

**EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA**

No. 1 of 1993

IN THE MATTER OF A COMPLAINT BY:

SHIRLEY SMITH AND JOSEPHINE MITCHELL

Complainants

- against-

SANDALWOOD MOTEL PTY LTD TRADING AS
SANDALWOOD MOTOR INN

Respondent

JUDGMENT

BEFORE: Mr N Hasluck QC - President
A/Professor P Harris - Member
Mrs K French - Deputy Member

Counsel for the Complainants - Ms H Andrews
Appearing for the Respondent - Mr D Jones

HEARD: 15-17 November 1993, 21-22 December 1993.

REASONS FOR DECISION:

(Delivered: 15 APRIL 1994)

The Complainants, Shirley Smith and Josephine Mitchell, were singers in a band known as the Soul Sisters ("the band") who were engaged to perform at the Sandalwood Motor Inn in Kalgoorlie in September 1991 during the Kalgoorlie Racing Round. The Complainants claim that the Respondent, principally by its manager, Ross Stevenson, discriminated against them on the ground of sex. The complaint arises out of various incidents which occurred during the course of their employment at the Sandalwood Motor Inn.

The Premises

The Respondent Company is a body corporate trading as Sandalwood Motor Inn in Kalgoorlie. At all material times the Respondent Company was the owner of Sandalwood Motor Inn and of the adjoining Kalgoorlie Caravan Park. The principal director at that time was Mr Graeme Crisp. He said in evidence that he had operated a pharmacy in Kalgoorlie for many years. He formed the Respondent Company with other partners in the mid 1970s and built the Sandalwood Motor Inn, and later expanded the venture to include single person's quarters and the Kalgoorlie Caravan Park. At the relevant time the Sandalwood Motor Inn was being managed by Mr Ross Stevenson. Mr Crisp and his wife came to Kalgoorlie during the September 1991 racing round and during that week visited the premises regularly, but not so as to interfere with or supersede Mr Stevenson's management of the premises.

Mr Crisp said that the motel was standard country accommodation. The single person's quarters and caravan park were of a lesser standard of accommodation. A sketch plan was put in evidence which showed that the premises consist of licensed premises on the Great Eastern Highway consisting of a reception area, a restaurant, a cocktail bar and public bar. Motel units adjoined the licensed premises and at the rear of the premises there were additional motel units and an indoor swimming pool. Further away were the single person's corners, also known as the "dongas". These were transportable accommodation units which had previously been used on the Argyle Diamond Site. According to Mr Crisp these quarters were used to provide accommodation for both sexes. There was a male ablution block nearby and female occupants of the dongas were expected to use the female ablution block in the caravan park which was about 40 or 50 metres away.

In addition to Mr Stevenson the staff at the Sandalwood Motor Inn included a receptionist, kitchen staff, cleaning staff, waitresses for the restaurant and bar maids for the cocktail bar and public bar. A number of witnesses confirmed that various licensed premises in Kalgoorlie are accustomed to supplement the usual bar staff with "skimpy" barmaids. These barmaids usually wear flimsy or revealing garments and they are regarded as a means of attracting custom to the premises. Mr Crisp was not keen on the practice of employing skimpy barmaids, who expected to be paid at higher rates per hour, but was persuaded by Mr Stevenson that skimpy barmaids should be employed so that the Sandalwood Motor Inn would

be able to compete on an equal footing with other licensed premises in the area. The payroll summary for the various members of staff was received in evidence for early September 1991. The summary showed that the various members of staff were paid at different rates according to the hours worked. Mr Stevenson confirmed that *"over the racing round it was very difficult to get people to work, especially people that were permanent in Kalgoorlie at the time, and that ... we brought in people for that racing round time."* He said that all sections of the premises were busy during that period and, more particularly, in regard to the evening of Wednesday 4 September 1991, he confirmed that *"there was extra staff in every part of the building that evening"*.

Rosco's Bar

The public bar was known as "Rosco's Bar", having been named after Mr Ross (or 'Rosco'), Stevenson himself. Stevenson was a long standing friend of Mr Crisp and prior to his engagement as manager of the premises in June 1990 had little previous experience of running licensed premises. The name of the public bar was changed to Rosco's Public Bar in September 1990 and thus the first anniversary of the bar under its new name was to be celebrated during the September 1991 racing round. The person in charge of Rosco's Bar was the bar manager, Mr Andrew Sparkes, and both Mr Crisp and Mr Stevenson confirmed that the bar manager had authority to deal directly with any disorderly conduct in the bar by patrons or by bar staff.

Section 115 of the Liquor Licensing Act 1988 provides that where a licensee, whether personally or by an employee, permits drunkenness or disorderly or indecent behaviour to take place on licensed premises, that licensee, and the employee, commit an offence. Mr Sparkes reported to Mr Stevenson as manager of the entire premises. It follows that both men were under an obligation to deal with any trouble that might occur with Mr Stevenson being the final point of reference in a difficult case.

One could enter the public bar from the street via a door situated next to windows overlooking the street. A cigarette machine stood at the window end of the bar and a few feet away, close to the windows, was the end point of an "L" shaped bar which ran the length of the room. There was a pot belly stove and a scattering of tables in the centre of the room. At the far end of the bar a door lead inwards to the cocktail bar, restaurant and reception area. This door can conveniently be referred to as situated at the restaurant end of the bar.

The Public Bar did not have a stage or any area specifically set aside for the use of live entertainers. This was not altogether surprising because live entertainment was not usually provided at Rosco's Bar. During the Kalgoorlie Racing Round of September 1990, however, that is to say, twelve months prior to the events complained of, Mr Stevenson had engaged a duo called "Molly Duke" to perform in Rosco's Bar. The duo consisted of an experienced keyboard instrumentalist

named Trevor Gibson and a vocalist called Christine Courtenay (referred to by some witnesses as Christine Beaumont). It appears to be common ground that the two entertainers comprising Molly Duke cleared a space at the window end of Rosco's Bar which they treated as a notional stage, although they continued to be on the same level and in close proximity to the various patrons of the public bar. According to Christine Courtenay the bar was small, and the crowd, that year, was an odd mixture of well dressed socialites from Perth and the labourers who had built the bar.

She referred to Molly Duke setting up in a small corner close to the bar. It was very crowded and rowdy. People were leaving drinks on the speaker boxes and were jostling the keyboards constantly. At one stage the lighting tree was nearly toppled over. She said that the entertainers complained to the manager "Rosco" Stevenson about the lack of protection for the entertainers and their gear but got little response. She said he laughed off the complaint and, although the entertainers received no physical or verbal abuse, it was not a pleasant atmosphere to play in.

Although Christine Courtenay may have had some reservations about the wisdom of providing live entertainment in such a confined space, it seems that Mr Stevenson was reasonably pleased with the result because he obtained approval from Mr Crisp to repeat the experiment in the Kalgoorlie Racing Round September

1991. The first step in that regard took place towards the end of June 1991 when Mr Stevenson attended a performance at a hotel in Northbridge being given by Soul Sisters, a group consisting of the Complainants and Mr Gibson. It appeared from the evidence that Shirley Smith had known Trevor Gibson for many years and had occasionally filled in for Christine Courtenay. When Christine Courtenay decided to retire from Molly Duke, the group of that name was disbanded and Soul Sisters was then constituted with Mr Gibson on keyboard and the Complainants as vocalists. Mr Stevenson liked their music and discussions commenced with a view to having Soul Sisters perform at Sandalwood Motor Inn during the Kalgoorlie Racing Round September 1991.

Soul Sisters

Shirley Smith had been a successful musician for many years. She has worked as a professional musician in the music industry for 27 years having commenced her career by winning a talent quest. She met Trevor Gibson early on and for a time, with her brother, was a guest artist at various hotels around Perth. In 1968 she was chosen with the first West Australian concert party to tour Vietnam. She then recorded with Clarion Records and went on to perform in various shows in the Eastern States such as Bandstand, the John Laws Show, The Gordon Chater Show, the Bob Rogers Show and was also signed on by the entrepreneur Robert Stigwood and made various recordings. She married in 1971, then she returned to Perth with her husband and has been working continuously in the music industry. She

met up again with Trevor Gibson during the course of her work in Perth, performing with him on an occasional basis as part of Molly Duke.

Josephine, or Josie, Mitchell was also an experienced musician. She began working in Perth professionally in the early 1980s. In 1989 she became firm friends with Shirley Smith when they co-ordinated a project, namely, the recording of 17 West Australian/female vocalist/songwriters. Shirley Smith and Josie Mitchell had both been influenced by the black American singers and talked about putting an act together and calling it "The Soul Sisters". They both respected Trevor Gibson as a keyboard player and when it seemed that the Molly Duke duo would not carry on arrangements were made to form a new group known as Soul Sisters. According to their brochure the Soul Sisters were a 'combo' presenting hits of the motown era with an authentic "sound" of the 1960s plus the best of Soul and R & B through to the 1990s. The brochure speaks of "a unique combination of soulful harmonies, dynamic dance routines and riotous rhythms with a special brand of spontaneity which has made the Soul Sisters a major crowd pleaser. The Soul Sisters are accompanied by Trevor Gibson a prolific songwriter and performer who has toured the world and worked with many famous names during his 25 year professional music career."

The group commenced work in February 1991. According to Josie Mitchell they were working about 4 nights a week through to the beginning of winter.

Generally, they were doing about 3 or 4 gigs a week. She said that they were earning between \$350.00 and \$600.00 per performance. Special performances were getting up to \$900.00, so average wage was somewhere between \$300.00 and \$500.00 per week. Mr Gibson agreed in evidence that Josie Mitchell played a leading role in organising forward bookings and attending to the managerial side of the group's activities.

The Complainants said in evidence that the group had forward bookings to be fulfilled at various venues in Perth and elsewhere in the period following the Kalgoorlie Racing Round September 1991. They presented in evidence a list of bookings (confirmed via an entertainment agency run by Leslie Hinton) at the Windsor Hotel running through to 31 December 1991. At the Windsor Hotel in South Perth they were to be paid \$350.00 gross per performance which, after deduction of the \$35.00 agency fee, would produce a payment of \$105.00 each.

Mr Gibson suggested in evidence that there was a degree of tension between members of the group prior to September 1991 which made it difficult to predict what the future of the group would be. The Tribunal will return to this aspect of the matter later, but notes that, even on Mr Gibson's evidence, no discussion had taken place prior to the commencement of the Kalgoorlie Racing Round initiated by any member of the group which foreshadowed a wish to disband or reduce the activities of the Soul Sisters. Mr Stevenson certainly formed a favourable

impression when he saw Soul Sisters perform in late June and this lead to discussions about employing the group at the Sandalwood Motor Inn during the Kalgoorlie Racing Round in place of Molly Duke, the group which had performed the previous year.

The Contract

It appears to be common ground that the initial approach for the Soul Sisters to perform in Kalgoorlie was made by Mr Stevenson to Mr Gibson in view of their previous association. It also appears to be common ground, however, that Josie Mitchell was largely responsible for conducting the negotiations which followed. That she did play a leading role in these negotiations is substantiated by her Telecom Bill for the July/August 1991 period which evidences various long distance calls to Kalgoorlie. It is also clear that no written contract was made between the parties.

There is a degree of controversy as to the terms of the verbal contract constituted by discussions between Josie Mitchell on behalf of Soul Sisters and Mr Stevenson on behalf of the Respondent Company.

For the time being, it is sufficient to note that by their Amended Points of Claim the Complainants plead that the contract was for 6 performances to occur between 1 September and 7 September. The band was to receive \$400.00 for each

performance, with Mr Trevor Gibson, the keyboard player in the band, receiving an extra \$200.00 for travelling expenses. In addition, the band was to be provided with first class accommodation plus 3 meals a day for the duration of the contract.

The Respondent by its Points of Defence does not deny the Complainants' plea save and except a denial that the band was to be provided with first class accommodation. The Respondent by its pleading and by Mr Crisp and Mr Stevenson in evidence contended that the motel was heavily booked during the Kalgoorlie Racing Round and it was therefore not possible to provide accommodation of the kind contended for by the Complainants. It is alleged that the Complainants were offered only single accommodation. There is therefore an issue between the parties as to whether the Respondent by Mr Stevenson reserved to itself a discretion to provide the Complainants with accommodation at a lesser standard than that contended for by the Complainants. The Tribunal will return to this issue later.

Kalgoorlie Racing Round 1991

The band members arrived in Kalgoorlie on Sunday 1 September and were provided with accommodation in conventional motel rooms.

Mr Stevenson had attended a social function in Coolgardie and was not on the motel premises when the band arrived. Accordingly, in the absence of any

direction from him as to where the band should set up for their first performance, which was to take place that evening, the band created a performance space at the window end of Rosco's Bar, this being the area, as Mr Gibson was aware, that had been used by Molly Duke the previous year.

The band performed on the Sunday evening without incident. The audience included Josie Mitchell's domestic partner at that time, Mr Alan Grant, and her sister Marie Mitchell. Alan Grant's parents were residents of Kalgoorlie and the arrangement was that Alan Grant and Marie Mitchell would stay with them but Josie Mitchell would stay with the other two members of the band in the motel rooms.

The Bar staff during the evening consisted of a professional barmaid, a skimpy barmaid and Mr Andrew Sparkes as bar manager, although he was also attending to the requirements of patrons in other areas of the premises. During the course of the evening Mr Stevenson and a group of his friends gathered at the restaurant end of the bar for a drink and, according to his evidence, the group initially included his wife and daughter. He accepts, however, that by the time the band finished its performance his wife and daughter had already departed.

The Complainants allege that on the Sunday evening, after the performance, Mr Stevenson drew Shirley Smith into a conversation with his friends which included

some offensive sexual repartee. Josie Mitchell was present at the end of the discussion complained of.

For the time being, the Tribunal simply notes that the incident, if it did occur, did not lead to a breakdown in the relations between the parties. The band performed on Monday evening 2 September 1991 without incident and again all three members of the group continued to sleep in the separate motel rooms provided to them.

On the morning of Tuesday 3 September Mr Stevenson advised the band that they would have to move out of their rooms for that evening as the rooms were otherwise booked. On the Complainants' case he assured them that this arrangement was for one night only, and that they could stay in the single person's "dongas" to the rear of the venue. It followed that the Complainants would be obliged to utilise the female facilities in the ablution block in the nearby caravan park. This arrangement was unsatisfactory to the Complainants because it seemed to be inconsistent with the arrangements previously negotiated. In the event Josie Mitchell decided to stay with the parents of her partner, Alan Grant, at their home in Kalgoorlie. Shirley Smith did stay in the "dongas". That evening the band performed at premises nearby called De Bernales Tavern, this having been negotiated by Mr Stevenson as a means of sharing the cost of having the band in Kalgoorlie.

Wednesday

On Wednesday 4 September the band were required to play at a Champagne Breakfast to celebrate the first anniversary of Rosco's Bar. Because of the distance between the single quarters or "dongas" the Complainants were given the use of an occupied room in the motel prior to the breakfast and assured that the current occupant would not require his room during this time. In their Amended Points of Claim the Complainants pleaded that whilst Shirley Smith was having a shower in the designated room the occupant of the room entered it. This was embarrassing particularly as the incident was freely discussed and became common knowledge around the motor inn.

It is common ground that the band performed at the champagne breakfast on Wednesday 4 September 1991 without incident, although there is a degree of controversy as to what members of the motel staff were serving behind the bar during the course of that social function.

Evidence was given by Mr Stevenson on behalf of the Respondent and by other Respondent witnesses that in the weeks immediately preceding the Kalgoorlie Racing Round the usual bar staff of Rosco's Bar consisted of a bar maid who worked alone in the bar during the day shift. She was usually relieved by Fiona Keane who held a clerical position during the day and went straight from her day job to commence part time work as a bar maid at the Sandalwood Motor Inn at

about 5.30pm. At about the same time a skimpy barmaid would commence work. The Respondent's case was that the regular skimpy barmaid during the weeks preceding the Racing Round and during the week of the Racing Round itself, was Karinna Bekker. Mr Andrew Sparkes as bar manager would also spend part of his time behind the bar in the course of his general duties and if the bar became crowded some further assistance might be obtained from the barmaid in the cocktail bar or from Mr Stevenson himself. The Tribunal has already noted that the Racing week was expected to be a busy week for the premises and therefore according to Mr Stevenson there was extra staff in every part of the building that evening.

The members of the band went to the races and returned to the premises later in the day. They were ready to commence their evening performance at about 7pm and were encouraged to make an early start by Mr Stevenson. Mr Stevenson himself was due to host a dinner of business friends and associates in the restaurant and was therefore not present in Roscoe's Bar when the band commenced its performance.

The Complainants allege that two traumatic incidents then took place which made it impossible for them to continue. The Tribunal will look at this aspect of the matter in more detail later. For the moment it is sufficient to note that before the Complainants left the premises on that night, as a consequence of the incidents complained of, a confrontation took place with Mr Stevenson during which the

manager of the premises adopted the stance that the contract between the parties had come to an end. Later that evening, Mr Gibson, acting on his own behalf, approached Mr Stevenson and indicated that subject to his obtaining some sheet music from Perth, he would be willing to carry on as a keyboard player without the two Complainants. Mr Stevenson agreed to that proposal.

Thursday

The Complainants stayed overnight at the home of Alan Grant's parents and returned to the motel premises on Thursday morning. They put up a proposal to Mr Stevenson to reconstitute the contract but he was adamant that the contract had come to an end. The Complainants then made arrangements to return to Perth, but, before doing so, they spoke to the Manager of the De Bernales Tavern, Mr John Vosseveldt. They told him what had occurred at Rosco's Bar the previous night, and that prompted Vosseveldt to ring up Mr Stevenson to discuss the matter in question. That discussion did not lead to any change in Mr Stevenson's stance that the contract with Soul Sisters had come to an end. Mr Gibson played at the Sandalwood Motel on the Thursday and Friday evenings and was paid separately for his work.

Subsequent Events

On the following Sunday the band was due to fulfil one of their forward bookings, a regular gig at the Windsor Hotel in South Perth. They carried out their

obligation in that regard but relations between the three members of the band were now severely strained. On the one side, the Complainants felt that Trevor Gibson had failed to support them in regard to what had happened on the Wednesday evening in Kalgoorlie, and had subsequently betrayed them by continuing to work for the Respondent. On the other side, Trevor Gibson considered that the Complainants were behaving unreasonably. During the course of a telephone conversation a few days after the gig at the Windsor Hotel it became apparent that the band could not continue and they did not perform together again subsequently. The Complainants contend that the events in Kalgoorlie not only brought about a dissolution of the band but also had a prejudicial effect upon the capacity of the Complainants to continue as vocalists.

Pleadings

By their Amended Points of Claim the Complainants set out the terms of the verbal contract made between the parties. They alleged that after the performance on Sunday evening 1 September Mr Stevenson made a sexual proposition in the presence of other males to the Complainant Shirley Smith regarding a friend of his. The Complainant Josie Mitchell interrupted the conversation (but Mr Stevenson continued to make comments about the friend's sexual capacity.) This allegation was denied. The Tribunal will call this the Sunday evening issue.

The Complainants in their Amended Points of Claim also rely on the allegedly unsatisfactory arrangements concerning accommodation and to the incident involving the use of another occupied room. The Respondent pleaded in reply that the band was offered adequate accommodation for the duration of their stay in the single person's quarters at the rear of the motel. Motel unit accommodation was to be made available only in the event that such accommodation was available. The Respondent had no knowledge of the alleged incident concerning the occupied room and by implication denied that it had occurred.

The Complainants alleged further that by the time of the Wednesday evening performance many of the patrons of the hotel had been drinking for some time. Some of them were in an advanced stage of intoxication and were exceeding normal conventions of behaviour. During Wednesday evening's performance the Complainants observed an incident in which patrons paid money to a barmaid so that she would show them her breasts and allow her nipples to be sucked by one patron. The Complainants were concerned by this behaviour especially because the room was quite small and there was no stage to elevate them from the level of the audience. The Complainants drew the patrons behaviour to the attention of staff of the Respondent and requested that the Respondent's staff should act to protect them and their equipment. The Respondent's staff, according to the Complainant's plea, took no action. This will be called the first Wednesday evening issue.

