

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

HUMAN RIGHTS LIST

VCAT REFERENCE NO. H11/2013

CATCHWORDS

Equal Opportunity Act 2010 (the EOA), ss 15, 92, 93, 103, 104; Harassment by employer of employee and alleged victimisation; Unwelcome sexual advances including touching, assaults, comments, SMS text messages and notes; Comparative credibility of the Applicant and Respondent; Applicant unable to continue in her employment; Duty to eliminate sexual harassment and victimisation; Whether evidence of other complainants is admissible to show a tendency; Applicant's substantive claim of sexual harassment found proven; Question of loss, damage and appropriate compensation adjourned for further hearing.

APPLICANT	Amanda Jayne Collins
RESPONDENT	David Donald Smith
WHERE HELD	Melbourne
BEFORE	Judge Jenkins, Vice President
HEARING TYPE	Hearing
DATE OF HEARING	15-18 December 2014
DATE OF APPLICANT'S CLOSING SUBMISSIONS	12 January, 27 January 2015 and 27 March 2015
DATE OF RESPONDENT'S CLOSING SUBMISSIONS	20 January 2015 and 11 February 2015
DATE OF ORDER	10 July 2015
CITATION	

ORDERS

- 1 The Tribunal finds:
 - (a) Complaints in relation to sexual harassment by the Respondent, as employer of the Applicant, in contravention of ss 92 and 93 of the *Equal Opportunity Act 2010* (the EOA), as described in a series of incidents between 5 January 2013 and 4 April 2013, inclusive and identified in the Reasons at paragraphs 380 and 381, are proven.
 - (b) The complaint of victimisation, in reliance on ss 103 and 104 of the EOA is not proven, and is therefore dismissed.
 - (c) The complaint, as it relates to the Respondent failing to eliminate discrimination, sexual harassment or victimisation in compliance with s 15 of the EOA is misconceived, and is therefore dismissed.

- 2 The proceeding is to be listed for a further hearing on a date and time to be fixed, for the purpose of hearing submissions on the question of compensation payable to the Applicant for loss, damage or injury suffered in consequence of the proven contraventions.
- 3 Costs reserved.



Judge Jenkins
Vice President

APPEARANCES:

For Applicant

Ms T McCarthy of Counsel

For Respondent

Ms S M Keating of Counsel

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REASONS

NATURE OF APPLICATION

- 1 The Applicant alleges she was sexually harassed and victimised by the Respondent in contravention of the provisions of the *Equal Opportunity Act 2010* (the EOA).
- 2 Sexual harassment is defined in s 92 of the EOA to include unwelcome sexual advances and conduct. Section 93(1)(b) of the EOA makes it unlawful for an employer to sexually harass an employee.
- 3 The harassment and victimisation is alleged to have occurred during a period of approximately four months from 5 January to 4 April 2013, while the Applicant worked for the Respondent at a local post office.
- 4 The Applicant details a series of alleged incidents involving persistent and unwelcome conduct of a sexual nature comprising, physical contact; verbal comment including propositioning for sex and threatening comments; and written communications including a card, note and text messages.
- 5 The Applicant seeks general and specific damages by way of compensation for breaches of the EOA plus legal costs. The Tribunal has adjourned the question of compensation and costs for a further hearing at a date to be agreed after the release of this decision.
- 6 The Respondent denies that any sexual harassment or victimisation took place. He says that the alleged conduct either did not occur or, where it is admitted, he says that his conduct was not unwelcome.

OVERVIEW

- 7 The events described by both parties are predominately the subject of witness statements and oral evidence by each party. There are no other witnesses to the events described and the only objective evidence comprise limited text messages, a card and mobile phone records. Accordingly, an assessment of the credibility of each party's account is crucial to the findings to be made.
- 8 The assessment of the credibility of witnesses is always a fraught exercise. Accordingly, it should never be undertaken in isolation. In the present case, my assessment is informed by a number of factors, which will be outlined in the context of various alleged incidents and encounters detailed below. Having observed the parties under cross-examination and re-examined their evidence in detail, I make the following observations, more details of which are addressed below:
 - (a) The Applicant was generally consistent in her evidence which was also corroborated to the extent of available text messages and telephone records; I am satisfied that she gave a credible account of events, which were also plausible, having regard to the context and

surrounding circumstances; I am also satisfied that her answers under cross-examination were responsive and consistent; and taking her evidence as a whole, I do not consider that there was any reasonable basis to impugn her credibility or reliability in relation to any issue in dispute;

- (b) My overall assessment of the Respondent is that he was an evasive and unreliable witness. In reaching this conclusion, I have had particular regard to:
- i. A pattern of apparent selective recollections, in his oral evidence and witness statements;
 - ii. His implausible explanations for the Applicant's behaviour or apparent change of behaviour;
 - iii. His failure to provide either any comment or plausible explanation for a number of text messages and the St Valentine's Day Card;
 - iv. His failure to recall aspects of significant events; and
 - v. Inconsistencies between his written statements and oral evidence.

- 9 I propose to summarise the evidence, in some detail, which encompasses the following:
- (a) There are particular encounters which are the subject of specific allegations of misconduct, amounting to sexual harassment and/or victimisation;
 - (b) There are numerous encounters and communications detailed by the Applicant, which although apparently innocent or innocuous in isolation, give relevant context or explanation to other conduct;
 - (c) There is a further category of evidence which purports to give some explanation of a party's state of mind, at a particular time. No reliance is placed upon such evidence, to the extent that it purports to rely upon that party's assumption of the other party's intentions;
 - (d) There is a category of evidence which is not relevant to any issue in this proceeding but which is included only to provide a more comprehensible continuity to the interactions between the parties;
 - (e) I address tendency evidence, sought to be relied upon by the Applicant; and evidence purporting to impugn the credit of the Applicant, sought to be relied upon by the Respondent; and
 - (f) Finally, I deal with expert opinion evidence which relates to the Applicant's psychological state and treatment subsequent to the cessation of her employment.
- 10 In written submissions, Respondent's Counsel criticised the apparent reliance by the Applicant upon an alleged 'course of conduct' by the

Respondent. In my view, these submissions are misconceived and do not reflect the manner in which the Applicant clearly put her case. I have considered each alleged incident of sexual harassment and determined whether such conduct or communication constituted sexual harassment within the terms of the EOA. An assessment of the differing accounts given by the parties and the credibility and reliability of such accounts, is necessarily informed by the surrounding circumstances and subsequent conduct and communications.

BACKGROUND

- 11 The Applicant is Amanda Collins (the 'Applicant') and her employer at the relevant time was David Smith (the 'Respondent'). The Respondent is the owner and manager of the Geelong West Licensed Post Office (the 'Post Office'), in partnership with his wife Angela Smith (Mrs Smith).
- 12 As at April 2011, the Post Office had two permanent employees, one of whom was the Respondent's son, Timothy Smith (Tim). In April 2011, Tim moved overseas. A replacement position for Tim was advertised on a casual 12 month basis, there being an initial expectation that Tim would return to his position in one year. The Applicant was interviewed and was successful in securing the job.
- 13 The Applicant commenced her employment at the Post Office on or about 30 May 2011. Although employed on a casual basis, the Applicant's hours were equivalent to full time, being approximately 9:00 am to 5:15 pm on weekdays and 8:45 am to 12:15 pm every second Saturday. The initial 12 month appointment was extended verbally on a couple of occasions. From January 2013, the Applicant began working Saturday shifts from 9:00 am-12:00 pm.
- 14 From the commencement of employment until 5 January 2013 (being the date of the first incident) the Applicant says she enjoyed her job. She got along well with the Respondent. She respected him and considered him to be kind. She described him as a good friend with whom she found it easy to converse. She asked him for advice on things and felt she could trust him. She considered the Respondent to be '*like a father figure*'.¹ There is no allegation of sexual harassment or victimisation in the period 30 May 2011 to 4 January 2013.
- 15 When Tim did not return from London as expected, it was commonly understood by staff at the Post Office that the Applicant's temporary position would continue indefinitely.
- 16 In September 2012, the Respondent and his wife took leave and visited their son in London. They were informed unexpectedly that Tim would be returning to Australia and that he sought to return to his former position at the Post Office.

¹ Amended Witness Statement of Applicant dated 24 January 2014, para 9.

- 17 When the Respondent returned to work at the Post Office in October 2012, he informed staff, including the Applicant that his son would be returning, whereupon the Applicant's employment would cease.²
- 18 On or around October 2012, the Respondent says he detected a change in the Applicant's behaviour towards him, detailed further below.³ The Respondent states that the Applicant's conduct led him to believe that she was interested in something more than a professional relationship.
- 19 On 5 January 2013, the Respondent admits that he attempted to kiss the Applicant in a back room of the Post Office to '*test the waters*'. This is the 'first incident' considered in further detail below. While both parties agree upon certain aspects of this incident, their accounts also differ in some significant respects.
- 20 The events which took place over the following months are also in dispute. Approximately 47 encounters have been detailed by the Applicant, many of which merely provide context or continuity. Commencing with the incident on 5 January 2013, a number of specific incidents and communications form the substance of the allegations of sexual harassment. Each are considered in further detail below.
- 21 The circumstances in which the Applicant's employment at the Post Office came to an end are also in dispute. In broad terms, the Applicant claims that her Saturday shifts were removed and her employment was effectively terminated because she consistently rejected the Respondent's various sexual advances.⁴ The Respondent then refused to provide her with a reference.
- 22 The Applicant acknowledges that it was in fact her decision not to return to work but says it was because she became too distressed by the Respondent's conduct.⁵ The loss of employment and the refusal to provide a reference form the bases of the victimisation allegation.
- 23 The Respondent denies that the Applicant's employment was terminated due to a rejection of his advances or for any other untoward reason. The Respondent says that the Applicant resigned of her own accord.
- 24 The Respondent denies that any of his conduct amounted to harassment or victimisation. He says that the Applicant enjoyed his attention and close friendship and through words and subtle actions, encouraged his behaviour. The Applicant's allegations of touching and implied threats of rape are outright denied.

² Respondent's Witness Statement dated 25 February 2014, para 22.

³ Respondent's Witness Statement para 23.

⁴ Applicant's Application.

⁵ Applicant's Amended Witness Statement para 115.

ISSUES FOR DETERMINATION

- 25 The Tribunal must determine whether, on the evidence and within the terms of the EOA, the Respondent has:
- (a) Sexually harassed the Applicant on any and what occasions;
 - (b) Victimised the Applicant on any and what occasions; and/or
 - (c) Breached his duty under s 15 of the EOA to eliminate discrimination, sexual harassment or victimisation in the workplace.

RELEVANT LEGISLATION & STANDARD OR PROOF

- 26 Section 93(1)(b) of the EOA makes it unlawful for an employer to sexually harass an employee of that person. It is common ground that the Respondent was the Applicant's employer at all relevant times.

(1) An employer must not sexually harass —

...

(b) an employee of that employer.

- 27 Sexual harassment is defined in Section 92 of the Act. The section relevantly provides as follows:

(1) For the purpose of this Act, a person sexually harasses another person if he or she:

(a) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person; or

(b) engages in any other unwelcome conduct of a sexual nature in relation to the other person;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

(2) In subsection (1), conduct of a sexual nature includes

(a) subjecting a person to any act of physical intimacy;

(b) making, orally or in writing, any statement with sexual connotations to a person or about a person in his or her presence;

(c) making any gesture, action or comment of a sexual nature in a person's presence.

- 28 Relevant case law and principles are non-contentious. I draw upon Counsels' helpful written submissions, in setting out relevant parts below.

- 29 The Applicant also relies upon s 94 of the EOA which makes sexual harassment unlawful in a common workplace. However, s 93 applies more

specifically to the circumstances of this case, being an employer-employee situation. Accordingly, it is not necessary to consider the application of s 94.

Unwelcome conduct to be determined on a subjective basis

- 30 It is well settled that the question of whether conduct is unwelcome is to be determined on a subjective basis, assessed from the perspective of the particular complainant rather than that of the ordinary reasonable person. In *GLS v PLP*,⁶ Garde J set out a list of authorities which support this approach.
- 31 In applying a subjective test, an applicant's conduct is a relevant factor in determining whether or not the conduct complained of was unwelcome. Hence, while some conduct may not be unwelcome, other conduct may cross a line that an applicant is 'entitled to draw'.⁷ A friendly response to conduct can, in appropriate circumstances, be evidence that the conduct was not unwelcome.⁸
- 32 The conduct complained of must be 'unwelcome' to meet the definition in s 92 of the EOA. In *Aldridge v Booth*,⁹ it was held that the advance, request or conduct was unwelcome if it was not solicited or invited by the employee, and the employee regarded the conduct as undesirable or offensive. One needs to have reference to the state of mind of the Applicant.¹⁰ That formulation has been applied in many cases since.¹¹
- 33 In contrast, determining whether conduct is of a sexual nature is an objective test.

Application of objective test

- 34 Determining whether a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated, entails the application of an objective test.¹²
- 35 In *Kraus v Menzie*,¹³ the Full Court of the Federal Court of Australia considered the proper construction of s 28A(1) of the of the *Sex Discrimination Act 1984* (Cth) which defines sexual harassment for the purposes of that Act. The provision before the Full Court was substantially similar to s 92 of the EOA.

⁶ *GLS v PLP* [2013] VCAT 221 at 33.

⁷ *Horman v Distribution Group Ltd* [2001] FMCA 52 at [64].

⁸ *Daley v Barrington* [2003] FMCA 93, [34].

⁹ (1988) 80 ALR 1 at 5.

¹⁰ *Kraus v Menzie* [2012] FCAFC 144 at [22].

¹¹ For example *Elliott v Nanda* (2001) 111 FCR 240, *Horman v Distribution Group Ltd* [2001] FMCA 52 at [64], *Poniatowska v Hickinbotham* [2009] FCA 680.

¹² *Johanson v Blackledge* (2001) 163 FLR 58, 75 [84]-[85]; *Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81, [83].

¹³ [2012] FCAFC 144 (Rares, McKerracher and Murphy JJ).

36 The Court referred to the definition of sexual harassment as the starting point.¹⁴

There are relevantly two elements to that definition:

- (1) unwelcome sexual advances or unwelcome sexual conduct ... and
- (2) that a reasonable person in all the circumstances would have anticipated that the person harassed would be offended, humiliated or intimidated.

It is common ground that the question of whether conduct is unwelcome is to be determined on a subjective basis – that is by reference to the state of mind of Ms Kraus. It is also common ground that the question whether conduct has the character referred to in s 28A(1), which is the test set out above at paragraph [21(2)], is to be determined on an objective basis: the perspective of a reasonable person in the role of a hypothetical observer (*Leslie v Graham* [2002] FCA 32 at [70] per Branson J).

Standard of proof

37 Justice Garde P, considered the standard of proof applicable in the recent sexual harassment employer-employee matter of *GLS v PLP*¹⁵ in which His Honour concluded that the *Briginshaw* principle is applicable and stated as follows:

44. Whether evidentiary questions are considered under the common law or under s 140, the process of reasoning must necessarily be affected by the nature of the complaint, the nature of the subject matter, the gravity of the matters alleged and the consequences flowing from a finding of sexual harassment.
45. As this is a case in which the matters alleged by the complainant represent serious misconduct by Mr PLP, strong evidence is required – clear and cogent – assessed with care and caution, before I can find that it is more probable than not that Mr PLP sexually harassed Ms GLS in the manner alleged.
46. This analysis requires also the drawing of inferences in this case. I take the view that, in assessing contradictory accounts of the incidents, I should not draw an inference adverse to Mr PLP or make a finding of fact adverse to his case unless, after having examined the evidence with care and caution, I am satisfied that the incidents took place in the manner alleged by Ms GLS and that the inferences sought to be established from the evidence by Ms GLS can be drawn.

38 I have taken the same cautious approach to findings of fact and drawing of inferences.

¹⁴ Ibid [7] (emphasis in original).

¹⁵ (Human Rights) [2013] VCAT 221 pp 35–46 inclusive.

Victimisation

39 Victimisation is prohibited by s 103 of the EOA and defined in s 104, which provides, relevantly to the present case, as follows:

- (1) A person victimises another person if the person subjects or threatens to subject the other person to any detriment because the other person, or a person associated with the other person—
...
 - (g) has alleged that any person has contravened a provision of Part 4 or 6 or this Part, or Part 3, 5 or 6 of the old Act, unless the allegation is false and was not made in good faith; or
- (2) It is sufficient for subsection (1)(g) that the allegation states the act or omission that would constitute the contravention without actually stating that this Act, or a provision of this Act, has been contravened.
- (3) In determining whether a person victimizes another person it is irrelevant—
 - (a) whether or not a factor in subsection (1) is the only or dominant reason for the treatment or threatened treatment provided that it is a substantial reason;
 - (b) whether the person acts alone or in association with any other person.

40 Accordingly, in order to establish a breach of s 103, the Applicant must show that the Respondent subjected her, or threatened to subject her, to any detriment; and that this was done because she did any of the things in section 104(1)(a)-(h).¹⁶

41 *Detriment* is defined in s 4 of the EOA to include humiliation and degradation.

42 To be an allegation for the purposes of s 104(1)(g), a statement need not mention particular words or the EOA. It is sufficient that the material acts are alleged (s 104(2)). Importantly, it is irrelevant whether there are other reasons for the victimisation, provided that the complaint about a material act is a substantial reason (s 104(2)).

43 The evidence relied upon by the Applicant in regard to alleged victimisation is dealt with below.

A duty to eliminate discrimination, sexual harassment or victimisation

44 Section 15 of the EOA is expressed to apply to a person who has a duty under part 4, 6 or 7 not to engage in discrimination, sexual harassment or victimisation (s 15(1)).

45 The Applicant alleges that the Respondent is in breach of his duty under s 15 of the EOA to eliminate discrimination, sexual harassment or

¹⁶ See *Obieta v NSW Department of Education & Training* [2007] FCA 86 at [240].

victimisation. While there is no question that the Respondent is subject to such duty, in my view, this further allegation is misconceived for the following reasons:

(a) Section 15(4) deals with contraventions of subsection (2) as follows:

A contravention of the duty imposed by subsection (2) may be the subject of an investigation undertaken by the Commission under Part 9.

(b) Section 15 falls in Part 3 of the EOA. Section 15(2) provides that:

Part 8 does not apply to a contravention of the duty imposed by subsection (2).

and

(c) Part 8 of the EOA contains s 122 which gives jurisdiction to the Tribunal to hear and determine applications for alleged contraventions of Parts 4, 6 or 7 of the EOA.

46 Hence, the Tribunal lacks jurisdiction to hear any application for contravention of section 15.

47 In any event:

(a) There is no evidence of discrimination, sexual harassment or victimisation in the workplace generally under the control of the Respondent, other than the allegations made by the Applicant against the Respondent; and

(b) While technically the Respondent may be in breach of s 15 by himself committing sexual harassment as an employer, in my view it is not the purpose of this section, in the context of this case, where there is a more specific prohibition created by s 92 and s 93.

SUMMARY OF EVIDENCE

48 The Applicant affirmed her three witness statements with minor corrections.¹⁷ She and her husband have now relocated. She has been unable to return to work since her employment with the Respondent ceased and she is still receiving counselling.

49 The Applicant was initially engaged at the Respondent's Post Office under contract dated 19 April 2011, to commence from 30 May 2011 for 12 months. At the expiration of this contract, she was not given a new contract but told that she could stay for the foreseeable future and at least while the Respondent's son remained overseas.

50 During the period of the alleged sexual harassment she gave evidence to the effect that she felt vulnerable because she did not have any sick leave entitlement and needed to go to work.

Under cross-examination

¹⁷ Exhibit A - 24 January 2014; Exhibit B - 22 March 2014; and Exhibit C - 17 April 2014.

- 51 The Applicant described her daily work routine at the Respondent's Post Office, which involved regular duties of serving customers and refilling stock. While she did not socialise with other employees outside work, she enjoyed good professional relations at work. She agreed that the physical environment of the Post Office was quite small and staff worked in close proximity to each other. She agreed that she could normally hear what another staff member was saying unless she was serving a customer. The Post Office was very busy during the day and staff were required to serve customers as quickly as possible. She would normally go home during her lunch break. Her normal work hours were 8:45 am to 5:15 pm but sometimes she worked overtime to complete work such as a passport interview. She agreed that the Respondent did not ask her to work back after hours.
- 52 The door between the service counter and the rear storeroom would be open unless there were mail pickups; a staff member was on a break; or a staff member was taking a phone call.
- 53 The Applicant agreed that:
- (a) The Respondent was normally softly spoken to customers. However he could be aggressive in his manner and had yelled at her;
 - (b) Prior to January 2013:
 - i. apart from incidental contact, there was no physical contact between her and the Respondent;
 - ii. the Respondent had not given her any indication of any romantic interest toward her;
 - iii. she felt that she had done her job well;
 - iv. the Respondent expressed that he was happy with her employment and had made it quite clear to her that it would continue as long as his son did not return;
 - v. when the Respondent returned from overseas in October 2012, he told her that her job was safe for the time being and implied that he would sort something out for her when his son returned. On this basis she made financial commitments; and
 - vi. she agreed that there was no guarantee of continued employment.
- 54 When the Respondent returned from overseas in October 2012, she denied:
- (a) behaving any differently toward the Respondent;
 - (b) behaving in a friendlier than usual manner;
 - (c) standing closer to the Respondent; touching his hand or shoulder; or holding his hand longer when handing him keys;

(d) behaving in a flirtatious manner or engaging in prolonged gazing at him.

- 55 During the period of the alleged sexual harassment, the Applicant described the Respondent as '*extremely manipulative*'. She tried to deal with the situation and be compliant so that she could keep her job. She agreed that she did not make a formal complaint. She did mention the Respondent's conduct to one girlfriend, but told her it was under control.
- 56 She agreed that she had not applied for any other jobs by 2 March 2013, but she had commenced looking in the paper.

Incident of Saturday, 5 January 2013 – Applicant's Evidence

- 57 After closing the shop for the day the Applicant recalls being asked to have a chat with the Respondent in the staff room. The Respondent asked her to sit down and then himself sat down with his chair facing hers. He appeared nervous and spoke quietly.
- 58 The Respondent said to her, words to the effect:
- My hands are shaking, my hands are shaking. I need to get this out of my head. I am not sure when it started; maybe it was the new uniforms. I cannot get you out of my head. I find you beautiful, desirable and intelligent. I know you can be naive and say silly things, but I know there is a brain in there. Your eyes, your skin, your fingers, even your ears are just beautiful.
- 59 She describes freezing and being in shock, because the Respondent had never said anything like this to her before.
- 60 The Applicant said in reply:
- I am in shock. I am happily married. I look at you like a dad. I thought you just regarded me as an annoying kid.
- 61 She told the Respondent that she was flattered, but that she would never have a sexual or romantic relationship with him. She told him that she loved her husband. The Respondent just sat there staring. Eventually the Respondent said '*just do this one thing for me. Just close your eyes*'. She complied with his request. She sensed him coming towards her and felt his breath on her face. She opened her eyes and saw him trying to kiss her on the mouth. She said firmly '*No David*'. She told him that she saw him as a friend and father figure. She told him again that she was flattered by his compliments, but did not feel the same way about him.¹⁸
- 62 She stood up to leave when the Respondent asked: '*where do we go from here*'. She replied that she wanted to forget that this happened. '*I just want to do my job and be professional*'.
- 63 She described the Respondent's expression as '*sad*' and '*crestfallen*'. She tried to counter the tense and uncomfortable atmosphere by being happy and upbeat. She said to the Respondent '*come on, don't be silly. Let's just*

¹⁸ Applicant's Witness Statement para 15.

- forget this happened*'. The Respondent replied to the effect that he understood and agreed he would not make any further sexual advances.
- 64 The discussion ended with the Applicant saying '*Are we good?*' to which the Respondent replied '*Yes*'. The Applicant then gave the Respondent a quick hug as a sign of friendship and to try to minimise his feelings of embarrassment before leaving. She believed that the matter was now resolved.

Incident of Saturday, 5 January 2013 – Respondent's evidence

- 65 The Respondent's evidence in reply was to the effect that his behaviour toward the Applicant on 5 January 2013 was precipitated by the Applicant's own behaviour toward him.
- 66 In October 2012, the Respondent informed the Applicant that Tim would be returning to the Post Office and that he would be taking back his previous role, which at that time was held by the Applicant.
- 67 His relationship with the Applicant, at least up until October 2012, does not contradict the Applicant's account. In particular, he refers to a professional relationship and there was no social contact outside of work, aside from engaging her husband once as a carpenter on commercial terms.
- 68 From October 2012, he says the Applicant's behaviour changed. Under cross-examination, the Respondent said that he did not connect the change in the Applicant's behaviour to the likely termination of her employment.
- 69 The Respondent described the change as follows:¹⁹

It is difficult for me to explain that change. Ms Collins would often stand close to me or make physical contact with me. The closeness was noticeable. Ms Collins hadn't previously behaved this way and I was conscious of the difference in her behaviour. Ms Collins would also make physical contact with me. For example, if she were handing over keys to me she would brush my hand with hers or place the keys in my hand and rest her hand in mine for a moment. This would be accompanied by direct eye contact and a smile or look. At other times, it would be a hand on my back or shoulder.

I was surprised by Ms Collins' behaviour, and after it persisted for several months I formed the view that Ms Collins was interested in something more than a professional relationship.

- 70 He formed the opinion that Ms Collins was interested in something more than a professional relationship.
- 71 Shortly after finishing work on Saturday 5 January 2013, he said to the Applicant that he wanted to talk to her. She said okay and the two of them went together and sat in the lunch room. He said that he had feelings for the Applicant. He said that he thought that she might be feeling the same way.

¹⁹ Exhibit 5, Witness Statement of David Donald Smith, para 23-24.

He could not remember what he did say but did not deny saying some form of romantic feelings. He says that the Applicant smiled and said that she enjoyed his flattery and attention.

- 72 He then moved to kiss the Applicant. She said '*stop*' and he did so immediately.²¹
- 73 After the attempted kiss, the Respondent estimates that the conversation continued for approximately 10 minutes. The exact words are not recalled, but he says that the effect of the conversation was that the Applicant was happy with the closeness, flattery, attention, and the jokes between them, however, she could not have an affair with him. It could not happen as they would get caught and that there were a lot of cameras around now.²²
- 74 The conversation ended with the Applicant saying to the Respondent '*Are we good?*' to which he replied '*Yes*'. The Respondent then describes a warm, friendly and prolonged hug of 20-30 seconds in duration, her arms around his neck and their bodies pressed together. He says he was surprised by the hug. He did not expect it and it was the first time they had non-incident physical contact.
- 75 He further says that he did not notice any tension, stress or anxiety in the Applicant, nor did he see anything in her manner, demeanour or words which suggested she was upset or offended in any way.²³
- 76 Under cross-examination, he added that he needed to be clear to find out in his mind whether there was anything or whether it was purely a working relationship between him and the Applicant. He agreed that he did this by attempting to kiss her.

Comment

- 77 In order to assess the credibility of each party's version of events, I set out some further context:
- (a) At all relevant times the Respondent was the employer of the Applicant and she received her daily work instructions from him;
 - (b) The workplace comprised only two permanent employees as well as approximately three casual or part-time staff;
 - (c) The Respondent and his employees worked in one office in close physical proximity;
 - (d) The Applicant was born in 1981 making her 31 or 32 years of age at the relevant time;
 - (e) The Respondent was aged mid to late fifties and had children the same age as the Applicant;²⁸

²¹ Exhibit 5, para 26.

²² Respondent's Witness Statement para 27.

²³ Exhibit 5, Respondent's Witness Statement para 29.

²⁸ History recorded in the medical report of Professor Dennerstein dated 24 February 2014 at p 6.

- (f) Both parties were married. The Applicant stated that she was happily married and there is no evidence to the contrary;
- (g) The Respondent agreed he took the initiative, and to this extent he that:
 - i. He asked the Applicant to stay back after work;
 - ii. He told the Applicant he had feelings for her; and
 - iii. He attempted to kiss the Applicant.

Assessment of the Respondent's evidence

- 78 The Respondent's defence relies heavily on the Applicant's perceived change in behaviour, as it goes to whether or not the Respondent's conduct was unwelcome. The following matters cast doubt upon the Respondent's evidence on this point.
- 79 The Respondent's recollection of the 5 January incident (and many subsequent events) was poor, notwithstanding that it was a significant event in his relationship. On this particular point, I note that:
- (a) He admitted to wanting to '*test the waters*' but could only recall '*the intent but not the words*' of the conversation which preceded his declaration of romantic interest in the Applicant;
 - (b) He said he wanted to '*find out*', and that he was '*curious*' but could give no further explanation as to intent or expectation, or how he thought the relationship might develop;
 - (c) When asked in cross examination what he would have done if she had not declined the kiss, he said he had '*absolutely no idea*';
 - (d) He agreed that he was embarrassed by the whole incident, but could not recall any other feelings he had about it at the time;
 - (e) After the kiss, he estimates conversing for 10 minutes. He recalls that the Applicant was happy with the closeness of the friendship, and with the closeness and friendship continuing, but could not recall the words which gave him that impression;
 - (f) Under cross examination, he could not identify the frequency of the Applicant's changed conduct or even whether it started before or after he announced to staff that his son would be returning to work there; and
 - (g) There was no explanation provided for the Respondent's poor recall.
- 80 The Respondent's description of the change in behaviour, leading up to the 5 January 2013 incident was vague and non-specific. On this point I note that:
- (a) He agreed that the period over which he formed his view of changed behaviour was mainly November and December 2012. A slightly

lesser period than the '*several months*' referred to in his Witness Statement³⁰;

- (b) The Applicant never said anything accompanying her actions or left any notes or text messages;
- (c) He did not say anything to the Applicant about the inappropriateness of her conduct in a working environment; and
- (d) He did not consider terminating her employment, as he needed someone to work there;
- (e) In the Respondent's Supplementary Witness Statement³¹ he says there is incidental physical contact because of the small space in which they work. However, under cross-examination, he stated that the conduct of the Applicant was not the usual bumping and touching resulting from working behind the small front counter. Rather he describes the Applicant's conduct as '*definite intention*'. When asked how he could know the Applicant's intention or state of mind, he agreed he could not know and could not distinguish whether it was accidental or not.

Assessment of the Applicant's evidence

- 81 Whereas the Respondent's recollection of 5 January 2015 was poor and the detail was lacking, the Applicant's recall was strong. The Applicant recalls in detail her actions and reactions, and her emotions. She also had strong recollection of the actual words used by the Respondent and she was able to describe the Respondent's emotions, as she perceived them.
- 82 Significantly, the actions, reactions and emotions described by the Applicant are consistent and logical with one another. On this point, I note that:
- (a) She stated that the incident on Saturday 5 January 2013 was '*a complete shock*' and that she '*froze*'. This is consistent with the Applicant having an otherwise normal professional working relationship up to this point in time. It is consistent with the fact that she was happily married. It is consistent with her view of the Respondent as a father figure and someone who she turned to for advice;
 - (b) The Applicant described the atmosphere after the attempted kiss as tense and uncomfortable, she tried to counter the mood by being upbeat and minimised his embarrassment by saying she was flattered; before leaving, she gave the Respondent a quick hug '*as a sign of friendship and to try and minimise his feelings of embarrassment*'. This is consistent with the Applicant's desire to salvage the positive working environment and her previously positive relationship with the

³⁰ Respondent's Witness Statement at para 24

³¹ Para 8(c).

Respondent. It is consistent with the Applicant's desire to continue working in her role; and

- (c) The use of the word '*flattered*' which both parties agree was said by the Applicant, is consistent with polite rejection, in the context of '*I'm flattered, however ...*'. The use of the word in this context is consistent with the Applicant's version of events.
- 83 Having regard to the above matters, I accept the Applicant's account of the 5 January incident as most credible and plausible. In particular:
- (a) I accept that for almost 2 years prior to the incidents in question, whilst being happily married, the Applicant was also happily employed and a valued employee who enjoyed a respectful and professional relationship with her employer;
 - (b) I accept the evidence of the Applicant that she had no romantic feelings toward the Respondent; made no overtures toward him in that regard; and was genuinely shocked, disappointed and confused by the 5 January incident as she described;
 - (c) I also accept the evidence of the Applicant to the effect that she was taken aback by the Respondent's approach and sought to state her position clearly and revert to their pre-existing professional relationship;
 - (d) I reject the evidence of the Respondent in relation to the Applicant's alleged change of behaviour toward him. The evidence was vague and entirely inconsistent with the Applicant's circumstances. Furthermore, there is no logical connection with the advice to the Applicant of Tim's return; nor was there any suggestion that the Applicant sought any assurance from the Respondent as to the security of her position; nor was there any suggestion that the Applicant said anything to the Respondent to give confirmation to his description of her behaviour toward him;
 - (e) I reject any imputation which might arise from the Respondent's evidence that the Applicant engaged in flirtatious or provocative behaviour and that such behaviour induced the Respondent to '*test the waters*' as suggested; and
 - (f) I reject any imputation which might arise from the Respondent's evidence that the 5 January incident was friendly, without tension and that the Applicant declined to embark upon an affair for fear of being caught.
- 84 I am comfortably satisfied to a high degree that the 5 January 2013 incident constituted sexual harassment by the Respondent of the Applicant by reason that:

- (a) The Respondent made an unwelcome sexual advance toward the Applicant, namely attempting to kiss her; and made an unwelcome implicit request of the Applicant to engage in a sexual relationship;
 - (b) Such advance and request were both of a nature that a reasonable person, in all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated; and
 - (c) The Applicant did not invite or welcome such conduct in any way and was indeed offended, humiliated and intimidated.
- 85 To the extent that I have found that any particular subsequent incidents constitute sexual harassment by the Respondent, I have only reached such finding after being satisfied, to a high degree, that the alleged behaviour, written or spoken words:
- (a) were in the nature of unwelcome sexual comment or requests for sexual favours or a sexual relationship, or unwelcome physical contact of a sexual nature;
 - (b) that a reasonable person, in all the circumstances, would anticipate that the Applicant would have been, offended, humiliated or intimidated; and
 - (c) that the Applicant did not invite or welcome such conduct, comment or communication and was indeed offended, intimidated and humiliated by it.
- 86 My assessment of the Applicant's evidence of the 5 January incident is further affirmed by a number of subsequent attempts she made to confirm her position to the Respondent, that she wished to maintain a professional relationship only; and she consistently conveyed to him to the effect that she found his attention unwelcome and offensive. I deal with each of these encounters below.

Monday, 7 January 2013 – Apology

- 87 On the following Monday, the Respondent approached the Applicant in the tea room and said that he was sorry about the advances. She replied '*that is fine, we will put it behind us*'. He said at that point that he was the one who had to '*deal with the consequences*' and further said that if she needed to talk to him about it she could. She was relieved. She thought he was sincere in his promise not to engage in any further sexual advances.
- 88 In contrast, the Respondent says that the Applicant's change in behaviour as noted from October 2012, continued. They had a conversation during the morning tea break, but he did not recall the specifics of that conversation. He has no recollection of making an apology and in his witness statement he says that he cannot think of why he would have done so. During cross-examination, the Respondent conceded that looking back he should have apologised at the time.

Comment

- 89 The Respondent's evidence in response is at best ambiguous and otherwise inconsistent with the evidence which he gave in relation to the 5 January incident. That is, on his account, there was nothing in his behaviour of 5 January which caused the Applicant any offence or discomfort, and therefore there was no reason to offer an apology. His contention that the Applicant continued to behave in a flirtatious manner is also inconsistent with his later contention to the effect that in such a small workplace other employees could observe untoward comments which he is alleged to have made to the Applicant. I reject the Respondent's assertion that the Applicant's behaviour continued unabated as vague, non-specific and self-serving.
- 90 I accept the Applicant's evidence as to the apology, which is also consistent with the connotation which the Applicant had placed upon the 5 January incident.

First meeting to discuss the conduct

- 91 The Applicant says that at some point in that week she asked the Respondent if she could discuss the situation. They met one afternoon in the lunch room when both were alone. She did not consider that she had an option as they would have been seen elsewhere. The Respondent said to the Applicant *'I'm not going to beat around the bush, I want to have sex with you'*. She replied again that it would not happen and reminded him that she was happily married.
- 92 She further said to the Respondent *'I don't understand why you would want to risk your kids and your marriage'*. He said *'you're probably right, but I have not given that any thought'* and then added *'oh, I'm not going to leave Angela for you'*.
- 93 The Applicant was disgusted at the Respondent thinking that she might be interested in a sexual relationship with him. Furthermore, she was disappointed that her attempt to stop the sexual advances was used as an opportunity for the Respondent to try again.
- 94 In response, the Respondent says there was no formal meeting arranged, rather the Applicant raised the issue casually. He cannot recall the specifics of the conversation but agrees that *'I certainly said at times in those first three months of 2013 that I would not leave Angela for anyone.'*³²
- 95 Under cross-examination, the Respondent denied ever asking for sex. He also said that the Applicant made it clear that there would not be any sexual relationship but that the friendship would continue.

Comment

³² Exhibit 5, para 35.

- 96 By the Applicant's further evidence, which I accept, she has consistently reiterated to the Respondent her desire to maintain a friendly but professional relationship. The Applicant's evidence of her responses to subsequent verbal propositions by the Respondent (to have lunch or meet outside work hours) are entirely consistent with her initial statements.
- 97 In my view, given the Respondent's position as employer and his direct supervision of the Applicant, the Respondent's behaviour created an intolerable situation for the Applicant in which to perform her work. The Respondent's evidence in response to the above incident is again ambiguous. Furthermore, his answers under cross-examination on this and many other occasions were hesitant and sometimes contradictory. He seems to have conceded that the Applicant was sufficiently concerned to want to have a discussion with him but he could not elaborate upon such discussion. He otherwise gives no explanation as to why he would have made a reference to never leaving his wife.
- 98 I accept the Applicant's evidence as to the occurrence of this incident, which in my view clearly constitutes further sexual harassment, in the nature of unwanted sexual propositioning. I further accept that the Applicant was caused further distress and humiliation, all the more aggravating by reason of the proximity to the first incident.

Comment: 'I can't get the thought of making love with you out of my head'.

- 99 On or about 10 or 11 January 2013, the Applicant says she noticed a change in the Respondent's body language. He was quiet and did not speak to her, whereas he had always been friendly in the past.
- 100 While the Respondent was reading the newspaper in the staff room the Applicant asked him whether there was something wrong. He replied '*your plan isn't working*' and '*I can't get the thought of making love with you out of my head*'.
- 101 The Applicant replied, '*come on, don't be silly, we have talked about this*'. She returned to serve customers. She said she could not believe hearing this as she considered the matter at an end. She felt disappointed and humiliated.
- 102 The Respondent has no recollection of being in a dark mood or avoiding the Applicant on 10 or 11 January 2013. He denies saying anything to the effect of her plan was not working, or that he could not get the thought of making love to her out of his head. Furthermore, he says it is beyond comprehension that he would say such things in an open working environment where another employee, in particular Ms Dempsey, might hear.

Comment

- 103 It is unclear from the evidence whether this incident happened before or after the incident described above. In any event, at this point there have

been three occasions within 2 weeks within which the Respondent is alleged to have propositioned the Applicant for a sexual relationship.

- 104 The Respondent acknowledged that on 5 January 2013, the Applicant resisted him kissing her and did not want to engage in a romantic or sexual relationship. In this context the words allegedly spoken above by the Respondent, would clearly be of an unwanted sexual nature and for the same reasons cited in relation to the 5 January incident, would constitute sexual harassment. The Respondent has flatly denied that any such words were spoken and points to the unlikely circumstance of making such comments in the context of a physically confined workplace with other employees present.
- 105 In my view, although clearly raising the spectre of other employees being alerted to something untoward, I am satisfied that limited comments of the kind alleged could have been spoken without being overheard, particularly if the parties were both present together in the staff room (as alleged) and Ms Dempsey was otherwise engaged with customers. The likelihood of this incident having taken place is reinforced by the occurrence of the next alleged incident.
- 106 I accept the Applicant's evidence as to the occurrence of this incident. I accept that the Applicant was caused further distress and humiliation.

Invitation to lunch

- 107 On or about 21 January 2013, the Respondent invited the Applicant to lunch at his house, noting that his wife was away visiting her friends or her family. He said, *'why don't you come by the house with me tomorrow and have lunch by the pool?'*. She replied *'you know I can't do that'* and *'I can offer you friendship only'*.³³ She denied saying *'it would be too risky'*.
- 108 She thought that it was on another occasion, during a lunch break, that the Respondent asked her to meet up to take the dogs for a walk, to which she replied, *'you know I cannot do that'*.
- 109 The Respondent agreed that he did ask the Applicant to have lunch with him the following day, when he was not working but the Applicant was working. He denies that the invitation was to come past the house or to have lunch by the pool. He says he asked to have lunch with her and suggested that they meet at the Post Office. The Applicant said that was okay.³⁴
- 110 On 22 January 2013, while driving to the office to meet the Applicant for lunch, the Respondent says he received a missed call from her and then telephoned her back. He says that the Applicant said *'I don't want to meet, it's too risky'*. The Respondent said okay and instead suggested they meet at Deakin University to walk the dogs. She said she could not do that because they would be seen together and no-one would believe it was just

³³ Exhibit A, para 26.

³⁴ Exhibit 5, para 37.

friendship. He then turned around and drove home. He does not believe he went to the Post Office on that day, but if he did, he says it was to drop off stock. He therefore cannot recall any conversation taking place. He cannot recall later sending a text message. If he did send it, he assumes it was a reference to the invitation to lunch and dog walking.³⁵

Conversation in the car park

- 111 The Applicant's account of 22 January 2013 differs as follows. The Respondent was in the car park as she arrived for work, even though it was his day off. The Respondent commented that the Applicant looked stressed. She replied '*all this stuff with you is stressing me out*', the Applicant confirmed that this was a reference to the sexual advances. The Respondent said, '*I don't like seeing you like this*'.
- 112 On Wednesday 23 January 2013, the Respondent wrote the Applicant a text message which read '*I do not want to stress you out*'.³⁶ Later in the day, the Respondent called the Applicant. She told him that his advances were getting to be too much, and that she was having difficulty working with him. They arranged a second meeting to discuss the conduct.

Second meeting to discuss the conduct

- 113 On 24 January 2013, the Applicant and the Respondent met after work at the Post Office. She repeated that the advances towards her were making it difficult for her to work and had to stop; that she was flattered that he liked her; but she was happily married; and did not enjoy his attention. The Respondent indicated that he would keep the relationship strictly professional. By saying that she was '*flattered*', the Applicant says that she was trying to '*soften the blow*' of her rejection.³⁷ The Applicant agreed that she returned to work after walking out with Ms Dempsey, but it was only ever to talk to the Respondent about his conduct, and never to discuss other matters.
- 114 The Respondent denies that there was any meeting arranged to discuss his advances. The discussions which are conceded in his evidence were only ever informal discussions.

Comment

- 115 In relation to the alleged conversations and meetings between 21 and 24 January 2013 inclusive, the Applicant again gave a consistent account under cross-examination to that contained in her witness statement. By contrast, while making certain admissions, the Respondent did not give any or any satisfactory explanation as to why he was seeking to arrange a luncheon meeting with the Applicant outside of work, which had never been a feature

³⁵ Exhibit 5, Para 39.

³⁶ In cross-examination, the Respondent did not recall sending that text message. Phone records show a text message was sent by the Respondent to the Applicant at 11:07 am on 23 January 2013.

³⁷ Exhibit A, para 31-33.

of their prior working relationship. The Respondent also conceded that he had not invited any other staff members to lunch at his home or elsewhere. He again appears to represent the Applicant in the nature of a 'provocateur' wanting an illicit relationship but playing a 'cat and mouse game' under the guise of being too afraid of being caught. I reject the Respondent's evidence as unsatisfactory and implausible.

- 116 The above interactions assume a more sinister connotation in the context of the Respondent's preceding propositions for sex and the Applicant's consistent rejection of his advances. The behaviour amounts to a persistent, unwelcome and entirely inappropriate proposition to meet the Applicant outside the office and in potentially compromising circumstances. In my view, in context, the Respondent's request to meet the Applicant for lunch outside of the workplace, either at his home or elsewhere, constitutes further harassment with the intent of pursuing an unwelcome romantic or sexual relationship.

Sexual assault in the staff room

- 117 On Friday, 25 January 2013, everyone had left at the end of the day and the Applicant was sitting in the staff room. She describes how the Respondent approached her with an intense and scary look on his face, his eyes were glazed over.
- 118 She crossed her arms. The Respondent began rubbing her shoulders and then down her arms. As she backed away the Respondent followed and his rubbing moved towards her crotch area and thighs with both hands. As he did so he said '*Come on, you know you want to, come on, come on*'. The Applicant said firmly '*It's not going to happen, it's not going happen, I've told you it's never going to happen David*'.
- 119 The Respondent kept rubbing. The Applicant said '*No!*' firmly and the Respondent stepped back. She was very distressed. She gathered her things and then left.³⁸
- 120 The Respondent denies the allegations. With the exception of the attempted kiss on 5 January, he did not ever touch or attempt to touch her. The only other physical contact was incidental. On one occasion he was relieved when the Applicant fixed a financial error, so he held her head on each side and kissed her on the forehead. This occurred in the presence of customers.³⁹

Effect on emotional state

- 121 On Saturday 26 January 2013, the Applicant attended work at approximately 8:45 am. She says she was nervous and shaky. The Respondent said to her '*I am scared you are going to come in here and say that you never want to see me again*'.

³⁸ Exhibit A, paras 35-38.

³⁹ Exhibit 5, paras 44-45.

- 122 She told the Respondent that she was stressed out by what happened the night before and his advances in general. She reconfirmed that she was never going to cheat on her husband and recommended that the Respondent 'get his head together' and discuss the matter with his wife. She asked him to maintain a professional relationship. He agreed to do so and then opened the store.⁴⁰
- 123 The Respondent denies that this conversation occurred and further says that the allegations are untrue and there was no reason for the conversation.⁴¹ Curiously, under cross-examination he said that he did not recall whether the Applicant had told him she was stressed out by what had happened the night before and his advances in general.

Comment

- 124 This is one of a number of instances where the Respondent flatly denies performing certain behaviour and/or making certain statements. It is therefore necessary to again consider the allegations made by the Applicant having regard to:
- (a) perceived credibility and reliability of each party;
 - (b) the plausibility of the allegations in the context of the particular circumstances; and
 - (c) the plausibility of the allegations in the context of the preceding and succeeding alleged incidents, some of which are verified by other objective data.
- 125 Having regard to all of these factors, I accept the evidence of the Applicant concerning the 25 January assault, which describes conduct which clearly constitutes continuing sexual harassment, furthermore the comment made by the Respondent the next day is comprehensible in the context of his behaviour the previous day.
- 126 In my view, the Applicant again presented her evidence consistently. I accept that she was genuinely attempting to effectively 'manage' the Respondent, whom she had reason to believe was acting in an erratic and increasingly intrusive manner. Objectively, the incident of 25 January represents an escalation in the Respondent's sexual pursuit of the Applicant.

Ongoing comments and advances

- 127 For the next couple of weeks, the Applicant says the situation continued. At times the Respondent was professional. Other times he would make sexualised comments out of the blue or touch her inappropriately. Comments included that the Applicant was beautiful and had nice breasts. She felt she could not escape his gaze. He also made comments to the effect that he wanted to spend money on her and at one stage said: *'My mind goes*

⁴⁰ Exhibit A, paras 39.

⁴¹ Exhibit 5, para 46.

into over drive to think what I could do for you. I think about your car. I could give you nice things'.⁴²

- 128 One morning the Respondent sent her a text message which read *'I am in bed listening to the rain. I wish you were lying here with me. You drive me crazy'*. She immediately deleted the message and was unable to produce evidence of it to the Tribunal, other than her oral evidence.
- 129 The Respondent said he could not recall sending the above text message. He otherwise agreed that he often gave compliments and said that the Applicant looked nice. He denies that he ever commented upon her breasts. He states that from late January 2013, the Applicant would at least once a week, leave after work with Ms Dempsey and then return to the Post Office 5 minutes later. She would say something like *'can we talk'* and he would let her back in.
- 130 The Respondent describes the conversation as *'just chit chat'* and of *'no consequence'*. The conversations were always informal and not pre-arranged. The Applicant never showed signs of distress.
- 131 On some occasions the issue of their relationship would come up. The Applicant would say she was happy with the flattery and having a bit of fun, but she could not have a sexual relationship. She said on more than one occasion that she was happy with the ways things were but she could not give him everything that he wanted. He recalls asking whether she was happy with that and she said yes.

Comment

- 132 During the period referred to above by the Applicant, she has not given a precise account of the sexualised comments made or the context in which such comments were made or the physical contact of a sexual nature. It is therefore not possible to evaluate such alleged comment or conduct.
- 133 A perplexing aspect to the Respondent's evidence is his apparent propensity to present the Applicant as the principle protagonist in the relationship, by seeking discussions after work (having ostensibly left work and returned again); and welcoming continuing flattery and jocular behaviour. At the same time the Respondent concedes that the Applicant consistently states that she cannot have a sexual relationship with him. In my view, the picture painted by the Respondent of the Applicant is inconsistent with all of the surrounding circumstances, the historic relationship between the parties and other subsequent objective evidence of written communications. For these reasons, I reject the Respondent's evidence.

Threatening comments

- 134 In or around February 2013, on dates which cannot be recalled with accuracy, the Applicant describes a number of threatening comments that the Respondent said to her:⁴³

⁴² TB 251 Supplementary Witness statement of Applicant, para 2.

- (a) *'I want to take you out the back against the safe'*. The Applicant shook her head;
- (b) After the Applicant said to the Respondent that she would not have sex with him, he said *'I might just have to take it anyway'*. She replied *'You wouldn't do that'*; and
- (c) On one or two occasions, the Respondent said to her *'What would you do if I just threw you on the floor?'* She responded *'You wouldn't do that'*.

135 The Respondent denies that he made any such threatening comments and further says that he finds the suggestion that he would joke about rape or threaten the Applicant to be deeply upsetting and offensive.

Comment

136 I accept that the Applicant's evidence is consistent with the Respondent's previous utterances of his desire to have sex with her. To that extent such comments constituted continuing sexual harassment. However, I am not satisfied to the requisite degree that by his words the Respondent threatened or intended to threaten the Applicant with rape. The evidence is not sufficiently cogent or precise as to the context or circumstance to enable an inference to be drawn as to the connotation advanced by the Applicant. From the Applicant's perspective, I am mindful of the incident of 25 January when she alleges that the Respondent did physically sexually molest her while propositioning her for sex and only ceased the unwelcome sexual behaviour upon continued verbal resistance by the Applicant. As described, such incident would have heightened the Applicant's concerns as to the Respondent's increasingly intrusive and persistent behaviour. However, in the above incident there is no evidence of an overt physical assault upon the Applicant.

A further meeting on a date in February 2013

- 137 Another meeting took place between the Applicant and the Respondent where she tried again to discuss her concerns and asked him to refrain from further advances.
- 138 At the end of this meeting, she hugged the Respondent and as she did he whispered in her ear *'I have an erection now'*. She jumped away. He said *'Don't be silly, I kept it away from you'*. She felt at this stage the Respondent was behaving in an unpredictable way.⁴⁴
- 139 The Respondent says that he recalls this incident, but not the date. He and the Applicant had an argument about something during the day, the cause of the argument he cannot recall. The Applicant returned to the Post Office after her shift. The Respondent did not recall the meeting being acrimonious in any way. They talked for a while and then as the Applicant

⁴³ Exhibit A, paras 43-46.

⁴⁴ Exhibit A, paras 47-48.

went to leave she hugged him. It was a close and prolonged affectionate hug lasting 20-30 seconds. The Applicant's arms were around his neck and their bodies were in full contact. The Respondent said to her *'if you keep holding me like this, I will get an erection'*. The Applicant laughed and left shortly after. She did not express disgust or jump away.⁴⁵

- 140 Under cross-examination, he agreed that this was not a proper thing to say to an employee.

Comment

- 141 I am satisfied that the Applicant has given the more credible and reliable account of this incident which of itself constitutes a continuation of the sexual harassment.
- 142 While the Respondent has made candid admissions, in my view his account of the Applicant's alleged reactions are entirely implausible. Furthermore, the Respondent's account again appears to be aimed at characterising the Applicant as flirtatious and comfortable with what is otherwise clearly inappropriate sexual comment and behaviour by an employer toward an employee. Objectively, the behaviour would be unwelcome and the comments of the Respondent, offensive and humiliating.

'Let me massage your thighs for 15 minutes'

- 143 While waiting for a passport photo to print in the staff room, she saw the Respondent write on an A4 piece of paper and then fold it in half. He walked up to her at the printer and then unfolded it. It read *'Let me massage your thighs for 15 minutes and you can have everything in my wallet'*. She replied *'don't be ridiculous, I can't believe you would write that, I am so offended'*. The Respondent replied *'My wallet is full, too'*. At the end of that day he walked the Applicant to her car and she said to him *'I cannot believe you said that. You made me feel like a prostitute'*.⁴⁶
- 144 The Respondent does not recall writing anything on a piece of paper. He denies walking to the Applicant's car, and denies that the Applicant said that he made her feel like a prostitute.⁴⁷

Invitations

- 145 On a separate occasion, the Respondent invited her to come with him to get an ice cream. She agreed that this occurred after an elderly couple recommended ice cream. The Respondent also asked that she wear a nice mini skirt. The Respondent invited her to walk his dogs with him in the Deakin Estate winery near his house, so that *'no one will see us'*. She said that she could not attend.⁴⁸

⁴⁵ Exhibit 5, paras 60-62.

⁴⁶ Exhibit A, paras 49-51.

⁴⁷ Exhibit 5, para 63.

⁴⁸ Exhibit A, para 52.

146 The Respondent admits asking the Applicant to walk his dogs on 21 January 2013, in a different context, as set out above. He recalls that on one occasion he invited the Applicant for an ice cream. He cannot recall the date, but says it was preceded by an elderly customer recommending good ice cream at a nearby café. He denies having asked the Applicant to wear a nice miniskirt.

St Valentine's Day card

147 On 15 February 2013, (the day after St Valentine's Day) the Applicant found a rectangular red card (the 'Card') which had been placed inside of her mobile phone cover which was inside her handbag. It contained some typed words set out in three verses. She recognised them as the lyrics of two songs, with some words changed.⁴⁹

I only want to make it good
So if I want a little more than I should
Please forgive me, I can't stop wanting you

You can't tell me it's not worth trying for
I can't help it, there's nothing I want more
Please forgive me, every word I say is true

Please don't deny me, help stop this pain I'm going through
Please forgive me if I need you like I do
Please forgive me I can't stop wanting you.

148 The Respondent asked later '*did you like the song?*' The Applicant said '*It's two songs that you've changed the words to*'. He said that he had made the Card himself.

149 The Applicant says she felt bewildered and violated that he would go to the trouble of composing words on a computer, printing them on a card and then going into her handbag to hide it there.

150 The Respondent recalls these events. He says it was really done as a bit of fun, as the Applicant was quite happy to play jokes on others. He makes the comparison of when the Applicant decorated his bike with tinsel at Christmas.

151 The Respondent says that the Applicant was acting unusual the day before, on St Valentine's Day. He asked the Applicant if she were expecting something for St Valentine's Day. He does not recall the specific words in reply, but came away with the strong impression that the Applicant expected him to give her something.

152 Accordingly, overnight the Respondent printed the lyrics from a number of songs and then pasted them on the Card. He put the Card in her handbag the following day to surprise her. When the Applicant found the Card she

⁴⁹ Exhibit A, para 53-55.

laughed and said that she knew the words were lyrics, and that it was very flattering.⁵⁰

- 153 Under cross-examination, he said that he was not trying to communicate anything in particular by the Card. It was just a joke and a bit of fun.

The orgasm text message

- 154 Later that day the Respondent sent a text message to her saying that he would like to bring the Applicant to orgasm and that he would prefer it to be through intercourse so that he could be pleased too. She says she felt disgusted and asked the Respondent not to send any further messages like that at work. However she was unable to engage in a proper conversation about the text message due to the presence of customers at the Post Office.⁵¹

- 155 The Respondent notes that his phone records confirm that a text message was sent from his phone at 1:30 pm on this day but he has no specific recollection of the text message.⁵²

Comment

- 156 The St Valentine's Card is a significant piece of objective evidence.
- 157 The Respondent's evidence, in summary, was that he gave the Card to the Applicant on 15 February 2013, having formed the view that the Applicant was disappointed that she did not receive anything from him on Valentine's Day, the day before. The Respondent says he considered it a joke and a bit of fun. Whereas the Applicant says she was violated and bewildered, both by the Card, and the fact that he hid it inside her hand bag.
- 158 It is admitted by the Respondent that he made the Card; that he chose the words to place on the Card; and that he left the Card in the Applicant's handbag for her to find.
- 159 The Respondent described the incident as a bit of fun and that the Applicant often played jokes herself. He made reference to the Applicant decorating his bike with tinsel around Christmas time.
- 160 The Respondent also says that the Applicant gave him the strong impression that she expected him to give her something for Valentine's Day. Yet, he could not recall the words used by the Applicant.
- 161 The words on the Card are entirely consistent with the harassment the Applicant alleges to have been taking place at that time. There are multiple references to the Respondent '*wanting*' the Applicant, the Respondent being unable to control himself, and the Respondent seeking forgiveness.
- 162 On the other hand, the Card is quite inconsistent with the way in which the Respondent describes their relationship. There is no suggestion in the Card

⁵⁰ Exhibit 5, paras 65-68.

⁵¹ Exhibit A, para 56.

⁵² Exhibit 5, para 69.

that the Applicant 'wanted' the Respondent, or that she enjoyed or invited his attention. On the contrary, *'please forgive me'* is repeated four times. The Respondent would have no cause to seek forgiveness if it were true that the Applicant was inviting and enjoying his advances.

- 163 I propose to take the series of events described above by the Applicant together, including the alleged note seeking to massage the Applicant's thighs and offer the contents of his wallet; invitations to walk together for an ice-cream or walk the dogs; the St Valentine's Day Card; and the 'orgasm text message'. The Respondent's evidence is a somewhat vague mixture of admissions, denials and inability to recollect. In particular:
- (a) In relation to the last text message, the sending of a text message is verified by the telephone records. However, the Respondent has no recollection of it. Curiously he does not deny that he did or would ever have sent such a message;
 - (b) The Respondent admits the Card, but explains this in terms of a joke and a response to the Applicant's implicit invitation. In my view, both of these propositions are implausible. Decorating a bike with Christmas decorations, as the Respondent suggested that the Applicant did for him, is of an entirely different nature to a Card comprising composite lyrics consistent with unrequited romantic feelings and communicated in a very private and secretive manner;
 - (c) The invitation concerning the ice cream and dog walking is partially conceded by the Respondent, but explained in a different context; and
 - (d) The Respondent could not recollect the note offering to massage the Applicant for the contents of his wallet. However, he did not deny that such note was made by him.
- 164 In my view, taking all the circumstances into account, I am satisfied that the Applicant has given a credible and plausible account of the above incidents, which separately evidence sexual harassment and collectively evidence an escalating sexual pursuit of the Applicant.

Pako Festa

- 165 On 22 February 2013, the Respondent invited the Applicant and some other staff, including Ms Dempsey, to attend the following day the Pako Festa, an annual street festival held in Geelong West. Being amongst the group, the Applicant said yes to avoid causing a scene. She did not feel comfortable attending and so she later called the Respondent to tell him this. The Respondent got angry and hung up. The Applicant called him back. The Respondent said to her that he wanted to show her that *'we could just be friends'*. She then agreed to go.⁵³
- 166 On Saturday, 23 February 2013, the day of Pako Festa, the Applicant was working alone with the Respondent. While at the Post Office the

⁵³ Exhibit A, paras 58-63.

Respondent asked the Applicant a number of questions including whether she had sex in crazy places and when she lost her virginity. He told her the circumstances about how he lost his own virginity at school.

- 167 After work they headed to the Petrel Hotel for a drink. The Applicant understood that they were going to meet with another colleague, Ms Dempsey, however she did not show up.
- 168 While at the hotel, the Respondent said to her *'I want to know about you Mandy, outside work, I want to be your friend'* [which the Respondent denied] and he asked a number of further questions including whether she planned to have children and whether she thought orgasms came internally or externally. The Applicant agreed that she answered his questions just to be polite and she thought she had no option.
- 169 When the Respondent asked whether she was using contraception the Applicant answered *'no'*. The Respondent then said to her *'Well, just to ease your mind, I have had the snip'* [the Respondent agreed he said this, but in a different context].
- 170 The Respondent agrees that he asked the Applicant and Ms Dempsey to attend Pako Festa. Both agreed that Ms Dempsey indicated she would attend with her husband.
- 171 The Respondent agrees that the Applicant later called to say she could not come. She told him that her father was coming to visit so she may not be able to come. He was cleaning the Post Office at the time and did not have time for a long discussion. He recalls asking why she could not just wait until the next day to tell him.
- 172 The Respondent says the Applicant attended work the next day in plain clothes. He asked whether she had made up her mind about attending Pako Festa. She said she did not want to see the festivities and instead suggested having a drink at the pub next door. The Respondent said that the whole purpose was to see the events, not just drink, and then told her not to bother coming. The Applicant then agreed to come along.
- 173 Once at Pako Festa, they walked the entire length of the event before arriving at the Petrel Hotel, which had set up an outdoor liquor serving area where they planned to meet Ms Dempsey.
- 174 The Respondent agrees that much of the conversation centred on sexual matters. She did not say she was uncomfortable or display unease. He recalls the Applicant saying that most women climaxed through internal stimulation; and the Respondent said that the Applicant raised a number of sexual topics, including sex in risky places and her dislike of one night stands. The Applicant also told a story about discovering a friend in bed with her boyfriend, which devastated her at the time.⁵⁴

⁵⁴ The Applicant denied raising any sexual topics. Rather, she only responded to the Respondent's questions.

- 175 In relation to the '*I have had the snip*' comment, the Respondent says they were discussing the question of children, and that his wife had made the decision not to have any more. He then said '*having the snip*' had made sure of it.⁵⁵
- 176 Under cross-examination, the Respondent agreed that the sexual nature of the conversations at the Festa was inappropriate in the context of an employer/employee relationship.

Comment

- 177 The events surrounding and including attendance at the Pako Festa are a somewhat confusing mixture of conversations alleged by each party. In the circumstances, I am not persuaded that the Respondent intended to engage in a private or isolated tryst with the Applicant. Both admit that other staff members were invited to accompany the Respondent and both expected other staff members to be present.
- 178 In relation to the sexual nature of questions asked and other commentary given by the Respondent, he has admitted to discussion of a general sexual nature. However, in the context of the Applicant's prior complaints and concerns, such intimate questioning and revelations, made in the absence of other members of staff, were clearly inappropriate and unwelcome and constitute a continuation of the ongoing sexual harassment of the Applicant.

Further physical assaults

- 179 The Applicant describes further incidents of touching without warning, which occurred on a regular but not daily basis at the Post Office.⁵⁶ She cannot recall the exact dates. On one occasion this included the Respondent grabbing her bottom near the line of her underpants. The Applicant jumped back and said '*Don't!*' and then kept moving.
- 180 On another occasion, towards the end of her employment, the Respondent put his hand down her top near her breasts. The tips of his fingers were just inside of her bra. He stated '*I like this*'. The Applicant backed away and shook her head.
- 181 The Respondent denies these allegations.⁵⁷

Changes in mood and further comments

- 182 The Applicant described the Respondent as having unpredictable mood changes.⁵⁸ On different dates which she could not recall, the Respondent said to her:

⁵⁵ Exhibit 5, paras 73-82.

⁵⁶ Exhibit A, paras 64-66.

⁵⁷ Exhibit 5, para 83.

⁵⁸ Applicant's evidence TB 256 at [13]; Exhibit A, para 67-69.

- (a) *'I am never going to give up on you. It will happen. And if I am happier towards you, it will give me more of a chance than if I am cranky'*;
- (b) *'In my own silly way, I love you'*; and
- (c) That it took all of his power and control, when her hair was up, not to come and kiss her on the back of the neck. He subsequently told her on a number of occasions when he walked out the back, if she was on a break *'watch your neck'*.

183 The Respondent denies that his moods were unpredictable or changing.⁵⁹
In particular:

- (a) He never saw the Applicant crying, or even upset. *'I observed nothing in her behaviour or demeanour to suggest that she was upset in any way'*; and
- (b) The Applicant *'often said that she was married and could not give me everything that I wanted'*. However this was always said in the context of the Applicant saying that she enjoyed the flattery and flirting.

Comment

184 The Applicant's account of continuing inappropriate attention and comment and, in at least two instances, physical touching of a sexual nature, clearly constitute sexual harassment, objectively unwelcome and behaviour which did cause the Applicant ongoing distress and humiliation.

185 In my view, the Respondent's admission that the Applicant often said she was married and could not give him everything he wanted, is entirely consistent with the Applicant's evidence. Furthermore, the Respondent's assertion that he never observed the Applicant to be upset in any way is inconsistent with certain text messages in which he acknowledges that she was stressed or otherwise apologises for his behaviour. Taking all the circumstances into account, I reject the Respondent's evidence that the Applicant enjoyed the flattery and flirting.

Request to see the Applicant's tattoo

186 On 1 March 2013 at around 4:00 pm, the Applicant was working in the parcel room when the Respondent asked if he could see her tattoo. He knew it was on her hip as the tattoo had been discussed with the Respondent and Ms Dempsey on another occasion. She refused to show him. She says the Respondent became visibly annoyed with her for the rest of the shift and for the next day.⁶⁰

187 The Respondent recalls this incident and agrees that when he asked to see the tattoo the Applicant said no. He says he did not know where the tattoo

⁵⁹ Exhibit 5, paras 84-86.

⁶⁰ Exhibit A, para 70.

was, and asked out of curiosity. He was not annoyed when she refused, and thought nothing more of it.⁶¹

Comment

188 I do not consider that this incident is of any particular significance or consequence.

First attempt at resignation

189 By 2 March 2013, the Applicant describes the working environment as becoming unworkable, with the Respondent being short and abrupt with her. She felt hopeless, sick to the stomach and spent time in the toilet crying.

190 On the afternoon of 2 March 2013, she told the Respondent that she could no longer work at the Post Office. She then left and attended a sewing shop in a state of distress to collect a dress that had been altered.

191 During the walk she calmed down somewhat. She decided to return to the Post Office. She advised the Respondent that she needed to keep her job because she needed the money. She told the Respondent that the comments, advances and touching were making her job impossible. He agreed to keep it professional. However, in the following two weeks, the Respondent's behaviour continued, with further advances, comments and anger.⁶²

192 The Applicant denies becoming demanding during the Saturday shift or wanting him to stand with her at the counter and talk to him. The only time she became frustrated was when she had to serve many customers and the Respondent would not help or was rude to her.

193 The Respondent provides a very different account.⁶³ He says that around this time the Applicant became increasingly insistent upon him standing at the front counter talking with her on Saturdays. She made these demands even when there were no customers to serve. He preferred to use the quieter time at the Post Office to do other things.

194 He became uncomfortable with the Applicant's behaviour. On this particular Saturday, the Applicant's demands become stifling and he became frustrated. When he refused to stand at the counter with her, the Applicant became sullen and short with him. Before leaving for the day, she said that she understood his concern; would be less demanding in the future; and would '*try to be pleasant*'.

195 After the shift, the Applicant returned to the Post Office. She said that she was not happy with the way things had gone in the morning. He said that it was unrealistic for him to be able to keep her company at the front counter

⁶¹ Exhibit 5, para 87.

⁶² Exhibit A, para 71-73.

⁶³ Exhibit 5, paras 88-92.

all morning, or to be jovial all the time. The Applicant said that she understood and then asked 'are we good', and the Respondent said yes.

196 The Respondent says that there was no discussion of job security or the need for money. She did not say the job was becoming impossible.

Comment

197 I find the evidence of the Respondent completely implausible and entirely self-serving. There is no particularity given as to why the Applicant would suddenly commence behaving in the way alleged, namely possessive and demanding of his attention, which is otherwise entirely inconsistent with the prior evidence of the Applicant, which I have accepted.

198 I reject the imputation which the Respondent again appears to advance to the effect that the Applicant was sexually provocative, flirtatious and seeking to encourage the Respondent's romantic attention.

Text message 'my heart has taken over'

199 On 12 March 2013, a private number called the Applicant's phone. She did not answer that call. Afterwards she received a text message from the Respondent which read:⁶⁴

Sorry i know i will regret this but my heart has taken over, and as you have not called me back i assume you don't care what i had to say or you want me to follow "your lead" with no more phone or text messages between us.

200 The Respondent telephoned the Post Office and she answered the phone. The Respondent denied calling her from a private phone number when asked. The call ended after discussing work related matters.

201 The Respondent then telephoned again. This time he said '*I cannot lie to you*'. She asked him why he had called her to which he answered '*I will have to speak to you about it when I am back at work*'.

202 A series of text messages were exchanged between 17:23 and 17:33pm:

Applicant: U said u would speak to me later in the week.

Respondent: It's about you not me.

Applicant: I don't understand.

Respondent: Or not interested?

Applicant: I just tried calling u, must be on the phone, I'm utterly confused, thought this was sorted.

203 The Respondent's witness statement merely states that no text messages or phone calls were made from his mobile to the Applicant on 11 March 2013, being the date mentioned in the Applicant's Amended Witness Statement.⁶⁵

⁶⁴ Aide memoire, screen shot of text message 12 March 2013, Ex F. Refer also Exhibit A, paras 74-75.

⁶⁵ Exhibit 5, para 93.

- 204 By Supplementary Witness Statement dated 11 March 2014, the Applicant says that the messages and events occurred on 12 March 2013, and she corrects her statement accordingly.
- 205 Under cross-examination, the Respondent did not otherwise deny the text messages, he merely could not recall them; and he did not deny the phone call from a private number. The Applicant's evidence was not challenged.

Text message 'something to keep me going'

- 206 On 13 March 2013, while the Respondent had a day off work, he sent the Applicant a text message which asked for '*something to keep me going*'. The Applicant interpreted that message to be a request for some form of sexual favour or photograph to arouse him. The phone records show text messages sent from the Respondent to the Applicant, amongst a series of other messages. The Applicant deleted the message from her phone. She replied to the above message with:

You know where I stand and you know that MSG would stress me out!
Please keep your promise!⁶⁶

- 207 The Respondent notes that there were a number of phone calls and text messages between the Applicant and himself on that day.
- 208 The Respondent says that he made a call to the Applicant at the Post Office from a shopping centre with his wife present. He notes that although Mrs Smith was aware who he was speaking to, he did not realise she could see him during parts of the conversation.
- 209 He says that his wife witnessed his body language and smiles, which raised concerns for her that something may have been going on between himself and the Applicant. This phone call led Mrs Smith to question his fidelity on the first day of their holiday in Palm Cove.⁶⁷
- 210 Under cross-examination, the Respondent was unable to recall the nature of the conversation. He says it was not particularly long.
- 211 The Respondent did not deny the evidence of the text messages and the Applicant's evidence in this respect was not challenged.
- 212 On 14 March 2013, the Respondent sent a further text message as follows:⁶⁸

Thanks for hanging in there today I really do appreciate your work. You are really special:-)

Comment

- 213 The above text messages cited by the Applicant and the Respondent's apparent admissions in relation to them are significant. The Respondent provided no explanation or comment. In my view, they represent strong and

⁶⁶ Paragraph 76 of the Amended Statement of AJC. Optus records page 84. Exhibit AJC1
⁶⁷ Exhibit 5, paras 94-95.
⁶⁸ Exhibit AJC1.

unchallenged evidence, consistent with previous evidence given by the Applicant, of the continuing sexual pursuit of the Applicant by the Respondent. The apparent realisation by Mrs Smith that her husband may be engaging in an illicit relationship does not provide any independent evidence in itself, but is merely consistent with the character of the behaviour of which the Applicant complains.

Second resignation attempt and meeting at Ferguson's Café

- 214 On Saturday, 16 March 2013, the Applicant arrived at the Post Office to start her shift, but it was closed. She found the Respondent at a nearby café and asked him to open the shop. The Respondent appeared very angry with her. He said that he no longer had romantic or sexual feelings towards her and that he would now do things his own way. The Applicant cried on a number of occasions throughout that day.
- 215 At the end of the Saturday shift, the Applicant tried to discuss resolution of the problem once more. The Respondent became angry. He said it was her fault and that she had led him on and flirted with her eyes. He also said: *'I don't love you like I said. I realise now this is purely physical'*.⁶⁹
- 216 She was again reduced to tears, left and went to her car. She then returned to the Post Office and advised the Respondent that she would have to resign, and that this was her two weeks' notice.
- 217 She returned to her car. The Respondent followed her telling her to reconsider her resignation. She drove away. She telephoned her husband to advise that she had just quit her job.⁷⁰
- 218 A series of text messages were exchanged back and forth from 12:25 pm to 15:45 pm. There were also phone calls from the Respondent to the Applicant and a call from the Applicant to the Respondent in between the text messages. The Applicant and Respondent arranged to meet in person at Ferguson's Café at approximately 4:00 pm. The sequence of communications is set out as follows:

Respondent [12:25pm]: On Monday if you have not changed your mind you should put something in writing, second chance to think it over.

Applicant [12:41]: I'm about to talk to Leigh, I suggest you talk to Angela.

Respondent [14:05]: Is your phone on?

Applicant [14:06]: Yep.

Respondent [14:09]: *Phone call from the Respondent to the Applicant for a duration of 1 minute and 24 seconds. (the 'First Phone Call')*

⁶⁹ TB 258 Applicant's Supplementary Witness Statement para 19.

⁷⁰ Exhibit 5, paras 77-79.

Respondent [14:22]: No point, nothing else to talk about the decision appears to have been made sorry.

Applicant [14:23]: I'm 5 mins away.

Applicant [14:35]: Phone call from the Applicant to the Respondent for a duration of 15 minutes and 11 seconds. (the 'Second Phone Call')

Applicant [15:33]: May u meet me at 4pm where suits you?

Respondent [15:37]: Baseball centre skateboard park Burn.

Applicant [15:38]: Can we just go get coffee.

Respondent [15:41]: At four?

Applicant [15:41]: Yep.

Respondent [15:42]: What's open?

Applicant [14:44]: Café at waurn ponds would be open?

Respondent [15:45]: Ok.

Applicant [15:45]: I'll meet you at Michelle's near the Safeway there, I'll leave now.

It's Ferguson's.

- 219 The Applicant says that during the First Phone Call, the Respondent suggested that they meet to discuss the situation⁷¹ and that Zen Bakery would be the location. The Respondent did not show up as planned. Instead, she received the text message at 4:22 pm (above) which read *'No point, nothing else to talk about the decision appears to have been made sorry'*. The Applicant had arrived at Zen Bakery, her husband was waiting in the car.
- 220 The Applicant then telephoned the Respondent in what was the Second Phone Call. The Applicant describes the discussion which took place as 'heated'. She said to the Respondent that she felt as if she had been forced to resign because of his conduct, and that it was not fair. The Respondent asked *'then what do you want me to do?'* to which the Applicant said that she would speak to her father. The Respondent agreed to meet but he required that the Applicant's husband not be there.
- 221 After a series of further text messages, the Applicant and Respondent met at Ferguson's Café for a conversation at approximately 4:00 pm.
- 222 Once at Ferguson's Café, the Applicant stated again to the Respondent that the conduct had to stop, and that she did not want to have any sort of sexual relationship with him. She also said that it was unfair to blame her for the

⁷¹ The Amended Witness Statement of the Applicant at para 85 states that she contacted the Respondent. Upon review of the phone records, the Applicant's' Counsel advised the Tribunal that she was mistaken about who placed the call.

conduct, or to require her to give up her job because of it. The Respondent agreed, but then sought to have the Applicant admit that she was beautiful, and stated that he wanted to give her a hug but knew he could not. The Applicant agreed to continue working at the Post Office, she felt she had drawn a line in the sand. She agreed not to tell anyone about the Respondent's conduct.⁷²

- 223 The Respondent conceded that there were the meetings, conversations and text messages, as alleged. However he gave an entirely different account of their content and purpose.⁷³ He says that it was not his usual practice to get coffee before work, he did so to avoid having to deal with the Applicant before the shift started, because of the way in which she had been behaving on Saturdays. He does not know how the Applicant found him there. When she found him, he explained why he was there and the Applicant said she would be '*less demanding*'.
- 224 The Respondent says that the Applicant appeared upset throughout her shift and said it was because he was not talking to her and spending time at the counter with her. He says they spoke about him having accepted her position that she was not interested in a sexual relationship, and how he found it confusing that she made ongoing demands for him to stand at the counter with her.
- 225 The Respondent agrees that the Applicant said she was resigning, and that he followed her out into the car park. He was concerned that he would be a staff member short while he was away. Despite her Saturday 'outbursts', the Respondent says she was a good employee and he wanted her to continue working at the Post Office.
- 226 The Respondent said he did not give any thought as to why the Applicant resigned, and thought at one point perhaps she had taken up her sister's offer of getting a job with Australia Post Corporate.
- 227 During the afternoon, the Respondent says he received a number of hostile telephone calls and text messages, the tone was a surprise and it was as though she was a different person.
- 228 The Respondent says he initially agreed to meet the Applicant at the Zen Bakery but became delayed. After further messages from the Applicant, he agreed to meet her at Ferguson's Cafe.
- 229 At Ferguson's Café, the Respondent says that the Applicant spoke completely contrary to the aggressive way she spoke a short time earlier. The Applicant now appeared '*happy and relaxed*' and the conversation was '*general chit chat*'. He further says there was no discussion of her resignation or employment at all. The Applicant did not retract her resignation and he did not ask her to. The meeting only lasted 10 minutes, he came away with no idea what it was all about, he did not want to be at

⁷² Refer generally, Exhibit A, paras 80-87.

⁷³ Exhibit 5, paras 96-98.

the meeting, had other things on his mind, was not engaged in the conversation and his thoughts were elsewhere.

- 230 On 17 March 2013, the Respondent left for a two-week holiday in Palm Cove with his wife.

Comment

- 231 There are a number of aspects to the Respondent's account which make it implausible, not least of which being the assertion that he had no idea why the meeting at Ferguson's Café was convened and there was no discussion concerning resignation or employment. In my view, the Respondent's account is confused and contradictory.
- 232 I note at this point that the Aide Memoire provided to the Tribunal to assist in piecing together the chronology of the telephone calls and text messages, appears to have taken out of order some of the text messages exchanged on 18 March 2013.
- 233 From a detailed analysis of the phone records of the Applicant and the Respondent, and the screenshots of the Applicant's mobile phone, which were provided as part of the Applicant's evidence, it appears that Daylight Saving, operating in Victoria but not Queensland, was the likely source of the confusion.
- 234 The screenshots of the text messages received by the Applicant confirm that the text messages sent from the Respondent's mobile were received by the Applicant exactly 1 hour later than when they were sent. On 18 March 2013 Melbourne was in the Daylight Saving period, meaning Victoria was 1 hour ahead.
- 235 To avoid further confusion, I have set out the chronology based on when the text messages were received by the Applicant.

18 March 2013 – Text message in three parts

- 236 On Monday, 18 March 2013 at 12:11 pm the Applicant sent the Respondent a text message which appears to indicate that she had received a missed call from the Respondent while at work:

Applicant [12:11] Can't answer, Raels is at lunch sorry.

- 237 The Respondent indicates by text message in reply that he will try to call again later:

Respondent [12:11] I will try calling at safe time for you before after work lunch.

- 238 At 12:35 pm, the Applicant received a text message from the Respondent which came through in three parts, I presume because it was too long for a

single SMS message. This was followed by one further separate text message. The messages read as follows:⁷⁴

(1/3) Just called to say I hope You are feeling better and no longer stressed. Remember every day is a new day with no mistakes stay positive

(2/3) as far as leaving Goes dont rush with decision. I obviously want you... To stay, I know i can be difficult but i hope the highs outweigh the lows i know it is now also complicated as our secret is on (sic) longer ours.i cant make you promises i cant keep if i could i Would. He Wy Must LEAVE Pls speak to of first

(3/3) i no i should not ask this bit tacky but Pls give me heads up when the gossip starts and it will believe me. Now our secret is over. I do know i deserve everything i get an sorry i hurt you i x regret it

Sorry rushed but should make sense

239 The Applicant says that she was confused by the message and replied six minutes later at 12:41 pm as follows:

Applicant [12:41] Would like to speak to you, but know you won't be able to, we can chat when you get home, if u want hope everything is ok, gossip shouldn't start, I'm not telling anyone.

240 At 1:48 pm (Victorian daylight saving time), the Respondent called the Applicant and telephone records show that a conversation took place for a duration of 13 minutes and 17 seconds. The Applicant's witness statement says that she called the Respondent, but the phone records indicate it was the reverse.

241 The Applicant told the Respondent that she thought the issue had been resolved during their discussion on 16 March. They agreed again that she would continue to work at the Post Office if there was no more sexual conduct.

242 The Applicant states that she had a great two weeks at work while the Respondent was away for the rest of his holiday.

243 The Respondent says that shortly before going away, he overheard a postman talking to Ms Dempsey about the Applicant and himself. He thought from the tone of the conversation that the postman and Ms Dempsey suspected there was something going on. This played on his mind, and so he sent the text message to see if anything was said.

244 The Respondent says that he does recall speaking to the Applicant early in his holiday. He cannot recall what was said during the phone call, but whatever was said, it was not to the effect that the Applicant would continue to work and that he would abstain from sexual conduct. He denies ever promising to maintain the relationship at a professional level.

⁷⁴ Aide Memoire text messages 18 March 2013.

Events on holiday – 18 March 2013

- 245 The Respondent's witness statement details the events which took place on his holiday.⁷⁵ On the first day of the holiday, Mrs Smith asked him about his call with the Applicant on Wednesday, 13 March 2013. He told his wife about the friendship that had developed and that he was fond of the Applicant.
- 246 Mrs Smith was upset, she said she felt hurt and let down. They spent time on Sunday and Monday talking about it, and spent time alone thinking about it. He says it was a difficult period for them.
- 247 They continued to work on their personal difficulties throughout the holiday, but also recognised they had two businesses with staff which needed to function. They needed to find a replacement employee, and had to decide what hours that person would work.
- 248 The Respondent says that the Applicant's resignation gave him and Mrs Smith the opportunity to restructure and address the downturn in trade and foot traffic. It appears from the Respondent's statement that the Applicant's resignation was a *fait accompli*.⁷⁶ They decided that the Saturday shift would be filled by one of the four family members and sought to reduce the Tuesday and Wednesday shift to 5 hours rather than 8.
- 249 Under cross-examination, the Respondent agreed that the Applicant's original contract of employment included Saturday mornings. He also agreed that the Applicant wanted to work Saturday mornings because she needed the additional income; and that when they were taken away from her she tried to speak to the Respondent about it.

Comment

- 250 In my view, the Respondent's account is entirely inconsistent with the sentiment expressed in the text messages of the same day; and inconsistent with there having been no prior suggestion that the position occupied by the Applicant was not necessary.
- 251 I do not place any weight upon the evidence of the Respondent to the extent that the Respondent gives an account which relies upon conversations with his wife and decisions which he says they made together. Mrs Smith was not called to give evidence. Mrs Smith attended the hearing and was clearly available to make a statement.
- 252 The objective evidence provided by the text messages supports the Applicant's contention that she had been under considerable stress. Furthermore, it alludes to behaviour by the Respondent which he did not wish to become public or the subject of office gossip.
- 253 The sequence of events concerning the Applicant's resignation are more consistent with the account given by the Applicant, namely:

⁷⁵ Exhibit 5, paras 110-115.

⁷⁶ Exhibit 5, para 113.

- (a) An initial verbal resignation, which was not confirmed in writing;
- (b) A text from the Respondent on 18 March which included the words 'Don't rush your decision' and 'I obviously want you to stay'; and
- (c) Confirmation by the Applicant on 2 April that she wants to keep working.

254 Furthermore, the following exchange of text messages on 28 March 2013, in my view reveals confusion on the part of the Applicant consistent with her stated belief that her employment had been confirmed.

Alleged victimisation – attempt to accept previous resignation

255 Ten days later, on 28 March 2013 at 4:23 pm, while the Respondent was still on holiday in Palm Cove, a series of text messages were exchanged. From these messages it appears that the Respondent was relying upon the Applicant's previous resignation attempt on 16 March 2013, in order to confirm termination of her employment:

Respondent [16:23]	Did you confirm your resignation in writing?
Applicant [16:26]	Nope.
	Is that ok?
Respondent [16:34]	Ok, i guess the contract has expired. anyway, but have you told raelene?
Applicant [16:36]	Do you want me to resign David?
Respondent [16:49]	You told me Saturday week ago you were giving 2 weeks notice and would not be back after easter.
Applicant [16:57]	May u pls call me at 510.
Applicant [17:11]	Finished.

256 The Applicant says that she tried but was unable to get in contact with the Respondent after the exchange of text messages. The Respondent did not call her back. She formed the view that the Respondent did not wish for her to work at the Post Office anymore.⁷⁷

257 The Respondent recalls sending a text message to the Applicant asking her whether she had put her resignation in writing, and recalls wanting to know whether she had told the other members of staff. He recalls the Applicant asking whether he wanted her to resign. However, under cross-examination, he did not recall whether the Applicant tried to contact him while he was on his holiday; he agreed that he did not contact her; and again did not contact her on his return in response to a further text message. The Respondent said he concluded that money was not a problem for the Applicant and she did

⁷⁷ Exhibit A, paras 91.

not need the money from her job, although the reason for such conclusion was never put to the Applicant.

Alleged Victimisation – removal of Saturday shifts

- 258 On Tuesday, 2 April 2013, the day after Easter Monday, which was a day off for the Applicant, she phoned the Post Office at 8:30 am to discuss the unresolved matters from 28 March. The Respondent agreed to meet her after work at the Post Office.⁷⁸
- 259 At this meeting, the Applicant alleges that the Respondent made a number of comments including that:
- (a) His wife had searched through his mobile phone and found draft text messages to the Applicant, and that now his wife ‘knew’;
 - (b) He had discussed the legal implications of the matter with his wife;
 - (c) Now that his wife knew, things must change;
 - (d) She could no longer work on Saturdays because that would mean that she would be alone with him;
 - (e) She was an asset to the business, but he did not want to make promises that he could not keep; and
 - (f) If the Applicant wanted to have a sexual relationship with him, he would welcome the commencement of one.
- 260 The Applicant said she told him that she should not be punished for rejecting him. She says that she told the Respondent that he had put her in a difficult position because she has a mortgage, which was the reason she arranged to take over Ms Dempsey’s Saturday shifts in January. She says that the Respondent was aware of this at the time. The Respondent confirmed that she could not work on the coming Saturday, but indicated he would see what he could arrange.
- 261 As the meeting concluded and the Respondent was leaving, he tried to kiss the Applicant and touched her bottom with his hand. She shook her head and said ‘*stop it*’.
- 262 The Respondent says that he received three calls from the Applicant on 2 April, the first two he dismissed and the third he answered at 5:15 pm. They met and the Applicant indicated that she wanted to keep working at the Post Office.
- 263 The Respondent says that he explained that he and Mrs Smith had decided that changes in existing work hours needed to be made, due to the drop in trade, and that the family would now cover Saturday shifts. He did not mention the change in weekday hours at that point. He told the Applicant she could work through until Friday, as they had not finalised arrangements following her resignation.

⁷⁸ Exhibit A, paras 92-97.

- 264 The Respondent says that he spoke to his wife that night and it was agreed that the Applicant would be re-employed until Tim returned. However, her shifts would not include Saturday. Tuesday and Wednesday would be reduced to 10:00 am-3:00 pm.
- 265 The Respondent says that he did tell the Applicant that he had spoken to his wife about their friendship; about how his wife raised concerns about the 13 March 2013 phone call; and also mentioned that his wife had found a draft text message to the Applicant.
- 266 The Respondent agreed that he:
- (a) told the Applicant she was an asset to the business;
 - (b) provided a letter to the Applicant to enable her to apply for a car loan; and
 - (c) suggested meeting with the Applicant's husband '*to clear the air*'.
- 267 The Respondent denies:
- (a) that he said '*now that Angela knows, things have got to change*' or that this was the reason she could no longer work on Saturdays;
 - (b) discussing legal implications;
 - (c) being told by the Applicant that she did not want to be punished for rejecting him; and
 - (d) attempting to kiss the Applicant or touch her bottom.⁷⁹

Demanding of favours and threat to 'just take it anyway'

- 268 On 3 April 2013, the Respondent called while the Applicant was driving to work. He asked if her husband had seen some of the text messages from him while he was on holiday. She advised him that he had not. The Respondent asked whether he could come to the Applicant's house and speak to them both. She said that he could not. The Applicant says she does not know why the Respondent made this request.
- 269 After work the Applicant sought to discuss the issue of Saturday shifts again with the Respondent. The Respondent appeared angry and said their professional working relationship was not going to work. He said to her '*if you can demand to work on Saturdays, I should be able to demand favours from you*'.
- 270 When she left work on that day, the Respondent said to her, '*how does it feel knowing that one day when you walk out of here you will have had sex with me?*' She replied to him that '*that would not happen*' and the Respondent replied '*I will just take it anyway*'.⁸⁰

⁷⁹ Exhibit 5, paras 116-122.

⁸⁰ Exhibit A, paras 98-102.

- 271 On 4 April 2013, while the Applicant was on her lunch break, the Respondent asked her whether she had changed her mind about commencing a sexual relationship with him. She shook her head and looked downwards. The Respondent stated '*I had my hopes up*'.⁸¹
- 272 The Respondent says that a meeting took place on 3 April 2013 to discuss the Applicant's re-employment with reduced hours. The Applicant demanded that she retain Saturday shifts and needed that shift due to financial commitments. The Respondent explained that the Post Office also had financial commitments. Knowing how demanding the Applicant was about keeping Saturdays, he still did not mention the reduction in week day hours.
- 273 The Respondent denies the allegation that he demanded favours or made comments to the effect that he had his hopes up, or that he would take it anyway.

Further sexual assault – 'taking a bow' incident

- 274 Later that day, on 4 April 2013, the Applicant recounts an incident where she was putting out the mail.⁸² This involved handing the bags to the Respondent who stood outside the Post Office on Pakington Street. As she passed a bag to the Respondent, he lent into the Post Office and grabbed her vagina area with his hand, palm upwards. The Applicant immediately jumped backwards. The Respondent stated '*in my school boy days, that was called taking a bow*' and '*If I can't help myself out here in the open, I know what I will try and do when we are alone*'.
- 275 The Respondent does recall this incident, but says it happened differently.⁸³ He says they were both standing on the footpath. It is a very public area. They were both loading bags into a colby (large cage on wheels). The sacks weigh around 15 kilograms. He accidentally hit the Applicant at or below the waist, or potentially she thought was going to be hit, which caused her to involuntarily flinch and bend forward at the waist.
- 276 The Respondent says that the surprised look on the Applicant's face brought back high school memories of when boys would mess about and pretend to hit someone below the waist, and thereby cause them to 'take a bow'. He says the Applicant laughed along and showed no signs of distress. He denies saying he knew he would try something if they were alone.

A further meeting to discuss the conduct and the Lamborghini analogy

- 277 Later in the day, still on 4 April 2013, the Applicant asked to speak to the Respondent once again. The Respondent asked that the discussion take place on Hope Street, because he was not sure what he would do if they were alone inside. He said he would '*try something*'.

⁸¹ Exhibit A, para 103.

⁸² Exhibit A, paras 105-108.

⁸³ Exhibit 5, 128-132.

- 278 During the conversation, the Respondent made the analogy between the Applicant and a Lamborghini, stating *'if I had a Lamborghini in the garage, and I can't drive it, then I don't want it here anymore'*. The Applicant replied *'can't you just find it a nice car'* and the Respondent replied, *'No, not anymore'*.
- 279 The Applicant, having formed the opinion that the Respondent was trying to terminate her employment said to the Respondent that although she really wanted to keep her job, she realised that it was not going to be possible. She said she would start looking for another job. She asked the Respondent for a reference. He declined stating *'it wouldn't say what you would like it to say'*.
- 280 The Applicant said it could take some time to find a new job. The Respondent repeated the car analogy *'if I can't drive the car, I don't want it here'*. She asked if she could continue working until she found a new job. The Respondent told her to attend for her next shift, and then he would try and work something out, but he said he could not promise anything. She left.
- 281 The Applicant did not attend her next shift. She was too distressed. She has not worked since.⁸⁴
- 282 The Respondent agrees that a meeting took place. He still had on his mind the need to inform the Applicant of her reduced weekday hours, but felt uncomfortable about the conversation. As with previous meetings, the Applicant left and then returned to the Post Office a short time later.
- 283 The Respondent says that the Applicant had a beaming smile on her face. She said to him *'you know how I can get you to do anything...'*. He felt uncomfortable with her approach and explained that the conversation should take place outside in the car park. The Respondent denies that he said the meeting should take place outside because he might try something inside. He was also uncomfortable because he knew that the Applicant would be upset that any re-employment would be on a reduced-hours basis.
- 284 The Respondent says that the Applicant requested a reference that night, but the time frame was too short. He offered to speak to any prospective employer if something came up before the written reference. The Applicant sent a text message later saying she was unwell and would not be attending work the next day.
- 285 The Respondent recalls a conversation about the Lamborghini, but says it happened on a different date. There was a discussion about media reports in the United States, which involved someone making that remark to an employee. It was not a comment directed at her.
- 286 The Respondent says that the Applicant never said that he could not terminate her employment, or that she could not be punished for rejecting

⁸⁴ Exhibit A, paras 109-115.

his advances. Furthermore, the Respondent says that if she had raised the issue of her employment, he would have confirmed that she had resigned.⁸⁵

Comment

287 For reasons elaborated below, I am not satisfied that the alleged conduct of the Respondent, taken at its highest, constitutes victimisation within the meaning of the EOA.

OTHER EVIDENCE

Tendency evidence

- 288 The written submissions of Counsel for the Applicant rely upon third party witnesses and tendency evidence.⁸⁶ After this proceeding was commenced in April 2014 and following newspaper publicity in relation to it, two women came forward and made themselves known to the solicitors for the Applicant. Ms Cheryl Korondy and Ms Kaelene Sumner claimed that the Applicant engaged in unwanted conduct of a sexual nature toward them (separately) when they were working in Local Government in the (previously named) City of Newtown in Geelong. In each case, the events occurred between 24 and 21 years ago respectively.
- 289 Ms Korondy and Ms Sumner both provided Witness statements which were served on the Respondent in April 2014.
- 290 The statements were tendered for two principal purposes:
- (a) First, to rebut the Respondent's assertions set out in paragraphs 152 to 154 of his witness statement dated 25 February 2014. In particular, the Respondent's contention that he had '*never been accused of assault*'; he describes himself as '*shy kind and thoughtful*'; and that he finds it unbelievable that anyone would describe him as '*aggressive*', and would be surprised to be described as '*assertive*'; and
 - (b) Second, to show, either by itself or having regard to other evidence adduced by the Applicant that the Respondent has behaved in a similar way with other female employees, which is relevant to the facts in issue. In particular, that the evidence establishes a tendency in the Respondent to engage in a pattern of conduct of sexual harassment of young women in a reporting relationship to him, in the course of employment.
- 291 At a Directions Hearing, held on 11 December 2014 and prior to the final hearing of the matter, I declined an application by the Respondent that the evidence of Ms Korondy and Ms Sumner was inadmissible as either tendency or rebuttal evidence, but without prejudice to the Respondent's right to raise further objections to such evidence.

⁸⁵ Exhibit 5, paras 133-141.

⁸⁶ Final written submissions on behalf of the Applicant, paragraphs 39 and following.

292 The Respondent did not file any written material in response to either statement.

Ms Cheryl Korondy

293 Ms Korondy gave evidence at the Hearing by telephone link and was cross-examined. She confirmed her witness statement with some corrections. I have ignored paragraphs 10 to 14 inclusive of her statement on the basis that the contents are not relevant or rely upon speculation or hearsay evidence of third parties.

294 Between 1985 to 1992 Ms Korondy worked at the former City of Newton. When she returned to her full-time position, after maternity leave in early 1997, she reported directly to the Deputy Town Clerk while the Respondent, then the Town Clerk, was her overall boss.

295 Her work involved attending numerous IT training sessions in Melbourne and she was frequently required to work overtime to do data entry, when she would spend a lot of time working alone with the Respondent.

296 She refers to one occasion in mid-to late 1988 when after working late, returning from Melbourne, the Respondent suggested that they go somewhere to eat. She felt obliged to accept the invitation, although not friends with the Respondent. She felt uncomfortable with the conversation, and felt that the Respondent was '*openly coming on to me*'. When she attempted to leave from the booth in which they were both sitting, she said that the Respondent:

...grabbed me, pinned me against a wall kissed me, pushing his tongue inside my mouth. I was so shocked. I pulled away from him and left as quickly as possible.⁸⁷

297 She did not tell anyone about this incident because she felt ashamed; needed to keep her job; and feared that her husband might confront the Respondent.

298 Thereafter she felt very uncomfortable by the Respondent's behaviour toward her which involved:

- (a) often invading her personal space;
- (b) touching or brushing up against her;
- (c) inappropriate comments;
- (d) asking her out to dinner or lunch even though she continually said *no*; and
- (e) leaving two letters on her desk which contained unwelcome propositions.

299 Under cross-examination Ms Korondy's agreed that:

⁸⁷ Witness statement Exhibit J, paragraph 6.

- (a) she shared an office with another male employee for the duration of her employment;
 - (b) she had little day-to-day work related contact with the Respondent, other than training;
 - (c) she could not remember specific occasions when he asked her out to lunch or dinner; and
 - (d) when the training for the computer system ceased, which was the main source of contact with the Respondent, things went back to normal.
- 300 The Respondent gave evidence that his day-to-day contact with Ms Korondy was minimal, perhaps once or twice per week only to seek clarification on a matter.
- 301 In relation to the main incident described, he recalled an occasion when he and Ms Korondy were working back late, for the purpose of getting rate notices out, when he invited her for a drink at a local hotel. They both attended in their own cars. The Respondent purchased a drink for her and then lent over and kissed her. He could not recall her reaction and there was no further interaction. He then left and they went their own ways.
- 302 The Respondent had no recollection of the alleged touching, inappropriate comments or leaving notes. He could not recall working alone on a project with Ms Korondy and denied ever asking Ms Korondy out to lunch or dinner.

Ms Kayleen Sumner

- 303 Ms Sumner gave oral evidence and confirmed her written statement.⁸⁸
- 304 Ms Sumner worked at the then City of Newton from 1988 to 1992 when she was aged 27 to 31 years. During that time the Respondent was the Town Clerk and her direct manager. On one occasion she enquired of the Respondent as to why she was unsuccessful in securing a promotion. The Respondent did not wish to speak to her in the office and suggested that they do so over lunch. Although she felt uneasy about this suggestion, as they were not friends, she agreed. During lunch he told her that there had been accusations made against him by Counsellors to the effect that he was promoting her because they were engaged in a romantic relationship. The Respondent then declared that he did have feelings for her and liked her more than a friend and wanted a relationship with her. She was shocked as she was happily married and knew the Respondent was also married with children. She responded to him '*don't be stupid, I don't have feelings for you*'. The lunch ended abruptly. She denied that it ended amicably saying that she was most uncomfortable and asked to be taken back to work. Upon returning to the office she told a close friend and colleague about the Respondent's approach, as she was very upset, and she also told her

⁸⁸ Exhibit K, Statement dated 17 April 2014.

husband. Thereafter it was awkward at work. The Respondent subsequently left notes for her and often invaded her personal space.

- 305 Ms Sumner considered that strange things happened to her thereafter where she had to prove her professional qualifications all of a sudden. She was a Union representative at the time and contacted the Union about what was happening. She also made a complaint to the Mayor in relation to the Respondent's unwanted advances. The Mayor and the Union each subsequently initiated an investigation into the accusations. The Council ultimately resolved that the Mayor write to her acknowledging that it was wrong for the Respondent to have expressed affection towards her and that it placed her in a difficult position. A copy of the Mayor's letter dated 28 August 1992, is annexed to Ms Sumner's Statement. The letter also recommends that the Council request the Mayor to advise the Town Clerk (the Respondent) of the committee's report on the complaint; that the Council considers it inappropriate for the Town Clerk to have placed both himself and the complainant in the difficult position which inevitably followed by him expressing affection towards the complainant; and that in future he should, in dealing with staff of the municipality, act to ensure that his personal dealings with them did not go beyond what was appropriate to maintain a cordial and efficient working environment.
- 306 In his oral evidence, the Respondent denied that he expressed any feelings for Ms Sumner and said that he could not recall the luncheon. He also denied leaving notes other than a note one evening to say goodbye or a work-related note attached to an item of correspondence. However, he agreed that he did leave notes encouraging her to include in her Council reports personal letters of appreciation sent to her.
- 307 Counsel for the Respondent submitted that the Tribunal ought not place any weight on the statements nor permit them to be used for a tendency purpose.
- 308 It was further submitted that the Tribunal ought to be guided by the treatment of tendency evidence under the *Evidence Act*, and submitted variously in relation to the evidence of Ms Korondy and Ms Sumner that:
- (a) The statements did not contain any evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding. Accordingly, they should be rejected on the basis of relevance; and
 - (b) The evidence lacked significant probative value, in that the recall was poor and evidence under cross-examination was inconsistent. The Respondent dismissed the significance or denied that similar circumstances had been proven.

- 309 Respondent's Counsel submitted that what must always be borne in mind, as the overarching concern in tendency matters, is fairness.⁸⁹
- 310 I have now considered in detail the evidence directly relevant to this proceeding. I have found in the Applicant's favour in regard to the majority of the allegations of sexual harassment and I have done so without regard to the efficacy of any tendency evidence.
- 311 In the circumstances therefore, it is not necessary for me to finally determine the relevance or admissibility of the evidence of Ms Korondy and Ms Sumner. However, I make the following general comments:
- (a) The significant lapse of time since the alleged misconduct against each of the complainants by the Respondent, inevitably made it very difficult for him to recall in detail the timing, circumstances and context of the allegations;
 - (b) The age difference between the Respondent and each complainant at the relevant time was not comparable to the age difference between the Respondent and the Applicant;
 - (c) The complainants both gave evidence of a sudden sexual advance by way of an unwanted and unwelcome kiss in circumstances where the Respondent had initiated a social meeting outside of work;
 - (d) The Respondent admitted inviting Ms Korondy for a drink after work and kissing her but otherwise could give no explanation for his conduct or comment upon her reaction at the time;
 - (e) The Respondent did not recall the 'kissing incident' with Ms Sumner and otherwise made no comment upon the subsequent investigations, findings and recommendations of the Council;
 - (f) The subsequent alleged unwelcome attention by the Respondent was somewhat vague and non-specific in nature;
 - (g) There is no evidence of any intervening complaints having been made about the Respondent's conduct in an employment situation;
 - (h) There were a number features which bear similarity to the Applicant's circumstances, namely:
 - i. The complainants were of a similar age to the Applicant and both were also married;
 - ii. Both were required to work during periods when only the Respondent was also at work;
 - iii. There was a direct or indirect reporting relationship to the Respondent;
 - iv. They were both financially reliant upon continued employment; and

⁸⁹ *R v Papamitrou* [2004] VSCA 12.

- v. Subsequent to the 'kissing incident' in which they each rejected his advances, they both described continued inappropriate sexual comments and touching as well as notes being left.
- 312 Taking all of the above circumstances into account, in fairness to the Respondent, the probative value of the evidence of these complainants is modest. In any event, as indicated above, I placed no reliance upon such evidence in reaching my ultimate findings.

Applicant's credibility (WorkCover claims)

- 313 As indicated above, this case has given rise to significant conflicts in the testimony of both parties. Counsel for the Respondent submitted to the effect that the Tribunal can be assisted in resolving such conflict in favour of the Respondent, having regard to the evidence given by the Applicant in relation to WorkCover claims.
- 314 Under cross-examination the Applicant agreed that she had been seeing her general practitioner monthly for Certificates of Capacity between January and May 2014. When asked about answers which she gave when interviewed for a workers' compensation claim, the Applicant initially responded: '*it is my belief that WorkCover can't be used in this [proceeding]*'.
- 315 It subsequently transpired that the Applicant was acting upon legal advice. Her Counsel raised an objection pursuant to s 588 of the *Workplace Injury Rehabilitation and Compensation Act 2013* which relates to the unauthorised use of information obtained under or pursuant to that Act, the *Accident Compensation Act 1985* or the *Workers Compensation Act 1958*. The Applicant subsequently went on to answer questions, without objection in a responsive and straightforward manner.
- 316 The Applicant was questioned extensively about her answers to questions in claim forms in the period February 2014 onwards, which related to certificates of capacity, and whether she was engaged in any paid, unpaid or voluntary work. The Applicant conceded that the answers were not entirely accurate when she had ticked 'no' to the question about work on each form. In fact, the Applicant was associated with two businesses.
- 317 There is an ABN held in the name of AJ Collins and LA Collins which relates to a business of her husband which has been active from 4 February 2014.
- 318 The Applicant holds an ABN as the sole proprietor of a business with the registered name Bliss Massage and Lashes. She explained that creating this business was part of the massage therapy, sports and remedial massage course which was at least partly funded by workers' compensation. There was no suggestion that any income was in fact derived from that course.
- 319 The second business identified also has an ABN and has the registered business name of Mandaleigh Custom. The business has existed for many

years but the website was only created early in 2014. The website has various statements including '*Mandaleigh is a small business that is run by Leigh and Mandy*' and '*Mandy can be commissioned to create a number of murals & chalkboards*'.

320 The Applicant conceded that at the time of signing certificates of incapacity she was running a small business. However:

- (a) Dr Emily Hill and the Applicant's friends had suggested she focus on creating art as a means of therapy and as a distraction from the negativity of legal proceedings. This is consistent with the titles of her works and the representations within them, one piece was named 'Determination' and another piece was named 'Mixed Emotions';
- (b) While her husband Leigh's side of the business, selling furniture pieces, was successful, the Applicant did not earn any income from her art work and had not done any art work for anyone. She may have sold some art pieces in the past, although the evidence was unclear on this point. When she had been asked to do art work more recently, she declined saying that it was not the right time for her; and
- (c) She sometimes answers the phone or assists completing invoices when Leigh is not available. She avoids customers when Leigh is not there.

321 I note that the Applicant's husband gave evidence in support of the Applicant's account of their registered businesses.

322 Taken as a whole, I do not consider that the evidence regarding the Applicant's WorkCover claims has any bearing upon her credibility in the current case. For the purpose of the Work Cover claims, I accept that the Applicant honestly believed that she was not engaged in any paid, unpaid or voluntary work.

Mr Leigh Collins

323 The Applicant's husband, Mr Leigh Collins, filed a witness statement⁹⁰ and gave oral evidence.

324 Mr Collins' statement refers to the day on which the Applicant told him '*I think David just came on to me*'. He described the Applicant as being serious, surprised and shocked.

325 Between January and March 2013, Mr Collins noticed that the Applicant was not herself. She had lost weight and became moody. She told him that the work situation with Mr Smith '*keeps repeating itself*'. She was reluctant to talk about it, rather she would brush him off and indicate the situation was under control.

326 Mr Collins says that the Applicant's mental state has deteriorated rapidly. She is withdrawn and rarely wishes to socialise. She appears traumatised.

⁹⁰ Exhibit H.

There is a lack of affection in their relationship. He wishes things would return to how they were before January 2013.

- 327 In his oral evidence, Mr Collins confirmed that Mandaleigh Custom was structured as a business partnership with himself and the Applicant. However, he was the only one working in the business. Mr Collins confirmed that the Applicant remained withdrawn and depressed and that there remained a lack of physical affection in their relationship.

EXPERT EVIDENCE

Dr Francis Maxwell, General Practitioner

- 328 Dr Maxwell prepared an expert report dated 27 August 2013 at the request of the Applicant's solicitors, which was tendered without objection.⁹¹
- 329 The Applicant first attended the Kardinia Health GP Super Clinic on 5 April 2013, when she saw Dr Liam Twycross and during that consultation was also referred to Dr Emily Hill clinical psychologist. The Applicant next saw Dr Maxwell at the Clinic on 9 April 2013 and saw him a total of eight times between April and August 2013.
- 330 Dr Maxwell records a history of severe mood and anxiety symptoms which had developed in the context of alleged sexual harassment by the Respondent. The Applicant complained of daily panic attacks; being fearful seeing the Respondent; sleep disturbance; recent weight loss; nausea and shaking. Dr Maxwell diagnosed a major depressive episode with significant anxiety features and recommended fortnightly follow-up consultations. The Applicant commenced therapy with Dr Hill. In a subsequent consultation on 7 May 2013, Dr Maxwell noted a deterioration in mental state and further 4 kilogram weight loss.⁹² She was commenced on antidepressant medication, which she had been previously reluctant to take, and reported a 'definite improvement' June 2013. By 16 August 2013, the Applicant continued to complain of sleep disturbance, including nightmares involving the Respondent. Dr Maxwell noted that consistent with the symptoms which the Applicant described to him:
- the significant features of mental state examination observed were that Amanda generally appeared anxious, sad and tearful.
- 331 Dr Maxwell continued to prescribe antidepressant Fluoxetine and the Applicant continued to attend Dr Hill. Dr Maxwell considered that the Applicant's '*current mental state will remain largely unchanged until there is resolution of the situation with Mr Smith.*'

⁹¹ Exhibit O.

⁹² Professor Dennerstein notes at p. 9 of her report a weight loss from 62 kgm to 49 kgms.

Dr Emily Hill, Clinical Psychologist

- 332 Dr Hill prepared expert reports dated 16 August 2013 and 23 July 2014, at the request of the Applicant's solicitors, which were tendered without objection.⁹³
- 333 Dr Hill confirms that she commenced therapy sessions with the Applicant in April 2013 after she was referred by Dr Twycross. As at 23 July 2014, the Applicant had attended for 30 sessions with future appointments arranged. Therapy sessions incorporated trauma based treatment strategies and cognitive behavioural therapy.
- 334 Dr Hill initially took a history similar to that recorded by Dr Maxwell. Dr Hill diagnosed a Major Depressive Disorder and Anxiety Disorder and noted a worsening of symptoms over time. In her second report, Dr Hill diagnosed '*Post Traumatic Stress Disorder most likely related to the alleged harassment*'.

Dr Hill reported that the Applicant was an active participant in therapy. However, her psychological functioning fluctuated in accordance with her involvement in the worksafe investigation and litigation process.

It seems likely that Ms Collins condition will improve with the settlement of legal proceedings and her gaining meaningful employment in the future.

Ms Veronica Knox, General Psychologist

- 335 Ms Knox, Psychologist, prepared a report dated 5 October 2013⁹⁴ and gave oral evidence in this proceeding. The Applicant requested an assessment of her psychological and emotional functioning for the purpose of this proceeding.
- 336 Ms Knox conducted a number of tests. Her findings were that the Applicant has moderate depression (Beck Depression Inventory); 30/50 for anxiety and depressive symptoms (Kessler Psychological Distress Scale); and is symptomatic of Post-Traumatic Stress Disorder (Post Traumatic Checklist & Clinician Administered PTSD Scale). At the time of her assessment Ms Knox recommended:⁹⁵

Given Mrs Collins current difficulties, her level of distress and emotional instability and the severity of symptoms and impact on occupational and social functioning it would not be in her best interest to return to work but rather to attend ongoing weekly counselling sessions with her psychologist with whom she finds helpful and supportive.

⁹³ Exhibit N.

⁹⁴ Exhibit M. Ms Knox confirmed the date of the report in cross-examination. The report itself does not have a date visible.

⁹⁵ Exhibit M p 6.

Professor Lorraine Dennerstein AO, Psychiatrist

- 337 Professor Dennerstein, performed a forensic psychiatric assessment of the Applicant and prepared an expert report at the request of the Applicant's solicitors⁹⁶ and gave oral evidence. Professor Dennerstein had been provided with previous reports of Dr Von Ammers, Ms Knox and Dr Maxwell.
- 338 The Professor's report outlines the Applicant's personal development background including: family, education, relationship and occupational history, social and sporting interests, past medical and psychiatric history. Prior to January 2013, she had no problems with mental health and there was no other relevant medical or social history.
- 339 The report also provides a description of the harassment as recounted by the Applicant to her and the impact the harassment has had on her. She diagnosed the Applicant with Chronic Post Traumatic Stress Disorder and Major Depressive Disorder in partial remission with treatment; and considered that her current treatment regime of psychological counselling and antidepressant medication is reasonable and appropriate:
- The disorders are related in timing and content to the repeated sexual harassment she described occurring in her employment... And subsequent loss of her job... Her capacity to work at the moment is very limited because of her continuing psychiatric symptoms. Her condition is still severe and unstable and she should not return to work until better control of her symptoms is achieved.⁹⁷
- 340 Under cross-examination, Professor Dennerstein was provided with a copy of a medical report prepared by Consultant Psychiatrist Dr Wendy Triggs, prepared for the purposes of assessing the Applicant's workers' compensation claim.
- 341 Dr Triggs conducted her assessment of Ms Collins on 30 October 2013. Dr Triggs gives the opinion that the Applicant's mood would improve if she were to return to work and notes that initially it would be best for the Applicant to have a female boss.
- 342 Professor Dennerstein confirmed she had not read the report of Dr Triggs. If she had been provided the report, she would have read it, but would still have made her own independent assessment of the Applicant.
- 343 Respondent's Counsel sought to tender the report of Dr Triggs through Professor Dennerstein with the intention of inviting the Tribunal to draw an inference as to why this report was not provided to Professor Dennerstein. I refused the tender and advised that there was no basis for drawing such inference.

⁹⁶ Exhibit L.

⁹⁷ Exhibit L, p 13, para 3 and 4.

344 I also note that although Professor Dennerstein was not provided the report of Dr Triggs, the Applicant informed Professor Dennerstein of the existence of the report and the conclusion.⁹⁸ Professor Dennerstein's report states:

She said Workcover payments were denied because of the report of psychiatrist, Dr Wendy Triggs, in October 2013 who said that she could go back to work in another post office despite having had letters from Amanda's psychologist and doctor contrary to this.

Comment

345 In relation to the above expert opinions, I am satisfied that the Applicant has given a history to the reporting experts consistent with her account of alleged sexual harassment. Furthermore, I am satisfied that the opinions of her treating health practitioners and medico-legal experts are consistent with a nexus between the alleged sexual harassment and consequent psychological trauma.

ASSESSMENT OF EVIDENCE IN SUMMARY

346 The circumstances, as described by the Applicant and the Respondent, vary significantly, and it has been necessary for the Tribunal to resolve significant contests as to the facts.

347 The starting point for the Tribunal has been to examine the written statements and oral evidence from the Applicant and the Respondent as a whole, and to then to consider that evidence in light of the most reliable physical evidence which has been put before the Tribunal; namely the text messages sent between the Respondent and the Applicant; the St Valentine's Day card (the Card); and relevant telephone records confirming calls made or messages sent.

Text messages

348 The text messages provide highly reliable evidence of the knowledge and state of mind of the parties at various times throughout their interactions. The text messages also provide a reliable indication as to what events preceded the sending of the messages.

349 As indicated above, a significant amount of the Respondent's narrative is contradicted or becomes highly implausible when considered in the light of the text messages. Although the Respondent frequently could not recall them or the meaning or intent of the messages, there was no challenge to the veracity of those text messages which have been produced. Text messages were proven through mobile phone screen shots and phone records of the Applicant and the Respondent.

350 One example is the text message of 13 March 2013, sent from the Applicant to the Respondent:

⁹⁸ See page 8 of Professor Dennerstein's report.

You know where I stand and you know that MSG would stress me out!
Please keep your promise!

- 351 The words of the 13 March text message, taken at face value, are entirely consistent with the narrative that the Applicant sets out in her witness statement.
- 352 I am satisfied that it is reasonable to infer from the text message of 13 March 2013, that the Applicant had set boundaries to their relationship (*'you know where I stand'*); that the Respondent has made a promise not to overstep the boundary (*'please keep your promise'*); that the Respondent had in fact overstepped the boundary and broken a promise by something said in a previous text message; and that the Respondent knew his behaviour was stressing out the Applicant (*'you know that message would stress me out'*).
- 353 It is consistent with the text message above that the Applicant was responding to a text message received from the Respondent immediately prior which, as she alleges, asked for *'something to keep him going'*. The Respondent did not deny the evidence of the text messages and the Applicant's evidence in this respect was not challenged.
- 354 I am satisfied to a high degree that the *'something to keep me going'* text message was sent by the Respondent to the Applicant, and that the content of that text message meets the definition of conduct of a sexual nature. Furthermore, on the basis of the Applicant's response, it was unwelcome and unwanted.
- 355 The lengthy 3-part text from the Respondent, while on holiday, to the Applicant five days later on 18 March 2013, is similarly informative. The message is set out in full above but once again, may be analysed as follows:
- (a) *'I hope You are feeling better and on (sic) longer stressed'* ... again acknowledges that the Applicant is stressed about something;
 - (b) *'as far as leaving Goes dont rush with decision.... He Wy Must LEAVE Pls speak to of first'* ... expresses encouragement to the Applicant not to rush her decision [to resign] and asks that she speak to him first if she must leave;
 - (c) *'i cant make you promises i cant keep if i could i Would'* ... again refers to broken promises, consistent with the Applicant's claims that the Respondent broke his promises to refrain from sexual advances;
 - (d) *'I know i can be difficult but i hope the highs outweigh the lows'* ... is consistent with the Applicant's claims that the Respondent had unpredictable mood changes;
 - (e) *'I do know i deserve everything i get'* ... appears to express an admission of wrong doing on the part of the Respondent;
 - (f) *'an sorry i hurt you i x regret it'* ... contains an apology and acknowledgment that he has caused the Applicant hurt.

356 The text message itself does not contain any sexual propositioning. However, the text message strongly supports the Applicant's version of events. There are admissions of hurting the Applicant and admissions from the Respondent that he deserves everything that he gets. The messages are inconsistent with the Respondent's portrayal of the Applicant as a provocateur. Again, the Respondent has raised no credible alternative hypothesis to explain the content or the circumstances surrounding the sending of the text message.

Comparative credibility of the applicant and the respondent

- 357 Counsel for the Respondent submitted a number of reasons why the Tribunal should prefer the Respondent's evidence over that of the Applicant.
- 358 In relation to the Respondent, for the reasons given above, taking his evidence as a whole, I am not satisfied that he was a credible or reliable witness in relation to the matters in issue. In particular:
- (a) He was frequently evasive and non-responsive in his answers under cross-examination;
 - (b) Where he could not recall conversations or text messages, he did not always deny that they did occur, but otherwise could not give any explanation for them;
 - (c) Where there were text messages or phone records produced, he did not contest their content but equally provided no or no plausible explanation for them; and
 - (d) Where he denied conversations or text messages, his accounts were often implausible and self-serving.
- 359 There were numerous occasions, both in his witness statement and cross-examination, that the Respondent had a surprising lack of memory. He showed a repeated tendency to recall events in a way which supported his narrative, but without any particularity or detail about exactly what was said or done.
- 360 Equally, the Respondent purported to have a poor recall of events which were potentially significant, for instance:
- (a) attempting to kiss an employee for the first time;
 - (b) a confrontation with his wife about infidelity; and
 - (c) a conversation with the Applicant when she gave notice of resignation, at a hastily convened meeting after work.
- 361 All of these events were likely to have consequences and could be expected to be impressed upon the Respondent's memory.
- 362 In relation to the 5 January 2013 incident, I have already given reasons above why I accept the account given by the Applicant. In cross-

- examination, the Respondent agrees that he took the initiative and sought to *'test the waters'*. He said that he told the Applicant that he had feelings for her, and that he thought she may be feeling the same way. He could not be sure those were the words he put to the Applicant and could not elaborate upon anything else which he said. He could also not remember whether he was nervous about the conversation but dismissed with certainty the Applicant's recall that he said his hands were shaking. He also firmly rejected the Applicant's very specific recall of his comments while acknowledging that he does not remember what he did say, other than he agrees he made some romantic statements. He does not recall the Applicant's reply to the effect that she was in shock, or that she thought he looked at her like an annoying kid.
- 363 After the unsuccessful attempted kiss, the Respondent says that the conversation continued for 10 minutes. Yet he does not remember the content of the conversation, only that the effect of the conversation was that the Applicant was happy with the closeness, flattery, attention, and the jokes between them, however, she could not take it any further.
- 364 In relation to the meeting at the Ferguson's Café at 4:00 pm on 16 March 2013, I have set out the chronology of text messages and phone calls above. The Respondent agrees that the Applicant resigned that afternoon.
- 365 The Respondent says that the resignation came as a surprise to him, and that he did not give any thought as to why the Applicant resigned. In re-examination, the Respondent confirmed that he was surprised and had no reason to believe she wanted to resign, and their relationship at that time was 'close'.
- 366 In the context of the special friendship that the Respondent describes between himself and the Applicant, the propositions that he did not give any thought as to why the Applicant resigned; was not told by her why she resigned; and that he did not ask the Applicant why she resigned, are inconsistent and implausible.
- 367 Having suddenly resigned without explanation, the Respondent says that the Applicant asked to meet with him via text messages and telephone calls. He describes the tone of the Applicant's telephone calls as hostile and also surprising.
- 368 Despite resigning just hours earlier and despite the pressing phone calls and text messages, upon meeting at the Café, the Respondent described the Applicant as appearing *'happy and relaxed'*.
- 369 According to the Respondent, the conversation proceeded as *'general chitchat'* and there was no discussion about her resignation or ongoing employment whatsoever. He says he came away with no understanding of what the meeting was about.
- 370 As I have noted throughout, the Respondent's account of 16 March 2013 is completely implausible. I have formed the view that the Respondent's

account is a self-serving invention, and apparently crafted to fit around the text and telephone record evidence.

- 371 In my view, the accounts given by the Applicant are far more probable, namely, that despite the concerns which she had consistently raised with the Respondent as to his behaviour, he sought to change her mind about resigning. His sudden change of mind in this regard, coincided with his further discussions with Mrs Smith.
- 372 Finally, in relation to the events during the Palm Cove holiday, Mrs Smith had apparently seen a draft text message to the Applicant and seen the Respondent speak to the Applicant by phone while shopping, both of which aroused her suspicions. She confronted the Respondent. On his own evidence, his wife was clearly upset, hurt and let down. They spent time talking together and alone. They continued to work through their personal problems during the two week holiday. Clearly, it was a significant event in their marriage.
- 373 The Respondent was not able to recall during cross-examination whether he had told Mrs Smith about the attempted kiss incident; or whether he told her that he sought to 'test the waters' to see if the Applicant wanted a sexual relationship with him. He also did not recall whether he told Mrs Smith that he had sexual feelings for the Applicant.
- 374 In relation to the draft text message which Mrs Smith found, the Respondent similarly could not recall the content of such message. He knew the text message referred to something about the 16 March 2013 meeting at Ferguson's Café. He thought Mrs Smith was mostly upset about the fact they met after hours. But again, could not say with any particularity why she was so upset.
- 375 As indicated above, I do not give any weight to the evidence of the Respondent to the extent to which it relies upon the substance of conversations with his wife. Mrs Smith did not make a statement and was not called to give oral evidence.

Interpretation of Sexual Comment

- 376 To the extent that the Respondent did not contest comments or conversations which the Applicant alleged, he otherwise rejected the connotation of sexualised comment or that such comment could amount to sexual harassment. I reject the Respondent's evidence in this regard for the following reasons:
- (a) In the case of the 5 January incident, the Respondent rejected the detailed recollection given by the Applicant of what he said to her, although he otherwise did not have a clear recollection of what was said. He told the Applicant that he had feelings for her and thought she might be feeling the same way. He thereupon attempted to kiss her. She said 'No' and in conversation said to him: *'it couldn't happen as*

we would get caught’ and *‘there are always cameras around now.’* The Respondent said under cross-examination that he recalled that the Applicant said that she did not want a sexual relationship. He also conceded subsequently, in a number of conversations with him, that the Applicant again said she would not have a sexual relationship with him; and he stated that he would never leave his wife. In my view, even without reference to the Applicant’s evidence, the only reasonable inference to be drawn from the Respondent’s admissions is that he proposed or discussed a sexual relationship with the Applicant, which she resisted at every opportunity;

- (b) There are a number of comments which the Respondent agreed he made, which in the context of a married female employee who had previously enjoyed a professional and respectful relationship, constitute unwelcome sexual comment consistent with a sexual pursuit by the Respondent. Into this category I include the following:
- i. The comment about having an erection;
 - ii. The St Valentine’s Day Card;
 - iii. The Pako Festa conversation on 23 February; and
 - iv. The text messages sent by the Respondent on 12 and 13 March.

Applicant as a witness

377 As indicated above, under cross-examination the Applicant maintained her accounts of the alleged events, in a responsive manner. In my view, no inconsistencies of substance were identified. The Applicant’s recall of the events is also entirely consistent with the phone and text messages between the parties.

