HRC 113 the complainant suffered hurt feelings, humiliation and distress when he was not re-engaged under a labour hire arrangement. The recommended compensation for non-economic loss was $2,000.

(b) In *Smith v Reflex Traffic Systems Pty Ltd* 2018 Aus HRC 125 the complainant suffered hurt feelings, humiliation and distress when a job offer was rescinded on the basis of an irrelevant criminal record. The recommended compensation for non-economic loss was $2,500.

(c) In *Attorney-General* v *Commonwealth & Finite Group* 2018 Aus HRC 124, the Department of Foreign Affairs and Trade encouraged Finite to withdraw the complainant's services, amounting to an exclusion based on his criminal record. The complainant suffered hurt feelings, humiliation and distress. The recommended compensation for non-economic loss was $3,000.

(d) In *BE v Suncorp Group Ltd* [2018] Aus HRC 121 Suncorp rescinded an offer of employment to the complainant on the basis of his criminal record. The respondent suffered hurt feelings, humiliation and distress. The recommended compensation for non-economic loss was $2,500.

(e) In *AW v Data #3* [2016] Aus HRC 105 the complainant's employment was terminated on the basis his criminal record. He suffered hurt feelings,

humiliation and distress. The recommended award for non-economic loss was $5,000.

63. AHRC decisions suggest compensation of between $3,000 and $3,500 is appropriate for hurt and humiliation for discrimination on the basis of criminal record. It is notable, however, these recommendations related to hurt, humiliation and distress in the apparent absence of evidence of psychiatric or psychological injury. They appear broadly consistent with the Tribunal's approach to compensation where there is no evidence of medical diagnosis.

64. It should also be noted that while the AHRC can make recommendations about compensation, it cannot enforce those penalties, and the respondent may (and often does) decline to pay[18].

Assessment of compensation

65. The Tribunal has before it clear evidence of an exacerbation of a pre-existing psychological injury, albeit for a limited period, as well as evidence of ongoing hurt feelings, humiliation and distress, continuing from the time of being notified on the denial decision to the time of the compensation hearing, a period from around 8 December 2018 to September 2020.

66. The denial decision compromised the applicant's right to equality before the law, and undermined his dignity, relevant considerations under section 53E(3) of the HRC Act. It is appropriate that any compensation award consider the public interest in ensuring equal and effective protection before the law without unlawful discrimination, including equal treatment by government agencies. Hence, consistent with *Richardson*, however, any award should reflect the increasing awareness within the community of the effect of discrimination on mental health and wellbeing and the foreseeable injury that may result.

67. However, the matter is no case is not without its mitigating factors, which also need to be considered pursuant to section 53E(3)(e). The denial decision was a

[18] Under the Commonwealth scheme, discrimination on the basis of criminal record may exist under the Regulations, there is no means to pursue a remedy. Applicants may apply to the Commission for conciliation of their complaint. If conciliation is unsuccessful, the Commission may prepare a report with its findings and recommendations, for tabling in Parliament. The Commission's recommendations are not enforceable, and employers may decline to follow them.

consequence of a wrongful application of the law. While the decision perhaps suggested a degree of prejudice against the holders of criminal records generally, perhaps due in part to bureaucratic routine, there is no evidence that the applicant was individually targeted or subjected to a deliberate cruelty of the kind suffered by the applicant in *Richardson*, nor of the sustained discrimination or serious medical consequences in *Huntley*. Nor is there any evidence of long term psychological or psychiatric damage. The respondent is willing to apologise.

68. Having regard to the above, I award $15,000 compensation for exacerbation of the applicant's pre-existing illness for the period from the denial decision to November 2019, pain and suffering and for ongoing stress and humiliation.

Compensation – exemplary damages

69. Toward the end of his submissions, counsel for the applicant made the following submission:[19]

> *We really do think that if there is no warrant for passing any negative judgment on* [the applicant's] *business capacity, there's a - I have to report and I am instructed to say, a little bit of resentment that the criticism of his capacities as a businessperson is coming from the same body politic that has criticised his personal qualities on the basis of a couple of bad months and resulting criminal convictions.*
>
> *A generous approach ought now to be taken, in my respectful submission.*

70. While I do not consider this to be an application for exemplary damages (so much as a request to take a generous approach to general damages), as a matter of completeness, I will deal with that issue in case that is what was suggested.

71. There is no basis upon which the Tribunal could award exemplary damages in this case. The denial decision was not made out of spite, vengeance, or any personal animosity toward the applicant himself. The Commissioner acted only a mistaken belief as to the law. This distinguishes the matter from, for example, *Kovac No 2*, where the tribunal actually found that there was a level of cruelty in that conduct by the respondent, and a lot of the other cases actually indicate

[19] Transcript of proceedings 28 July 2020 page 130

not only a level of cruelty but a level of ongoing cruelty and a level of ongoing discrimination.

72. In relation to the hearing process, while I have no doubt the applicant felt some distress and offence at the respondent's questioning his business acumen, I am satisfied that the respondent's conduct of the proceedings was appropriate, and necessary to the defence of this proceeding. Nothing about the respondent's conduct at the hearing nor anything in written submissions would warrant an award of exemplary or punitive damages.

Compensation – economic loss

73. In support of his claim for past and future economic loss claim, the applicant relied upon a report of Andrew Sykes, Director, RSM Australia Pty Ltd, dated 2 June 2020 (**Sykes Report**) and a witness statement from an experienced motor vehicle dealer, Mr Petar Nachev.

74. In preparing his report Mr Sykes drew upon several sources, including a business case and cash flow projections prepared by the applicant in order to obtain finance. The business case formed the basis of the business model Mr Sykes considered and assessed.

75. Mr Sykes drew upon comparable ACT market data to formulate projections for what a viable small car dealership could expect to earn in future years. In broad terms, he assumed:

    (a) a starting stock of 10 vehicles;

    (b) four vehicles sold per month at $16,250 per vehicle;

    (c) a gross profit margin of $2,125;

    (d) a net profit in year one of approximately $80,000, a majority of which would be paid to the applicant as a dividend.

76. After considering a range of factors, Mr Sykes then calculated economic loss suffered by the applicant because of the discrimination found by ACAT, up to 31 May 2020 as $70,357.

77. Importantly, Mr Sykes' instructions were to assess what a "viable" car dealership could expect to earn, and his report assumes that the car dealership he is assessing is a viable business. There was some dispute between the parties as to what a 'viable' business meant in this context, and Mr Sykes' report does not clearly address this. Under cross-examination, Mr Sykes suggested it meant a business with all the approvals needed to commence operations, but that is not evident on the documentation.

78. Mr Sykes also did not address the applicant's particular characteristics or whether the applicant himself was likely to possess the qualities needed to be successful in the used car sales business. The applicant argued that it is not within Mr Sykes' expertise to comment on the competency of the applicant to work as a car dealer, and nor was it within the competency of the respondent's expert, Mr Green. The applicant submitted, instead, that it was for the Tribunal to make such findings, based on the medical evidence, though the starting point should be to accept Sykes' methodology and calculations, and apply reductions, if appropriate.

79. The applicant's other witness, Mr Nachev gave evidence about the second-hand car industry in the ACT. His view was that a car dealership can be a profitable business:[20]

> *...if the person setting up or managing the business is committed, motivated and customer service focused. The profits can range from $10,000 to $15,000 a month with a stock of an average 30 cars in stock. This would be considered a small dealership.*

80. Mr Nachev said that he was not aware of any incidence in the last ten years where a used car business had failed. Some car yards had closed down but others were opening. He had not heard of any car yards closing recently. However, he could not comment on the applicant's prospects specifically:[21]

> *So obviously, as I said, it's depending on the person with the patience, the way he wants to run, the way he wants to interact with other dealers and learn the industry. So I can't tell you if he's going to succeed or not, because obviously it's depending on the stock you've got. If you've got a very desirable car, anybody will buy it from anywhere in Australia. If*

[20] Witness statement of Petar Nachev dated 26 August 2019
[21] Transcript of proceedings 27 July 2020 page 16

> *you've got, like, a very bad car which is smashed, which is scratched up, it's not good, it's not popular in the market, nobody will touch it. So it's all depending on the scenario of how you're marketing your stock as well, and as I said earlier in our conversation, if you know which car is more desirable on the market, then you target these sort of cars, can guarantee you can succeed, but if you buy a car that nobody want, then you'd be hardly selling one car a month. I can't make judge, and say if he's going to succeed without knowing what sort of car he's going to buy. And obviously you mentioned he's going to buy lower priced cars. Actually they're the ones that are easy to sell and they're the one you make less ... So that's - the most important thing is, I guess, in my experience, if you buy the car right in the first place and you've got a nice presentable car,...*[22]

81. A key point in Mr Nachev's evidence, which is consistent also with Mr Green's, and with the applicant's own business case, is the importance of buying the right vehicles for resale. The applicant gave evidence on this point, and emphasised his interest in vehicles, his experience purchasing for his own purposes, his familiarity within online sales (eg. carsales.com.au) and identifying bargains on those websites, and contacts he has at Pickles Auction House, amongst other sources.