The Respondent pleaded in response that staff on duty on the Wednesday evening consisted of the bar manager, Andrew Sparkes, one bar person Fiona Keane and one skimpy bar person. It was said in evidence that this was Karinna Bekker. It was pleaded that Mr Stevenson did not work in the bar that night because he had to attend to another function in the motel's restaurant. The Respondent denied that a skimpy bar person did the acts complained of.

The Complainants said further that after the first Wednesday evening issue the attention of the patrons turned to the Complainants. Comments of an explicit sexual nature and requests for sexual favours were made to them. The Complainants drew this behaviour to the attention of the staff of the Respondent and refused to continue performing unless preventative action was taken but Mr Stevenson refused to reprimand or remove the patrons in question. The Complainants then terminated the performance. This will be called the second Wednesday evening issue.

The Respondent pleaded that whatever conduct may have been engaged in, upon it being drawn to the attention of the Bar Manager, he quickly acted to moderate the behaviour of the patrons in question and moved them away from the female band members. Mr Stevenson was seated in the restaurant eating when approached by the bar manager who reported that the band would not continue playing. Mr Stevenson did not believe it necessary to further reprimand the patrons, who it is

alleged acted in an unruly manner, because that action had already been carried out by the bar manager. Mr Stevenson spoke to the members of the band and told them that if they were not intending to finish their performance they could leave the premises and return the next morning to collect their pay.

The Complainants pleaded that on Thursday 5 September they returned to the Respondent's premises and advised Mr Stevenson that they would complete the contract if he provided them with accommodation as agreed and guaranteed their protection from further inappropriate behaviour. Mr Stevenson advised them that as far as he was concerned they had sacked themselves on the previous evening by terminating the performance. However Mr Stevenson continued to employ the male member of the band Trevor Gibson.

The Respondent pleaded in defence that on Thursday 5 September 1991 Mr Stevenson again spoke to the band members but, after hearing them conditionally agree to continue their performances, refused their offer to perform on the basis that he treated the premature cancellation of the previous nights performance as a termination of their performance contract.

The Complainants pleaded that the events outlined in their pleadings constituted unlawful discrimination on the ground of sex by the Respondent against the Complainants in the terms and conditions of employment afforded to them, by

subjecting them to a detriment and by dismissing them contrary to provisions of the Equal Opportunity Act 1984 as amended. The Respondent denied liability for discrimination and denied that the Complainants were entitled to compensation by way of damages.

Issues

The pleadings appear to give rise to a number of discrete issues, and, indeed, the matter was argued in this way at the hearing.

First, a question arises as to whether there was any discriminatory conduct associated with the provision of accommodation. This will be called "the accommodation issue".

Second, a question arises as to whether the Respondent exercised proper control in its management of the workplace. Resolution of this issue will require findings to be made in regard to the factual issues described above as the Sunday evening issue, the first Wednesday evening issue and the second Wednesday evening issue. The general question of whether the manner in which the Respondent controlled the circumstances of employment infringed provisions of the Act will be called "the control issue."

Third, an issue arises as to whether the circumstances of the dismissal or termination of the employment constitute an infringement of the relevant statutory provisions.

Evidence

Josie Mitchell said that it had been verbally agreed between her and Mr Stevenson that the band was to have first class accommodation by which she meant accommodation in motel rooms. On her evidence the single person's quarters could not be adequately secured and were generally inferior to motel rooms and had the added disadvantage that there were no proper toilet or ablution facilities. She therefore regarded the requirement on the Tuesday morning that the band transfer to the dongas as a unjustified downgrading of the accommodation and as a breach of contract. Further, as a consequence of the events of Wednesday evening, neither she nor Shirley Smith were prepared to stay in the dongas because they feared for their safety.

She referred to the Sunday evening issue. Her evidence was that after the Sunday evening performance was over she saw Mr Stevenson draw Shirley Smith into his group of friends at the restaurant end of the bar by putting an arm around her. Later, when she noticed some agitation in her friend's manner, she joined the

group, and overheard some offensive remarks about the pattern on the corner panel above the bar having been achieved by urination on the metal while it was still pliable.

As to the first Wednesday evening issue, she said that when the Soul Sisters started playing the bar was quite crowded. Some of the people were very drunk and some were in working clothes. To the best of her recollection the bar staff consisted of Andrew Sparkes, an ordinary bar maid and a skimpy bar maid. A man at the window end of the bar was annoying the band initially but then desisted. A noisy group of 4 or 5 men situated about the middle of the bar were being cheeky and engaging in backchat with the skimpy bar maid who was dressed in a cut off animal print T-shirt. The group of men were very loud and yahooing and yelling out and seemed to be dressed in working clothes with dirt or dust on their clothes. She saw a tall man in the group wave a hundred dollar bill and persuade the skimpy to let her breasts be sucked. Josie Mitchell then left the bar and complained to Mr Stevenson, but he simply said "*As far as I am concerned if I didn't see it, it didn't happen.*" She persisted, whereupon he had a word with the skimpy barmaid and she left.

On Josie Mitchell's evidence the noisy group then turned their attention to the band. The tall man in the group approached the band, dancing around in a suggestive manner, grasping his genital area and making lewd comments. He had

his finger in his mouth and was running his finger around his mouth poking his tongue out, directing his action at both singers, but coming up close to Shirley Smith who by then had her eyes closed. As a consequence of this, Shirley grabbed her bag and made a run for it. Josie Mitchell joined her friend in the ladies toilet soon afterwards where, for the next twenty minutes or so, the two women attempted to compose themselves.

According to Josie Mitchell, the two female singers then approached the bar manager, Andrew Sparkes, and said that they could not continue. He said that he was just a barman and did not have authority to deal with it, so he went into the restaurant to get Mr Stevenson. On her evidence, when Mr Stevenson emerged from the restaurant, he pushed past the Complainants, walked into the bar, had a look at the rowdy group, came back to the singers and said "*Don't worry about them, they are harmless, they are from the bush.*" He told the Complainants to get on with the job and when they protested he said "*Go and do your fucking job or pack your bag.*" He made no attempt to talk to the patrons who had behaved in a disorderly way.

After that altercation the Complainants began packing up. Although one of the men in the rowdy group then approached them to offer an apology, Josie took the view that it was too late for that. She contacted her partner Alan Grant who was at home with his parents. The Complainants spent the evening with the Grant family,

not being willing to spend a night at the dongas in view of what had occurred. The Complainants had reason to believe that some of the men in the noisy group were staying in the dongas, and feared for their safety.

Josie Mitchell said that on the following day they approached Mr Stevenson with a view to finding out whether it was possible to reconstitute the contract. They sought assurances about control of unruly behaviour and about the provision of secure accommodation. When they spoke to the manager in the motel reception area he simply said that he did not have time to talk to them and as far as he was concerned they had sacked themselves last night and that was the end of it. They obtained a cheque for the money that was due to them in respect of the performances they had given to that point.

Josie Mitchell went on to refer to the eventual break up of the band after the gig at the Windsor Hotel. She described how her confidence as a performer had been severely shaken by the trauma of events of the Wednesday evening. She also said that as a consequence of the lewd and suggestive behaviour of the rowdy group her domestic arrangements suffered and as a result she had now parted company with her former partner, Alan Grant. He confirmed that her health and confidence deteriorated apparently as a direct result of the events in Kalgoorlie. Josie stated quite unequivocally that the skimpy barmaid involved in the first Wednesday evening issue was not Karinna Bekker but a larger and more sturdily built woman.

Shirley Smith gave more detailed evidence concerning the Sunday evening issue. After the performance was over on that evening she was on her way to the toilet and had to pass Mr Stevenson's group at the restaurant end of the bar. On her evidence he pulled her into the group and kissed her on the cheek and soon afterwards the men in the group began telling a shaggy dog story the point of which seemed to be that the marriage of one of the men in the group had broken down because his penis was too big. The suggestion was that Shirley Smith might like to take him out on the town and show him a good time. This was followed by some back chat about the copper work above the bar being pleasing because it had been pissed on at the right temperature. She was joined by Josie at this stage. Both women were offended by this closing riposte.

Her evidence concerning the events of the Wednesday evening were similar in general effect to the evidence given by Josie Mitchell. She did say, however, that to the best of her recollection there were two skimpy barmaids at work behind the bar initially. She too said that the skimpy barmaid who allowed her breasts to be sucked in exchange for a hundred dollar bill was not Karinna Bekker but a larger woman. Her recollection was that the barmaid involved in the incident disappeared soon after Josie took steps to prevent the same thing happening again.

She said that after the barmaid left, the men in the rowdy group transferred their attention to the band and the tall man staggered up close to the two female singers

and began making lewd comments such as "*Flash your gash*" and "*Suck on this*". He came up close to her making sucking notions in his finger and with bank notes in his hand. She was forced to close her eyes to avoid the spectacle and could feel that he was right up close to her. He was about a foot away from her when she opened her eyes and looking past him, her eyes met those of a ten year old girl who was sitting there watching. At that point, aghast, she cried out "*I can't handle this any more.*" She grabbed her bag and ran out of the public bar to the safety of the ladies room. In describing her feeling of horror she said that they were surrounded by men who seemed to be entertained by what was going on and added "*I felt that we could have been raped right there on the floor and they would have cheered, quite honestly. I was very scared.*"

She confirmed that she was joined in the female toilet by Josie Mitchell and they made an effort to compose themselves. They then spoke to the bar manager, Andrew Sparkes, who claimed he had no authority to deal with the matter and eventually fetched Mr Stevenson. The latter refused to do anything about the matter and insisted that the Complainants either do their job or pack their things. As a consequence of that discussion the Complainants packed up and left. Throughout this phase of the proceedings, Trevor Gibson seemed to be annoyed at the Complainants for taking a break and could not understand why they were upset. They spent the night with the parents of Alan Grant.

According to Shirley Smith, on the following morning the Complainants saw Mr Stevenson and said that they would be prepared to fulfil their contract if they could get their rooms back or have even just one room to share and be given some security. They wanted an assurance that incidents of the kind they were worried about would not happen again. On her evidence he simply said that if he did not see it, it did not happen. As far as he was concerned they had sacked themselves the previous night. He then proceeded to pay what was due to them. On her evidence at no stage, on either Wednesday night or the Thursday morning, did he make any attempt to find out in detail what exactly had happened in the public bar. It emerged from a consideration of her evidence, as was the case with Josie Mitchell's evidence also, that Mr Stevenson did not ask Mr Sparkes for details of what had occurred, or quiz Mr Gibson about the matter.

Shirley Smith confirmed that Soul Sisters came to an end shortly afterwards. As a consequence of what had happened in Kalgoorlie, the band could not work together any longer. She gave evidence that she was severely affected by the events of the Wednesday evening and had lost her confidence as a performer and was not prepared to perform on the pub scene. Her evidence in that regard was confirmed by her husband Russel Smith. He said that she was badly shaken up after she came back from Kalgoorlie. She lost a fair bit of her confidence. He also said in evidence that her sleep patterns were severely interrupted. She was obviously affected by the incident because whenever she told a story about the events at

Kalgoorlie she would be reduced to tears. The Tribunal pauses to note that Mr Smith also had a long experience as a musician. In his experience bouncers or security people were generally available to protect the band, that being part of their function. Both Josie Mitchell and Shirley Smith confirmed that in their experience they had not previously been subjected to disorderly conduct of the kind they experienced in Kalgoorlie and in their view it stood in marked contrast to the usual conduct of hotel patrons in such a situation.

Marie Mitchell gave evidence on behalf of the Complainants and said that the Complainants on the day after the Wednesday evening incident were fairly shaken up by what had occurred. She confirmed that her sister's health had deteriorated as a consequence of what had occurred and related this to the violent and alcoholic domestic situation in which she and her sister had grown up.

John Vosseveldt gave evidence that on the Thursday morning the two Complainants spoke to him about what had happened on the Wednesday evening in Rosco's Bar. They told him that they were going back to Perth. He was concerned by what he heard and spoke to Mr Stevenson by telephone. To the best of his recollection he summarised the main features of the complaint and the nature of his concern but Mr Stevenson simply laughed it off, and made no attempt to find out more about the matter.

Mr Crisp, in effect the proprietor of the motel at that time, as has been noted earlier, gave evidence on behalf of the Respondent. He had no specific knowledge bearing on the negotiation of the contract of employment. According to him, the single person's quarters were adequate accommodation. He was not involved in the Sunday evening incident and was not present on the Wednesday evening or on the Thursday morning and therefore had no evidence to offer concerning the events on those days. He did say, however, that although Mr Stevenson had indicated in passing that there had been a problem with the band, he, Crisp, heard no mention from any quarter that any allegation had been made of lewd conduct occurring in the Sandalwood Motel Public Bar. Details of the allegations reached him eventually once a complaint was lodged with the Equal Opportunity Commission but that was the first he knew of the matter.

Mr Stevenson in his evidence denied that any arrangement had been made with Josephine Mitchell for first class accommodation and said the arrangements were simply for single accommodation in the single persons' quarters but better accommodation would be provided if available.

In regard to the Sunday evening issue, he denied the substance of Shirley Smith's allegation about the stories told in her presence, but he agreed that, in a jovial fashion, he might have drawn her into the group and engaged in some conversation with her.

His evidence was that the bar staff on the Wednesday evening in Roscoe's bar consisted simply of the bar manager, Andrew Sparkes, the ordinary barmaid Fiona Keane and a skimpy barmaid, being Karinna Bekker. However, under cross-examination, as has already been noted, he conceded that extra staff had been engaged for the Kalgoorlie racing week. Further, when taken to the payroll summary, he did not deny that, by reference to abbreviated symbols it was possible to identify two or three female staff in addition to Karinna Bekker who were depicted as having worked in Roscoe's Bar in the period ending 11 September 1991. He also referred to a roster in respect of casual staff.

As to the first Wednesday evening issue, his evidence was to the effect that he became aware at some stage that the band was not playing and was told by Mr Sparkes that there had been some incidents concerning a skimpy barmaid but that it was under control. In effect, he denied having been approached by Josie Mitchell about that issue. He also denied speaking to a barmaid about the matter. As to the second Wednesday evening issue his evidence was as follows:

"When Andrew came to get me out of the restaurant, because there was no music being played, I went into Roscoe's Bar, I went past the two girls who were in the hallway, went a few steps into the bar, saw Trevor who I knew well and beckoned him to come over. I also noticed the microphones had been taken down, I went into the bar adjacent to Rosco's Bar with all of them. They said they can't sing any more in there so, I said "Well you have effectively sacked yourselves".

He went on to say that he wasn't prepared to discuss the matter with them because they were emotionally upset and irrational. He also said this: - "*They said they were harassed by somebody in the bar.*" He also conceded that Andrew Sparkes had approached him about the matter for assistance.

Mr Stevenson agreed in evidence that he had an encounter with the Complainants on the following day. The Complainants requested that provision be made whereby they wouldn't be harassed in Rosco's Bar, but he took the view that there was no way that he could comply with such a request because a stage wasn't possible and he wasn't willing to reconstitute the contract. By that time, he had already made an arrangement with Trevor Gibson for the male member of the group to perform as a solo artist on keyboard. Stevenson agreed that, on the previous evening, after the Complainants had left the premises, he had taken steps to assist Trevor Gibson in obtaining his sheet music from Perth.

An affidavit of Andrew Sparkes was placed before the Tribunal and he was cross-examined on that affidavit by telephone. His evidence was confined to what happened on the Wednesday evening. He said that he was the duty bar manager on that evening and was assisted in the bar by two other bar persons one of which he believed to be Fiona Keene and the other to be Karinna Bekker. He said in his belief the latter was one of two or three such bar persons who were regularly employed by the respondent on a rostered basis. At no time on the Wednesday

evening did he see Miss Bekker accept any money to perform the lewd acts which have been alleged by the Complainants.

On his evidence, upon receiving the complaint concerning the first Wednesday evening issue, he confronted Miss Bekker but received her strong denial.

As to the second Wednesday evening issue, he said that about 9.00pm it was reported to him that the band was refusing to continue their performance unless some patrons left the bar and this was confirmed to him by the Complainants. He then approached the patrons and confronted them with the allegations whereupon the patrons admitted their poor behaviour and offered an apology and an undertaking that there would be no repeat of such behaviour.

According to his affidavit he passed this information on to the Complainants but they were not willing to continue so he then returned to the restaurant and advised Mr Stevenson of the band's refusal to play. Mr Stevenson left the restaurant where he was then dining and returned with Sparkes to the bar area to speak with the band who were packing up their gear to leave. He recalls that Mr Stevenson spoke to all members of the band and advised that if they did not intend to finish the performance they could leave the premises and return the next day to collect their pay as he considered their contract to have terminated. It is material to note that in the affidavit Sparkes does not refer to Mr Stevenson making any attempt to enquire

into the details of the second Wednesday evening issue. Under cross-examination Mr Sparkes seemed to accept that, in approaching Mr Stevenson in the restaurant, he (Sparkes) indicated to the manager that Mr Stevenson was being brought in to decide an issue which was beyond the bar manager's capability to resolve and that he (Sparkes) conveyed to Stevenson the general nature of the Complainants' concern.

Karina Bekker gave evidence. She spoke forcefully and testified to the effect that there was only one skimpy barmaid on duty on the Wednesday evening and she was that person. She denied having been involved in any lewd act of the kind the subject of the first Wednesday evening issue and although she claimed to remember the presence of a rowdy group positioned mid-way along the bar said she knew nothing of any incident resembling the second Wednesday evening issue.

Under cross-examination Miss Bekker seemed unable to provide any clear account or recollection of what events surrounded the band ceasing to play and eventually packing up.

Fiona Keane said in evidence that she commenced work regularly as a part-time barmaid in Roscoe's Bar at about 5.30pm most evenings. She indicated that her position was generally at the restaurant end of the bar and therefore she may not have had a clear view of what was taking place elsewhere in the bar. Her

recollection was that she was probably working on the bar on the evening in question but she did not seem inclined to say positively that she was there. The Tribunal found her evidence in this regard to be somewhat unsatisfactory.

Trevor Gibson gave evidence in support of the Respondent's case. In his view it was a term of contract that motel accommodation be provided. He agreed that negotiation of the details of the contract was left to Josie Mitchell.

As to events of the Wednesday evening he had a clear view of what was happening in the bar even though he was the keyboard player in the band. He agreed that although he normally wears spectacles (being short sighted) he was not wearing his spectacles during the performance. He said this did not interfere with his perception of what was taking place. He agreed that there was a rowdy group in the bar who were making derisory remarks but in his view a band playing the pub scene simply had to put up with that sort of thing.

He denied that the first Wednesday evening incident occurred in the manner described by the Complainants. He also denied that the second Wednesday evening incident occurred as alleged by the Complainants. He agreed that he was present at an altercation between the Complainants and Mr Stevenson but there was nothing in his evidence to suggest that at any stage of that encounter did Mr Stevenson enquire closely into what exactly had occurred in the public bar which was of

concern to the Complainants. He confirmed that after the Complainants had left the premises he made an arrangement with Mr Stevenson to continue performing as a solo musician on the keyboard for the remaining days of the week. He confirmed that after the band performed at the Windsor Hotel in South Perth a telephone conversation took place which made it clear that owing to personal tension between the members of the band as a consequence of what had happened in Kalgoorlie it was impossible to continue with Soul Sisters. However, on his evidence, the relationship had already been fading away because the band could not hold onto the bookings they had established and in his view the band only had a limited future in any event.

Evidentiary Issues

It is apparent from this summary of the evidence given by the various witnesses that there are considerable areas of difference between the witnesses and, in particular, there is an extremely vexed area of controversy as to whether there was a skimpy barmaid other than Karinna Bekker in Roscoe's bar on the Wednesday evening who engaged in the lewd act described by the Complainants in their evidence. Before making findings in regard to these matters, however, and in order to determine whether discriminatory conduct occurred, the Tribunal must turn briefly to the statutory provisions which provide a framework within which any findings should be made.

Statutory Provisions

By Section 8 of the Equal Opportunity Act 1984 discrimination occurs, if, on the ground of sex of the aggrieved person, the discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person of the opposite sex.

Section 11 provides that it is unlawful for an employer to discriminate against a person on the ground of the person's sex in the terms or conditions of employment that the employer affords the employee or by dismissing the employee or by subjecting the employee to any other detriment.

Section 4 provides that employment includes part-time and temporary employment and work under a contract for services. It did not appear to be contested at the hearing that the contract whereby the band was engaged to perform at the Sandalwood Motel should be characterised as a contract of employment within the language of the Act.

By Section 5 discriminatory conduct need not be the dominant or substantial reason for doing the act complained of. By Section 161 where an employee or agent of a person does, in connection with the employment of the employee an act that would, if it were done by the person be unlawful under the Act, the Act applies in relation

to that person as if the person had also done that act. Section 161 (2) provides, however, that this rule does not apply in relation to an act done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in the vicarious liability provisions.

Section 162 provides that where for the purposes of the Act, it is necessary to establish that a body corporate has done an act on a particular ground, it is sufficient to establish that a person who acted on behalf of a body corporate in the matter so acted on that ground.

The Complainant bears the onus of establishing that he or she has been the victim of unlawful discrimination. The case must be proved on the balance of probabilities but, in the absence of direct evidence the Complainant may use in support inferences drawn from the primary facts, although discrimination cannot be inferred when more probably innocent explanations are available on the evidence. See Fenwick v. Beveridge Building Products Pty Ltd EOC 92-147; Erbs v. The Overseas Trading Corporation Pty Ltd (1986) EOC 92-181.

The cases also indicate that a comparison can be drawn between the situation of the Complainant and the situation of a notional person in the same or a not materially

different set of circumstances. See Chesson v. Buxton (1990) EOC 92-295; Oakley v. Rochefort Holdings (1991) EOC 92-352.

Further, it is not necessary to establish deliberate discriminatory conduct for an act of discrimination to take place. The Statutory provisions cover conduct arising from thoughtlessness and neglect. It must be shown, to establish an act of unlawful discrimination, that there is a causal connection between the alleged discriminatory act and the circumstances of the complaint. It is not necessary to show a purpose or intent to discriminate. See Williams v. Council of the Shire of Exmouth (1990) EOC 92-296; Slater v. Brookton Farmers Co-operative Company Ltd (1990) EOC 92-321.

These later principles were recently endorsed by the High Court in Waters v. Public Transport Corporation (1991) 173 CLR 349. The High Court indicated that the provisions of the Act read must be viewed in the light of the statutory objects which are to be achieved and this is of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation the courts have a special responsibility to take account of and give effect to the statutory purpose. The Court went on to say that it would significantly impede the attainment of the objects of the Act to render unlawful discrimination and promote equality of opportunity between persons of different status, if the objects were to be interpreted as requiring an intentional motive on the part of the alleged

discriminator that is related to the status or private life of the person less favourably treated. It is enough that the material difference in treatment is based on the status or private life of that person, notwithstanding an absence of intention or motive on the part of the alleged discriminator relating to either of those considerations. A similar view was adopted by the House of Lords in R. v. Birmingham City Council (1989) AC 1155 in relation to provisions which described less favourable treatment on the ground of sex.

In reviewing the case law in Australia the Tribunal also notes that, although generally the relevant legislation contains separate provisions concerning sexual harassment, in New South Wales in O'Callaghan v. Loder (1984) EOC 92-023 the concept of discrimination on the ground of sex was considered to include sexual harassment. A number of cases note that an employee is entitled to work without being subjected to harassment and therefore discrimination can occur in circumstances where an employee is subjected to unwelcome sexual conduct.

Against this background the Tribunal now returns to the circumstances of the present case.

Findings

The Tribunal is obliged to say at the outset that in its view the two Complainants to were reliable and credible witnesses. In regard to the controversial issue

concerning the identity of the barmaid allegedly involved in the lewd act the subject of the first Wednesday evening issue the Tribunal was favourably impressed by the fact that the Complainants were quite forthright in saying promptly that the person involved was a person other than Karinna Bekker and Fiona Keane even though this was likely to create an ambiguity which might be to the prejudice of the Complainants' case. On the other hand, the Tribunal took a cautious view of much of the evidence given by the Respondent's witnesses.

Mr Stevenson contradicted himself in various respects and tended to gloss over points of difficulty. Mr Gibson betrayed a degree of animosity as far as the Complainants were concerned. Further, and in any event, his general indifference to the question of what amount of abuse musicians should put up with suggested that he was not a keen observer of details bearing upon such a matter. Thus, the Tribunal was not inclined to place much reliance upon his recollection of events relevant to the Wednesday evening issues.

Ms Bekker was a forceful witness but her vagueness concerning the circumstances in which the band actually stopped playing on the Wednesday evening meant that the Tribunal was left with an unclear picture of what scene was actually presented to her eyes.

Fiona Keane was the youngest of the various witnesses and appeared to be

unwilling to commit herself to positive statements as to whether she was working in the bar on the Wednesday evening. This made it difficult to accept her evidence generally.

Andrew Sparkes gave his evidence in chief by affidavit, and although he suggested that the female bar staff on the Wednesday evening consisted of Karinna Bekker and Fiona Keane, he seemed to accept that there were other skimpy barmaids who worked at the premises on a casual rostered basis.

Having carefully reviewed the evidence, and having taken account of the exhibits and the manner in which the testimony was presented, the Tribunal must now deal with the various issues in turn.

The Tribunal considers that the contractual terms concerning accommodation were as pleaded by the Complainants and supported in evidence by Josie Mitchell, namely, that the Complainants were to be provided with accommodation in motel rooms. Thus, the decision by Mr Stevenson on Tuesday morning, 3 September 1991, to require that the Complainants be accommodated in the single person's quarters was, in the Tribunal's view, inconsistent with what was negotiated. However, breach of contract, or conduct inconsistent with a contract does not necessarily amount to discrimination on the ground of sex. The three members of the group were treated in the same manner, and the decision to re-locate them in

the single person's quarters seems to have been dictated by the pressure for accommodation during the racing week.. In the circumstances of the present case, the Tribunal considers that this aspect of the complaint has not been substantiated.

The second main issue concerns the control of the workplace. In the present case the respondent by its manager is obliged by the provisions of the Liquor Licensing Act to take action to prevent disorderly conduct. The Licensee of premises is not necessarily liable for the actions of patrons but the question in the present case is whether in failing to intervene the Respondent by its manager and staff acted in a discriminatory manner.

The Tribunal considers that the Sunday evening incident did occur in circumstances described by Shirley Smith and that a person of the opposite sex would not have been subjected to treatment of that kind. The element of sexual innuendo contained in the story told, and in the subsequent discussion concerning the copper work above the bar, was conduct which was aimed at and in fact embarrassed the Complainants, and meant that they received less favourable treatment in the course of performing their contract of employment than would have applied in the case of a male employee such as Trevor Gibson.

