

LYON AND GODLEY

Nos 7 & 8 of 1989

BEFORE: L.W. Roberts-Smith, Q.C. (Deputy President).
P. Harris and B. Buick (Member).

HEARD: 15 and 16 FEBRUARY 1990 at Perth.

REASONS FOR JUDGMENT

(delivered: Tuesday 6 March 1990)

On 17 June 1988 the Complainant lodged a complaint with the Equal Opportunity Commission ("the Commission") alleging her previous employer Mr Reginald Godley had sexually harassed her in her employment and unlawfully discriminated against her in her employment on grounds of sex.

On 21 June 1988 her employment was terminated by the Respondent Mr Godley.

By letter dated 30 June 1988 (received by the Commission on 11 July that year) the Complainant made a further complaint of victimisation, this time against Mr and Mrs Godley as the partnership by which she had been employed, alleging that she had been dismissed because of her previous complaint to the Commission.

The Commissioner for Equal Opportunity ("the Commissioner") then investigated the complaints as she was obliged to do by Section 84 of the Equal Opportunity Act ("the Act") and attempted conciliation between the parties. This included a Conciliation Conference held on 19 December 1988. That, and further attempts to negotiate a settlement through Godleys' solicitors (Messrs Claudio Russo Shaw), proved futile and by letter dated 14 February 1989 the Complainant requested that her complaint be referred to this Tribunal. The Commissioner advised the Respondents by letter dated 10 March 1989 that she was referring the complaints to the Tribunal pursuant to Section 93(1) (b) of the Act but they were not so referred until the Commissioner's letter dated 21 August 1989 was received by the Registrar on 25 August 1989.

A Preliminary Hearing was held on 18 September 1989 and Orders were made that Points of Claim and Defence be filed and served.

The complaints came on for hearing on Thursday 15 February 1990 and as it appeared (and was agreed) that the two complaints arose out of substantially the same circumstances it was ordered pursuant to Section 108 of the Act that a single inquiry be held into them.

At the outset of the hearing on 15 February the Tribunal expressed its concern about the lapse of time between the occurrence of the events the subject of the complaints in May/June 1988 and the date of hearing. In particular it was noted there was a period of some six months between the date of the complainant's request that the matters be referred to this Tribunal and that actually being done.

It is obviously important for complaints under the Act to be either resolved by negotiation or determined by the Tribunal as soon as possible. In addition to the general desirability of resolving such matters in a timely way there is also the need to avoid the adverse consequences or difficulties which can flow from delay - including the problem that may cause for witnesses in recollecting events and conversations in the distant past, the fact that some witnesses may become difficult even to locate (as apparently did occur here with a co-worker of the complainant; a Ms Julie Thorne, in this case thereby depriving both parties and the Tribunal of the opportunity to hear whatever evidence she may have been able to give) and of course the particular practical difficulty of perhaps limiting the range of orders the Tribunal may realistically be able to make if a complaint is made out.

Complaint No. 7 of 1989 is that of victimisation. Logically that should be dealt with after the complaint alleging sexual harassment and discrimination which is No. 8 of 1989 and we will proceed in that way.

It is unlawful for a person to sexually harass an employee of that person (Section 24 (1) of the Act). Sexual harassment is described in Section 24 (3) (4) in the following way -

"S24 (3) A person shall, for the purposes of this section, be taken to harass sexually another person if the first-mentioned person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or engages in other unwelcome conduct of a sexual nature in relation to the other person, and -

(a) the other person has reasonable grounds for believing that a rejection of the advance, a refusal of the request or the taking of objection to the conduct would disadvantage the other person in any way in connection with the other person's employment or work or possible employment or possible work; or

(b) as a result of the other person's rejection of the advance, refusal of the request or taking of objection to the conduct, the other person is disadvantaged in any way in connection with the other person's employment or work or possible employment or possible work.

(4) A reference in subsection (3) to conduct of a sexual nature in relation to a person includes a reference to the making, to or in the presence of, a person, of a statement of a sexual nature concerning that person, whether the statement is made orally or in writing."

The allegation of discrimination is put in the alternative in that Ms Andrews, Counsel for the Complainant, argued that the Respondent's conduct amounted to unlawful discrimination in employment on the ground of sex (Section 11). This was put essentially on the basis that to subject an employee to unlawful and unwelcome sexual advances was an interference with the employee's right to "quiet enjoyment" of her employment and in that way amounted to subjecting her to some detriment within the meaning of Section 11 (2) (d) of the Act.

Victimisation is covered by Section 67 (1) of the Act which makes it unlawful for a person to subject or threaten to subject another person to any detriment on the ground that the latter has (inter alia) made a complaint under the Act.

It is to be noted that subjecting a person to a detriment for making a false complaint of an unlawful act under the Act, the complaint not being made in good faith, will not constitute victimisation (see Section 67 (2)).

Although at one stage Ms Andrews suggested there was no onus on the Complainant to prove her complaints but the Tribunal was simply conducting an enquiry to ascertain the facts in light of the evidence presented by the Parties, we proceed on the basis that the onus is on the Complainant to make out her complaints and the burden of proof is proof on the balance of probabilities.

At the commencement of her case Ms Andrews sought to tender the Commissioner's reports (including the copied correspondence attached to them). Those reports were admitted into evidence pursuant to Section 119 (c) of the Act.

The Complainant's case in outline was that whilst she was employed part-time as a driveway attendant by the Respondent at the Service Station business known as BP Beechborough from 6 May 1988 to 21 June 1988, Mr Godley subjected her to unwelcome sexual advances, unwelcome requests for sexual favours and other unwelcome conduct of a sexual nature and that following her complaint about this behaviour to the Commission on 17 June Mr Godley dismissed her from her employment because of that complaint on 21 June 1988.

Particulars of the alleged sexual harassment and discrimination were set out at paragraph 3 of the Complainants Points of Claim as follows -

- "(a) on 6th May, 1988, the first day of the Complainant's employment with the Respondent, the Respondent made comment about the size of her breasts;
- (b) on 9th May, 1988, the Respondent invited the Complainant to go out with him to celebrate her birthday and impliedly suggested sexual relations between them. The Complainant declined the invitation;
- (c) on 10th May, 1988, the Respondent called the Complainant into his office, touched her breast as he put a \$10 note in her breast pocket saying it was for a birthday present and that she should not mention it to anyone, put his hands on her face and kissed her hard on the mouth. The Complainant resisted his advance and escaped from his grasp as soon as she was able;
- (d) later on 10th May, 1988, when the Complainant's mother called to collect her from work the Respondent asked the Complainant's mother if he could take the Complainant out to dinner and the Casino. He again invited the Complainant out, told her he would keep asking until she agreed and again impliedly suggested sexual relations between them. The Complainant told the Respondent she would never go out with him;
- (e) on 16th May, 1988, the Respondent called the Complainant into his office and asked her why she would not go out with him. He also questioned her on her sexual experience. The Complainant told the Respondent that she would not discuss these matters with him and left his office;

- (f) on 17th May, 1988, the Respondent called the Complainant into his office and asked her to go to the Casino with him. She refused and the Respondent grabbed her hand and kissed it. The Complainant informed the Respondent that she objected to this conversation and behaviour;
- (g) on 23rd May, 1988, the Respondent told the Complainant he had won enough money to take her out to dinner and wherever else she wanted to go. The Complainant refused his invitation. The Respondent then made suggestions of a sexual nature and spoke of his sexual exploits with other girls. The Complainant told him she did not wish to discuss anything that wasn't connected with her work and left the Respondent's presence;
- (h) on 31st May, 1988, the Respondent called the Complainant into his office and again asked her to go the Casino with him. The Complainant again refused. The Respondent told the Complainant he wanted to have sexual relations with her. The Complainant asked the Respondent to leave her alone and left the room;
- (i) on 1st June, 1988, the Respondent called the Complainant into his office ostensibly to discuss winter uniforms. He touched her above the knee and offered her money for certain sexual favours. The Complainant objected and left the office. Fifteen minutes later the Respondent called the Complainant back into the office, apologised for embarrassing her and continued talking about uniforms. The Complainant stated that she liked a particular jacket and the Respondent stated that he would get her one if she would sleep with him. The Complainant again asked the Respondent to leave her alone. The Respondent then took hold of her genitals, through her jeans, and held on for about five minutes. The Complainant voiced her objection loudly and eventually freed herself from his grasp. As the Complainant attempted to leave

the room the Respondent grabbed her around the waist with his right hand and put his left hand down her skirt and inside her bra, grabbing her right breast which he continued to fondle despite being begged not to do so. The Respondent then offered the Complainant \$100 if she would sleep with him. She refused. The Respondent then began rubbing himself on her buttocks. The Complainant voiced her objection loudly and left the room as the Respondent told her not to tell anyone what had happened;

- (j) on 3rd June, 1988, the Respondent again asked the Complainant to sleep with him. She refused;
- (k) on or about 7th or 8th June, 1988, the Respondent told the Complainant that her job prospects would suffer if she spoke against him in any way;
- (l) on 8th June, 1988, the Respondent pinched the Complainant on the buttocks;
- (m) on 10th June, 1988, the Respondent called the Complainant into his office, again asked her to go out with him and pinched her left breast. The Complainant told the Respondent never to touch her again. The Respondent then grabbed her arms and held them behind her back, hurting her."

The complainant gave evidence which largely reflected what had been set out in the Points of Claim. By way of elaboration she said that she had left school at fourteen years of age and immediately obtained employment at Hungry Jacks. She remained there for eleven and a half months before obtaining further employment at "The Bakers Bun" at Morley. Her employer there was Mrs Jane Winkless. She remained at the Bakers Bun for about eleven months and then went to Action Food Barn where again she remained for some ten or eleven months. She had to leave that employment because the store moved to Dianella and it was too far for her to travel.

She was out of work for some two months when she sought employment from the Respondents by answering an advertisement in the West Australian Newspaper.

She went to the Respondent's Service Station on 6 May 1988 seeking the job of Driveway Attendant.

She said that she was immediately successful, being asked to start that day.

It was a part-time job with her working Monday to Wednesday 3 - 6 p.m. and Friday 4 - 6 p.m. She was paid \$5 an hour or \$15 a day. She was sixteen when she got that job.

There were then two other employees, both female. One was Donna Devorty who was in her early twenties and the other was Julie Thorne whom the Complainant thought was about a year older than her. Julie was employed full-time but Donna was a part-time employee. The hours worked by her and Donna did not overlap and she therefore had very little to do with Donna at her work.

The Complainant said that on the very first day of her employment Mr Godley asked her where she got her "Dolly Parton" breasts from. She said he asked her that several times but she just ignored him although she said she was surprised by the query.

Her second day at work was 9 May. It was the Complainant's birthday on 10 May. She said that on 9 May Mr Godley asked her if he could take her out for her birthday the following night. He said he would like to take her to the Casino and then out afterwards. In cross examination she explained that the way in which he extended this invitation implied to her that he was seeking sexual relations with her.

The following day Mr Godley called the Complainant into his office. This was described to the Tribunal as an enclosed area behind the counter of the Service Station. One feature of the office or "lunch room" as it was otherwise described was a one way mirror enabling a person inside the office to see out but which did not permit a view the other way.

The Complainant said that Mr Godley put a \$10 note in her breast pocket, told her it was for her birthday and then grabbed her cheek and kissed her really hard on the mouth. She pushed him away. She said she just started walking out but he called her back and told her that whatever he did or said she was not to tell anyone.

The Complainant had an arrangement with her mother for the latter to collect her after work each day.

When the mother arrived that afternoon (at approximately 5.40 p.m.) Mr Godley went over and began talking to her. When the Complainant came out the Respondent asked her if she would go out with him that night to the Casino and said he would give her "a real special night" for her birthday. She said she refused and told him that she would never go out with him. She said he then told her he would keep asking her until she did go out with him.

Although she was not able to be precise about dates the Complainant testified that on various occasions the Respondent used to ask her to go to the Casino with him on Tuesday nights. She always refused. She said that on one occasion he grabbed her hand and kissed it.

She recalled an incident one night when Mr Godley called her in to discuss the winter uniform. There was a jacket she liked and he asked whether, if he got this jacket for her, she would sleep with him. She said she refused but he put his hand on her leg above her knee; she pushed his hand away and told him that she did not like him touching her and speaking to her the way he had done. She said at that stage "... he was pinching my breast and my bum". She said he also grabbed her vagina and began squeezing it. She was trying to fight him off but he would not let go. She started swearing and shouting at him and did kick him and he eventually let go. Whilst holding her he was also rubbing his penis on her buttocks. She said at this stage Julie was out the front serving petrol to cars and she would not have been able to see anything of these events. She said Donna was not there.

She said on another occasion Mr Godley offered her \$20 for her to show him her breasts and \$50 if she would let him suck and feel them. This too occurred in the office. She refused.

On another occasion she said she went into the Garage part of the Service Station where Mr Godley was working on a car and spoke to him about a horse. She said he was "talking clean at first" but then began asking her questions of a sexual nature. He again asked whether she would go out with him and when she refused he told her how he liked to take out young girls to teach him new positions and said that if not he would teach them. The Complainant said she told him that she did not like talking about things like that. She said he told her that he wanted to make love and that he wanted to "... get inside of the thing that's between (her) legs". She said she walked away.

When asked whether she had told anybody about these events the Complainant said that she had told her mother first about the remarks that the respondent was making to her, that when he actually touched her she told her brother and that finally, after the occasion upon which he grabbed her vagina she told her mother everything. Her mother took the Complainant to the Midland Police Station where a complaint of sexual assault was made against Mr Godley.

The Complainant said that she was subsequently advised by the police that because there was no other evidence they could take no action against the Respondent and they advised her to continue on in her employment with a view to getting additional evidence. These conversations and this advice were confirmed both by her mother and by a police officer.

The Complainant continued in evidence to say that Mr Godley had asked her one Friday night to stay back after work and sleep with him. She was unable to remember whether that was before or after she had been to the police. In any event she confirmed that she had received no further advance nor sexual suggestions from Mr Godley between 10 June and 21 June 1988.

The police subsequently advised her to make a complaint to the Commission which she did on 17 June.

On 21 June she went to work and when she went into the office area she found Mr Godley and Donna already there. The former called her over to his desk and told her that he had to dismiss her because she was not doing her job properly. She said he told her she had forgotten to replace customers' oil and petrol caps and kept leaving the bowser keys outside. She said that he had never complained to her previously about her work but had always said that she was a good worker and indeed that he was considering putting her on full-time employment. She said her reaction to being told she was to be dismissed was one of anger and hurt because she knew the reason was that she had made the complaint to the Commission. She said that she told him that the only reason he was firing her was because of that complaint. She said he denied at first even knowing of the complaint but when she told him she knew that a staff member of the Commission had contacted him he told her "it's not because of that".

The Complainant denied the allegation that she had left an oil filler cap off and oil had spilled all over a customer's engine and that the Respondent Godley had spoken to her about that. She also denied having left a petrol cap out as a result of which an old lady had demanded a new one which the Respondent had to supply. She agreed that and the previous reason were both given to her by Mr Godley on the occasion of her dismissal but she denied ever having been spoken to about them previously.

Likewise, although she conceded that on one occasion she had left out the key to the meter in the petrol bowser, that had only ever occurred once and all Mr Godley had said to her about that was to be more careful. She said that this happened at an early stage of her employment.

She did agree that there was some difficulty over the manner of recording some sales of petrol on account but she attributed this to the fact that Julie had not properly instructed her in relation to it and that when the error was discovered it was she (the Complainant) who brought it to Mr Godley's attention. She said he was angry but only because she had not been properly instructed about how to write up such accounts.

She conceded that she had been late for or absent from work on a couple of occasions but both of those were due to circumstances beyond her control. On the first occasion her nanna was seriously ill and the second occasion the nanna had already died and the complainant was too distressed to go to work that day.

According to the Complainant these experiences with her employer soon began to have an effect upon her. By the end of May she was having "weird" dreams, thinking that her head was getting big and that her body was shrinking. She started talking to herself in her sleep and was unable to sleep properly. She went to see her General Practitioner Dr Haines and he referred her to a psychiatrist, Dr Warren. All of this occurred before she was actually dismissed from her employment.

Her sleeplessness and the feelings she described lasted many months and she said that even now she cannot sleep at night. She also said that the incidents with the Respondent had turned her against her father, probably, because he is more or less the same age as the Respondent. She now feels "funny" around old people. In addition she is unable to have a close relationship with a male and in short she felt that the experience had "stuffed me right up". She said that the effect of what happened is still continuing.

Ms Andrews called five other witnesses on behalf of the Complainant and by consent tendered the affidavits of three other witnesses - two of them going to the Complainant's performance as an employee in other jobs and one from a police officer (Detective Senior Constable Bradley Waghorn) who described certain action taken and advice given by him to the Complainant in respect of the complaint made by her to the police on 9 June 1988.

The Complainant's mother, Shirley Enid Lyon, told the Tribunal that she had occasion to talk to Mr Godley on the night of her daughter's birthday that is, 10 May 1988. She had pulled up at the Service Station and was waiting for her daughter to finish work. This was probably around a quarter to six. Mr Godley went up to her and began to speak to her. She said he asked if it would be all right for him to take

Yvetta out that night for tea and some place special after for her birthday. She said first she was surprised by this and secondly he did not await an answer but kept talking to her niece who was with her in the car. She said he did say that he was quite pleased with her daughter's work, that she had picked it up pretty quickly and that he was thinking of giving her a full-time job. When the Complainant came to the car and got in Mr Godley said to her "your mother's given me permission to take you out tonight" to which her daughter responded that she would not go out with him. Mrs Lyon said that Mr Godley did say that he would ask her out on the Friday night and the Complainant said she still would not go with him. He then told her he would keep asking her until she did decide to go out with him. They then left.

Mrs Lyon said that on the very first day her daughter had complained that Mr Godley had told her she had Dolly Parton breasts and on other occasions related incidents in which Mr Godley had called her into the office to ask her out, eventually culminating in her description of the events of 1 June when (it was alleged) Mr Godley grabbed the Complainant's vagina.

Mrs Lyon said that during the period of the employment she noticed a change in the Complainant's demeanour almost immediately. She became depressed, used to have outbursts about her employer and at night was scared to go to sleep and had nightmares when she did. Mrs Lyon said that she advised her daughter to give up the job but her daughter replied that she needed the money and felt she could cope with Mr Godley.

She said that the Complainant's grandmother died on 4 June 1988 - that being after her daughter had been to see the doctor about the stress she was suffering as a result of these incidents.

She said that her daughter told her about the incident on 1 June some days later when they were out late night shopping. She immediately took her daughter to the police station in Midland where they made a complaint of sexual assault.

She confirmed the Complainant's evidence that the police told her they did not have sufficient evidence to prosecute Mr Godley in the criminal court and their advice to her to stay on and endeavour to obtain evidence against him.

The Complainant's brother, Leonard Lyon, confirmed that the Complainant had told him about these incidents at the time and in particular that Mr Godley had grabbed her by the vagina. He said he also advised her to remain in the employment to try to get evidence. When asked by Mr Russo (Counsel for the Respondents) in cross examination why he made that suggestion, Mr Lyon said to "get him charged, because its not right a man grabbing a young girl around do you think?" He was then asked whether it would not have been safer for her simply to leave the job, to which the Complainant's brother responded "why? - and let him do it to the next person that got employed?"

The Complainant's previous employer, Mrs Winkless, gave evidence of what she regarded as the most satisfactory way in which the Complainant had worked for her and also confirmed that on one occasion when she encountered the Complainant and her mother at a shopping centre in Morley some time after the former had commenced employment with the Respondents, she asked the Complainant how she was going at her new job. She said the Complainant told her it was not going well and when asked why, the Complainant told Mrs Winkless that her employer was "touching her up" but that she had to stay there because she needed the money.

At that stage of the proceedings - on 15 February - Ms Andrews advised the Tribunal that subject only to calling Dr Warren (for whom arrangements to attend the following day at 10 a.m. had been made) she would be calling no further evidence.

Mr Russo indicated that he too had made arrangements to call a medical witness the following morning and it was appropriate that both such witnesses should be interposed during the evidence of Mr Godley. He then accordingly opened the case for the Respondents and called Mr Godley.

Mr Godley's examination in chief was brief. It involved no more than having him identify and confirm as true the matters set out in the Points of Defence. They essentially amounted to denials of all allegations although he did admit that whilst the Complainant was in his office on 10 May 1988 he gave her a \$5 note for her birthday. He denied that he had touched her breasts or that he had put any money in her breast pocket. He denied that he had put his hands on her face and kissed her hard on the mouth.

He admitted that the Complainant's mother collected her from work each evening although he was not certain whether she did call on 10 May. He did say however that at no time did he ask the Complainant's mother if he could take the Complainant out to dinner or to the Casino. He denied that he had ever invited the Complainant out and he denied that he ever did anything which impliedly suggested sexual relationships between them.

The Respondent denied that he had ever indicated that he was happy with the Complainant's work and indeed asserted there had been a number of complaints, namely that -

- a) on one occasion a customer complained that the Complainant left the oil filler cap off and oil spilled all over the engine;
- b) another occasion she had left an old ladies petrol cap off, as a result of which the lady demanded a new one which the Respondent supplied at a cost of \$17;
- c) on a number of occasions she left the keys for reading the meter in the petrol bowser at night;
- d) the Complainant was responsible for mistakes in the Respondent's day book (recording the payment for petrol sold on account);
- e) on two occasions she failed to turn up for work.

He denied that she was dismissed because of her complaint to the Commission and insisted that the reasons for her dismissal were those set out above.

In cross examination Mr Godley said that he first learned about the complaints made by her against him after he had dismissed her on 21 June 1988. He said that after she had been dismissed and after she had gone a courier arrived to deliver a letter. He said this was about 4.00 or 4.30 that afternoon. He said he immediately telephoned Ms Fran Shute at the Commission and spoke to her about it. He then took a taxi to the Commission and spoke to Ms Shute in her office.

He was adamant that all of this occurred after the Complainant had been dismissed.

That was the position when the Tribunal adjourned on 15 February.

When the proceedings resumed on the morning of 16 February Ms Andrews sought leave to call Ms Shute a Conciliation Officer with the Commission.

In her reports to the Tribunal (Exhibit A and B) the Commissioner had noted that -

"On 20 June 1988 Conciliation Officer Ms Fran Shute advised Mr Godley by telephone of the allegations of sexual harassment made against him and he advised Ms Shute that he intended to dismiss Ms Lyon from her employment."

And again

"On 20 June 1988 Ms Shute rang Mr Godley and informed him of the allegations against him she suggested he come in and discuss these once he had received written notice but when he informed her that he was planning to dismiss Ms Lyon, Ms Shute suggested that he attend at the Commission's offices immediately and this he did".

The critical nature of these assertions in light of Mr Godley's categorical denial that he was aware of the complaint made by the Complainant before he dismissed her was obvious.

As the importance of Ms Shute's evidence to the complaint of victimisation should have been apparent from the outset leave to call evidence in rebuttal would not likely have been permitted were the rules of evidence and procedure to be applied strictly. However this Tribunal is not bound by those rules and is indeed obliged to "... act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms" (Section 120 (b)). Accordingly for that and other reasons set out in the transcript leave was granted and Ms Shute was called and interposed after Dr Warren (to whose evidence we shall return below).

Ms Shute confirmed that on 20 June 1988 she had telephoned Mr Godley to advise him that a complaint had been made by the Complainant against him and indicated what it was. She said that he told her he had already decided to dismiss the Complainant and in light of that she warned him of the victimisation provisions of the Act and suggested that he should come to the Equal Opportunity Commission to speak with her. She said that he did that and she explained in detail what the Complainant's allegations were. All of this she said occurred on 20 June 1988.

It was not put to Ms Shute by Counsel for the Respondent that these conversations did not occur nor that they did not occur on 20 June.

After the completion of Ms Shute's evidence Counsel for the Respondents called Dr Farrelly. He had never seen the Complainant before and never had occasion to treat her. His testimony was entirely general in nature and consisted only of a "critique" of a report by Dr Warren (which although not tendered in evidence apparently reflected what she had told the Tribunal) and general observations of an academic nature about traumatic stress disorder and the symptoms which might be expected to demonstrate that.

The Respondents then called Ms Donna Devorty who is still employed by them as a driveway attendant at the Service Station. Mr Godley described her as "his right hand man". Ms Devorty said that the Complainant had not been a successful employee - she said the latter was slow in the driveway, did not engage in cheerful dialogue with the customers, appeared to be slow to learn what she ought to have picked up fairly quickly and made a number of mistakes

which caused problems for the Respondents. She referred to the oil cap and petrol cap incidents and to the difficulty with the recording of payment by account in the day book. She said that she had explained to the Complainant the procedure to be followed in relation to the recording of payments on account in the day book and that it was she who brought that particular matter to the attention of Mr Godley. She confirmed that in her view the Complainant was not suitable for that employment and that "some days before" the Complainant's dismissal Mr Godley had asked her (Donna) to advertise the position as vacant.

Determination of these complaints turns essentially on the Tribunal's assessment of the credibility of the witnesses. Wherever possible we have looked for objective evidence or evidence about which there is no dispute against which to gauge the accuracy and reliability of the accounts given by those witnesses whose evidence is in dispute.

The Complainant presented as a young girl who found it distressing to publicly relate in detail and to be cross-examined on events which occurred almost two years ago and which were traumatic and stressful experiences for her then. She gave her evidence with as much precision as could be expected under the circumstances. She was not sure about some dates nor the exact sequence of events, although she said she was able to provide the dates and sequence set out in the Complaint and Points of Claim because on Ms Shute's advice she had prepared them in diary form prior to making the written complaint. She answered questions directly, frankly and with apparent feeling. She stood up well to a skilful, quietly conducted but very careful and thorough cross examination which exhaustively tested each allegation and matter of complaint. She adhered to her account of events throughout and was in no way drawn in cross-examination to resile from them.

Mr Godley's examination in chief afforded the Tribunal no opportunity to evaluate his credibility.

In cross-examination he was initially careful and measured in his responses. As it progressed however, he appeared to gain confidence and begin almost to enjoy jousting verbally with Counsel. As he relaxed his guard, and more freely indulged in that, the Tribunal was able to gain a much better impression of his personality.

In the Tribunal's assessment Mr Godley's deceptively "sleepy" appearance belied a particularly quick witted and intelligent man who gained a certain enjoyment when he thought he had scored some point off Counsel and who delighted in affecting simulated outrage or an air of pained misunderstanding as he thought appropriate. He demonstrated an ability to rapidly appreciate a situation and almost instantly seek to turn it to his own advantage.

At the commencement of his cross-examination he had said that he first learned of the complaints of sexual harassment on 21 June after he had dismissed the Complainant. He said that "that's the time I heard she had made an allegation against me and after she had gone I got a courier delivered letter about 4.30 that afternoon or 4 O'clock - ... and immediately I rang - I read the letter. I rang ... Ms Fran Shute".

Thereafter he steadfastly maintained that -

- * he had been thinking for some time about dismissing the Complainant for the reasons he gave her and the Tribunal.
- * He dismissed her on 21 June 1988 at which time he knew nothing about her complaint to the Commission (although she then mentioned it and said that she believed it to be the reason for her dismissal).
- * After he dismissed her he received the letter from the Commissioner by courier, that same day.
- * He immediately telephoned Ms Fran Shute and took a taxi to the Commission's office to speak with her.

He was adamant that he knew nothing about the complaint before he dismissed the Complainant.

This of course was in direct conflict with the evidence given by Ms Shute (and which although interposed in Mr Godley's own cross-examination was already before the Tribunal as part of the Commissioner's report - Exhibits A and B). She testified that the telephone call and meeting in which the Respondent Mr Godley was advised of the Complainant's complaint both occurred on 20 June 1988. Later in cross-examination when pressed further on the date of the Commissioner's letter (12 July 1978) Mr Godley said he dismissed the Complainant and then he had a telephone conversation with Ms Shute and went to see her and that he received the letter subsequent to that.

At the conclusion of his evidence he was asked further questions about this by the Deputy President, his attention being drawn in particular to the fact that in the third paragraph of the Commissioner's letter dated 12 July 1988 the Commissioner had written -

"as outlined verbally at your meeting with Fran Shute, Conciliation Officer on Monday 20 June 1988, the substance of Ms Lyon's complaint is that during her six weeks employment at the Service Station she was allegedly subjected to unwelcome sexual comments, requests and physical contact from you".

He agreed that he had discussed that letter in detail with his solicitors and that those issues in it with which he told them he disagreed as being wrong, were detailed in the letter from his Solicitors to the Commissioner dated 23 August 1988.

He then said that although he had decided to dismiss the Complainant before learning of her complaint to the Commission he had not actually done so and he must have had the telephone conversation and meeting with Ms Shute before conveying that decision to the Complainant on 21 June 1988.

The Tribunal notes that in addition to this very significant change in Mr Godley's evidence in cross examination in this regard, there was no mention in his Solicitor's letter dated 23 August 1988 of any disagreement with the proposition in the third paragraph of the Commissioner's letter dated 12 July that year.

The Tribunal is in no doubt whatever that Mr Godley knew not only of the fact of the complaint made by the Complainant before he dismissed her on 21 June 1988 but that he was fully apprised of the details and potential ramifications of it, having already had a telephone conversation and meeting with Ms Shute the previous day.

The Tribunal is entirely satisfied that his denials in evidence of that knowledge at that time were deliberately false.

The Complainant's mother, Mrs Lyon, impressed as a truthful and credible witness. Her evidence was essentially confined to a description of one meeting and conversation she had had with Mr Godley on 10 May 1988, various complaints made to her by the Complainant, the making of the complaint to the police on 9 June 1988 and the effects she observed these events had on her daughter. Her responses in cross-examination were forthright and apparently spontaneous and had the ring of truth. When Mr Russo put to her a question

"that was the first day that she was in a new job and her employer comes to you and says he wants to take her out and you continued talking to him for at least half an hour?"

She replied with feeling -

"well, put it this way: I have never come into contact with slimy old men that want to take out young girls".

And a little later she said -

"as I said I was not used to slimy old men coming on to young girls. I haven't heard that much about that sort of thing and I never expected it". (Transcript page 84).

In the course of his address Mr Russo invited the Tribunal to regard Mrs Lyon's evidence of this conversation on 10 May 1988 with circumspection because (he suggested) she may have invented it to assist her daughter gain money from the Godleys by way of damages. The Tribunal is not prepared to entertain that suggestion. It was never put to Mrs Lyon and there is absolutely no evidence whatever to support it.

The Tribunal accepts Mrs Lyon as a witness of truth and accepts her evidence, as it does that of the Complainant's brother Leonard Lyon.

The Respondents called Donna Devorty who conceded that because their working times only occasionally overlapped she had no great opportunity to assess the Complainant's performance at work.

In assessing her evidence the Tribunal is conscious that she is still employed by the Respondents, that her sister is married to the Respondent's son and that the events to which she testified occurred almost two years ago.

In the Tribunal's view Donna Devorty was an honest witness in the sense that she was telling of events and impressions as she now recalls them but her testimony now probably magnifies and exaggerates some of those events and impressions and in part may be unwittingly based on what she has been told by Mr Godley since the events occurred.

We turn now specifically to the complaint of sexual harassment and unlawful discrimination in employment.

Evidence that the Complainant did complain about Mr Godley's statements and activities as set out in the Points of Claim is not corroboration of her evidence. None the less it does indicate consistency. Such complaints were made to her mother, brother, the police, Mrs Winkless and to Dr Warren. Co-incidently with those complaints the Complainant was observed to be suffering from a range of symptoms which Dr Warren testified were consistent with stress. (Dr Farrelly's evidence did not entirely contest this conclusion; we will return to that below).

Mr Russo strongly argued that the fact that the Complainant remained in the Godley's employ until her dismissal on 21 June 1988 must cast doubt on her credibility in that she would surely not have done so had these traumatic events actually been occurring. That was put to the Complainant (and to other witnesses). The Complainant maintained that she thought the behaviour might stop; subsequently that she had no choice she liked the work involved, more importantly, she needed the money because of a hire-purchase commitment and further (after 9 June 1988) had to stay because she had been told by her brother and the police to remain "to get more evidence".

Constable Waghorn's affidavit confirmed this evidence, as did the testimony of her mother, her brother, Mrs Winkless and Dr Warren.

The Tribunal accepts those as being her reasons at the time and finds that the fact that she remained in Mr Godley's employ does not detract from the credibility of her account.

It was also suggested on behalf of the Respondents that the allegations were not only false but had been deliberately made up by the Complainant for the purpose of extorting money from Mr Godley (see transcript page 65). That was flatly denied by the Complainant. There was absolutely no evidence to support that proposition. References were made to and questions asked about another family member who had apparently been convicted of extortion but no details of that were adduced and no involvement by the Complainant was shown. This amounted to no more than a speculative attempt to fix some doubt on the Complainant's credibility by association and innuendo. There was no evidence at all to suggest that the Complainant had, nor had hoped for, anything to gain by her complaints - indeed the evidence indicated that she thought the legislation provided for a process akin to a criminal prosecution and she had no idea she could be awarded damages until after she had made the complaint and was told that by staff at the Commission.

We accept the evidence of the Complainant and her witnesses. We do not accept the evidence of the Respondent Mr Godley.

In particular we are satisfied and find that -

- (1) on 6 May 1988 the first day of the Complainant's employment with the Respondents the male Respondent commented to her about her "Dolly Parton breasts";
- (2) on 9 May 1988 Mr Godley invited the Complainant to go out with him and impliedly suggested sexual relations between them. The Complainant declined the invitation;
- (3) on 10 May 1988 he called the Complainant into the office, touched her breast as he put a \$10 note in her breast pocket, saying it was for a birthday present and that she should not mention it to anyone, put his hands on her face and kissed her hard on the mouth. The Complainant resisted his advance and escaped from his grasp as soon as she was able;
- (4) later the same day when the Complainant's mother called to collect her from work, Mr Godley asked the mother if he could take the Complainant out to dinner and the Casino. He again invited the Complainant out and told her he would keep asking until she agreed and again impliedly suggested sexual relations between them. The Complainant told the Respondent that she would never go out with him;
- (5) on 16 May 1988 the Respondent, Mr Godley, called the Complainant into his office and asked her why she would not go out with him. She told him she did not mix work with pleasure and even were she not working for him she would never go out with him. He then asked her if she was a virgin and if she was good in bed. She told him that what she did with her life was very private and she did not discuss it with anyone. He said he was not "anyone", that he was her boss, and that he would look after her. She told him that she would not discuss it and walked out;

- (6) on 17 May 1988 Mr Godley called the Complainant into his office and asked her to go to the Casino with him. She refused and he grabbed her hand and kissed it. She told him that she objected to this conversation and behaviour;
- (7) on 23 May 1988 the Complainant had cause to go into the garage part of the service station where the Respondent, Mr Godley, was working on a vehicle. They initially had an innocuous conversation but he then again asked her whether she would go out with him. When she refused he told her how he liked to take out young girls to teach him new positions, and if not, then he would teach them. The Complainant told him that she did not like discussing things like that. He then told her he wanted to make love to her and that he wanted to "get inside of the thing that's between (her) legs". The Complainant then started to walk away and as she did so Mr Godley told her that he had slept with many girls who had worked there before;
- (8) on one occasion Mr Godley offered the Complainant \$20 to show him her breasts and \$50 to let him suck and feel them;
- (9) on 1 June 1988 Mr Godley called the Complainant into his office ostensibly to discuss winter uniforms. He touched her above the knee, but she objected and left the office. Some minutes later Mr Godley called her back into the office, apologised for embarrassing her and continued talking about uniforms. The complainant stated that she liked a particular jacket and Mr Godley told her he would get her one if she would sleep with him. She again asked him to leave her alone. Mr Godley then took hold of her genitals, through her jeans, and held on for some time. We are satisfied that this period was a significant

one although undoubtedly not the "five minutes" mentioned by the Complainant. No doubt, however, it would have seemed a particularly long time to her. The Complainant voiced her objection loudly and eventually freed herself from his grasp. As the Complainant attempted to leave the room the Respondent, Mr Godley, grabbed her around the waist with one hand, put his other hand down the top of her clothing and bras and fondled her breast at the same time rubbing his penis on her buttocks. She swore and shouted at him and kicked him. He eventually let her go;

- (10) on various occasions Mr Godley asked the Complainant to go out with him and to sleep with him; she refused each time;
- (11) in early June 1988 Mr Godley told her that if anyone treated him wrongly or did any wrong against him he would make it difficult for them to get a job. She (rightly) took this as a threat.

The next question is whether the facts as found substantiate a complaint of sexual harassment under Section 24 of the Act.

There is no dispute that the Complainant was Mr Godley's employee nor that the sexual advances, requests for sexual favours and other sexual conduct were unwelcome.

But it must also be shown that either

- "S.24 (a) the other person has reasonable grounds for believing that a rejection of the advance, a refusal of the request or the taking of objection to the conduct would disadvantage the other person in any way in connection with the other person's employment or work or possible employment or possible work; or

- (b) as a result of the other person's rejection of the advance, refusal of the request or taking of objection to the conduct, the other person is disadvantaged in any way in connection with the other person's employment or work or possible employment or possible work."

Ms Andrews puts it here on both bases. She contends that whether the Complainant had reasonable grounds or not for believing that a rejection of Mr Godley's advances etc., would disadvantage her in connection with her employment does not matter because she was in fact dismissed as a result of that conduct and so subsection 3 (b) applies.

The Tribunal does not accept this. The Complainant's own evidence was that there was no untoward behaviour by Mr Godley to her after 10 June 1988 to the date of her dismissal. There is no evidence to show she was dismissed then because she had refused his advances.

It is therefore necessary to consider whether the Complainant has shown she had reasonable grounds for believing that a rejection of Mr Godley's advances would disadvantage her in connection with her employment.

In this case there was evidence (which the Tribunal has accepted) that -

- * The Complainant needed work (having been unemployed for some two months prior to 6 May 1988).
- * She liked her work and wanted to continue doing it even after Mr Godley began sexually harassing her.

- * It was Mr Godley himself who had employed her and who was therefore in a position to decide whether or not she remained in employment.
- * The relationship between them was one of great personal inequality not only because he was her employer but also because of the very great age difference between them.
- * In early June 1988 Mr Godley told her that her job prospects would suffer if she spoke against him.
- * The Complainant repeatedly asked her mother and brother not to speak to Mr Godley because she needed her job.

These factors are clearly sufficient to establish that the Complainant had reasonable grounds for believing that a rejection of Mr Godley's advances would disadvantage her in her employment (see Hall & Others v Sheiban Pty Ltd and others (1989) EOC para 92-250 especially Lockhart J at page 77-393 and Wilcox J at 77-402).

The Tribunal accordingly finds that the conduct of the Respondent Mr Godley did constitute unlawful sexual harassment under Section 24 (1) and (3) (a) of the Act.

The complaint of discrimination in employment on the ground of sex (Section 11) was put as an alternative to the claim of sexual harassment.

We accept Ms Andrews submission that sexual harassment may amount to sexual discrimination in employment if it involved in respect of the quiet enjoyment of employment the less favourable treatment of the Complainant (by reason of her sex) than persons of the other sex may be treated by the Respondent. (See Nathan J in ex-parte Burns (1985) VR 317 applied in Hutchinson v Smirlis (1986) EOC para 92-152 and Hall and Others v Sheiban (Supra)).

The Tribunal is satisfied that this ground is also made out.

That brings us to the question of damages.

Section 127 (b) (i) empowers the Tribunal to order the Respondent to pay the Complainant damages not exceeding \$40,000 "... by way of compensation for any loss or damage suffered by reason of the Respondent's conduct".

The amount of \$40,000 is a maximum figure and does not set the top of a range.

Compensation is therefore to be assessed in accordance with principle irrespective of that maximum and it is only if the amount so arrived at would exceed \$40,000 that the Tribunal is constrained to limit itself to a maximum award in that amount.

In this case the Complainant claims damages for loss of earnings and for "hurt, humiliation and stress".

As to loss of earnings, on the evidence the Complainant lost only one weeks work, securing a better paid job a week after her dismissal on 21 June 1988. The amount claimed is \$60 nett. This loss, however, was the result of the dismissal not of the sexual harassment and so we make no allowance for it on the first complaint.

Counsel for the Respondent did not submit that the power given in Section 127 (b) (i) to award damages "... by way of compensation for any loss or damage suffered by reason of the Respondent's conduct ..." does not include hurt, humiliation and stress.

Some authorities treat the contravention of anti-discrimination legislation as a species of tort and approach the matter of damages accordingly. (Allders International Pty Ltd v Anstee & Others (1986) 5 NSWLR 47, 65; Australian Postal Commission v Dao & Others (1985) 3 NSWLR 565, 604, (McHugh J.A.)). However as French J observed in Hall & Others v Sheiban Pty Ltd & Others (Supra) at page 77, 431; "whether that classification is strictly correct or not the measure of damages is to be governed by the statute and the rules applicable in tort can be of no avail if they conflict with it. It may be that while there are events for which the conduct complained of is a sine qua non they would not be recognised in any practical sense as arising "by reason of" it. Exclusion principles analogous to concepts of remoteness and failure to mitigate may then be seen to operate. In the end, however, these are to be subsumed in a practical judgment of cause and effect. In the case of sex discrimination and sexual harassment the identification of compensable loss and damage suffered is not to be assessed by reference to the reasonableness of the victims response to the conduct in question "The question to be addressed so far as injury to feelings and humiliation is concerned, is a factual one - what was the effect on the Complainant of the conduct complained of? There is no general principle of "reasonableness" by which the existence of loss or damage is to be judged."

It must be borne in mind that Section 81 (4) of the Sex Discrimination Act 1984 (Com) - with which the court was dealing in that case - specifically provided that the compensable damage included injury to the Complainant's feelings or humiliation suffered by the Complainant. Although there is no similar provision in the Equal Opportunity Act (W.A.) in the end result that probably makes little practical difference.

Lockhart J, addressed this aspect in Sheiban when he said (at page 77,395)

"In Allders International Pty Ltd v Anstee and Others ... Lee J held that the assessment in damages in an action under the Anti-Discrimination Act 1977 (NSW) should be by analogy with an action in tort and that the assessment of general or compensatory damages might take into account the hurt feelings of the Complainant, damages in respect of which were recognised in the torts of defamation, negligence and malicious prosecution. The second proposition accepted by his Honour is given statutory expression in subsection 81(4) of the Act".

It is now well accepted by authority that in tort damages are recoverable for mental or nervous shock - that is, mental or psychological disturbance, as distinct from grief or "mere" distress.

It would be wrong to adopt a strictly tortious approach to assessment of damages by way of compensation under anti-discrimination legislation. The whole thrust of such legislation is to reflect and enforce community attitudes which in this area have changed significantly in recent years - and of which the legislation itself is a signal manifestation. There would inevitably be many cases of unlawful discrimination under the Act which would not necessarily attract any award of damages at all were assessments to be approached on a strict application of the principles relevant to assessment of damages in tort. Such an approach would largely defeat the purpose of the legislation.

Whilst it would seem clear that exemplary damages cannot be awarded under Section 127 (b) (i) of the Act because they are punitive rather than compensatory in character (see Lockhart J in Sheiban at page 77, 396 to 397). We accept that aggravated damages may be awarded in an appropriate case (see Lockhart J also at page 77, 395-6 *ibid*).

In particular in Lamb v Cotogno (1987) 164 CLR 1 at page 8, the High Court observed in a joint judgment that "aggravated damages in contrast to exemplary damages are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like".

There is a further aspect to be mentioned before turning to the assessment of damages in this case.

Mr Russo submitted that the Complainant was more vulnerable here than a "normal woman". There is in our view no merit in this submission. It is well established that a wrong doer takes his victim as he finds her (Purkess v Crittenden (1965) 114 CLR 164 at 171-2 per Windeyer J). This is so whether the pre-disposition is physical, mental or emotional (see Bray C.J. in Pipikos v W Brown (1970) SASR 508 at 514; Negretto v Sayers (1963) SASR 313; and Gribben v Woree Caravan Park and Motels (1970) Qd R 420).

We have already adverted above to the evidence of Dr Warren and the generally conflicting evidence of Dr Farrelly.

Dr Warren was a most impressive witness. She first saw the Complainant on 15 June 1988 (that is approximately one week before the Complainant's dismissal). In all, she had consultations with the Complainant, on five occasions extending from that date to 27 October 1988. That is over some four months, towards the end of and immediately following the events out of which the complaints arose. Other appointments were made but the Complainant did not attend. The Complainant told the Tribunal that her reason for not attending was because she did not like to be "open". We take that to mean that the Complainant as a particularly shy and generally introverted person, found it distressing and uncomfortable to expose her innermost feelings and emotions, to the extent that psychiatric consultations would involve. We accept that as being consistent with the evidence as a whole regarding the Complainant's reactions and personality.

In her evidence Dr Warren was precise, logical and careful to go no further in expressing an opinion, than she thought the facts and her observations would allow.

Dr Farrelly on the other hand, had never seen the Complainant. His evidence was entirely general in nature. In essence it amounted only to saying that he would not expect symptoms of the type described to flow from incidents such as those complained of - although later he conceded that symptoms such as an inability to relate to ones father or adult men, and difficulty in forming relationships with males, could be consistent with stress from incidents of sexual assault.

We do not propose to canvass the medical evidence at any length. Suffice to say, we accept Dr Warren's evidence. We were unimpressed by Dr Farrelly's evidence and were not assisted by it.

Dr Warren's evidence went both to support the Complainant's own testimony of what had been occurring to her and also to the medical and psychiatric sequela to the events she was experiencing.

We find, that as a consequence of Mr Godley's sexual harassment of her, the Complainant very soon suffered inability to sleep, and thereafter began to experience sensations (in a drowsy state) wherein she felt that her head was going to explode and there was a difference between the sizes of her head and body respectively. She also began to experience hearing mumbling voices coming from under her bed or within the wardrobe of her bedroom. We are satisfied that these symptoms were her reaction to acute stress that stress being caused by the experiences she was having with Mr Godley. We are satisfied that although the symptoms have abated somewhat since she left the Godleys' employ she still suffers sleepless nights and is still experiencing the symptoms of that stress other than what she described as "weird dreams".

