AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

CITATION: **MAREE TYRELL** and **UNITED GROUP PTY LIMITED** (First Respondent) and **KELVIN AUMONT** (Second Respondent) **[2007] ACTDT 9 (6 December 2007)**

DT 07/14 & 15

Catchwords: **Workplace – common employer – sexual harassment**

Discrimination Act 1991 sections 59 and 74

Tribunal: Mr G C Lalor, Deputy President

Date: 6 December 2007

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL) NO: DT 14 & 15 of 2007

RE: **MAREE TYRELL**
Complainant

AND: **UNITED GROUP PTY LIMITED**
First Respondent

AND: **KELVIN AUMONT**
Second Respondent

REASONS

6 December 2007 Mr G C Lalor, Deputy President

1. In a complaint form lodged through her solicitors with the Human Rights and Discrimination Commissioner on 30 November 2006 the applicant alleged that she was treated unfavourably because of her sex in employment resulting from an incident on 11 February 2006.

2. For the purposes of this application it is not necessary to set out details of the alleged conduct. It is sufficient to say that the conduct is alleged to have occurred on a bus as it was travelling from Bungendore to the Australian Capital Territory following attendance at a race meeting by members of a social club and invited attendees.

3. The evidence that is not in contest is that the complainant and the respondent to proceedings DT07/15 were in attendance. The complaint is essentially that Mr Aumont by making certain comments has subjected her to sexual harassment and thereby caused her injury requiring, among other things, psychological counselling.

4. The complainant has brought her complaint against United Group Pty Ltd in a separate complaint to that brought against Mr Aumont.

5. It is common ground that the complainant was at the time employed by United Group Process Solutions Pty Ltd and Mr Aumont was at the time employed by United Group Services Pty Ltd. Both employers were subsidiary companies of United Group Limited and both operate out of the same premises in Northbourne Avenue, Canberra City. It would seem, although there is no direct evidence before me of it, that the social club comprised members from all the corporate entities of United Group Limited.

6. At the request of the complainant on 9 July 2007 the Commissioner referred both complaints to the Tribunal on 20 August 2007. In each of the matters, the respondent has brought an application under Section 79 of the Discrimination Act 1991 ("the Act"). These applications seek to have the complaints struck out on the basis that each lacks substance.

7. The grounds, put succinctly, are:
    1. Mr Aumont is not employed by the United Group Pty Ltd or the employer of the complainant and as such is not a person to whom Section 59 of the Act applies.
    2. The conduct complained of did not take place in a place that is a workplace or potential workplace as required by Section 59 of the Act.

8. On the hearing of this application I indicated that I intended dealing with the first ground of the application without going to the second ground. I did so as it seemed to me that there was a significant legal question to be resolved before entering into consideration of whether the conduct took place in a place that was a workplace. That question essentially was whether Section 59 of the Act encompasses conduct of, for example, one employee against an employee of a separate employer provided it took place in a disparate, distinct area that might be called a workplace.

9. Section 59 of the Act provides

> **"*Employment etc***
>
> *(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 people.*
>
> *(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.*"

10. I note, as I have said, that the original complaint in this matter alleged that the complainant's employer was United Group Ltd. A response to that complaint was filed by solicitors acting on behalf of United Group Process Solutions Pty Ltd. The Commissioner wrote to the solicitors for the complainant indicating that it was alleged that that company, and not United Group Ltd, was the employer of the complainant. The documents forwarded from the Commissioner have been entitled United Group Pty Ltd. The complainant has filed an affidavit with the Tribunal on 8 November 2007 in which the first respondent is now United Group Process Solutions Pty Ltd, the second respondent is United Group Limited. The pleadings in this matter have to be regularized.

11. Section 59 of the Act is contained in Part 5 of the Act with the heading for that Part being "*Sexual Harassment*". The heading for section 59 is *"Employment etc"*. Subsections (1) to (5) of the Act prohibit sexual harassment between groups of people specifically set out – e.g. employer and employee or a person seeking employment, or employee and employee etc. Those subsections do not on their face prohibit such conduct as between persons from one subsection towards persons from another subsection.

12. A reading of subsections (6) and (7) of the Act would seem to indicate initially that they have been included in the Act to allow for such cases. The essence of Part 5, as taken from the part and section headings, is to prevent sexual harassment in employment. Subsections (6) and (7) allow for a wider category of persons than the restricted categories in the first five subsections. It could be said, as the applicant says, that the subsections are still governed by the concept of an employer/employee type relationship. The category of person prohibited from engaging in such conduct is extended, so it could be said, by including partners, commission agents etc who are not governed by a contract of employment such as to bring them within the definition of employee. Thus, for example, conduct amounting to sexual harassment is prohibited under subsection (6), such conduct being by an employee against a partner of an employing partnership. Both parties are *"workplace participants*" in a *"workplace"* where they have a common *"employer*" being the partnership.

13. The applicant's submission is that, absent some commonality of employment, there can be no conduct prohibited between parties. In the present case it is submitted that given the parties are employed by separate subsidiaries of the same primary company, the section has no application as there is no commonality of employment.