82. In response to the claim for non-economic loss, the respondents relied on the report of Mr Paul Green, Director, Forensic Accounting at Vincent dated 22 June 2020 (**Green Report**). The Green Report was prepared in response to the Sykes Report.

83. Mr Green's report dealt explicitly with the issue of whether the busines was likely to be viable and successful. He set out several of factors that he considered important for the success if a second-hand motor vehicle business, concluding that "skill and expertise or management" and the capital to fund inventory as the key determinate of the viability of a second-hand car dealership. He concluded that there was no evidence of either of these being met, and hence that he did not consider the business viable.

84. Mr Green also questioned the cash flow assumptions used by the applicant in his business case. Mr Green considered that the applicant's cashflow projections

[22] Transcript of proceedings 27 July 2020 page 16

showed the proposed business outperforming industry norms, which he submitted cast doubt on their reliability.

85. Mr Green's report was well referenced and set out the assumptions that underlay it. He answered questions frankly, as did Mr Sykes. I have no reason to doubt the credibility of either expert, or that of Mr Nachev.

The approach calculating economic loss

86. The decision of the High Court in *Malec v J. C. Hutton Pty Ltd* [1990] HCA 20 (***Malec***) is the leading authority of 'loss of chance' damages. In *Malec*, the High Court opined that the probability of a future event required an adjustment by the court in its award of damages to reflect that degree of probability.[23]

87. The key starting point for the consideration of Mr Sykes' report it that it was premised on the assumption that the business was viable. I take that to mean that Mr Skyes' report sets out what a fully operational business, established in accordance with the applicant's business plan, with all regulatory requirements in place, could expect to turnover if moderately successful. I am satisfied, on this basis, that such a business would turnover a modest profit of about $70,357 in its first two years of operation.

88. However, the applicant does not have a viable, operational business. There is no guarantee he could establish one, even assuming all his assumptions were correct. As the High Court made clear in *Malec:*

> *if the law is to take into account future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring*.[24]

89. It is these contingencies, the things that may compromise the viability of the business, that Mr Green's report addresses.

90. Accordingly, I do not find the evidence of the experts to be irreconcilable. Rather, Mr Sykes' report deals with the expected profit of a viable used car sales business. Mr Green's report addresses viability.

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[23] See also, *KS and XT v Calvary Health Care ACT trading as Calvary Hospital and Dr Andrew Foote* [2018] ACTSC 84

[24] *Malec v J. C. Hutton Pty Ltd* [1990] HCA 20 at [7] per (Deane, Gaudron and McHugh JJ)

91. I am satisfied based on the evidence of Mr Nachev and Mr Sykes that the applicant had a reasonable prospect of running a successful business, and that the denial decision denied him the opportunity to do this.

92. However, having accepted that, I must make an appropriate discount to reflect that the business, and the profit, is not guaranteed but rather aspirational. What I am really assessing is the value of the applicant's "loss of a chance"[25] to establish a viable business.

93. As was observed by the High Court in *Malec:*

> *If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring*[26]

This is not, and cannot be, a precise science, so much as consideration of what evidence is available to make an assessment.

94. The starting point is the business plan and the cashflow summary. These are hypothetical, and the respondent has submitted that I should give them little weight. While I agree with the respondent that they should not be elevated to a level of certainty, to give them no weight would be to deny the applicant the possibility of establishing that his business could have been successful, which would in turn make it impossible for the applicant to obtain damages for his lost opportunity. Mr Sykes has accepted the business plan and the cashflow summary as a basis for his report, and I accept that report.

95. Turning to other factors, when determining the issue of a loss of chance, as was noted in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 575, the applicant's past conduct is one of the key considerations:

> *Determining whether there is a real chance that something will occur requires an estimation of the likelihood that one or more events will give rise to the occurrence of that thing. In many, if not most cases, determining what is likely to occur in the future will require findings as to what has occurred in the past because what has occurred in the past is likely to be the most reliable guide as to what will happen in the future.*

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[25] Transcript of proceedings 28 July 2020 page 93
[26] *Malec* at [7]

96. Mr Green's report also indicates the importance of past experience in the operation of a comparable business as key criteria for success. The complainant has no experience in the car sales industry. He had, at best, bought cars and done them up for a hobby. There is also no evidence that he had ever successfully run a small business before. This lack of direct experience is a consideration that decreases his chances of establishing a viable business.

97. However, evidence suggests the applicant has some business and management experience, albeit mixed. He has managed two building projects, and although two of those went over budget (possibly for reasons beyond his control), and one went over time, the projects were completed. He has also maintained successful employment in other industries, while undertaking private projects. While this shows motivation, not experience, no doubt determination and initiative are valuable traits.

98. Mr Green opines that the cashflow summary part of the business plan represents an optimistic position. However, no alternative has been suggested.

99. Mr Nachev's evidence suggests that opportunities exist in the market and used car businesses are regularly successful.

100. However, while I accept Mr Sykes' report as broadly reflecting how the business will operate if established in accordance with the cashflow statement and business case, I am not convinced that all the assumptions in those documents are practical or sustainable. At the very least, they increase the risk associated with the enterprise.

101. For example, the business plan does not explicitly allow for rent. The applicant justified this by explaining that he had a good-will arrangement with an associate, whereby he may use a vacant lot owned by an associate in exchange for a notional payment. While this is a significant boon to the applicant, the arrangement carries a degree of risk as the terms are uncertain and it cannot be enforced at law. It is not, for example, clear how long this arrangement is expected to last, and while I do not doubt the applicant's faith in his friendship, there must be a risk that if a better deal comes along, the yard owner will take the paying option over the less profitable arrangements with the applicant. The

yard owner did not give evidence confirming the arrangement and there are no written terms.

102. The lot is currently without electricity. To his credit, the applicant had clearly thought about this and explained how he intended to manage during the startup phase without electricity:[27]

> *The detailing would have been done by me but I didn't need a vacuum cleaner as such, because I could just drive down to the carwash and pay $4 and use their vacuum cleaner there and then bring the car back. There is water on the site, so I would have been able to do the rest of the detailing myself as I've got experience. So the cars would primarily be detailed, cleaned, photos taken of. Then I would have done a condition report, which I've got a sample here if anyone wants to see.*

103. Still, the sustainability of that arrangement is not clear. The lack of electricity would, at the very least, restrict hours of operation to daylight hours, which further limits the time available to the applicant to operate his venture. This is a concern given, as discussed below, he intends to continue working full time hours in the public service.

104. Other problems were also identified by Mr Green and by the respondent's counsel. No are no contingency arrangements for warranty obligations that may need to be met. It is not clear if insurance is properly calculated. There is no objective evidence that the applicant had pre-approval for a business loan (although no reason to doubt it will be approved either) and it is not clear how the initial purchase of vehicles will be funded – although I do note that the applicant appears to have some start-up capital by reason of having obtained a voluntary redundancy of just under $50,000.

105. There is no convincing evidence before the tribunal of the basis for the assumption that the applicant will sell four cars a month. As noted above, all parties appear to agree that the key criteria will be the applicant's ability to identify and purchase the right vehicles, at a good price, and then value add in some way. In terms of sourcing the right vehicles, the applicant relies upon his knowledge of the cars, gained through his hobbies and interests, and upon his own skills and contacts, particularly his conducts with Pickles Auction House. I

[27] Transcript of proceedings 27 July 2020 page 36

have no reason to doubt that the applicant has a good knowledge of the car market, and accept that he is able to recognise bargains when available on the internet or from private sellers. However, none of this evidence addresses the time it will take him to do this, a significant consideration in light of his plan to continue alternative employment full time.

106. I am less convinced of the value of this contacts at Pickles. As I understand it, the applicant contends that staff at Pickles, who he knows, will give him preferential access to vehicles. I am unsure why staff would do this, and no Pickles staff member gave evidence confirming the claim. Again, it may well be that the applicant has close associates will give him some assistance, but even if this is the case, there is inherent risk in a business plan that requires good will relationships, particularly where there may be conflicting commercial interests. Perhaps this is not unusual in the industry, but in the absence of that evidence I cannot give much weight to this claim. Given the importance placed by all the witnesses on sourcing the correct vehicles, this lack of supporting evidence for this claim is a significant problem for the applicant's case.

107. I am also uncertain what, if any, benefit the applicant could derive from his assertion that he has contacts with the Road Transport Authority. It would be stretching credulity to suggest a public servant would give him favourable treatment, but perhaps he may be able to source advice or guidance on what issues typically arise and how to ensure a car passes all the relevant roadworthy tests.

108. I must also consider whether the applicant has had an opportunity to mitigate his loss and adjust any award accordingly. The applicant says that it was unnecessary to take his primary income into account, because he was always intending to operate the business in addition to continuing to work his usual occupation. He explained that the:

> *...original concept was that I was starting this on the side as a side business with my fulltime work still being done by me. It wasn't a plan that I'm going to quit the public service and run this fulltime. I think I made*

> *that clear in my business plan, and also in my personal statement provided to the Commissioner for Fair Trading.*[28]

109. He explained how he saw the project working as follows:

> *How I saw that working was that I had a yard which is [an associate's]s yard. I was going to collect cars. ... I was planning to keep 13, ... I would purchase the vehicles. It had a custom, sort of unique, tailored business approach to it where I would clean the cars, detail them. Everything was outsourced and I've made a note of that in my business plan as well.*
>
> *What I was planning on doing is, as I mentioned, on weekends I would clean, polish the cars, get them ready, have the roadworthy done, the condition report done, put them on Facebook, my Facebook Marketplace page, with condition report, and then it was viewing by appointment only. So that would filter down serious buyers, because they would see a condition report, they would see photos of the car, they would know that it's got a roadworthy and there would be a dealership licence attached with it. So when I say 'appointment only', you work 9.00 till 5.00.*[29]

110. And in terms of maintaining his full-time employment:

> *...being a public servant, I was flexible with my hours. I could have started at 7.30 and finished at 4.00. So - you're allowed to answer your phone while you're work and check emails. So if someone was serious on a car and I got an inquiry, I would make a time with them after-hours to go and see them on site and show them the range of cars that I had.*[30]

111. This plan is contingent upon the applicant being granted permission to operate a business while engaged in a full-time public-sector employment. There is perhaps some risk that permission to do so may not be granted. There is also a question as to how the applicant will manage not just the mechanics of preparing the purchased vehicles for sale and showing them to customers, but also managing book keeping and accountancy work, liaising with the RTA, and searching carsales and other websites for good deals, while working full time.

112. I must also consider, to some degree, applicant's mental health, including his reaction to previously stressful events such as managing his house. I do not place great weight on this factor, particularly as there is no medical evidence addressing this issue, but given the applicant's stated intention is to operate both this business and continue his full-time employment, the stress this may cause,

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[28] Transcript of proceedings 27 July 2020 page 35
[29] Transcript of proceedings 27 July 2020 page 37
[30] Transcript of proceedings 27 July 2020 page 38

and the effect on that on his mental health, is risk factor that I need to at least consider.

113. For the reasons set out above, I am satisfied that the applicant likely would have made a profit of $74,000, had the business been successful and viable. I am satisfied he had a reasonable chance of establishing a business, but the risks inherent in achieving this were significant and some of his assumptions appear optimistic as best and tenuously reliant upon the goodwill or friends and associates, none of whom attended to give evidence or confirm their beneficence. The Tribunal applies a 60% reduction to the estimated profit to allow for the vicissitudes of life – resulting in an anticipated profit of $29,600.

114. I accept the evidence of the applicant that he intended to pay the profit from the business to himself as a dividend. This would have left minimal monies to expand.

115. No party may submissions about the effect of company or income tax on the income that the applicant would have earned but for the respondent's wrongful act. I have made no adjustments for it. The applicant will need to seek his own advice on the taxation of the economic loss component of this decision.

116. I decline to make any orders for past expenses as they were not particularised, not for future medical treatment as there is no evidence before me that the applicant will require any.