We also note and accept Dr Warren's observations that the Complainant's very awareness of these symptoms was itself a cause of added stress.

In our view an appropriate award under this head would have been \$7,000 had there been no aggravation. However, whilst recognising that aggravated damages are the exception rather than the rule, we consider that this is a case in which the circumstances do call for an additional component to the award. We are particularly mindful of the very great age difference between the Complainant and Respondent, that this was not a situation in which the harassment was, for example, by one employee towards another but was harassment by the employer himself, that the conduct was not occasional nor fortuitous but was sustained and had the character of a deliberate campaign to wear down the Complainant's resistance, that the Complainant suffered particularly by the need to involve her family, the police and to seek psychiatric help, and because the humiliation and indignity suffered by the Complainant as the consequences of the events themselves were exacerbated by the manner in which the Respondent conducted his defence. This latter aspect is most notably reflected in the (unsubstantiated) allegations that the Complainant had invented her complaints to extort money from him, and that her mother had likewise invented at least part of her evidence knowingly to achieve a similar end.

We allow a further \$2,000 as aggravated damages making a total award of \$9,000 on the first complaint.

COMPLAINT OF VICTIMISATION (NO. 7 OF 1989)

Ms Shute's evidence was that when she telephoned Mr Godley on 20 June 1988 and advised him that the Complainant had made a complaint of sexual harassment against him, he immediately told her that he had decided to dismiss the complainant for the reasons he repeated in evidence.

The Tribunal's first reaction to this was to accept the possibility that Mr Godley had, as he maintained, made that decision prior to his discussion with Ms Shute.

We say that was our first reaction because on reflection we came to the contrary conclusion.

There were several reasons for this.

The most significant reason was Mr Godley's own prevarication on this issue. We have already referred to this. The fact that (as we find) he lied when he said that he knew nothing of the complaint before he dismissed the Complainant lends strong support to the inference that he did dismiss her for that reason - indeed the Tribunal is of the view that there is no other reasonable explanation for that lie open on the evidence.

In cross-examination by Counsel for the Complainant and in response to questions from the Tribunal Mr Godley demonstrated time and time again that he was able to appreciate a situation almost instantly and to immediately seek to turn it to his own advantage. We are satisfied that was what he did when he spoke to Ms Shute on 20 June 1988 and his dismissal of the Complainant the following day was simply a continuation of that.

We are satisfied that although the Complainant had made some mistakes in her first few weeks employment for the Respondents, that was by no means unusual for a new employee; that despite those mistakes she had generally performed well (although on all the other evidence it is inevitable that Mr Godley's own behaviour was having some deleterious effect on her work) and that the making of her complaint to the Commission was in fact the reason for her dismissal on 21 June 1988.

That dismissal constituted unlawful victimisation under Section 67 (1) of the Act and we accordingly find that complaint made out also.

During the Hearing the Deputy President queried the position if the Tribunal were to find that the making of the complaint was but one of a number of other (legitimate) reasons for the dismissal. The query was made because Section 5 of the Act which provides for the reference to the doing of an act by reason of a particular matter

"... includes a reference to the doing of an act by reason of two or more matters that include the particular matter whether or not the particular matter is the dominant or substantial reason for the doing of the act."

is specifically expressed to apply only to Parts II, III, IV and IVA of the Act.

Section 67 (which makes victimisation unlawful) is in Part V.

The ordinary canons of statutory construction would therefore suggest that it would not be sufficient to establish that for example the making of a complaint was only one of a number of reasons for subjecting a person to a detriment if the others were not unlawful.

In the event it was not necessary to resolve this question given the Tribunal's finding that in fact the Complainant was dismissed because she had made a complaint of sexual harassment to the Commission.

The act of victimisation (by the dismissal) was something quite separate from, and in addition to, the prior sexual harassment of the Complainant. Damages must be assessed accordingly.

In the Tribunal's view it is unfortunate that exemplary or punitive damages cannot be awarded under Section 127 (b)(i). Were that possible this is a case in which such damages could well have been appropriate. It was not a situation in which the Respondent, Mr Godley, merely became aware that a complaint had been made under the Act. Ms Shute had told him by telephone of the complaint and warned him then that to dismiss the Complainant for that reason would be victimisation. She repeated this in more detail when he called at her office at the Commission that day. It was thus with a full knowledge not only of the complaint but of the unlawfulness of subjecting the Complainant to any detriment on account of it that he dismissed her the following day.

His conduct in dismissing the Complainant was in blatant and arrogant defiance not only of the spirit of the legislation but of its express terms.

Reprehensible as that conduct might be, the Tribunal has no power to "punish" the Respondent, Mr Godley, for it but is constrained to award damages only to compensate the Complainant for the loss and damage suffered by her as a consequence of it.

There were no circumstances of the dismissal itself which added greatly or in any unusual manner to the Complainant's humiliation and indignity and so it would not be proper to award aggravated damages in respect of that unlawful act.

The first aspect of the claim on this complaint is for loss of earnings. We allow \$60 for this.

As to the claim for damages for "hurt, humiliation and stress" we accept that for the Complainant to be dismissed ostensibly for poor and unsatisfactory work performance when the real reason was the complaint she had made to the Commission, must necessarily have added to the indignity and stress of the termination itself.

At the same time we must be careful not to make an award which would amount to overlap and duplication of damages awarded on this complaint and that for sexual harassment.

We consider that an award of \$2,000 would be appropriate for the dismissal itself.

The total award on the victimisation complaint is therefore \$2,060. As the dismissal was effected by Mr Godley acting as agent for the partnership by which the Complainant was employed, our findings of liability and the award are made against the partnership itself, that is against the Respondents, Ogilvy Reginald Godley and Lynette Faye Godley jointly.

Before leaving these matters we should say something about one submission made by counsel for the Respondents.

On the issue of damages Mr Russo argued that any award the Tribunal may make on the complaint of sexual harassment should be reduced significantly because of what he described as the Complainant's failure to mitigate her damages. He put it that once she began to experience the sexual harassment complained of it was open to her simply to give up her job and that by remaining in the Godleys' employ she must be taken to have accepted the consequences.

We have no hesitation in rejecting this submission totally.

Every person is entitled to quiet enjoyment of his or her occupation, free of unlawful discrimination or harassment. The Act provides the statutory means of enforcing that entitlement.

It cannot be right that where there is a prospect the wrongdoer will continue to act unlawfully, the victim of such unlawful acts must choose either to relinquish his or her employment or risk a reduction in compensatory damages by remaining in it.

To hold otherwise would be entirely contrary to the whole purpose and thrust of the Act.

This legislation makes those who engage in unlawful discrimination accountable for their conduct.

No-one can be required to forego their fundamental right to freedom of employment because of an expectation that a wrongdoer will continue to act unlawfully.