14. The respondent to this application, the original complainant, submitted, effectively, that so long as there was a common *"workplace"* it did not matter whether the *"workplace participants"* had a common employer or not.

15. In submission before the Tribunal I asked whether either counsel had any authority relevant to the interpretation of the section and was advised that there was none. I asked whether either counsel had a copy of the reading speeches for the section to see if it could throw any light on the proper interpretation of the section. They had not. At the conclusion of the hearing on this preliminary point I invited both counsel to provide further submissions in writing by 4 pm 30 November 2007. Counsel for the respondent to this application has availed himself of this opportunity and has referred me to the reading speeches for the amendments to section 59 of 31 May and 21 June 1995. Counsel for the respondents has filed further submissions and has referred me to Hansard for 21 June 1995. I have considered the further submissions of both parties in reaching my decision.

16. Subsections (6) and (7) of section 59 were inserted by Act No 9 of 1995. A complaint alleging sexual harassment was lodged by a staff member of a member of the Legislative Assembly alleging that the member had sexually harassed her. The Act at the time did not include the subsections. The Commissioner, under the applicable procedure at the time, exercised her powers under the Discrimination Act and conducted a public hearing over seventeen days. On 29 December 1995 she published her reasons and found that the complaint had not been substantiated, as the complainant was not an employee of the member of the Assembly but an employee of the ACT Government.

17. The complainant appealed to the Administrative Appeals Tribunal and in its reasons delivered on 18 June 1996 the Tribunal said:

> *"The provisions of the Act relating to sexual harassment have been amended by the Discrimination (Amendment) Act 1995, since the events of which Mrs Marshall complained took place, and the amendments to the Act are not retrospective. We must therefore have regard to the Act as it stood at the relevant time. Under the Act, as it then stood, the conduct of which Mrs Marshall complained could amount to sexual harassment only if it occurred between employer and employee ...*
>
> *It is unlikely that the problems thrown up by this case will recur; the 1995 amendments have not only removed any doubt about the relationship between the Assembly member and staff member for the purposes of the Discrimination Act, but introduced a new concept of harassment between workplace participants, which removes some of the other problems arising under the pre-1995 amendment provisions."* (Margot Marshall and Discrimination Commissioner et ors No C96/5 of 18 June 1996)

18. This matter then went on appeal to the Supreme Court of the Australian Capital Territory. In his reasons for decision of 17 July 1997 (SC 45 of 1996) the then Chief Justice, Miles CJ, noted that amendments to the Act in 1995 "*may have removed doubt about the relationship between an Assembly member and a staff member for the purposes of the Discrimination Act and have introduced a new concept of*

harassment between workplace participants". His Honour noted that " … *whilst the Act may be seen as comprehensive, it does not purport to be concerned with all forms of discrimination within the community."*

19. In his address to the Assembly of 21 June 1995 concerning the introduction of the amendment to Section 59 of the Act the then Attorney General said:

> *"The Government also supports the amendment, Mr Speaker. As indicated it widens the scope of the legislation ... Certainly, under the framework of the present legislation, particularly Section 59, the workplace may not extend to the point of an example that was put to me of two paralegals in a legal firm who meet at the Land Titles Office to exchange contracts, to do work on behalf of their employers. Under this definition, that would be a workplace which probably is not covered under the present legislation. Therefore, this amendment would extend the scope of the legislation and protect more people in those circumstances. That is obviously appropriate ..."*

20. I am thus of the view that although the complainant and the respondent, Mr Aumont, were employed by different legal entities, conduct between them is governed by the application of section 59 of the Discrimination Act. It is entirely a separate question whether conduct occurring on a bus hired by a small group of a social club members occurred in the "*workplace"* and whether the named corporate respondents have any responsibility for the conduct of Mr Aumont under the provisions of the Act. These questions are reserved for further submissions.

I certify that this and the 4 preceding pages are a true copy of the decision and reasons for decision herein of Mr G C Lalor, Deputy President.

S M Welsh
Associate
Date: 6 December 2007

AUSTRALIAN CAPITAL TERRITORY
DISCRIMINATION TRIBUNAL

APPEARANCE DETAILS

FILE NO: DT 14 & 15 of 2007

COMPLAINANT:	**MAREE TYRELL**
FIRST RESPONDENT:	**UNITED GROUP PTY LIMITED**
SECOND RESPONDENT:	**KELVIN AUMONT**
COUNSEL APPEARING:	**COMPLAINANT: THOMAS**
	RESPONDENT:
SOLICITORS:	**COMPLAINANT:**
	FIRST RESPONDENT: GEE
	SECOND RESPONDENT: GEE
OTHER:	**COMPLAINANT:**
	RESPONDENT:
TRIBUNAL MEMBER:	**MR G C LALOR, DEPUTY PRESIDENT**
DATE OF HEARING:	**23 November 2007 PLACE: CANBERRA**
DATE OF DECISION:	**6 December 2007 PLACE: CANBERRA**

COMMENT: