60C 92-447.

JUDGEMENT

EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

No. 4 of 1991

RONDA ASHTON
Complainant

- against -

BEECHER (PETER) WALL
First Respondent

- and -

BEECHERS PTY LTD
Second Respondent

BEFORE: Mr N.P. Hasluck Q.C. - President
Ms B. Buick - Member
Ms K. French - Deputy Member

Counsel for the Complainant - Mr G. McIntyre
Counsel for the Respondent - Mr E.M. Heenan Q.C.
- Mr J. Walters

HEARD:

REASONS FOR DECISION

(Delivered: 10 July 1992)

INTRODUCTION

This is a complaint of unlawful discrimination on the grounds of sexual harassment in the course of employment. The complaint arises out of events said to have occurred within the period 30 July 1988 to 8 December 1989. During that period the female complainant, Ronda Ashton, was employed by the second respondent, Beechers Pty Ltd, which is a private company. The first respondent, Beecher Wall, was at all material times a director of the second respondent and was the person against whom the allegations made by the complainant were principally directed. He was the manager of the retail shop premises where the matters complained of were alleged to have taken place and it is quite clear from the evidence that for all practical purposes he was the real respondent to the complaints. Accordingly, whenever a reference is made to the respondent in these reasons it can be assumed that the reference is to the first respondent unless there is a specific indication to the contrary. The first respondent is generally known as Peter Wall.

OVERVIEW

Before turning to the main areas of controversy it will be useful to set out the history of the matter in general terms drawing principally on the pleadings and uncontested facts.

As at 30 July 1988 the respondent was the proprietor and general manager of retail shop premises situated in the main street of a suburban shopping precinct within the metropolitan area of Perth. It was a comparatively small retail shop selling homeware and gifts. The evidence suggested that customers of the business were fairly affluent and

it was necessary that the respondent and his staff should present themselves to the public as well groomed and personable people.

The complainant commenced work as a casual sales assistant at the respondent's shop on 30 July 1988. She did not have previous experience working in a business of this kind but she found her feet quickly and was generally well regarded by the respondent and by her fellow employees.

The complainant alleges that unwelcome conduct of a sexual nature took place during this initial phase of her employment, that is to say, from 30 July until 17 November 1988. The conduct consisted of suggestive remarks and physical contact less than sexual intercourse. For ease of reference the Tribunal will refer to the matters relied on by the complainant during the initial phase of her employment as *"the July/October allegations"*. The respondent denies these allegations.

The complainant then alleges that on or about Thursday 17 November 1988 while the complainant and respondent were alone in the premises after late trading, the respondent forced the complainant to have sexual intercourse in the office/storage area of the shop against her will. The Tribunal will look at the events of that evening in more detail shortly. It is clear, however, that the complainant went on working for the respondent. She alleges further that from 17 November 1988 until her employment ceased on 8 December 1989 the respondent forced her to have sexual intercourse against her will on a regular basis at the shop premises, usually after close of business on a Thursday night, and subjected her to various disadvantages. The Tribunal will call the matters relied on

by the complainant during this period, where the context indicates that a general description of that kind is appropriate, *"the post October allegations"*.

The respondent contends that the acts of sexual intercourse forming part of the post October allegations were entered into freely as a matter of mutual consent. At the hearing the respondent's defence was conducted on the basis that the parties had a romantic attachment or an affair for twelve months or so following the initial act of intercourse on 17 November 1988. He denies that the complainant was subjected to any disadvantages and denies that she is entitled to relief.

It is common ground that on or about 8 December 1989 the complainant's employment with the respondent was terminated by the respondent. Nonetheless the complainant kept in touch with other members of the staff and, as a consequence, she attended a lunchtime get together at a suburban hotel close to the shop in mid-January 1990. Some discussion occurred at that social which caused the complainant to take stock of her position. Soon afterwards, she sought and obtained medical advice and was later counselled by Dr M, a practising psychiatrist.

In July 1990 there was a flurry of communications between the parties arising out of an incident at a nearby beach. This led to the complainant lodging a complaint about the respondent's conduct with the police. The complaint was investigated but no action was taken against the respondent.

In early August 1990 the complainant sought legal advice and as a consequence a solicitor

engaged by her wrote to the respondent requesting that he not approach the complainant. The solicitor said also that the complainant reserved her right to go to the appropriate authorities and take legal action in respect of the current and past incidents if she thought fit.

Subsequently, on 8 September 1990 the complainant lodged a written complaint with the Commissioner for Equal Opportunity which embraced the July/October allegations and the post October allegations. The Commissioner was unable to resolve the dispute between the parties and the matter was then referred to this Tribunal.

It emerges from this overview that the first complaint made by the complainant to a person in authority about the respondent's conduct was in July 1990, that is to say, more than eighteen months after the initial act of intercourse and the events comprising the July/October allegations had taken place, and more than six months after termination of the employment. The specific complaint of sexual harassment contrary to provisions of the Equal Opportunity Act was first advanced two years after the events comprising the July/October allegations, had taken place, and a little under two years after the initial act of intercourse forming part of the post October allegations.

The Tribunal concludes this overview by noting that an issue arose at the hearing as to whether an order should be made suppressing or restricting publication of the evidence taken and the findings made by the Tribunal. Reference was made to the special considerations involved in a case of this kind where publication would expose to view the private lives and intimate affairs of the parties in a way that was likely to cause acute

embarrassment to them and to members of their respective families.

The Tribunal's ruling on that point appears in the final section of these reasons and therefore any person or organisation contemplating publication of the evidence or findings should look closely at the Tribunal's ruling in that regard before proceeding further.

THE RESPONDENT'S BUSINESS

When the complainant started work at the respondent's shop in late July 1988 the sales force consisted of the respondent himself, a middle-aged male called the *"Manager"* (although it was clear that the real manager was the respondent himself), two full-time female members of staff and a casual assistant. The respondent's wife also attended at the premises from time to time to provide some assistance.

At that time the shop had two public entrances. There was a front entrance on the western side opening onto the main street of the suburban shopping precinct *("the front door")*. There was also an entrance on the eastern side by which access could be had to a public car park *("the rear door")*. The staff toilet facilities for the business were located outside the rear door in a separate toilet block and the most direct route to the same from inside the shop premises was through the sliding glass door constituting the rear door.

Inside the front door of the shop was a counter or serving position and beyond that, in the main shop area, various shelves and cupboards containing merchandise. On the northern side of the main shop area, as a separate part of the premises, there was an office/storage

area including a kitchen sink and pantry, this part of the premises being connected to the main shop area by a narrow corridor.

The respondent attended to his bookwork from a desk situated at the rear of the office/storage area. At the centre of the office/storage area just outside the doorway to the pantry/kitchen was a small table. The layout of the premises was such that it would be unlikely that customers would find their way into the office/storage area, and generally, during the course of the working day, it would be unlikely that members of staff would spend much time in that area. They would only go into the office/storage area for a specific purpose. The respondent could summon staff to his office by an intercom device.

Towards the end of 1988 the respondent took over adjoining premises described on the sketch plan submitted in evidence as the *"Old boutique shop"*, and that resulted in the overall area of the shelves and cupboards and display stands comprising the main shop being extended. However, that expansion of the premises did not alter in any significant respect the configuration referred to earlier.

It seems that the respondent and members of his staff were accustomed to park their vehicles in the car park at the rear of the shop. To one side of the car park was the small toilet block mentioned previously. This had separate cubicles for male and female members of staff. The approach to this toilet block was obscured by lattice work. The toilet block was comparatively small in size and, in the female section, above door level there was a panel of glass which arguably afforded a glimpse of the interior of that

section of the block to a person standing outside.

After close of business the front door was locked and the respondent and his employees always left the premises by the rear door. The only persons having keys to the premises were the respondent and the man he employed as his manager.

THE COMPLAINANT

The complainant was born in 1943 and was 44 years of age in mid 1988. At that time she had been married for about twenty-seven years and had three adult children. In the period of ten years or so prior to commencing work with the respondent she had worked as a part-time sales assistant in other business premises but she did not have direct experience of homeware merchandise.

Her husband had been made redundant at his place of work early in 1988 and as a consequence the spending power of the family unit had been *"significantly reduced"*. The complainant said in evidence that her husband's money was secured and he couldn't resort to it and he was upset by the fact that he had been made redundant. He didn't have the willpower to go out and do anything much about it at that time. It was against that background that the complainant applied for the position advertised by the respondent, although it emerged, as the hearing proceeded, that from time to time the complainant's husband was able to pick up part-time work of about two days a week at his former place of employment.

In giving evidence the complainant appeared to be a mature, attractive and well-groomed woman. She had poise and, notwithstanding the occasional, almost inevitable, moments of distress during the course of responding to questions touching on her personal life and matters in controversy, she conducted herself with dignity and composure.

She was not an especially forceful personality, and on the whole, was quietly spoken, but nonetheless she did not yield to pressure and seemed to be quite capable of standing up for herself. At the date of the hearing she was working in a senior position in retail shop premises in another suburban shopping precinct. The Tribunal had little difficulty in accepting the inference arising from the evidence generally that she was a competent sales assistant and made a favourable impression when dealing with the respondent's customers.

The complainant's husband was a man of middle years, of about the same age as the complainant, or perhaps slightly older, and he impressed the Tribunal as a considerate man and a loyal husband. He had an interest in sailing and notwithstanding the setback he had suffered at his place of employment, was still able to pursue that interest by going regularly to his yacht club. Although the complainant and her husband may have had to tighten their belts financially as a consequence of the complainant's husband being retrenched, on the evidence brought before the Tribunal, they did not have to change their lifestyle in any significant respect.

In late July 1988 the complainant applied for the position of casual sales assistant at the respondent's shop. She was interviewed by the respondent. During the course of that interview she said it was imperative that she obtain at least a certain amount of hours a

week of work otherwise it would not be worthwhile for her to go out to work. She said in evidence that she was told by the respondent that she would never get anything less than 15 hours per week, or mostly have 20 hours per week and there might be more work when another member of staff was on holidays or during the Christmas rush.

The interview was on a Wednesday and she said in evidence that she commenced work as a casual sales assistant upon the following Saturday.

THE RESPONDENT

At the time of the interview the Respondent was 51 years of age. He was tall, well-groomed and physically fit. He lived with his wife and two children, having been married since May 1968. His wife was a nurse by training and also assisted him in the running of the business. At the time of the interview the business was in its tenth year.

The evidence showed that the respondent had a quick temper and sometimes upset his staff by sudden outbursts of rage. He did not deny this, but said that these flashes of anger were simply summer storms and, as far as he was concerned, were soon forgotten. As appears later, many of his employees took a less sanguine view of his angry moods.

At the hearing Counsel for the complainant sought to lead evidence of a propensity by the respondent to harass sexually members of his staff other than the complainant by suggestive remarks and unwelcome touching. This was strongly opposed by Counsel for the respondent but finally, for reasons which are referred to at greater length later in this

judgement, evidence of the kind contended for by Counsel for the complainant was eventually admitted on the grounds that it was relevant to issues before the Tribunal. This evidence will be referred to again in more detail. For the time being, it is sufficient to note that there was some evidence from persons other than the complainant reflecting a dissatisfaction with the respondent's conduct in regard to female members of his staff.

JULY/OCTOBER ALLEGATIONS

In the Points of Claim filed on her behalf the complainant pleads that very soon after she commenced employment in July 1988 and continuing until November 1988 the respondent engaged in unwelcome conduct of a sexual nature.

The particulars of this aspect of the complaint included running his hands up the legs of the complainant as she stood at the till, or when standing on a ladder in the storeroom, unwanted touching of and contact with the complainant's body, pinching the complainant's bottom on occasions sufficiently hard to bruise, on one occasion taking hold of the complainant's breasts and holding them, remarks of a sexual nature in the complainant's presence about herself and personal and intrusive questions about herself and her spouse.

It is also pleaded that by taking objection to such conduct she would be disadvantaged because the respondent had control over the complainant's employment. The pleading does not contain any reference to objections advanced by her concerning the conduct complained of and does not refer to persistence in such conduct by the respondent in the

face of any such objection. In the course of her evidence, however, she gave evidence bearing on the protests she made.

As to this aspect of the complaint the respondent denied that he engaged in unwelcome conduct of the nature described and also denied that the complainant had reasonable cause to believe that by taking objection to the conduct she would be disadvantaged.

The complainant gave evidence in support of her plea. She said that during the first week of her employment the respondent was always contacting her physically. She said that she was concerned by his conduct but thought it was *"probably just harmless"*. She had never worked in any sort of place where that had happened to her. As the conduct increased she became more concerned that she did not know what to do about it and felt that she would lose her job if she complained.

When asked whether she reacted in any way to the touching her evidence was that she would say *"stop"*. About five or six weeks into the employment as she was coming into the corridor leading to the office/storage area he groped at her breasts and she said to him *"Don't do that. You have no right to touch my body unless I give you permission"*. According to her, he just put his hands down and walked away. He never referred to the incident and didn't touch her again for a period of about two months. His suggestive remarks included references to whether she and her husband walked around naked and to the fact that he, the respondent, watched R rated movies.

When the respondent was asked about the nature of his relationship with the complainant

during the phase of her employment the subject of the July/October allegations he said that during the first months of her employment she was a normal, happy employee. She was a flirtatious person. A mild flirtation developed but there was no sexual misconduct. He was satisfied with her performance as a saleswoman.

The complainant called a number of witnesses with a view to obtaining corroboration of her testimony. At a later stage the respondent led evidence from former staff members. The Tribunal was therefore able to obtain an understanding of what went on at the shop during the relevant period. As the precise identity of these witnesses is not important for present purposes the Tribunal will adopt the practice of referring to the witnesses by their christian names.

The manager of the shop was a man named Gordon who was an experienced sales person. He was working for the respondent when the complainant commenced her employment. He confirmed that the respondent was a person given to temperamental behaviour. He said that he had seen the respondent touching women in a way which he did not regard as acceptable and referred to an incident involving a visiting female sales representative and an occasion when his 19 year old daughter had to tell the respondent not to touch her bra.

He also referred to an incident when he and his wife had dinner with the respondent and his wife at the respondent's home. During the dinner the respondent touched Gordon's wife and persisted in doing so until finally the respondent's wife had to tell her husband to stop it. Gordon said that he found it difficult to handle this situation because the respondent was his employer and, that being so, he found it difficult to intervene on

behalf of his wife.

Gordon also referred to incidents at the shop when the respondent would pretend to be masturbating and on two occasions, while the respondent was getting changed at the shop after going to the beach for some recreation, Gordon noticed that he was not wearing underpants, being a feature of the respondent's conduct which struck him as odd.

It emerged, however, that Gordon did not observe the respondent touching the complainant on any occasion and was not aware of any relationship between them. He did say, however, that he was present on an occasion when the respondent lost his temper and flung some icing nozzles into the air and then required the complainant to pick them up. Under cross-examination, he agreed that when told to pick up the nozzles she refused to do so. She stood up for herself on that occasion. It was in that context that Gordon said of the complainant that she was not a compliant person. She was just a normal person, she generally did what she was told to do but in that case she didn't and Gordon didn't blame her. He considered that the complainant was an excellent saleswomen. He considered that she would have *"absolutely no difficulty"* in finding a sales position in another place of employment and he considered that she was confident of her ability.

A witness called Jan, worked at the shop from August 1987 until July 1988. She didn't ever meet the complainant. She confirmed that the respondent had a short fuse and was likely to explode at a minutes notice but she didn't specify any sexual misbehaviour on his part and made it quite clear that had he touched her in any way that offended her she *"would have walked out"* being very particular about being manhandled.

Dianne, a mature woman, started work as a sales assistant in September 1988. She said that the respondent pinched her bottom on the odd occasion, probably a dozen times. He said *"a bit of rubber there"* and she would pass it off with a quip and walk on. She didn't see any other staff touched in that manner by the respondent. She confirmed that the respondent was inclined to lose his temper unpredictably and she regarded him as difficult to work with. She worked at the shop until May 1989 and then decided to leave on the spur of the moment. She considered that she was working in a pleasant environment most of the time. She became dissatisfied because she was being obliged to work on a day that didn't suit her. She considered herself to be a woman of sufficient experience and maturity to deal with the respondent's conduct and did not believe there was any suggestion in what he had done that the advances would go further. She did not at any time entertain any suspicions about the existence of a personal relationship between the complainant and the respondent.

Penny was employed at the shop during 1989. She was 18 years of age at the time and during the course of her evidence it emerged that the respondent had touched her breasts and her bottom. She said also that the complainant brought a bottle of wine to the premises and put it in the fridge. She saw the complainant and the respondent drinking wine together on a few occasions but mainly from a cask. *"They used to have a glass of wine in the shop with some nibbles as Thursday night trading was fairly slow"*.

Melanie was employed early in 1989 and worked at the shop until the end of that year. She was a university student, and an extremely forceful and articulate young woman. She said that while working with the respondent he would go past her in close proximity in a

way that was invading her personal space and wasn't intended in a friendly manner. He would brush up against her when there was really no need to do so. She also remembered an occasion when she was standing at the counter and, instead of asking her to move so that he could get something from the cupboard beneath the counter, he came into close proximity with her in a way that she found objectionable. She said that in her view he had an irrational temper.

Melanie also referred to an occasion when she saw the respondent touch the complainant. Melanie was in the office/storage area where the kitchen was and the respondent walked up behind the complainant and grabbed her bottom. She said she was shocked by the explicit nature of this advance, and as a consequence she couldn't recall how the complainant had reacted to the advance. Soon after the complainant ceased employment in December 1989 Melanie worked at the premises on a Thursday night and on that occasion the respondent asked her to share some wine with him at the end of the late night trading. She rejected what she took to be an improper advance. She eventually gave up working for the respondent because of her marked disapproval of him and the way he behaved. Under cross-examination, she agreed that she had an attitude of animosity toward the respondent.

In May 1989 Anne replaced Gordon as "Manager" of the shop. She held that position until December 1989. It was a full-time position and she was working five days a week at the shop between the hours of 9.00 a.m. and 5.30 p.m. She didn't work on Thursday nights but worked occasionally on a Saturday when an employee wasn't able to work or the respondent was away on holiday. During her employment the other staff members

employed by the respondent were Melanie, Penny and the complainant, of which Penny was the only other full-time staff member. To the best of Anne's recollection the complainant was working on Wednesdays and Saturdays and on Thursday nights.

Because Anne was called by the respondent, and because her employment did not commence until May 1989, her evidence was principally concerned with the post October allegations. Under cross-examination, however, she was asked questions going to the propensity of the respondent to act in an unusual or sexually improper manner as far as his employees were concerned. She said that she had not seen any such conduct. She agreed that after work on a Friday she and the respondent sometimes had a drink together on the premises, but nothing unusual occurred. Like her predecessor, Gordon, she presumed that a glass of wine after work was simply part of a normal and acceptable social interchange between those involved in the running of a small business.

It emerges from a review of the testimony given by employees other than the complainant that there was evidence of a propensity on the part of the respondent to engage in unwelcome sexual conduct affecting female members of staff. However, with the exception of Melanie, none of the other witnesses corroborated directly the complainant's testimony that she herself was subjected to unwelcome sexual conduct, and Melanie's evidence related to an incident at some stage during 1989. In his own evidence the respondent described his relationship with the complainant during the period the subject of the July/October allegations as being one of mild flirtation and by implication denied he was involved in any discriminatory or unwelcome sexual conduct of the kind described in those allegations.

POST OCTOBER ALLEGATIONS

The complainant contended that the situation at her place of employment took a new and dramatic turn on or about 17 November 1988.

It is pleaded in paragraph 6 of the Points of Claim that on 17 November 1988 the complainant was required by the respondent to work until close of business at 9.00 p.m. At close of business the complainant and the respondent were alone in the premises. The complainant, when collecting her belongings from the kitchen before leaving, found the respondent naked and sexually aroused. The respondent then forced her to have sexual intercourse against her will. This plea will be called the *"the 17 November 1988 allegation"*.

By his Points of Defence the respondent admits that the complainant and the respondent were alone in the shop premises on or about the date in question and admits that they then had sexual intercourse. The respondent pleads, however, that the complainant and the respondent engaged in sexual intercourse freely and by mutual consent.

It is therefore necessary to look at the evidence bearing upon 17 November 1988 allegation in detail, and then to look at the additional matters forming part of the post October allegations which occurred subsequently.

17 NOVEMBER 1988 ALLEGATION

In a written letter of complaint dated 8 September 1990 to the Commissioner for Equal Opportunity, which was received in evidence, the complainant commenced by referring to the July/October allegations and then said:

> " *He then groped at my breasts and I was so furious and turned on him and told him that nobody touches my person in any way without my permission and not to ever touch me again and he knew this time I really would do something.*
>
> *Once when I was getting up off the ladies staff toilet he was there at the clear glass panel near the door looking in at me. So humiliating and degrading.*
>
> *For approximately two months after that he never touched me. The reason being I believe was that Gordon the manager was going to England for a month and Dianne the other casual who started after me was going to Adelaide for a holiday, he couldn't take the chance of me leaving then.*
>
> *After those two months were up, the first Thursday night I worked he came out to me about 6.30 p.m. and said would I stay on to 9.00 p.m. as he had a lot of paperwork to do. My rostered time was 3.00 - 7.00. I stayed while he locked up and then went to the toilet. When I came back to the kitchen he was standing there naked with an erection. He then sexually assaulted me, I felt so degraded as a woman and was in pain and shock, I ran out of there and decided I just could not tell my husband and family or anyone as they would probably kill him.*
>
> *He rang me the next morning and asked me if I had told Richard, I said I could never tell my husband as he would be devastated for me, and I couldn't hurt him.* "

As appears from the overview, it is common ground that the complainant did return to work the next day. On the version of events set out in the letter it would seem that there had been no physical contact between the parties for two months prior to 17 November 1988 with the result that the July/October allegations must have taken place within the

period 1 August to 17 September 1988. The Tribunal also notes in passing that in evidence given at the hearing the complainant said that the toilet window incident occurred in June 1989.

In her sworn testimony the complainant gave evidence to much the same effect as the summary set out in the letter. She said that she worked till about 9.00 o'clock, then the respondent offered her some wine. After the wine she went out the back and when she returned and went out to the office/storage area the respondent was standing there stark naked and had an erection. He started to kiss her and she kept telling him to stop but he pushed her back on the small green laminex table outside the kitchen, removed her pants, and had intercourse with her at the conclusion of which he ejaculated. He didn't say anything after it was over and she left in a state of distress. She drove to Sorrento beach and sat on the beach until about 11.30 and then went home. Her husband was out so *"I got into bed and that was it"*. When the respondent telephoned her the next day he gave her an assurance that he wouldn't touch her again. *"He was very sorry and I believed it and I went back that day"*. When she went back the respondent acted as though nothing had happened and work was as normal. In a signed statement that was also received in evidence the complainant said that it was about this time that her rosters were changed and she worked every Thursday night. Thus, as a consequence, two weeks later she was again at the premises alone with the respondent on a Thursday night when a further act of sexual intercourse occurred.

In describing the events of 17 November 1988 under cross-examination the complainant agreed that when she left Sorrento beach and went home she went straight to bed without

having a shower. When asked whether she had a douche she said *"No. Oh I washed myself. I went to the toilet probably. I really don't remember"*.

The respondent said in evidence that 17 November 1988 was a busy trading night. He was on a high because of the successful evening. He and the complainant retired to the kitchen in the office/storage area for a glass of wine. He gave the complainant a hug because of the good trading result, the hug became a kiss, and from the kiss the situation *"developed"*, that is to say, they eventually had intercourse on the carpet squares in the office/storage area. There was no complaint or protest from the complainant and they both enjoyed the experience. He emphatically denied the version of events given by the complainant as described above. The following morning *"She was pleased to see me and I was pleased to see her"*. From then onwards the complainant *"Could barely keep her hands from me"*. He said also *"The mild flirtation that we had before our intercourse turned into a more serious business"*. He also said *"Whenever she or I were by ourselves, she would encourage me or we would have a fondle. We would be close to one another"*. He then said that intercourse became a regular Thursday night event in which the complainant was a *"very willing participant"*. The Thursday night shift would end and she would buy a bottle of *"special wine"* that we would have after working hours. She never protested or complained about his conduct.

He said that in due course the complainant produced a black sleeping bag which was kept in the cupboard where the girls kept their handbags and that became the bed they used for regular Thursday night sexual intercourse in the office/storage area after the shop had closed for the evening.

It follows from the respective versions of what occurred that whatever took place happened in private and no other witness was able to provide much in the way of corroboration of either story.

SUBSEQUENT MATTERS

The complainant pleads that as a result of the 17 November 1988 incident she decided not to return to her employment. On the day following the incident the respondent telephoned the complainant at her home and she advised him of her decision not to return. The respondent promised the complainant that the incident would not be repeated. As a result of his promise and because it was financially necessary for the complainant to work she decided to return and in fact continued her employment.

It is then pleaded that approximately two weeks after the complainant's return to work until the termination of her employment on 8 December 1989, the respondent engaged in unwelcome conduct of a sexual nature on a weekly basis and treated the complainant less favourably than he would treat a male in the same circumstances or circumstances not materially different by giving her less favourable terms and conditions of employment and subjecting her to detriment.

Particulars of the unwelcome conduct of a sexual nature complained of are provided in paragraph 8 of the Points of Claim.

In addition to the regular Thursday night acts of sexual intercourse it is said that on one

occasion on or about Saturday 25 February 1989 the complainant was working alone with the respondent during the afternoon. The respondent closed the shop and forced the complainant to have intercourse against her will. In addressing this plea the complainant said that mid afternoon the respondent locked the doors and put a sign on the front door, he got undressed, and came back to the little doorway near the passage in the main shop area and put a blue, green and white cloth on the floor. Her evidence in chief in regard to this point was as follows:

> " *What did he say to you? - He was just standing there naked. He just told me to get undressed and I did.*
>
> *Did you do anything else apart from getting undressed, or did you just stand there? - No, I got undressed and I got on the floor.*
>
> *And what happened then? - He had intercourse with me and then I got dressed again. He opened the shop and I think I worked for a little bit longer and then I went home.*
>
> *Did you say anything to him about the incident before it happened or after it happened? - I said "Don't do it". I couldn't believe that he would do that in the middle of the afternoon, in the shop anybody could have come, knocked on the doors or whatever, I don't know. He didn't seem to worry about that sort of thing.*
>
> *Did you have any particular feelings about it? - I was upset about it.*
>
> *As upset as you had been previously? - I guess I was just at the stage where I just did what was expected of me. I really did. I didn't feel that there was any way that I could not comply with anything that he did, whether it was to do with any of my money, my times, anything."*

The respondent denied the plea and the evidence given in support.

The complainant pleaded that on a date which she cannot recall in May 1989 the respondent requested her to attend early on a Monday morning to unpack stock. No other

employee was at the premises. The respondent locked the premises and forced the complainant to have intercourse against her will. This plea was supported by sworn testimony but was denied by the respondent.

The complainant pleaded that during working hours the respondent on dates too numerous for the complainant to recall would expose himself to her, and on occasions force her to hold his penis. This plea was supported by sworn testimony. She referred to occasions when she would go to his office and he would be sitting at his desk and expose himself. This evidence was denied.

The complainant pleaded that during working hours the respondent would undertake various lewd activities which are detailed in the pleadings but need not be repeated here. On one occasion on a date which the complainant cannot recall after May 1989 the respondent watched the complainant using the toilet through a clear glass window. This evidence was denied by the respondent. The complainant pleaded that the respondent abused and humiliated the complainant in front of other staff and customers. It was said that on two occasions, the dates of which the complainant cannot now recall, the respondent picked up displays of goods in the store and dropped them on the floor. He then ordered the complainant to pick them up.

A number of other witnesses gave evidence to the effect that the respondent was given to displays of temper and there was certainly some corroboration in support of this aspect of her pleas. The respondent himself did not deny that he was given to flashes of anger and was often irritable. An evidentiary issue remains, however, as to whether these displays

of anger directed at the complainant, and indeed other employees, formed part of a framework of sexually suggestive and unwelcome conduct.

The complainant pleaded that the respondent refused to consider the complainant for a full time promotional position of manager and from time to time arbitrarily cut her hours even though work was available.

The evidence established that Gordon the manager left the shop in about May 1989 and it was at that time the respondent sought a replacement for him. It was common ground that Anne, a woman of mature years, was given the position of manageress in May 1989. There is ample evidence to suggest that the complainant performed satisfactorily as a sales assistant, but it remains in issue as to whether she was suited to occupy the position of manageress on a full-time basis. The respondent denies that he wrongfully refused to consider her for the position of manageress, taking the view that she was not sufficiently qualified for the position.

The complainant pleaded that throughout her employment the respondent underpaid and overtaxed the complainant. The complainant supported this plea by sworn testimony and witnesses were called from the Department of Productivity and Labour Relations to corroborate her evidence.

The Tribunal is satisfied that there was evidence to show that the complainant did not receive her full entitlement. Again, however, a separate evidentiary issue arises as to whether this was due to inadvertence or whether it formed part of a conscious pattern of

conduct aimed at the complainant and forming part of a pattern of sexually suggestive and unwelcome conduct.

The Tribunal will refer to these various allegations as the *"Paragraph 8 allegations"*. The Tribunal pauses to note that the complainant supported these allegations by sworn testimony while the respondent emphatically denied the same, and, in so far as any of the events were found to have occurred, denied that they formed part of a pattern of discriminatory or unwelcome sexual conduct. He contended that, insofar as the matters complained of involved sexual conduct between the parties, this formed part of the consensual relationship which had by then been established between them.

In paragraph 9 the complainant pleaded that by taking objection to the conduct the subject of the paragraph 8 allegations she would be disadvantaged, and in fact was disadvantaged in her employment by the respondent. It is said that the respondent had control of the complainant's employment. On occasions too numerous for the complainant to particularise the respondent threatened the complainant that if she left her employment with the respondent she would never obtain employment elsewhere. The respondent told the complainant he had *"friends in high places"* and that no one would believe the complainant because he would ensure that it appeared they were having an affair. On a date in April or May 1989 which the complainant cannot now recall the respondent told the complainant that he had spoken to his solicitor about her and if she attempted to expose him he would have the support of his solicitor. The respondent threatened to tell the complainant's spouse that she was a willing partner in an affair with him. The complainant pleaded that the respondent on a date which the complainant cannot now

recall threatened to hit the complainant over the head with his walking stick. Further, the respondent threatened to run the complainant down in his car and smashed the complainant's husband's car.

It is pleaded also that the respondent telephoned the complainant on occasions too numerous to specify at her home and intimidated her by threatening to cut her hours, and in fact from January 1989 did cut her hours even though work was available and extra staff employed. On 30 September 1989 when the complainant left the premises in a distressed state the respondent chased her and took her back to the premises by force. He removed the complainant's keys and handbag and hid them to prevent her from leaving the premises.

This cluster of allegations will be called the *"Paragraph 9 allegations"*. These allegations go directly to the credibility of the complainant. If the allegations made by the complainant are believed then it would certainly seem that the respondent was exercising power and domination in a way which might be relevant to the obtaining of his sexual demands, because it is clear that he did indeed have control over her employment and was in a position to confer or withhold benefits. The respondent generally denied these allegations and it formed part of his case, as presented on his behalf at the hearing, to suggest that if there were moments of friction between the parties this was simply part of the normal ebb and flow of a passionate love affair.

In paragraph 10 it is pleaded that, by reason of the July/October allegations, the post October allegations, the Paragraph 8 allegations and the Paragraph 9, allegations the

respondent threatened to treat and did treat the complainant less favourably than he treated or would treat a male in the same circumstances or circumstances that are not materially different contrary to Sections 8(1) and 11(2) of the Equal Opportunity Act 1984. It was also pleaded that by reason of the matters referred to the respondent had harassed sexually the complainant in the course of her employment contrary to Section 24 of the Act.

In answer to the Paragraph 8 and Paragraph 9 allegations the Tribunal notes again that the respondent by his Points of Defence conceded that the parties engaged in conduct of a sexual nature on a weekly basis but pleaded that both parties engaged in such conduct freely and by mutual consent. The respondent contended at the hearing, and the matter was fought on this basis throughout, that from November 1988 onwards the complainant and the respondent were engaged in an affair or romantic attachment which continued until termination of the employment in December 1989.

Save and except for the admission that the parties engaged in conduct of a sexual nature by consent including sexual intercourse the respondent denied the Paragraph 8 and Paragraph 9 allegations and denied that the complainant is entitled to relief.

It follows from the description of the matters pleaded that a central issue to be determined is whether the acts complained of were undertaken by consent. This involves a consideration of the nature of the relationship between the parties.

THE NATURE OF THE RELATIONSHIP

In her letter of complaint of 8 September 1990 to the Commissioner for Equal Opportunity the complainant referred to the events of November 1988 and went on to say:

> " *For months after this I was continually sexually abused and assaulted, I felt he really hated me and he just controlled me with my fear of his threats and his power. He is an extremely perverted sick person and his thing is to degrade women wherever possible ... all those months I spent crying and frightened of the perverted human being, I just felt so absolutely powerless to get out of my situation.* "

The view of the relationship reflected in those comments was the view advanced by the complainant in her evidence at the hearing. She suggested that she was subjected to sexual abuse at an early stage of her employment and thereafter felt trapped and helpless. She had no option but to comply with virtually every demand that was made upon her. In other words, the relationship between the parties was abnormal, if not perverted, and led to a situation in which the complainant was sexually and financially exploited by the respondent, he being able to assert a power or ascendancy over her by force of his personality.

It is significant, however, as appears from the overview, that the complainant did not voice this view of the relationship to any other person, with the possible exception of her psychiatrist, Dr M, prior to her complaint to the police in July 1990. The letter of complaint to the Equal Opportunity Commission dated 8 September 1990 was prepared after she had spent many months in consultation with Dr M. Indeed, her letter refers to her having been sexually abused by her stepfather and living in fear of him and continues:

" *... which is why according to my psychiatrist I made the fatal mistake of going back to work for (the respondent).* "

Thus, there is an indication in the letter of complaint, that by September 1990, her view of what had taken place was influenced by her psychiatrist's interpretation of the events, and that interpretation, it would seem, had given rise to the notion in her mind that she was a participant in the events that had taken place as a result of psychological pressures and conditionings which were essentially beyond her control. This was how she presented the position in giving evidence at the hearing and, when confronted with the suggestion that she had been involved in a relationship which would normally be described as an extra marital affair, she strongly denied the accusation. Nonetheless, having regard to the chronology revealed in the overview, and a degree of ambiguity about the effect of consultations with her psychiatrist, Dr M, the Tribunal feels obliged to proceed cautiously in taking at face value the complainant's observations about the nature of her relationship with the respondent.

At the commencement of the complainant's cross-examination an exchange occurred which indicates the nature of the ambiguity surrounding her case:

" *Did you ever love (the respondent)? - No I did not.*

Never? - Never.

Did you never have any affectionate feeling for him? - No.

Did you ever tell anyone that you loved him? - I told my doctor.

That was Dr M? - Yes.

You told him that when you saw him in February 1990? - Yes.

You continued to tell him that until you had undergone psychotherapy for some time? - Not really."

In dealing with the 17 November 1988 allegations the complainant said in evidence that she allowed herself to be rostered on Thursday evenings, and when she was sexually assaulted again two weeks after the initial act, she felt that there was nothing she could do to resist. She felt shattered and devastated. She felt that she was locked in and that she might not be able to get other employment. She was afraid of what the respondent might do and that he might influence other people in the trade not to employ her. Nonetheless, in other portions of her testimony she suggested that she enjoyed her work at the shop.

It follows from the evidence already mentioned that, as far as the respondent was concerned, he and the complainant were involved in an extra marital love affair. He said that cards and endearments were exchanged but, being an extra marital affair, secrecy was necessary - hence the clandestine nature of the Thursday night meetings.

In a letter to the Commissioner for Equal Opportunity dated 31 October 1990 he put the matter in this way:

" *I am over 50 years old and was flattered to receive attentions from a vibrant younger female. I have heard of men and women and their love affairs and as Ronda's and my affection for one another grew I was flattered and grateful. At all times Ronda was a more than willing partner. Our affair commenced on or about Thursday 23 November 1988 ... our affair was happy and glorious until August 1989 by which time I realised what fools we were being. I went to Melbourne in August on business, to be greeted in my hotel room with a single red rose ... it had been sent by Ronda ... I believe our affair was known to nobody ... I have since learned that Ronda told Anne and Penny of our affair, that she was a willing partner, provided the supper and wine and a sleeping bag to prevent carpet*

burns."

Faced by these completely contradictory accounts, the Tribunal must look beyond the testimony of the parties themselves to see whether one version or the other is corroborated by the surrounding evidence.

It appears that communications were exchanged between the parties. The complainant agreed that she did send a red rose to the respondent while he was on business in Melbourne. It was put to her that a rose delivered to a hotel room unaccompanied by any card or message would generally be construed as an indication of affection between the sender and recipient. The complainant disputed this proposition and suggested that the rose was sent to the respondent as a warning signal or as a threat that his activities were under notice. She contended that he had been involved with other women and therefore the receipt of a rose unaccompanied by any message would be an enigmatic event which was bound to worry him and might even cause him to desist in his unwelcome conduct.

There is evidence that the complainant gave the respondent a mounted photograph of a beach scene being a photograph taken by her husband. The complainant said that this was a birthday present given to him in mid 1989 in an attempt to put him in a better mood so that her life would become more bearable. The respondent, on the other hand, contends that this photograph was another expression of affection and was accompanied by a smaller, unmounted photograph of the complainant herself on the same stretch of beach which, with her knowledge, he kept in his office. Both photographs were received in evidence, and there is therefore little doubt that they were handed over, but again the Tribunal is left with a conflict of testimony as to what exactly the photographs signified.

The respondent tendered a card bearing the initial *"R"*, this being the complainant's initial, and the notation *"X"* with a printed inscription commencing *"Whatever you dream you can be .."*. It seemed that the complainant did not have forewarning that such a card would be put to her at the hearing and she disputed the authenticity of the initial and of the card as something given by her to the respondent.

Another card was produced, however, of which she had forewarning. According to the respondent, in November 1989 the complainant gave the respondent the card in question being a card showing two teddy bears on the front exchanging gifts of flowers with a message inside the card in handwriting saying:

> *" My darling Peter, I love you I love you what more can I say Happy Anniversary, All my love"*.

The complainant acknowledged during the course of cross-examination that this message was written by her. There was a degree of controversy as to whether the initial *"R"* and the notation *"X"* which followed the written portion was in her hand. The Tribunal will call this *"the Anniversary card"*.

The complainant said in evidence in chief that she wrote the message on the card in November 1988. She contended that the reference to an anniversary was a reference to the anniversary of the respondent and his wife. It appears from evidence referred to earlier, however, that the respondent's wedding anniversary was in May. The respondent contended that the reference to an anniversary was the anniversary of the first occasion on which the complainant and the respondent engaged in sexual intercourse, namely, in mid

November 1988. He said: *"She gave it to me personally with a kiss".*

Another card was produced showing a photograph of a young maiden with flowing hair. The inscription inside the card, in the respondent's handwriting, said *"Dear Ronda ... Sorry! Sorry! Sorry! plus Thank you! Thank you! Thank you!".*

It was suggested during the course of evidence that this card (which the Tribunal will call *"the apology card")* had come into existence after an intemperate display of anger by the respondent. The complainant contended that this card showed the manner in which he was accustomed to keep her working for the business even though she was resolved to resign. The respondent suggested, on the other hand, that it was yet another example of a communication between the parties suggesting a degree of intimacy between them.

On the respondent's version of the relationship, the lovemaking between the parties on Thursday nights was usually preceded by a glass or two of wine. They would have supper together after the working shift was over and *"it eventually ended that she would buy a bottle of special wine that we would have after working hours".* He said that she never complained about his conduct towards her.

Some evidence was received at the hearing as to whether other witnesses had seen the complainant bringing wine to the premises. Anne, the manageress appointed in May 1989, gave evidence to that effect. The complainant conceded that she did bring a bottle of wine to the premises from time to time but that was because she often went out to dinner on a Thursday night with a young female friend called her *"chosen daughter"* and

the wine was needed for that purpose.

The Tribunal pauses at this point to say that the events surrounding the termination of the employment may also have a bearing on the nature of the relationship between the parties.

TERMINATION OF EMPLOYMENT

According to the respondent, as reflected in his letter to the Equal Opportunity Commission of 30 October 1990 referred to earlier (being the letter in which he answered the complainant's initial complaint), towards the end of 1989 he began looking for a way out of the relationship. He knew there was a risk he would hurt his family. He tried to persuade the complainant to think of her husband and to finish the affair. The rose he received while away on business annoyed him because he felt she was *"smothering me with love"*. The complainant's case was, of course, as indicated earlier, that she was still the unwilling and powerless victim of his demands. However, even on her case, it seems that upsets were occurring between the parties with increasing frequency. It was during this phase of the relationship, according to the respondent, that he went to a priest for advice, and, as a result, resolved to end the affair.

According to the complainant, on or about Wednesday 6 December 1989, the respondent abused her badly and she left the premises in a state of distress. Later that day she followed him in her car and a meeting took place at the side of the road in which she said she had had enough abuse and would be leaving. Nonetheless, he was able to persuade

her to return. According to her, it was on that occasion that the card containing his apology was given to her.

On Thursday 7 December 1989 there was a street party in the shopping precinct. The complainant said that she was threatened again and then told the respondent that she was not going to go on working for him. About 6.00 p.m. that night he came into the shop. There were lots of people about due to the street party. The respondent's wife and her children came into the shop. While the children went off to the street party, the respondent, the respondent's wife and the complainant then had a glass of wine in the shop. When the children came back, the respondent's wife departed. The complainant contends that the respondent was in a foul mood and that once again she was forced to have sexual intercourse with him, the circumstances causing her much pain. The complainant then decided to leave and to tell her husband that she had decided to go.

The Tribunal pauses to note that both the respondent and the respondent's wife said in evidence that after returning home from work on the evening of Thursday 7 December 1989 the respondent confessed to his wife that he had been having an affair with the complainant.

At the shop premises on the morning of Friday 8 December 1989 it seems that a confrontation occurred between the complainant and the respondent. According to the complainant, the respondent dismissed her, this being simply the outcome of his displays of temperament during the course of the preceding weeks and on the previous night. According to the respondent, having by now confessed his affair to his wife, he was left

with no option but to dismiss the complainant so as to bring the matter to a decisive end, and, on the Friday morning he did so. She refused to accept the cheque he gave her, and left the premises after an acrimonious telephone conversation with the respondent's wife. During this call, the respondent's wife said she was not prepared to meet the complainant because she knew of the affair and held the complainant in contempt.

Two other witnesses gave evidence bearing upon this aspect of the matter, being witnesses called by the respondent in support of his case.

Penny, the junior full-time employee, was in the shop that morning. She had this to say about what occurred:

> " *Peter and Ronda went out to the back of the shop to talk. Ronda came out - I'm not sure how long after. She spoke to Anne (the manageress) and I was cleaning out the front of the shop and she (the complainant) came up to me and said "You were right. Peter and I were having an affair. Its all out in the open. Annette (the Respondent's wife) knows everything and I will ring you and tell you all about it later"."*

The Tribunal pauses to note that Penny was a friend of the complainant and remained friendly, even after the employment had ceased. Penny seemed to be generally sympathetic to the complainant's position. It was put to Penny in cross-examination that, upon emerging from the final confrontation with the respondent, the complainant said words to the effect that the respondent had told his wife that he had been having an affair, that is to say, implying that the respondent had given a false account of what had happened, and in speaking to Penny the complainant was describing the nature of the deceit. Even though she was pressed strongly on this point Penny would not agree with

the suggestion put to her and held strongly to her recollection that the complainant had quite unequivocally announced that she had been having an affair with the respondent and, being aware that Penny had entertained suspicions to that effect, was simply confirming that Penny's suspicions had indeed been correct.

Anne, the shop manager, was also working in the shop that morning. She said that the complainant emerged from the back of the shop where she had been speaking to the respondent for about an hour and a half. She came straight out and spoke to Penny. After that, she told Anne she was leaving. Whereupon, as the lunch hour was approaching, Anne went to a nearby pastry shop with the complainant and had coffee with her. When asked about the discussion which took place, Anne gave evidence as follows:

> " *Did she tell you what the position was between herself and Mr Wall? - Yes she said that she had had a relationship with Peter for quite some time and that he had broken it off the night before.*
>
> *Did she indicate to you how long this relationship had lasted? - Approximately 14 months.*
>
> *Did she use the term "relationship"? - No she said "affair".*
>
> *Was there any mention of occasional arguments between herself and the respondent? - Yes she said they had a few arguments every now and then, but he used to write her a poem or with a card and send her flowers.*
>
> *Did she say what she did with those cards? - She kept them in a drawer, she said, and had a ribbon tied around them.*
>
> *Did she say what her emotional state was in relation to Mr Wall? - Well, she said that she was in love with Peter and couldn't accept the fact that he had broken it off."*

Anne was also tested in cross-examination but did not resile from this evidence. She said also that after the employment ceased the complainant rang her a couple of times at home and asked her about the respondent and whether he was making any inquiries about the complainant. Anne didn't appear to harbour any ill-will towards the complainant and nor was there any evidence of any strain in their relationship during the course of the complainant's employment, although it was Anne, of course, who became manager of the shop in May 1989 and thereby obtained one of the benefits which the complainant claims that she was denied. As evidenced by the get together in the coffee shop at the time the employment ceased, the relationship between the two women appeared to be cordial. At a later stage, when legal proceedings were contemplated, the complainant approached Anne with a view to enlisting her support, but Anne was not willing to become involved in the matter. She felt that the complainant was becoming too insistent that she become involved.

No circumstances were brought to the attention of the Tribunal which would suggest that either of these witnesses had any reason to fabricate an account of what occurred on the day the complainant's employment ceased or to embellish their account of what happened on that day. The complainant's version of events was as follows:

> *"Do you recall the day that you left - Yes, I do.*
>
> *Did you speak to Penny Amos that day? - Yes, I did, as I was leaving.*
>
> *Did you also speak to Anne - Yes, I asked Anne to go and have a coffee with me.*
>
> *And did you go around the corner to a French pastry place? - Yes, we did.*
>
> *What did you tell Anne on that occasion? - I told her that I was leaving. Peter had told Annette (the Respondent's wife) that we were having an affair and that I loved him.*

Did you not tell --?-- And then I told her that he was brutal and he made me bleed and all that sort of stuff, and I was crying.

Did you not tell Anne on that occasion that you had been having an affair with Peter Wall and that he had broken if off the night before? - No, I never did that ever."

Although the complainant's case was that the respondent's sexual misconduct and domination of her became unbearable shortly before the employment ceased on Friday, 8 December 1989 it is clear that she didn't tell her husband about her predicament at that stage or complain to anyone immediately following her dismissal that the respondent, on her account, had been forcing her to have sexual intercourse nearly every Thursday night for the past twelve months against her will.

THE JANUARY 1990 LUNCH

The complainant kept in contact with Penny after the employment ceased and on several occasions asked after the respondent and sought news of what he was doing. In early January 1990 a group of former employees of the business got together for lunch at a nearby suburban hotel with the complainant attending also. This was about a month or so after the complainant's employment had been terminated by the respondent. Those present at the lunch were the complainant, Melanie, Anne and Penny. According to Melanie, *"the main topic of conversation was the trauma that we'd all been through working with Peter"*. Melanie was outspoken in her condemnation of the respondent and made her disapproval of his conduct known. She felt that she had been subjected to behaviour that was not correct and she wanted to make sure that others were aware that they did not have to put up with it. She had some pamphlets with her that she had picked

up from the Equal Opportunity Commission and she referred to this at the lunch.

Melanie said in evidence that the complainant was upset throughout the whole lunch to the point where she, Melanie, was really worried about her. The complainant *"was shaking, she was confused, teary, generally extremely distressed."* Melanie said, initially, during her evidence in chief, that at the lunch *"what Ronda told me is that Peter had been dominating her in such a way that she had ended up having sexual intercourse with him and that it was not with her consent."* Under cross-examination, however, Melanie conceded that at the January lunch the complainant spoke of being in love with the respondent, and that she had kept cards he had sent her. Melanie said that the complainant produced a card in the respondent's handwriting but she, Melanie, thought *"it was an ambiguous card and could have been taken either way"* because it was not signed and not addressed to anyone. In re-examination it emerged that the card in question was the apology card.

While Melanie was being cross-examined the following exchange occurred:

> *MR HEENAN: "In the context of the discussion at that luncheon was it evident that Mrs Ashton had been involved in a sexual relationship with Mr Wall for some time? - Yes.*
>
> *Did Mrs Ashton say words to the effect that "I can't understand how it's finished because he and I were so in love with each other"? - I can't recall.*
>
> *Did she speak of being in love with Mr Wall? - Yes.*
>
> *Can you tell us, as best you can recollect, what Mrs Ashton said in relation to her love for Mr Wall? - That she was in love with him.*

Melanie also agreed under cross-examination that the complainant spoke of getting carpet burns on her back and there was some discussion about a sleeping bag - *"just that there was one involved and that it was in the shop"*.

The evidence given by Penny concerning that day was as follows:

> *" Would you tell the members of the Tribunal as much as you can recollect about her (the complainant's) conversation on that day? - She cried because she was upset. She told us all how much she loved him. She couldn't understand why the relationship had ended."*

Anne, the shop manager, giving evidence as to what transpired at the January lunch, recalled the complainant saying that she had had a relationship with the respondent for a long time and she couldn't accept the fact that the respondent had broken off the relationship. She was very much in love with him. She referred to the fact that when they made love on the floor of the office/storage area it hurt her back to do so and the complainant had eventually brought in a sleeping bag to ease the discomfort. At the lunch there was also reference to the respondent sending poems and cards to the complainant which she kept in a drawer at her home.

When cross-examined about the January lunch, the complainant denied that there was a discussion about a love affair between her and the respondent. She said that most of the conversation was about Melanie and Anne. She, the complainant, was *"absolutely devastated"* at what she was hearing and started crying.

She denied she told the women at the lunch that the respondent had sent her cards. *"He never sent me any cards, ever".* She also denied telling the women at the lunch that she brought in a sleeping bag to put on the floor when making love.

Penny also gave evidence that on an occasion other than the lunch the respondent had admitted to her that when she, Penny, was working in the shop on a Saturday, the complainant would wait at the top of a Coles car park nearby for Penny to be picked up. Once that happened the complainant would go back to the shop and meet the respondent so that they could either stay in the shop or go down to the beach together. The complainant agreed she did tell Penny she waited in the car park on about two occasions but that was all. Penny's father gave evidence of a brief chat with the complainant during which she indicated she had been emotionally involved with the respondent. The Complainant agreed that she spoke to Penny's father but denied his version of the conversation.

POST EMPLOYMENT EVENTS

The evidence suggests that the January lunch, was, on any view of the matter, a traumatic experience for the complainant. When one looks at what then occurred, however, the first occasion on which any independent action seems to have been taken by the complainant was the visit to a general medical practitioner, Dr Q, on 12 February 1990. That was followed by a referral to a practising psychiatrist, Dr M, whose first

consultation with the complainant took place of 15 February 1990. A report by Dr M was put in evidence, this being a letter dated 11 October 1990. The report had been prepared by Dr M at a later date in response to a request for a summation from the Equal Opportunity Commission.

A reading of that report discloses a series of consultations occurring monthly or fortnightly following the initial consultation. It reads in part:

> " *During the time I have been seeing Ronda she has become aware that the relationship that she had with Peter was an exploitative one. She had felt attacked, exploited, used and abused by Peter but had rationalised this into a love affair to explain her inability to get out of the situation and her helplessness in the face of his exploitation ... she had improved markedly in her mental state since she has been able to see the relationship with Peter for what it was, namely, an exploitation of his position relative to her and although this has caused a great deal of distress to herself, her husband and her family, she has become more settled and no longer so depressed, anxious and obsessionally pre-occupied as she was when she first came and saw me ... I think Ronda was suffering from a "hostage syndrome" which has been described in hostages taken in terrorist situations where they feel helpless and often fall in love and have sexual relationships with the hostage takers. It is only subsequent to their release, often, after some time has passed they see the relationship for what it was, namely, an exploitation of the power that the hostage taker had. I see Ronda's emotional confusion in a similar light namely that when she initially saw me she thought that she was having an affair when in fact later it became clear to her that she had been exploited, used and abused and unfairly exploited by her employer."*

Under cross-examination, Dr M agreed that his only source of information was the respondent herself. He made no independent inquiries to verify any of the matters related to him by the complainant. He did not make detailed notes concerning her and wasn't sure when exactly he made his diagnosis. The following exchange took place during the course of cross-examination:

"Did you take a narrative history of past illnesses or disabilities? - You mean psychiatric or medical?

Any form of past medical history? - No. There is nothing written down. I'm not able to say whether I did or I didn't.

Very well. Was your sole informant of the matters of concern, Mrs Ashton? - Absolutely. The impression that I have is that that was the only information that I had at that time.

What was the date when you satisfied yourself with the diagnosis of a dissociative disorder? - I couldn't tell you in retrospect the precise date but it was some few sessions after we commenced. I don't sort of write these sorts of things down. I tend to write down key phrases in the sessions.

Well, was it in February? - It may have been or it may have been in March. I can't be specific.

But not before late February? - I'm purely guessing. You are asking me 2 years ago when did I reach a specific diagnosis with regards to her. I can't specifically answer that.

But you made no notes on your files? - No.

There is nothing in Dr M's report to suggest that he gave any serious attention to the possibility that the complainant was confused and distressed in the aftermath of a love affair that had gone badly. In his evidence in chief he touched on that briefly as follows:

"The story you get with a broken love affair is totally different: You have a clear recollection of what happened, how it happened, the circumstances of it. You don't get contradictory statements. When somebody is coming because they are heartbroken, they come along and say "I'm heartbroken. I wish I could have him back. He was such a wonderful man," and she'll tell you how wonderful he was. She doesn't tell you then what an appalling person he was; how he abused her; belittled her; humiliated her."

Under cross-examination, however, he was obliged to concede that heartbreak can give rise to contradictory feelings about the former lover and with the woman scorned often, entertaining hostile feelings towards the man who rejected her. This exchange occurred:

"And can the hostility towards the former loved subject take on an unreal and exaggerated dimension? - Yes, certainly it can.

And can it also be associated with accusations and revelations which objectively are undeserved or untrue? - Yes, indeed they can, and I've seen that in the past, yes.

And can it be the case that such a person, out of a sense of self-justification, will be driven to making untrue and unsubstantiated allegations against a former person? - Yes; indeed I'm sure we're all aware of cases like that."

He also conceded at a later stage that where an affair is being carried on while both participants are cohabitating with their respective spouses that the affair will be surrounded with lies, prevarication and subterfuge which might not only make a coherent reconstruction of events difficult to obtain but also leave the rejected party with a feeling of acute humiliation and the problem of embarrassment in dealing with the husband and family.

The complainant said in evidence that in May 1990, she took a letter to the respondent's premises. *"I had been going to my psychiatrist for some time and I was feeling on top of everything, and part of my therapy was to write down things that upset me and all that sort of thing, so, I wrote down on a letter all the things about Peter that disgusted me."* According to the complainant he stuffed the letter down his trousers. The respondent denied this incident.

It was at about this time also that she placed upon the windscreen of the respondent's car, under the windscreen wiper, a photocopy of the apology card. That did not give rise to any response on his part and, as emerges from the overview, nothing then happened until July 1990, although the psychotherapy sessions were continuing with their same

frequency. Dr M denied that he ever suggested to the complainant that she should confront the respondent in order to get him out of her system but, in any event, as the incidents just mentioned indicate, it seems that she understood this to be part of the process of rehabilitation.

Evidence was received from various witnesses concerning an incident and series of events that took place in July. It seems that a Sergeant at the police station in an adjoining suburb received an anonymous complaint by telephone from a female caller that a man had allegedly exposed himself at a nearby beachfront. The caller supplied a car licence number supplied.

As a consequence of that information the Sergeant made enquiries which eventually caused him to contact the respondent. The respondent denied any involvement in the incident and leapt to the conclusion that the anonymous caller was the complainant in these proceedings. Whether he was right in that conclusion or not probably cannot be satisfactorily determined, and need not be, but certainly his remonstration about the matter produced an argumentative response from the complainant who rang the police and protested vehemently about the conduct of the respondent.

The police pursued some enquiries into the matter and it was against that background that the complainant finally told her husband that she had been involved in a sexual relationship with the respondent. This became necessary because telephone exchanges had taken place between the respondent and the complainant's husband. Her evidence on this point was: *"I went to Richard after Sergeant B advised to. I hadn't intended to tell*

Richard."

As a consequence of the complaint on 12 July 1990 the complainant wrote to the respondent's wife (being a letter also signed by the complainant's husband) saying in part:

> " *Peter seems to want to intrude into our lives and we have had enough ... on being called into the (Police Station) yesterday for questioning regarding exposing himself at (the Beach) on Monday decided that he would put the blame onto me. I remember well he did the same and lied to you about me when I left ... I was furious at the accusation ... I rang Peter and said are you insane. He hung up on me. So I rang back and said if he hung up again I would be around within the hour with Sergeant B and then he would have to face both of us with his lies and accusations plus if he was accused of exposure he knows and I know he is well and truly guilty - it always has been one of his favourite things to do ... I suggested he (Sergeant B) contact the sexual harassment board if he wanted to know of others who have worked and have suffered from Peter's behaviour."*

As a consequence of the beachfront incident the complainant lodged a complaint with the police about the respondent's behaviour generally, well knowing, it would seem, that she was accusing the respondent of sexual misconduct amounting to a criminal offence.

The police began inquiring into the matter. After a while the complainant became disturbed by the apparent delay and inaction on the part of the police and lodged a complaint about the police handling of the inquiry. This resulted in the internal investigation squad of the police force becoming involved. In due course, however, all branches of the police force determined that no further action of any sort was required.

As appears from the overview, it was at this stage that the complainant instructed a solicitor and on 8 September 1990 lodged a written complaint with the Equal Opportunity

Commission. The Tribunal pauses to note, however, that, as emerges from evidence referred to earlier, the complainant had been aware since the January 1990 lunch when Melanie produced forms relevant to the lodgement of a complaint of sexual harassment, that such a complaint could be advanced against an employer who had misconducted himself, but had taken no steps apparently to pursue that avenue of relief.

Evidence was received from Mrs D concerning an incident that occurred at about this time. As appears from the letter the complainant wrote to the respondent's wife on 12 July 1990, the complainant was by now working at a boutique at a nearby suburban shopping precinct. Mrs D was a customer of the boutique and had slight knowledge of the complainant as a result of Mrs D having been a supplier to the respondent's business. During the course of serving Mrs D the complainant told Mrs D that she was *"out to get the respondent"* and to the effect that she would make him lose his shop.

The complainant also initiated other complaints against the respondent. On 28 September 1990 steps were taken to involve the Department of Labour and Productivity in the question of the respondent's underpayments and denial of certain benefits to the complainant. On 27 October 1990 a letter was written to an industrial inspector about such matters and at about the same time there appears to have been an initiation of a complaint to the Taxation Department which resulted in an audit affecting the respondent and his business. That complaint was completed in February of 1991.

Counsel for the respondent suggested at the hearing that this flurry of activity after the incident in July evidenced a determination by the complainant to injure the respondent and

cause him embarrassment. It was said that she would not accept the very detailed investigation by the Department of Labour and Productivity which eventually produced a just resolution of her claims. Reference was also made to the fact that she initiated a complaint which was lodged with the Subiaco City Council Building Department concerning the transparent window to the women's toilet at the rear of the premises.

It is against this background that the Tribunal now turns to the statutory provisions relied on by the complainant.

STATUTORY PROVISIONS

By Section 8(1) of the Act a person discriminates against another person on the ground of the sex of the aggrieved person if, by reason of the sex of the aggrieved person the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

By Section 8(2) a person discriminates against another person on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons of the opposite sex are able to comply, which is not reasonable having regard to the circumstances of the case; and with which the aggrieved person does not or is not able to comply.

By Section 11(1) it is unlawful for an employer to discriminate against a person on the ground of the person's sex, in the terms or conditions on which employment is offered. By Section 11(2) it is unlawful for an employer to discriminate against an employee on the ground of the employee's sex in the terms or conditions of employment that the employer affords the employee, by dismissing the employee or by subjecting the employee to any other detriment.

By Section 24(1) it is unlawful for a person to harass sexually an employee of that person. By Section 24(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 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, 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 (b) as a result of the other person's rejection of the advance, or taking of objection to the conduct, the other person is disadvantaged in any way in connection with the other person's employment or possible employment.

Section 5 provides that a 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 2 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.

PRINCIPLES RE SEXUAL HARASSMENT

Before considering the effect of the relevant statutory provisions it will be useful to look briefly at the background against which the legislation was enacted and at the principles underlying the provisions as revealed in a number of textbook and previously decided cases.

In a recently published work, The Liberal Promise by Margaret Thornton, the learned author suggests that sexual harassment is pervasive within the workplace because there is a coincidence between maleness and domination on the one hand, and femaleness and subordination on the other hand, in the same way that sexual relations have been constructed in our society. Since the latter are understood as 'natural' they are not easily separable from the normative workplace paradigm. Thus, most incidents of sexual harassment do not crystallise into complaints.

Such an analysis suggests that a failure to complaint must be viewed with caution. That view of the matter having been conceded, however, it is important to note that when a complaint is made then the issue raised by the complaint must be resolved by reference to the statutory provisions establishing an avenue of relief. A Tribunal charged with the responsibility of interpreting and applying provisions relevant to sexual harassment should not be regarded as the custodian of morality or as an arbiter of current sexual mores, even though inevitably, as in the present case, the Tribunal may be obliged to inquire into matters of sexual conduct which would normally remain private. The Tribunal has a more specific task to carry out in determining whether relief is available to a complainant,

namely, to establish whether the criteria established by the Act have been met. In other words, the concept of an actionable claim for sexual harassment must be viewed within a framework established to effect a balancing of competing interests.

The position in the United States was that in Title VII of the Civil Rights Act 1964 it was declared unlawful for an employer to discharge or discriminate because of an individual's gender. Although there was no specific reference to sexual harassment, the decided cases established that sexual harassment was prohibited by the Act.

The first case reported in Australia dealing with sexual harassment appears to be O'Callaghan v Loder (1984) EOC 92-023, a decision of the Equal Opportunity Tribunal in New South Wales, concerning the Anti Discrimination Act 1977 in that State. The Tribunal noted that there was no reference in the Act to sexual harassment and therefore no statutory definition of it. The Act made it unlawful for an employer to discriminate against an employee on the grounds of sex. The Tribunal noted that a number of United States and Canadian decisions had determined that sexual harassment by an employer could amount to discriminatory behaviour and, against that background, held that sexual harassment could constitute discrimination on the ground of sex. The Tribunal considered that a person was sexually harassed if he or she was subjected to unsolicited and unwelcome sexual conduct by a person who stands in a position of power in relation to him or her.

When the Tribunal subsequently turned to consider the substantive matters involved in the particular dispute in O'Callaghan v Loder (1984) EOC 92-024, it made a number of

general observations about sexual harassment which are of assistance to the Tribunal in the present case. Those observations were, of course, advanced in the context of statutory provisions dealing with discrimination on the ground of sex but having regard to the way in which the statutory provision in this State came to be formulated, the observations are nonetheless of assistance in seeking to understand the effect of the provisions in this State.

The Tribunal indicated that equal opportunity legislation does not extend to impugn sexual approaches from one person to another merely because they are in disparate positions in the workforce. The object of the legislation is not to sterilise human relationships but to encourage their development on a free and equal basis. Genuine and fulfilling relationships exist in or society between people of highly disparate status. It would be quite wrong if these laws were taken to discourage this. It follows that before a sexual approach from an employer to an employee can contravene the law, there must be an additional blameworthy feature. The employer must either be using his position of power in order to obtain sexual favours, or he must be on notice that his intentions are unwelcome to the employee.

The Tribunal considered that a person who makes advances genuinely believing them to be welcome cannot be guilty of unlawful discrimination so long as the circumstances are not such that the person should, objectively, have realised that they were unwelcome. The employer has an onus to take the employee's objections seriously. The higher the disparity between the status of the parties involved, the greater the obligation on the part of the employer to observe and respect any unwillingness or reluctance shown by the

employee. There is also a requirement that the employee should take some steps to make his or her unwillingness known to the employer. The onus of showing that this was done rests on the employee. In the circumstances of that case the Tribunal was not satisfied that the respondent employer should have been aware that this conduct would be unwelcome to the complainant and therefore the complaint was dismissed.

In 1980 Australia signed the United Nations Convention on the elimination of all forms of discrimination against women, and the Convention was ratified in 1983. In 1984 the Commonwealth Parliament enacted the Sex Discrimination Act 1984 on the basis that such legislation was necessary to enable Australia to discharge its obligations under the United Nations Convention. See Koowarta v Bjelke Petersen & Ors (1982) 153 CLR 168; Commonwealth of Australia v Tasmania (1983) 158 CLR 1. The provisions of that Act contain explicit reference to sexual harassment so as to remove any lingering doubt as to whether the concept of discrimination on the ground of sex embraced sexual harassment. In the same year the Equal Opportunity Act 1984 was enacted in this State and, as appears from the statutory provisions referred to earlier, in a form reflecting the background described above. In general terms the statutory provisions reflect the considerations alluded to in the O'Callaghan cases that a person is sexually harassed if he or she is subjected to unwelcome sexual conduct by a person who stands in a position of power in relation to her, but with the position of the respective parties being viewed objectively.

Section 24 of the Act provides, in summary, that a person is taken to harass another sexually if that person makes and unwelcome sexual advance or request for sexual

favours, or engages in other unwelcome conduct of a sexual nature, where the subject of the attentions has reasonable grounds for believing that resistance would lead to disadvantage in connection with employment or possible employment, or the subject of the attentions is actually disadvantaged in connection with employment or possible employment as the result of rejection of the advance. The former test is directed to the reasonable belief of the victim as to employment disadvantage if the approach is rejected; the latter to actual disadvantage which is causally connected with rejection of the advance.

In emphasising the need to look at the situation objectively the Tribunal noted in the second of the two O'Callaghan cases at page 75514 of the report:

> " *One cannot have workable laws which proscribe activities solely upon the basis of the attitude of the recipient of those activities".*

In Hall v Sheiban Pty Ltd (1989) EOC 92-250 the Federal Court gave further attention to the general nature of the legislative. The three members of the Full Court accepted that the statutory provisions allowing for relief by way of compensatory damages should be viewed as a species of statutory tort. See Allders International Pty Ltd v Anstee & Ors (1986) 5 NSWLR 47. Wilcox J said that it is not enough that the conduct merely be unwelcome sexual conduct. The word *"harass"* implies the installation of fear or the infliction of damage. Consistently with this understanding of the term, the provision corresponding to Section 24(3) of the Act in this State made it an element of the conduct there described that the conduct has one of two particular features. The first feature mentioned in paragraph (a) is fear: that the recipient of the conduct has reasonable grounds for believing that an adverse reaction to the conduct would occasion a

disadvantage to that person in connection with actual or possible employment or work. The essence of conduct falling within paragraph (a) is exploitation; the harasser is able to take advantage of his or her superior position in connection with employment or work in order to force unwelcome sexual conduct upon another person. It is important to note that, consistently with the underlying policy of focusing upon objective facts, paragraph (a) does not require proof that the recipient of the conduct did in fact fear disadvantage. The test is whether a person in the position of the recipient had reasonable grounds for a fear of disadvantage. All these circumstances relating to the individual must be considered, including that person's work position and personal characteristics, but it is then for the Tribunal of fact to determine the existence of reasonable grounds for that belief.

The alternative feature which turns unwelcome sexual conduct into sexual harassment under paragraph (b) is disadvantage; disadvantage in connection with the recipient's actual or possible employment or work and flowing from the recipient's rejection of the unwelcome sexual conduct. If actual disadvantage is shown, it is now necessary also to show the existence of reasonable grounds for belief under paragraph (a).

In considering the concept of disadvantage it will be useful to take account of a number of decisions concerning what constitutes less favourable treatment within the workplace as a facet of discriminatory conduct.

In R v Equal Opportunity Board ex parte Burns (1984) 92-112 the Board held that *"less favourable"* treatment occurs if the ordinary standards of acceptable civil conduct for one

sex are not extended to the other. It is an act of discrimination to deny an employee a benefit connected with employment such as accrues to other employees. A benefit of employment is the concept of quiet enjoyment, that is, freedom from physical intrusion or from being harassed, physically molested or approached in an unwelcome manner. If that type of behaviour is permitted by an employer he is providing a detriment to one ground of employees who suffer such unwelcome intrusions. That view of the matter was approved in Navidad v Myre Fashions (1987) EOC 92-189. Further, in Freestone v Kozma (1989) EOC 92-249, Commissioner Einfeld J held that a sexually permeated work environment was sufficient to constitute the required element of employment detriment within the terms of the relevant statutory provisions.

As one reviews the cases it is noticeable that on most occasions the complaints relate to sexual conduct less than sexual intercourse, and on many occasions involving comparatively junior employees. The Tribunal notes, however, that in Aldridge v Booth (1988) EOC 92-222 the Federal Court upheld a finding of the Human Rights Commission that a complaint of sexual harassment was substantiated in circumstances where the applicant, a young woman of 19 years of age when she commenced work at the respondent's cake shop, was the subject of repeated unwelcome sexual advances leading eventually to intercourse that was found to have occurred *"at least 20 times"* during a period of employment lasting 12 months. Spender J did not accept the account of the first respondent that the first act of intercourse was reasonably spontaneous. He was satisfied that there was a course of conduct constituting sexual harassment that was in the main unwelcome. He was sure that it continued for as long as it did, and went as far as it did, because of the fear of the applicant losing her job.

The decided cases also focus attention upon evidentiary considerations. It appears to be quite clear that where an allegation of sexual harassment is made the Tribunal should apply the ordinary civil standard of proof on the balance of probabilities although it is permissible to take account of the gravity of the allegations and the serious consequences to a respondent following any adverse findings, when determining whether the evidence meets that standard. See O'Callaghan v Loder (1984) EOC 92-024. As the Tribunal in that case pointed out, at page 75513:

> " *It is an exceedingly difficult task for a tribunal to attempt to make factual findings about matters which, by their very nature, occurred in private. It is all the more so when the two participants have given such divergent accounts of what took place as has occurred in this inquiry. For this reason, we think that the only practicable method of trying to determine what took place between them is to take the evidence of each of them in relation to each alleged incident or series of incidents, to assess how that evidence measures up to standards of consistency and probability, and to test it against any independent evidence which might be available."*

The Tribunal proposes to follow that approach in the present case. In doing so, however, it notes also that in Fenwick v Beverage Building Products Pty Ltd (1985) 62 ALR 275 the Human Rights Commission held that the complainant bears the onus of proof of establishing that he or she has been the victim of unlawful discrimination but, in establishing this, he or she may, in the absence of direct evidence, use in support inferences drawn from the primary facts.

In reviewing the evidence the Tribunal also notes that during the course of the hearing a controversy arose between the parties as to whether the complainant should be allowed to

lead evidence of alleged acts of unwelcome sexual advances involving employees other than the complainant. It appeared to be common ground at the hearing that the matters the subject of such evidence were advances less than sexual intercourse. It was therefore argued on behalf of the respondent that such acts were insufficient to be probative in regard to the issues raised by the complainant in her points of claim, such issues including principally an allegation that unwelcome advances in the form of sexual intercourse took place between the parties over a substantial period.

In dealing with this evidentiary issue at the hearing Ligertwood: Australian Evidence (1988 Ed) the following passage appears at para 3.60:

> " *In other cases information revealing the disposition or propensity of a party in a civil case may be received if of sufficient relevance. The reasons contended above as providing the basis for an exclusionary rule in criminal cases do not apply to the revelation of the disposition or propensity of a party in a civil case. Civil cases seek to reach decisions probably correct, not correct beyond reasonable doubt, and can rest upon all information of sufficient relevance to the material facts in issue. The risk of convicting an innocent person does not exist to demand exclusion of information where its probative value is difficult to assess and it is appropriate to take difficult decisions and not to insist that probative value is pellucidly clear. By virtue of the same reasoning permission to call doubtfully relevant evidence of general good reputation has not been accorded to parties in civil cases. Thus information relevant to either propensity or disposition of a party disclosed by it is generally treated on its merits and admitted if of sufficient relevance.* "

On the basis that the jurisdiction sought to be invoked in the present case is a civil jurisdiction, being in respect of a species of statutory tort as aforesaid, a ruling was made at the hearing that evidence given by other employees concerning alleged unwelcome sexual advances by the respondent was sufficiently relevant and therefore admissible on

two grounds. First, the complainant complained not only of unwelcome sexual intercourse but also complained of allegedly unwelcome conduct of a lesser degree and the Tribunal considered then, and still considers, that evidence of propensity in regard to sexual conduct of the lesser degree was sufficiently relevant to be admissible. Second, and in any event, the Tribunal considered that the evidence was relevant and admissible in order to rebut a line of defence advanced by the respondent that there was an innocent explanation for his conduct in that he was involved in a romantic attachment with the complainant. Accordingly, consistent with the ruling given at the hearing, in reviewing the evidence, the Tribunal takes account of evidence and incidents involving other employees. Ultimately, however, a further and separate question arises as to what weight should be given to evidence bearing upon incidents involving persons other than the complainant herself. The Tribunal will come to that aspect of the matter in due course.

ISSUES

The Tribunal now returns to the circumstances of the present case.

The complainant was an employee of the respondent. It is apparent from the pleadings and, in any event, it is quite clear from the evidence, that during the period the subject of the post October allegations the respondent engaged in conduct of a sexual nature with the complainant as his employee, being at least various acts of sexual intercourse.

If, as the complainant alleges, these acts of sexual intercourse were *"unwelcome"* then, without having to resolve a number of other evidentiary issues, such as whether

unwelcome conduct of a sexual nature less than sexual intercourse occurred during the period the subject of the July/October allegations, and whether unwelcome conduct in addition to the acts of sexual intercourse complained of occurred during the period the subject of the post October allegations, it would clearly be open to the Tribunal to find on the balance of probabilities that the provisions of the Act concerning sexual harassment had been infringed.

A finding to that effect would carry with it, by implication, an acceptance of that part of the complainant's case in which she alleged that she was intimidated by the respondent's demands and was reduced to a state of fear and distress. Even though the acts of sexual intercourse might not have amounted to a criminal offence, it is inconceivable that a women subjected to repeated acts of sexual intercourse occurring without consent, or as a consequence of a consent reluctantly given as in Aldridge v Booth *(supra)*, would endure such a state of affairs except from dire necessity. Within the language of Section 24(3) of the Act the Tribunal would have to conclude that in such a case the woman in question had reasonable grounds for believing that refusal of the sexual demands would lead to disadvantage in her employment. Likewise, assuming for the moment that Section 24(3) is not intended to be an exhaustive definition of what constitutes sexual harassment, the Tribunal would have to find that she had been discriminated against in that, unlike a notional employee, she was being forced to continue in a sexually permeated work environment by an employer who had taken advantage of his position of power. Thus, the central issue is whether the acts of sexual intercourse complained of were unwelcome.

Before exploring that issue in more detail, the Tribunal pauses briefly to comment further

on what might be described as the subsidiary issues, now that the evidence has been summarised and the relevant legal principles referred to, namely, the conduct less than sexual intercourse the subject of the July/October allegations and the conduct additional to sexual intercourse the subject of the post October allegations.

One can envisage a situation in which sexual conduct preceding or extraneous to several acts of sexual intercourse might be characterised as unwelcome conduct amounting to sexual harassment notwithstanding that the acts of sexual intercourse were consensual. Indeed, it was partly on this basis that evidence of propensity was thought to be sufficiently relevant in the present case to be admitted. For example, the preceding or extraneous conduct might be so persistent or so bizarre as to overshadow a consent to sexual intercourse freely given on an occasion when both parties happen to be in the melting mood. Consent to sexual intercourse does not necessarily carry with it consent to whatever is proposed, although it is in the nature of such encounters that if sexual intercourse occurs there will be a strong presumption that consent to that probably denotes a condonation or the or style of flirtation or preliminaries that preceded or accompanied the acts of sexual intercourse.

In the present case, however, in looking at the subsidiary issues, the Tribunal considers that these issues are overshadowed by the central issue. If the Tribunal is persuaded that the complainant's allegations are made out in their entirety then, of course, the sexual conduct less than sexual intercourse in the July/October period and the post October period can be regarded as acts of sexual harassment of themselves and will certainly be relevant in the assessment of damages. If, however, the complainant fails to persuade the

Tribunal that the acts of sexual intercourse forming part of the post October allegations amount to sexual harassment, because the acts of intercourse were freely entered into as the respondent contends, then it would seem to follow that the subsidiary issues fall away. There must be many lovers or married couples who viewed the preliminary approaches made by their eventual partner as laughable, maladroit, or even uncouth. It becomes difficult to say so, however, with any real conviction, or to denounce such conduct, if the approaches, irrespective of what form they took, have led to twelve months of regular consensual sexual intercourse. In such a case, most observers with some experience of life would conclude that what was thought to be objectionable in the initial overtures was forgiven, forgotten or tactfully ignored for the sake of preserving the relationship as a whole. Likewise, if sexual intercourse not amounting to sexual harassment takes place over a lengthy period and is accompanied by additional sexual conduct or moments of anger and despair, but continues nonetheless, then the same observers would probably conclude that these additional matters fall within the ambit of the ongoing consent, unless the additional matters are the subject of a specific and constantly reiterated protest, or exceed reasonable expectations at a particular moment.

Thus, in the present case, although alive to possibility that the subsidiary issues might survive a finding against the complainant on the central issue, the Tribunal considers that resolution of that central issue depends on a finding being made as to the nature of the relationship of the parties, that is to say, a finding as to whether or not the parties cared for each other during the period the subject of the post October allegations as a consequence of which they engaged in conduct of a sexual nature freely and by mutual consent. The case of the complainant is not presented on the basis that she consented to

sexual intercourse but not to other acts. The case for the complainant is that she objected to all the conduct the subject of the July/October and post October allegations. The question to be determined is whether the sexual conduct complained of was unwelcome, especially the various acts of sexual intercourse during the period the subject of the post October allegations.

FINDINGS

It is clear on any view of the evidence that the respondent's conduct at his place of business fell far short of what would generally be regarded as an appropriate standard of behaviour. Even on his own account of what happened the relationship he describes as a love affair was conducted in an extremely perfunctory manner, and it is clear that he verbally abused the complainant from time to time, even in the presence of customers.

The Tribunal has also taken account of the evidence of various witnesses other than the complainant concerning the respondent's propensity to embarrass female employees by suggestive remarks and unwelcome conduct of a sexual nature. It is not the proper function of the Tribunal to be censorious in its tone or to express general views about morality or behaviour. In this case, however, the observations just made are important, because they have a bearing upon the innocent explanation advanced by the respondent in rebuttal of the allegations made by the complainant and upon his credibility in that regard. Further, as emerges from a review of the principles relevant to sexual harassment, one has to examine not only the specific events comprising the sexual conduct complained of but also the general nature of the relationship between the parties at the place of

employment because this may have a bearing on whether the employer took advantage of his superior position in order to exploit or instill fear in the employee. It is therefore appropriate that the Tribunal should pause and take a close look at the character of the respondent and the way he ran his premises before turning to the allegations made by the complainant.

The Tribunal finds that the respondent was a man given to extreme and unpredictable outbursts of anger. He himself admitted calling the complainant *"a fucking shithead"* in the presence of a customer. The Tribunal accepts that he frequently touched female staff members in an offensive and sexually suggestive way, and consistently displayed a complete lack of consideration for the sensitivities of his staff and other female visitors to the premises in the manner detailed by Gordon, Dianne, and Melanie in their evidence as summarised earlier in these reasons. Had Melanie decided to proceed with the complaint of sexual harassment that at one stage she contemplated bringing against the respondent it is quite possible that she would have succeeded because, as shown by the cases referred to earlier, a sexually permeated work environment can be sufficient to constitute a form of detriment. The tragedy revealed by these proceedings is that the complainant, an unsuspecting person looking for work, not knowing of the respondent's propensity to subject his staff to unwelcome sexual conduct, took a job in the potentially dangerous environment existing at her employer's place of business, and that he then commenced to take an active interest in her.

Whatever happened was bound to go badly for her and, with the benefit of hindsight, there can be little doubt that she would have been wise to repel any advances quickly and

decisively. That much having been said, however, the Tribunal has to keep steadily in mind that it is only concerned with the complaint actually laid, and that complaint requires a determination as to whether the complainant did in fact repel the advances made or whether the respondent's interest in her awakened a reciprocal interest that led to an affair. A determination of this kind requires the Tribunal to look closely at the credibility of the respective parties.

The complainant's credibility must certainly be examined with care. Even if the testimony of the complainant was considered in isolation she would have difficulty in making out her case to the Tribunal's satisfaction on the balance of probabilities. She is not like the 19 year old female employee whose claim was upheld in Aldridge v Booth *(supra)* as a consequence of that youthful employee being involved in sexual activities including sexual intercourse. At the time the complainant started work with the respondent on 31 July 1988 she was a woman of mature years living with her husband. The household spending power had been reduced as a result of her husband's retrenchment but she was certainly not in desperate financial circumstances.

Her own evidence suggests that with her grooming and experience she would have had little difficulty in finding employment elsewhere. This view of the matter is substantiated by the fact that not long after she left the respondent's employment she found a suitable position in a fashion boutique in a neighbouring suburban centre as appears from the letter she wrote in her own hand to the respondent's wife on 12 July, and as emerges from the evidence of Mrs D referred to a moment ago. Nonetheless, during the eighteen month period she worked for the respondent, it seems that she made no real attempt to

look for work elsewhere at any stage, even though, on her case, her job had become a matter of misery to her. She spoke of being locked in, of feeling trapped and helpless. When one considers that she had a husband to assist her, and the ability, by a comparatively simple exercise of the will, to escape from her predicament, but failed to take any active steps in that regard, her plea sounds unconvincing.

In reviewing the legal principles, the Tribunal noted that incidents of sexual harassment often do not crystallise into complaints because male domination is often seen as being normal in the workplace. Thus, a failure to complain must be viewed with caution. That much conceded, however, it is striking that the complainant made no complaint to anyone during the period of her employment. On her account she was physically overpowered and subjected to an unwelcome act of sexual intercourse on 17 November 1988. She protested to the respondent at the time, on her account, and after it was over she drove to the beach at Sorrento where she sat and thought for a while. She then drove home and, without taking a shower, went straight to bed. The following day she returned to work on the basis of an assurance that the unwelcome conduct would not occur again. Two weeks later, however, much the same thing happened again, but still she was not minded to make any protest to a third party, or confide in any friend or member of her family. She didn't confide in her husband, although there was nothing in the evidence to suggest that he would have met her plea for help with anger, or recriminations, especially if it was made clear to him that she was the innocent victim of an unwelcome and unprovoked assault. Her written complaint to the Equal Opportunity Commission suggested that she feared her husband might take violent action in response and might even kill the respondent. Having regard to her husband's calm demeanour at the hearing, this was an

unconvincing explanation as to why she should keep quiet. When her husband was an eventually told of what she had experienced in July 1990, he was loyal and persistent in his endeavours to advance her complaint, but there was nothing in his behaviour at that time to suggest that he was a violent person by disposition. The Tribunal is therefore left with a suspicion that the complainant exaggerated her fear of what might happen if she disclosed her predicament, and was less than forthright in suggesting that apprehension as to how her husband would respond underlay her continuing silence and failure to complain about the respondent's conduct.

Regular and allegedly *"unwelcome"* sexual intercourse continued to occur for the next twelve months after the initial act complained of on 17 November 1988. As appears from the overview appearing earlier in these reasons, however, apart from confiding in the psychiatrist she consulted, Dr M, she did not complain to any third party, or confide in her husband, until July 1990, more than eighteen months after the initial act of sexual intercourse and more than six months after the termination of her employment, and then only as a consequence, it would seem, of the incident at the nearby beachfront as a result of which she felt that the respondent had made a false accusation concerning her, and might do so again.

When she finally did make a complaint, there is some reason to believe that it was made to the police as a form of retaliation. She had been aware that complaints of sexual harassment could be made against an employer since the lunchtime get together with the former members of staff at a suburban hotel near the respondent's shop six months earlier in January 1990. This is borne out by her letter dated 12 July 1990 to the respondent's

wife in which she says:

> " *I suggested he (the Sergeant) contact the Sexual Harassment Board if he wanted to know of others who have worked and have suffered from Peter's behaviour.* "

Nonetheless, although she was apparently aware of at least one avenue of relief, no complaint was made, not even a discreet enquiry by phone or by an intermediary.

The degree of passivity just referred to, in the case of a woman of mature years, is extremely surprising and difficult to reconcile with the general tenor of her evidence that she objected strongly to the respondent's conduct and was in a constant state of turmoil. It was said by her, however, and argued on her behalf that she felt *"locked in"* and therefore remained suspended in a state of indecision. It is therefore appropriate, so that not too much weight be placed upon her surprising lack of decisive action, that other facets of her testimony be closely examined.

During the course of her evidence she conceded that she gave to the respondent cards bearing endearments. On the Anniversary card, written in her own hand, as she herself admitted in evidence, she wrote:

> " *My darling Peter ... I love you. I love you. What more can I say. Happy Anniversary. All my love.* "

That card was written, according to the respondent's evidence in November 1989, almost twelve months after the initial act of intercourse. The complainant said, in effect, that

she was forced to write this card and that the anniversary referred to was the respondent's wedding anniversary. The respondent's wedding anniversary, according to the uncontradicted evidence at the hearing was in May. She agreed also that she sent a red rose to the respondent's hotel while he was in Melbourne on business. This was said to be a warning sign. The Tribunal considers, however, upon the balance of probabilities, that these communications point strongly to the presence of a romantic attachment between the parties. An attachment of that kind would tend to explain the complainant's failure to protest to any third party about the respondent's alleged misconduct. In short, until the relationship turned sour she did not wish to complain, it could be argued. She believed she was in love, and did not regard the respondent's sexual conduct as unwelcome.

When the Tribunal moves beyond the complainant's own testimony, support for this view of the matter is to be found in the evidence given by other witnesses concerning the events surrounding the termination of employment on Friday 8 December 1989.

According to Penny, the junior full-time employee, the complainant, after emerging from the respondent's office, told Penny on that day that the complainant and the respondent had been having an affair. She repeated that admission by telephone a few days later, and went on to give details as to how the affair was conducted. Anne, the manageress, was also in the shop on the day of the complainant's departure. The two women went to a nearby coffee shop and during the course of their conversation the complainant, who was upset by her dismissal, confessed that she had been having an affair with the respondent for fourteen months or so. She said that she had received cards and flowers

from him and was in love with the respondent and couldn't accept that he had broken it off. Both these witnesses were cross examined, but didn't modify their evidence, and it is important to remember that for some time after the employment ceased Penny was a friend of and remained sympathetic to the complainant. The Tribunal finds that she did speak of her love for the respondent to these two witnesses.

It is common ground that the complainant attended a lunchtime get together with members of the respondent's staff at a nearby suburban hotel in January 1990. Those present in addition to the complainant were Anne, Penny and Melanie. They all gave evidence to the effect that at the lunch the complainant indicated she was or had been in love with the respondent and was visibly distressed on that occasion. Melanie, it will be recalled, was a witness called by the complainant and was noticeably hostile to the respondent. At the lunch she produced papers relevant to the lodgement of a sexual harassment claim and made it plain that, in her view action should be taken against the respondent. Nonetheless, even she conceded that the complainant spoke of her love for the respondent. The complainant denies that she made any reference at the lunch to having an affair with the respondent, but the weight of the evidence is against her on this point. Likewise, the evidence indicates that, contrary to her denial, she spoke of receiving cards from the respondent and referred to using a sleeping bag for making love. The Tribunal finds that she did speak of her love for the respondent and referred to receiving cards and to the sleeping bag.

It was at about this time also, in the course of a conversation with Penny's father, that the complainant referred to *"having a thing going"* with the respondent and that she *"cared*

for him very much". The Tribunal finds that this conversation took place as detailed by Penny's father.

Soon afterwards, the complainant sought medical advice from Dr Q, as a consequence of which the complainant was referred to the psychiatrist Dr M. Dr Q concluded that the complainant had been involved in a sexual relationship at work being *"the sort of relationship that people often tell me about that they formed at work"*. In other words, Dr Q was left with the impression that the relationship was not of the abnormal kind contended for by the complainant as part of her case but was more like the situation where two persons at their workplace, be they married or not, are sexually attracted to each other.

Dr M said in evidence that when he first saw the complainant on 27 February 1990 she spoke of being in love with the respondent. It is also apparent from Dr M's written report dated 11 October 1990, which Dr M submitted to the Equal Opportunity Commission in response to a request for information, that the complainant spoke of her love for the respondent at the initial consultation with Dr M. It will also be recalled that at the commencement of her cross examination, in the passage quoted earlier, the complainant admitted telling Dr M she loved the respondent.

This review of the evidence very strongly suggests that for the greater part of the period the subject of the post October allegations, that is to say, throughout 1989 until the employment ceased on 8 December 1989, the complainant regarded herself as being a party to a love affair with the respondent and told him that she cared for him. Apart

from the evidence of Dr M, which the Tribunal will come to in a moment, there is scant corroboration for the complainant's story that she was being constantly assaulted. The testimony of other witnesses, the admissions made by the complainant and the exhibits, principally the cards, amount to some corroboration at least for the respondent's story. If a finding is made that the complainant regarded herself as a party to a love affair with the respondent during the post October period of her employment, then it would seem to follow that she did not discourage his sexual advances during that period. In short, the regular acts of sexual intercourse referred to in her Points of Claim were not unwelcome but undertaken with her consent.

It would also seem to follow from such a finding that her word is not to be relied upon, because throughout the hearing and, indeed, in earlier complaints to the police and others, she has insisted upon a position dramatically inconsistent with such a finding. She has consistently sought to explain away or deny any piece of evidence which suggested the existence of a love affair. If a finding is made against her on this point then her credibility is suspect. If her word is not to be relied on then the July/October allegations, her allegations concerning the events of 17 November 1988 and her allegations of misconduct less than sexual intercourse subsequently must be viewed with great caution.

In putting her case to the Tribunal, the complainant in her evidence, and by Counsel, raised various matters in an attempt to diminish the effect of the evidence adverse to her case. It was inherently improbable, she suggested, that a mature women in her situation would submit willingly to regular acts of intercourse in the unattractive office/storage area of the shop. She must have been intimidated. The Tribunal does not consider that this

line of argument is sufficient to outweigh the documentary evidence and the evidence of independent witnesses that the relationship between the parties was accompanied by protestations of affection and endearments in the form of cards and letters, hollow as those protestations may seem to be in retrospect, and insubstantial as the endearments may seem when viewed with the benefit of hindsight. To anyone with a small knowledge of human nature, it does not strike the Tribunal as inherently improbable that when passions are aflame those affected will seize the hour with abandon and resort to the most unlikely places to appease the fierce urge, indeed, on both sides, that spirit of adventure may well be part of the mutual attraction. Thus, the Tribunal considers that this argument is less than compelling and prefers to rely upon the written evidence and the testimony of others as the best means of establishing what was said and done.

Further, in looking at the question of whether any of the evidence received at the hearing seemed inherently improbable, the Tribunal is obliged to say that a degree of improbability attached to various passages of testimony given by the complainant. For example, the account she gave of the incident on 25 February 1989 as described in the passage from the transcript quoted in the *"subsequent matters"* section of these reasons was unconvincing. Her testimony, as reproduced in that passage, suggests that she passively submitted to intercourse with a man who, on her evidence, she loathed and feared, and then went on working beside him for the rest of the day's trading without a murmur of dissent. As to 17 November 1988, if what happened was, as she contends, an act of forcible sexual intercourse very close to rape, then it seems astonishing, to say the least, that she should go home to bed not only without complaining to anyone but also without showering or having any specific recollection of a douche.

The Tribunal also has difficulty with her evidence that in November 1989 she was *"forced"* to write a love message on the Anniversary card. That card is entirely consistent with the findings made earlier by the Tribunal that on the day the employment ceased and at the January lunch she spoke to her colleagues of being in love with the respondent. There is no corroboration for her claim that she was forced to write the card and, according to Gordon's evidence she proved herself quite capable of standing up to the respondent when he made an unreasonable request. The Tribunal finds that the anniversary card was not written under duress but as an expression of her affection for the respondent as at mid November 1989.

It was suggested also that even though the complainant may have spoken of love and affection for the respondent she didn't mean it. To use her words, *"She was locked in"*. She felt she had no option but to comply with her employer's sexual demands, and her state of subjection in this regard was akin to a psychological condition. The word love may have been used but she was living in a world of illusion. She was erecting a barrier against reality.

Dr M was the principal proponent of this thesis. His report dated 11 October 1990 concludes by saying: *"During the time I have been seeing Ronda she has become aware that the relationship she had with Peter was an exploitative one. She had ... rationalised this into a love affair to explain her inability to get out of the situation and her helplessness in the face of his exploitation ... I think the complainant was suffering from a hostage syndrome."*

On any view of the matter the complainant must have been in a state of acute distress when she first consulted Dr M in February 1990. If she had been set upon by her employer in the callous way the case she advanced at the hearing suggested, then she would undoubtedly have been in urgent need of help, and quite possibly in a state of trauma. If, however, as the weight of the evidence seems to suggest, she was in the aftermath of a prolonged emotional affair with her employer, an affair which had just been terminated summarily by the man in question against her wishes, then she would have also been deeply upset, especially in the circumstances of the present case as described by other witnesses. She believed she had been party to a love affair, as appears from the remarks she made at the lunchtime get together with former members of the staff, but at least one of those present made it plain that, in her view, the man in question was an incorrigible rogue, possibly a pervert as far as his female staff were concerned, and should be sued for sexual harassment. Melanie's trenchant view would clearly have added insult to injury, and the complainant, as her own evidence suggests, must have felt both mortified and absolutely devastated. There is little doubt that at the luncheon she was visibly distressed, and the inference is inescapable that this was because the affair had gone wrong and the office/storage area which had once been suffused with a rosy hue, was now, suddenly revealed in all its drabness. A month or so after the lunchtime get together she consulted Dr M.