Interest

117. The applicant made a claim for interest under the Court Procedures Rules.

118. In *Kovac No 2*, Presidential Member Spender observed:

> *The Court Procedures Rules do not bind the tribunal although section 24 of the ACAT Act requires the tribunal, when making rules in relation to the practice and procedure of the tribunal, to consider rules dealing with similar matters under the Court Procedures Rules. The Tribunal is not aware of a precedent in the ACT where interest has been claimed in a discrimination matter. However interest has been awarded in some Federal Court discrimination matters. Interest has also been awarded in the Queensland Civil and Administrative Tribunal (QCAT) although there is an express provision in the Queensland Anti-Discrimination Act 1991empowering QCAT to award interest on an amount of compensation.*

> *In McCauley v Club Resort Holdings Pty Ltd (No 2) Member Gordon differentiated between an award of interest for non-financial loss (which he considered was not available because it would 'over compensate" the applicant) and an award of interest for financial loss where interest is available. Member Gordon relied upon the reasoning of the High Court in MBP (SA) Pty Ltd v. Gogic that the reason for an award of interest is to compensate a plaintiff for the loss or detriment which he or she has suffered by being kept out of his or her money during the relevant period.*
>
> *There is no express power given to ACAT to award interest under the Discrimination Act or the HRC Act, but the tribunal does have power to determine its own procedure under section 23 of the ACAT Act if there is no procedure prescribed under the Act or an authorising law. Section 19 of the ACAT Act recognises that a claim for interest may be made in a civil dispute application. Under the tribunal's procedural directions there is a power to award interest where the sum claimed is liquidated amount. In this case part of the sums awarded – the special damages of $30,468.70 – is liquidated because the amount can be ascertained by a simple calculation or other positive data. The Tribunal orders that interest is payable on this sum from the date that the special damages were incurred i.e. 3 November 2014.*[31]

119. A review of a selection of Federal Circuit Court and Federal Court decisions shows a variable approach where interest is awarded. For example, in *Wattle v Kirkland & Anor (No 2)* [2002] FMCA 135, Driver FM noted the lack of any specified right or rate in the Federal jurisdiction, and applied a pre-judgment interest rate calculated by reference to a small reduction in the post-judgment rate. He applied the same approach in *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209, but increased the interest rate to applicable in that case to reflect the rising interest rates at the time. The Court Procedure Rules are an appropriate equivalent in this jurisdiction.

120. A broader approach was taken by Madgwick J in *Clarke v Catholic Education Office* [2004] FCA 1085 at 360-61. His Honour awarded $20,000 for hurt and humiliation plus a $6,000 "allowance for interest on three quarters of that sum". His Honour does not set out the basis upon which this was calculated.

121. In *Qantas Airways Limited v Gama* [2008] FCAFC 69 the Full Court of the Federal Court confirmed, on appeal, that under the Federal Act the amount of interest awarded was discretionary.

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[31] At [85] – [86]

122. The Procedural Directions referenced in *Kovac No 2* have been replaced with the *ACT Civil and Administrative Tribunal Procedures Rules 2020*, but the relevant rules (101 and 102) relate only civil disputes, and this is not one of those. To the extent that the Tribunal can award interest, that power must lie in section 23 of the ACAT Act and the guiding principles in section 53E(3) of the HRC Act.

123. The medical evidence of Dr Saboisky indicates that the injury suffered by the applicant made him "…very focused on getting justice" and he "ruminates excessively about what has happened."[32] In calculating the non-economic loss, I have taken account of the effect of the delayed justice on the applicant's wellbeing and that is reflected in the compensation awarded.

124. Consistent with *Kovac No 2*, and having regard to how other jurisdictions have awarded interest in situations involving lost income, I am satisfied that is appropriate to award some interest on the potential lost income of $29,600. Interest under the Court Procedures Rules, assuming income as per Mr Sykes's report, adjusted as per this decision would be $2166.31.

Orders

1. The respondent must not repeat the unlawful act of taking into account the applicant's irrelevant criminal record in any future licence application made by the applicant for a motor vehicle dealers licence under the *Traders Licensing Act 2016.*

2. The respondent is to pay the applicant

   (a) General damages of $15,000;

   (b) $29,600 for economic loss arising from loss of opportunity; and

   (c) $2162.99 interest.

……..
Presidential Member H Robinson

[32] Psychiatrist report by Dr Saboisky dated 6 September 2019 page 3

Date(s) of hearing	28 October 2019 29 October 2019 27 July 2020 28 July 2020
Solicitors for the Applicant:	Ms Meller, Bradley Allen Love Lawyers
Solicitors for the Respondent:	Ms Belcher, ACT Government Solicitor