378 In written submissions, Respondent’s Counsel submitted to the effect that by continuing to place herself in close proximity to the Respondent, including requesting meetings with him after hours, the Applicant has herself engaged in behaviour not consistent with the conduct alleged against the Respondent. I accept that the conduct of the Applicant is a relevant consideration. However, caution must be exercised when examining the conduct of the Applicant for the purpose of reflecting upon whether she could have handled the situation better or differently. In this regard, the observations of Justice Garde in *GLS v PLP*⁹⁹ are most apposite:

The objectives of the Act include the elimination, as far as possible, of sexual harassment. The Act requires employers to refrain from engaging in the sexual harassment of employees. If an employer does engage in the sexual harassment of an employee, it is not appropriate to criticise the employee on the basis that she should have handled the sexual harassment better or should have stormed out of the room or escaped from the harasser

⁹⁹ *GLS v PLP* (Human Rights) [2013] VCAT 228.

earlier. It is enough if the respondent's conduct constitutes sexual harassment under the Act.[emphasis added].

- 379 In the circumstances, I do not consider that the conduct of the Applicant reflects adversely upon her evidence, having particular regard to:
- (a) the prior long-standing relationship between the parties which both agreed had been professional and which had engendered trust and respect in the Applicant for the Respondent;
 - (b) the Applicant's expressed desire to maintain her employment, which she had hitherto enjoyed and also by reason of her financial commitments;
 - (c) the Applicant's reliance upon continuing assurances from the Respondent that he would not engage in the conduct of which she complained; and
 - (d) the Applicant's desire to deal with the problems which had emerged in their working relationship in a discrete manner, without alerting other employees.

5 January 2013 incident

380 As indicated above, I have accepted the evidence of the Applicant in relation to the unwanted kiss and declaration of sexual interest on 5 January 2013 and for the reasons given I am satisfied to a high degree that the elements of sexual harassment have been proven.

Further alleged incidents of sexual harassment

381 As indicated above, I have accepted the evidence of the Applicant in relation to the following further alleged incidents or events of sexual harassment and for the reasons given I am satisfied to a high degree that the elements of sexual harassment have been proven:¹⁰⁰

- (a) During the week commencing 7 January 2013, the Respondent said to the Applicant *'let's not beat around the bush – I want to have sex with you'*;
- (b) On about 10 or 11 January 2013, the Respondent said to the Applicant *'your plan isn't working; I can't get the thought of making love to you out of my head'*;¹⁰¹
- (c) On 21 January 2013, the Respondent asked the Applicant to meet him for lunch at his house by the pool the next day, when his wife would be away;¹⁰²
- (d) On 25 January 2013, the Respondent approached the Applicant in the staff room after work at the back of the Post Office and began rubbing

¹⁰⁰ Applicant's submissions [23] to [36].

¹⁰¹ Applicant's evidence TB 63 at [22].

¹⁰² Applicant's evidence TB 63 at [26].

her on the shoulders, arms, thighs and crotch areas and said ‘*come on you know you want to*’;¹⁰³

- (e) On various dates in January or early February 2013, the Respondent said to the Applicant that she was beautiful and had nice breasts;¹⁰⁴
- (f) On an unknown date in mid to late January, the Respondent said to the Applicant ‘*My mind goes into overdrive to think what I could do for you, I think about your car. I could give you nice things*’;¹⁰⁵
- (g) On an unknown date in January or early February 2013, the Respondent sent the Applicant a text message saying ‘*I am in bed listening to the rain. I wish you were lying here with me. You drive me crazy*’;¹⁰⁶
- (h) In or about February 2013, the Respondent said to the Applicant ‘*I want to take you out the back against the safe*’. On a subsequent occasion not long after this occurred, the Respondent asked the Applicant ‘*are you scared?*’ when she went to the safe to get some change;¹⁰⁷
- (i) In or about February 2013, the Respondent said to the Applicant ‘*I might just have to take it anyway*’ when the Applicant had told him she would not have sex with him;¹⁰⁸
- (j) On an unknown date in or about February, the Respondent said to the Applicant ‘*what would you do if I just threw you on the floor?*’¹⁰⁹
- (k) The Respondent during the hug whispered into the Applicant’s ear ‘*I have an erection now*’ and ‘*don’t be silly, I kept it away from you*’;¹¹⁰
- (l) The Respondent presented a piece of paper to the Applicant which said ‘*Let me massage your thighs for 15 minutes and you can have everything in my wallet*’ and ‘*my wallet is full too*’;
- (m) In or about February 2013, the Respondent asked the Applicant to have an ice cream with him and to wear a nice miniskirt;¹¹¹
- (n) In or about February 2013, the Respondent asked the Applicant to walk his dogs with him so that ‘*no one will see us*’;¹¹²
- (o) On 15 February 2013, the Respondent put a small red handmade St Valentine card containing romantic song lyrics into the Applicant’s mobile phone case inside her handbag;

¹⁰³ Applicant’s evidence TB 64 at [35].

¹⁰⁴ Applicant’s evidence TB 65 [40] to [42].

¹⁰⁵ Applicant’s evidence TB 251 at [2].

¹⁰⁶ Applicant’s evidence TB 65 at [42].

¹⁰⁷ Applicant’s evidence TB 65 at [44]; Applicant’s evidence TB 257 at [13].

¹⁰⁸ Applicant’s evidence TB 65 at [43] to [46].

¹⁰⁹ Applicant’s evidence TB 65 at [46].

¹¹⁰ Applicant’s evidence TB 66 at [47]

¹¹¹ Applicant’s evidence TB 66 at [52]; exhibit “P”.

¹¹² Applicant’s evidence TB at [52].

- (p) On 15 February 2013, the Respondent sent a text message to the Applicant whilst they were both at work saying words to the effect that he would like to bring her to orgasm and he would prefer it to be through intercourse so that he could be pleased too;
- (q) On 23 February 2013, on the day of Pako Festa the Respondent asked the Applicant:
- i. When she had lost her virginity and told her when he had lost his;
 - ii. Whether she had had sex in crazy places;
 - iii. Whether she planned to have children;
 - iv. Whether she was using contraception;
 - v. Whether she thought orgasms came internally or externally; and
 - vi. Made the comment '*well, just to ease your mind, I have had the snip*';
- (r) On an unknown date, the Respondent touched the Applicant's bottom in the mail room;¹¹³
- (s) On an unknown date, towards the end of the employment, the Respondent touched the Applicant's breasts, his fingers going just inside her bra, and said '*I like this*';¹¹⁴
- (t) On an unknown date, the Respondent said '*I am never going to give up on you. It will happen...In my own silly way I love you*';¹¹⁵
- (u) On an unknown date, the Respondent told the Applicant that it took all of his power and control when her hair was up not to come and kiss her on the back of the neck. He subsequently told her on a number of occasions when she walked out the back, if she was on a break '*watch your neck*';¹¹⁶
- (v) On 12 March 2013, the Respondent sent the Applicant a series of text messages saying among other things:

Sorry i know i will regret this but my heart has taken over, and as you have not called me back i assume you don't care what i had to say or you want me to follow "your lead" with no more phone or text messages between us...it's about you not me...or not interested.¹¹⁷

¹¹³ Applicant TB at 68 at [65].

¹¹⁴ TB Applicant 68 at [66].

¹¹⁵ TB Applicant 68 at [69].

¹¹⁶ Applicant's evidence TB 256 at [13].

¹¹⁷ TB Applicant 69 at [74]; Aide Memoire, Exhibit F at P 7.

- (w) On 13 March 2013, the Respondent sent the Applicant a text message at about 4:00 pm asking for ‘something to keep him going’ while he was on holiday;¹¹⁸
- (x) On 16 March, 2013, the Respondent told the Applicant ‘I don’t love you like I said, I realize now this is purely physical’;¹¹⁹
- (y) On 2 April 2013, the Respondent said that if the Applicant changed her mind about a sexual relationship he would welcome the commencement of one;¹²²
- (z) On 2 April 2013, the Respondent tried to kiss the Applicant and touched her on the bottom with his hand;¹²³
- (aa) On 3 April 2013 the Respondent said to the Applicant that if she could demand to work on Saturdays, he should be able to demand favours from her too;¹²⁴
- (bb) On 3 April 2013 the Respondent said to the Applicant ‘how does it feel knowing that one day when you walk out of here you will have had sex with me?’ and when she said it would not happen ‘I will just take it anyway’;¹²⁵
- (cc) On 4 April 2013 the Respondent asked the Applicant whether she had changed her mind about not commencing a relationship with him, and when she said no he said ‘I had my hopes up’¹²⁶.
- (dd) On 4 April 2013, the Applicant’s evidence is that the Respondent grabbed the Applicant’s vagina area and when she flinched and jumped back he said ‘in my school days that was called taking a bow’. Then the Respondent said ‘if I can’t help myself out here in the open, who knows what I will try and do when we are alone’;¹²⁷
- (ee) On 4 April 2013, the Respondent said he would ‘try something’ if they were to remain inside the Post Office alone so asked the Applicant to go outside;¹²⁸ and
- (ff) On 4 April 2013, the Respondent also likened the Applicant to a Lamborghini stating ‘if I had a Lamborghini in the garage, and I couldn’t drive it, I don’t want it here anymore’.¹²⁹

¹¹⁸ TB Applicant 70 at [76] Particulars of Complaint [23].

¹¹⁹ Applicant’s evidence TB 258 at [19] and Applicant evidence TB 70 at [77 and 78].

TB Applicant 71[87] Further and Better Particulars [7].

¹²² TB Applicant 71 at [94]; Particulars of Complaint TB 15 at[35]; Further and Better Particulars [8].

¹²³ TB Applicant 72 at [92] Particulars of Complaint TB 15 at [37].

¹²⁴ TB Applicant 73 at [100]; Particulars of Complaint TB 15 at [38].

¹²⁵ Applicant’s evidence TB 74 at [102].

¹²⁶ Applicant’s evidence TB 74 at [103].

¹²⁷ Applicant’s evidence TB 74 at [106].

¹²⁸ Applicant’s evidence TB 74 at [109].

¹²⁹ Applicant’s evidence TB 74 at [110].

VICTIMISATION

- 382 To succeed in her claim of victimisation, the Applicant must show that:
- (a) the Respondent subjected or threatened to subject her to a detriment; and
 - (b) the subjection or threat was because of (in the present case) an allegation within the meaning of s 104(1)(g) of the EOA.
- 383 The Applicant alleges three instances of detriment, being:
- (a) the Respondent removing her Saturday shifts;
 - (b) the Respondent threatening to terminate her employment; and
 - (c) the Respondent refusing to provide a reference.¹³⁰
- 384 To succeed in a claim under this provision, the detriment is prohibited only if a causal nexus can be made between the detriment and the Applicant doing one or more the things listed in s 104(1)(a)–(h)
- 385 Therefore, the question is, did the Respondent remove the Applicant's Saturday shifts, threaten to terminate her employment, or refuse to provide her with a reference because she had made an allegation of sexual harassment? Taking the Applicant's claims of detriment at face value, in my opinion, in each case the detriment was not inflicted because the Applicant made complaints of sexual harassment. There were other motivations at play.
- 386 There is significant conflict in the evidence between the parties in relation to conversations on and from about 17 March 2013. In summary, the Applicant gave evidence that following heated discussions between the parties in which she asked the Respondent whether their problems could be resolved, he told her that it was all her fault and that she had 'flirted with him'.¹³¹ She told the Respondent that she must resign and gave two weeks' notice. The Respondent sent her a text message asking her to think about her resignation over the weekend and if she felt the same way on Monday, to put it in writing.¹³² The Applicant in turn responded by text advising that she would speak to her husband and that he could speak to his wife. In fact she just spoke to her father as she did not want to worry her husband who was already looking for work himself. She decided not to resign because the only reason for her resignation was the continued '*advances, comments and touching*'.¹³³ The Applicant then contacted the Respondent and at a further meeting she told him that she wanted to retain her position but without the harassment. He agreed.¹³⁴ Two days later, following an attempted telephone call, the Respondent sent the following text message:

¹³⁰ Applicant's outline of submissions, [23].

¹³¹ TB 70 at [77] and [78].

¹³² TB Aide Memoire Exhibit F at p. 9.

¹³³ TB 71 at [81] and [84].

¹³⁴ TB [71].

Just called to say I hope you are feeling better and on (sic) longer stressed. Remember every day is a new day with no mistakes stay positive...as far as leaving goes don't rush with decision. **I obviously want you ... to stay**, I know I can be difficult but I hope the highs outweigh the lows I know it is now also complicated as our secret is no longer ours. I cant make you promises (sic) I cant keep if I could I would. He wy **MUST LEAVE** pls speak to of first I no I should not ask this bit tacky but Pls give me heads up when the gossip starts and it will belive me. Now our secret is over. I do know I deserve everything I get an sorry I hurt you I x regret it sorry rushed but should make sense. (emphasis added)¹³⁵

387 In summary, the Respondent's evidence under cross-examination was that:

- (a) He could not recall what he meant by the references to '*our secret*,' '*making promises I can't keep*' and '*sorry I hurt you*';
- (b) He did not agree that '*I want you to stay*' meant he wanted her to keep working for him;
- (c) He agreed that the Applicant had not provided a written resignation; and
- (d) He agreed that '*don't rush with decision*' is contradicted by his subsequent text messages.

388 In my view, to this point in time, the evidence of the Respondent's text message clearly supports the account given by the Applicant. He wanted her to stay; she had not given her resignation in writing; and he clearly did not treat her as having made an irrevocable verbal resignation. His failure to recall the meaning of his text message is implausible. The message is also inconsistent with the manner in which the Respondent has otherwise characterised the Applicant, namely, as a provocative and flirtatious person who enjoyed his attention.

389 Following the Respondent's text message of 18 March 2013, the telephone records indicate that the Respondent placed several calls to the Applicant, two text messages and three missed calls before finally speaking to the Applicant, in which she said that she would continue to work at the Post Office if there was no further sexual conduct. The Respondent agreed. There was no further contact until 28 March 2013.

390 The Respondent gave evidence about revelations he made to his wife whilst on holidays, including that she had discovered a draft text message, the contents of which he could not recall. Under cross-examination the Respondent was vague and non-responsive. In my view, the evidence of the Respondent is wholly unsatisfactory. He provided no reasonable explanation of written communications, which, on their face, are compromising or directly contradict his version of events, while otherwise remembering other inconsequential details which reflect adversely upon the Applicant. The intervention of the Respondent's wife onto the scene

¹³⁵ Applicant's evidence TB 92; Aide Memoire, Exhibit F at P 1-15.

appears to be critical to the turn of events. Although Mrs Smith attended the hearing, she was not called as a witness and accordingly there is no corroboration, when there could have been, of conversations which directly involved her. In these circumstances, I draw the only reasonable inference that the evidence of Mrs Smith would not have assisted the Respondent.

- 391 The sequence of events reflected in text messages from 28 March 2013, reflects confusion on the part of the Applicant to the Respondent's apparent change of attitude and confirmation of her resignation. The Respondent's answers under cross-examination seem to acknowledge the Applicant's justified confusion.
- 392 On 2 April 2013, the Applicant placed three telephone calls to the Respondent and they arranged to meet after work as she still wanted to '*get it sorted*'. At that meeting, the Applicant said she wanted to continue working at the Post Office. The Respondent confirmed that, following further discussions with his wife, the Applicant could continue to work at the Post Office but that she would be withdrawn from the Saturday shift.
- 393 The Applicant denied that the Respondent said to her:
- (a) there had been a downturn in trade; or
 - (b) the family would now cover Saturday mornings; or
 - (c) that her resignation was confirmed and that she would only work additional hours until the end of the week.
- 394 The Applicant agreed that she requested a reference from the Respondent but denied that she asked him to produce it that day. He said to her that he would not give her a reference as she would not like what he had to say.
- 395 While I accept that the Applicant was motivated to offer her resignation in the first instance, only by reason of the continuing sexual harassment, taking the Applicant's evidence at its highest, I cannot be satisfied to a high degree that the Respondent either removed the Applicant from her Saturday shifts; or threatened to terminate her employment; by reason of her complaints of sexual harassment. There are other plausible explanations in the circumstances, such as a reorganisation of employee duties; or an ultimatum from his wife, who is a partner in the business, to the effect that the Applicant and Respondent not work alone together – a circumstance which the Applicant acknowledged. Furthermore, the Respondent gave evidence concerning the downturn in the Post Office business and the intention to restructure.
- 396 On 3 and 4 April 2013, according to the Applicant, the sexual harassment continued which prompted her to advise the Respondent that she was searching for a job and asked if he would provide a reference. He refused to do so on that day and has not provided a reference subsequently. Although it could be said that the Respondent behaved vindictively in refusing or failing to provide a reference, in the circumstances, it does not constitute victimisation within the terms of the EOA. Indeed, it is not suggested in the

Applicant's own evidence that this was because she had made a complaint of sexual harassment. The Applicant's own evidence was that she was being punished for rejecting his advances.¹³⁶ In the circumstances, it does not constitute victimisation within the terms of the EOA.

397 I am satisfied that the sequence of events described by the Applicant, in part corroborated by text messages, strongly supports the Applicant's contention that she was subjected to continued sexual harassment upon the Respondent's return from holidays, by words and conduct, which caused her to finally leave her employment. However, I am not satisfied that there is sufficiently cogent evidence that the Respondent additionally engaged in conduct amounting to victimisation.

398 In the context of the assessment of damages, the parties may wish to address the Tribunal on the relevance or otherwise of the Applicant's loss of employment and employment opportunities as a consequence of the Respondent's sexual harassment.

CONCLUSION

399 For the reasons set out above, the Tribunal finds that:

- (a) Complaints in relation to sexual harassment by the Respondent, as employer of the Applicant, in contravention of ss 92 and 93 of the *Equal Opportunity Act 2010* (the EOA), as described in a series of incidents between 5 January 2013 and 4 April 2013, inclusive and identified in the Reasons at paragraphs 380 and 381 above, are proven.
- (b) The complaint of victimisation, in reliance on ss 103 and 104 of the EOA is not proven, and is therefore dismissed.
- (c) The complaint, as it relates to the Respondent failing to eliminate discrimination, sexual harassment or victimisation in compliance with s 15 of the EOA is misconceived, and is therefore dismissed.

400 The proceeding is to be listed for a further hearing on a date and time to be fixed, for the purpose of hearing submissions on the question of compensation payable to the Applicant for loss, damage or injury suffered in consequence of the proven contraventions.

401 Orders are made accordingly herein.


Judge Jenkins
Vice President



¹³⁶ Applicant's Amended Witness Statement para 111