The Tribunal was singularly unimpressed by Dr M's testimony and by his report. His notes were minimal and his methods were obscure. He relied on 'key phrases'. A woman of middle years came to him in a state of acute distress speaking of a love affair that had gone wrong. It did not appear from his written report or from his evidence in

chief that he gave any serious attention to what would immediately strike most people as the most likely explanation for her distress, namely, that she was the injured female party in an affair of the heart, and that her upset was of a kind familiar to lovers throughout the ages. His report says that when he saw her initially *"she thought she was having a love affair when in fact later it became clear to her that she had been exploited"*. He expressed no persuasively reasoned view about the possibility that she had actually been having a love affair, and the comments he made when the issue did arise were vague and rambling suggesting that he only dimly apprehended what the cross-examiner was talking about. When pressed, he conceded that a woman such as the complainant might well harbour contradictory emotions in the event of an affair of the heart turning out badly, and there could be reasons other than the disassociative condition he contended for as to why her version of what had happened might sound disjointed.

Dr M left the Tribunal with an impression that he was totally absorbed in his own professional realm. He seemed avid to find signs of mental aberration in what might strike most people as normal human grief. Eventually his gaze came to be fixed squarely upon his so-called *"hostage syndrome"*. A later expert witness, a Professor of Psychiatry at the University of Western Australia, indicated that he was not familiar with the term as a diagnostic aid and said that in his view the description was *"far-fetched"*. Her distress was consistent with a lover being jilted. The Tribunal itself found difficulty in equating the situation of a woman employed on a part-time basis at a suburban shop, who went home after each day's work to her husband and a comparatively normal social round, with the situation of hostages held at gunpoint.

It was difficult to avoid the suspicion that the reference in Dr M's report to the complainant becoming aware that her relationship with the respondent was not a love affair, but an exercise in exploitation, was the outgrowth of a seed that sprouted during the course of the consultations following her first meeting with Dr M in February 1990. In cross examination it was put to the complainant, in effect, that within the unworldly calm of her psychiatrist's office she assembled a less compromising version of reality from the reluctantly remembered fragments of what had happened in the office/storage area of the shop. Certainly, it was not until the complainant had been consulting with Dr M for several months that she began thinking in terms of lodging a complaint against the respondent. Dr M speaks of her rationalising her exploitation into a love affair, but it emerges from discussion so far that another possibility must also be considered, namely, that in the merciful seclusion of Dr M's chambers, the contrary happened - she rationalised what once had been a love affair into a psychological condition containing elements of intimidation.

It is probably not necessary to ascertain to what degree the complainant's decision to proceed against the respondent was influenced by her consultations with Dr M. The Tribunal considers, however, put shortly, that Dr M's *"hostage syndrome"* thesis is nowhere near sufficient to outweigh the complainant's own admissions, during and after the employment, and the other evidence that points to the existence of a love affair between the parties, as that term is normally understood. The Tribunal has no doubt whatsoever that the love affair, such as it was, was unwise, ill fated, and, finally, a deeply painful relationship as far as the complainant was concerned. That having been said, however, the Tribunal has to keep steadily in mind that its task is not to lecture or

admonish the man responsible for her distress on the basis of what communal standards of good conduct are generally thought to be, but simply to determine whether the provisions of the Act have been infringed. The Tribunal also finds it difficult to overlook the evidence given by Mrs D that in September 1990, at the time the sexual harassment complaint was initiated, the complainant spoke of pursuing the respondent in a malevolent manner.

Having reviewed the evidence in its entirety, and taking careful account of the explanations advanced by the complainant in answer to those aspects of the evidence which weigh against her case, the Tribunal finds that the parties were involved in a love affair or romantic attachment from late November 1988 until the employment ceased in December 1989. Throughout that period the complainant did not reject the respondent's advances and the sexual conduct engaged in by the parties during the course of the affair cannot be characterised as unwelcome to the complainant. The affair may have been misguided, and caused the complainant pain eventually, but the presence of a deeply held affection, as evidenced by the anniversary card, meant that the relationship and the sexual conduct associated with it was characterised essentially by mutual attraction, rather than by fear or domination of the kind required to make out a complaint of discrimination or sexual harassment. It was open to the complainant to protest but the Tribunal finds that she did not do so. It follows from the principle referred to earlier that the higher the disparity between the status of the parties, the greater the obligation on the part of the employer to respect any unwillingness or reluctance shown by the employer. In this case, however, the complainant has not established that any reluctance was shown during this phase of the employment.

What is the effect of this finding upon events which took place prior to the commencement of the affair? The Tribunal is prepared to accept that during the July/October phase of her employment the complainant may have been subjected to suggestive remarks and fleeting physical encounters of a kind which were unfamiliar to her, being a woman who had led a secure and comparatively sheltered life to that point. The Tribunal is also of the view that on 17 November 1988, the first act of intercourse occurred in circumstances which, although not as extreme as the complainant's testimony would suggest, happened in a way that took her by surprise. It follows from the observations made earlier that the Tribunal is not inclined to place much reliance on the complainant's word. She denied having told anyone other than Dr M that she had been involved in a love affair with the respondent, and yet there is a good deal of evidence to the contrary. Putting her testimony to one side, however, it emerges from the evidence of other witnesses that the respondent had a propensity to take advantage of his position as employer by making advances and, even on his own account, the act of intercourse on the 17th November 1988 took place suddenly, in cramped surroundings, and in a rather perfunctory way. This suggests that his conduct on that evening, although not the subject of a specific protest, by the complainant, contained an element of domination. The Tribunal considers, however, and so finds, as foreshadowed by earlier observations, that any sense of the respondent's conduct being unwelcome was then overshadowed and condoned by the love affair that followed.

The Tribunal finds as a fact that from 17 November 1988 until the complainant's employment ceased she was a willing participant in regular acts of sexual intercourse which took place at the shop and in the manner described by the respondent in his

evidence. These encounters were usually preceded by the sharing of a glass of wine and accompanied by endearments. The respondent was therefore entitled to conclude that his advances and the sexual activities between the parties generally were welcome. The test is not how the complainant viewed the advances and sexual conduct in retrospect, after she had had time to dwell upon the one-sided nature of the relationship, and the futility of what had occurred but, viewed objectively, whether the advances and the acts of sexual conduct were unwelcome at the time they happened, and whether the respondent reasonably understood that his conduct was acceptable. As the Tribunal noted in the O'Callaghan case *(supra)*, one cannot have workable laws which proscribe activities solely upon the basis of the attitude of the recipient of those activities. The relationship was probably doomed to fail eventually but, being conducted at the time in an atmosphere of mutual sexual attraction, according to the Tribunal's finding, and in the absence of discouragement or specific rejection of particular advances, the respondent was entitled to conclude that his conduct was appreciated and therefore welcome.

It follows from this finding that the Tribunal has grave reservations about much of the complainant's testimony in respect of the period the subject of the post October allegations and does not accept that the sexual conduct complained of less than sexual intercourse occurred as alleged. If some of the incidents complained of did occur, the Tribunal considers that the conduct in question was not discouraged and was welcome. The complaint is therefore dismissed.

SUPPRESSION ORDER

By Sections 121 and 122 of the Act the Tribunal may direct that an inquiry be held in private and that publication of evidence be prohibited.

At the commencement of the hearing the respondent applied for an order that the complaint be heard in private pursuant to those provisions. That application was opposed by the complainant. She wanted the hearing to be held in public and the evidence to be available for publication.

After hearing argument, the Tribunal ruled that the hearing should be held in public but that any evidence given or information which might enable identification of the parties or of witnesses should be suppressed. The matters in issue were of an intimate kind which some witnesses would feel embarrassed discussing and the Tribunal did not want any witness to be deterred from saying what he or she knew of the matters in issue by apprehension that publicity might attach to the answer given or to the proceedings generally.

Now that a finding has been made, different considerations apply. It was argued strongly by Counsel for the Respondent at the hearing that if no liability was found to attach to the respondent, it would be unfair and iniquitous for his client to suffer the odium which might result from publication of reasons which presented his client in an unattractive light, even though the Tribunal has found that he did not infringe the Act. At a later hearing, prior to these reasons being handed down, the respondent modified his stance

and did not object to publication of the names of the parties or of the reasons but sought an order that resort to and publication of details of evidence should be restricted on the grounds that otherwise he might be prejudiced.

The Tribunal also feels compelled to observe that it will probably be in the best interests of both parties, having been through the catharsis of these proceedings, to put the matters in issue completely behind them so that they and their respective families can move forward again. The Tribunal hopes that this will happen. It follows that the Tribunal recognises some force in the view that publication of the evidence and the complete allegations should be prohibited. There is also a risk of the kind addressed by Section 36C of the Evidence Act (which prohibits publication of the names of complainants in sexual assault cases) that undue publicity may inhibit for prosecution of immediate or prospective claims.

Balanced against those considerations, however, is the general principle that courts and tribunals within the legal system should generally be open to scrutiny in every respect so that the community can understand and debate their findings, and also be confident that cases are being decided only upon the basis of their merits as viewed within the framework of evidence submitted by the parties to an impartial arbiter. The Tribunal pauses to note that a question arose in the present case as to whether The West Australian newspaper had sufficient standing to be heard in respect of the publicity issue. Having regard to the discussion of the Full Court in this state in Re Bromfield (1991) unreported SCL8930 the Tribunal holds that the newspaper does have standing and the Tribunal has taken account of the submissions made on its behalf.

In Scott v Scott (1913) AC 417 the House of Lords held that the Probate, Divorce and Admiralty Division had no power, either with or without the consent of the parties, to hear a nullity suit or other matrimonial suit in camera in the interest of public decency. Lord Shaw said at page 477:

> " *Publicity is the very sole of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial ... civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of parliament, without let or interruption, to inquire into and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any state be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise.* "

In Richmond Newspapers Inc v Virginia (1979) the Supreme Court in the United States said:

> " *A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process satisfy the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it ... people in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.* "

Further, it is also apparent from the Act itself and from materials preceding its enactment including the Second Reading Speech reported in Hansard on 20 December 1984 that the legislation has a broad social objective. The legislation was said to be based upon respect for the rights and freedoms of each individual to be treated equally and with a view to

providing equality of opportunity. The exercise of powers under the Act is intended to have a broad educative function within the community by establishing certain norms of behaviour as a consequence of policies advanced by the Commissioner and rulings made by the Tribunal.

This view of the legislation was recognised in Murphy v Ramus Pty Ltd (1990) EOC 92-309. In that case the Tribunal held that the respondent was liable for acts of sexual harassment. The Tribunal held that whilst the original order prohibiting publication was appropriate at that stage of the proceedings in order to protect the identity of the parties having regard to the nature of the allegations and the adverse effects which could have been caused by the disclosure of the parties, this was changed by the findings of the Tribunal subsequently. The circumstances of the acts of discrimination was such that they were proper for them to be available for the purpose of publication should the media so desire. There was a public interest in knowing the identity of those who are guilty of unlawful discrimination under the Anti Discrimination Act and there was no material before the Tribunal which would require the orders previously made prohibiting publication to be continued. However, the same did not apply to the orders which were then made concerning the non publication of the names of witnesses other than the complainant.

The present case is different, of course, in that the respondent has been found not to have infringed the provisions of the Act, but nonetheless analogous considerations apply.

Having given the matter careful thought, the Tribunal considers that the considerations in

favour of publicity outweigh the desire for privacy which would usually be natural to the parties. The finding made shows that it is not in all cases that sexual conduct between employer and employee will necessarily entitle a disaffected employee to relief. Each case must be dealt with on its merits, and in accordance with the criteria established by the legislation. Thus, it is important that the finding made by the Tribunal and the reasons underlying the finding, should be available for publication and scrutiny, should the finding be of interest to the community, and so as to enhance an understanding of the Act.

It emerges from a consideration of the authorities, however, that although the general educative purpose may be fulfilled by making the reasons available, it is nonetheless appropriate in certain cases to take steps to restrict publication of the names of the parties and of the witnesses. It is with that thought in mind, that the Tribunal considers that some protection should be afforded to the parties and to the witnesses who gave evidence in the present case. For that reason, the judgement has been prepared in a form where the subject business premises are not precisely identified and the witnesses are identified by their christian names only. A number of people close to the parties will inevitably draw their own conclusions about the identity of those involved but that of itself is not sufficient to negate the general need for safeguards. The Tribunal also considers that it is appropriate to impose restriction upon publication of the evidence and the full range of allegations advanced by the complainant most of which were not substantiated.

Accordingly, in exercise of the powers contained in Sections 121 and 122 of the Act the Tribunal orders and directs that:

1. These reasons and the dissenting reasons shall only be published for the purpose of providing a fair report of the proceedings before the Tribunal and/or for research.

2. Any information that might enable any person who has appeared before the Tribunal to be identified shall not be published save and except in the form and manner and to the extent set out in these reasons and the dissenting reasons.

3. The pleadings and the evidence given and the contents of any document produced to the Tribunal shall not be published save and except in the form and manner and the extent set out in these reasons and the dissenting reasons.