As to the first Wednesday evening issue, the Tribunal is satisfied on the balance of probabilities that the lewd act involving a skimpy bar maid described by the

Complainants did occur. The Tribunal considers that the Complainants can be relied on in regard to the description they gave. The evidence to the contrary consists of testimony by a number of witnesses which the Tribunal has reason to doubt. The Tribunal also notes that the evidence given by the Complainants is not necessarily excluded by the documentary records. The payroll summary contains reference to at least two additional female staff members that could have been on the premises on the night in question. In that regard, in particular, the Tribunal notes that one of the additional names which occurs in proximity to Karinna Bekker's name on the payroll received payments broadly corresponding with payments made to Karinna Bekker. In addition, Mr Stevenson conceded under cross-examination that extra staff were employed in all areas of the premises that night and such an admission does not sit comfortably with contrasting testimony that those in the bar in the night in question consisted only of Andrew Sparkes, Karinna Bekker and Fiona Keane.

The Tribunal is also satisfied that the events that are the subject of the second Wednesday evening issue happened in the manner described by the Complainants. The testimony of the Complainants is corroborated to a certain extent by the evidence of Trevor Gibson, but, in any event, the Tribunal accepts the Complainants as witnesses of truth. That being so, members of the Tribunal feel obliged to note in passing that the graphic nature of the description given by the Complainants and the lewdness of the acts complained of leave the Tribunal

convinced that the Complainants were deeply affected by the grotesque nature of the disorderly conduct. It is no answer to such a complaint to suggest, as Trevor Gibson insisted, that musicians on the pub scene should be expected to put up with any form of disorderly conduct no matter how extreme.

The Liquor Licensing Act clearly contemplates that disorderly conduct should be discouraged and that licensees must manage their premises accordingly. Further, and in any event, there must obviously be some forms of misconduct which exceed the bounds of tolerance, and this would be recognised by most musicians. Both of the Complainants were competent and experienced musicians, and it must obviously have come as a rude shock to them, as it would be to any performer, to find that, due to the indifference of the management, they were relegated to the status of women obliged by circumstance to put up with having money for sexual favours thrust at them in an atmosphere close to violence.

The Tribunal also accepts that the Complainants, after they had composed themselves, raised the matter of grievance with Andrew Sparkes. They conveyed to him the degree of their shock and upset and described the exact nature of what they were complaining about. The Tribunal accepts further that Mr Stevenson was under no doubt about the substance of the allegation, having been informed both by Sparkes and the Complainants themselves as to the general nature of the grievance. The Tribunal finds, however, that Mr Stevenson treated the complaint with brutal

indifference. He failed to make any proper inquiry and refused to take any action. This emerges from the evidence of various witnesses and from his own admission. It was at that moment, after he had been summoned from the restaurant by Mr Sparkes, that the discriminatory conduct occurred. The management was not necessarily responsible for misconduct by patrons but it was obliged to exercise appropriate managerial control, and this Mr Stevenson failed to do. Mr Sparkes had clearly brought Mr Stevenson in to exercise his final authority in regard to unwelcome sexual conduct directed at the Complainants but Mr Stevenson refused to act. The Tribunal is satisfied that this constitutes discriminatory conduct. Owing to the neglect of management the two female Complainants were required to work in an environment which proved to be hostile to them because of their sex. Thus, in the circumstances, they were treated less favourably than a person of the opposite sex would have been treated.

A similar finding follows in regard to the events of the next morning. The Complainants approached Mr Stevenson in a conciliatory mood but were rebuffed without any real attempt being made to understand the nature of their concern or to take steps to attend to their reasonable requirements as female singers working in a rowdy and predominantly male public bar. They were dismissed in circumstances that would not have applied in the case of a member of the opposite sex, and this is partly evidenced by the fact that Mr Stevenson was prepared to continue with the employment of Mr Gibson. The Tribunal finds support for its various findings in

the fact that when Mr Vosseveldt from De Bernales Tavern tried to raise the matters in issue with Mr Stevenson he was brushed off. This corroborates the evidence of the Complainants that Mr Stevenson was indifferent to the Complainants' concerns, both on the Wednesday night and the Thursday morning, and supports an inference that he failed to exercise proper managerial control in a way which worked to the disadvantage of the two female members of the band.

Thus, in summary, the Tribunal is satisfied discriminatory conduct occurred in regard to the manner in which the employment was controlled being an issue which embraces both the Sunday evening issue and the first and second Wednesday evening issues, and discriminatory conduct also occurred in regard to the circumstances of the dismissal. The question then arises as to the nature of the relief to which the Complainants are entitled.

Relief

As to the claim for general damages to compensate for non financial loss or injury, although it has been generally accepted that for purposes of assessment of damages discrimination cases should be treated as species of tort, it would be wrong to take a too pedantic or technical an approach. It is now well established for example, that the proper scope of awards under anti-discrimination legislation is both different in nature from, and much wider than, the scope of damages awards and torts. Perhaps the most obvious area in which this is apparent is that of

humiliation, emotional distress (falling short of nervous shock), embarrassment, hurt feelings and the like. See Alders International Pty Ltd v. Anstee (1986) EOC 92 - 157. It is important that awards compensating for injured feelings should not be minimal because that would tend to trivialise or diminish the respect for public policy Hall v. Sheiban Pty Ltd (1989) EOC 92 - 250.

These principles were recently affirmed by the Supreme Court in this state in MTT v. McCarthy (1993) EOC 92-478; 92-546 although the Tribunal notes that according to the court in that case, it is important that the Tribunal look in detail at evidence bearing on the question of what is an appropriate award of damages to compensate for loss of the kind addressed by the statutory provisions.

As with any other loss or injury, compensation will be recoverable where and to the extent that loss of injury shown to be caused by the wrongful act and is sufficiently proximate to it. See Erbs v. The Overseas Trading Corporation Pty Ltd (1986) EOC 92 - 181; Allegretta v. Prime Holdings Pty Ltd (1991) EOC 92 - 364.

In the circumstances of the present case the injury was severe. The Complainants were subjected to traumatic events, without intervention by the responsible party, which clearly amounted to a form of abuse. That injury was compounded when the respondent by its manager Mr Stevenson simply brushed aside their reasonable

requirements that he intervene and told them to put up with it. In the case of the singers with a professional background as musicians it must have been additionally humiliating to find themselves treated as people without status who were obliged to endure any level of disorderly conduct or sexual abuse. The humiliation was then compounded the following day when Mr Stevenson, although offered a chance to make amends, simply brushed them aside and sent them packing. It is quite clear from the evidence touched on above that the combination of these circumstances had a severe effect on the Complainants and their personal lives and interfered with their ability to pursue their careers.

The Tribunal has already referred to lost earnings. The schedule presented by the Complainant referred to total cancelled earnings of \$3,528.00 each in respect of actual bookings. Reference was also made to projected earnings for this period of \$20,000.000. It has to be recognised, however, that when one examines the causal link between what happened in Kalgoorlie and the future of Soul Sisters as a band it is difficult to make a precise finding as to how long the band would have stayed together and what its prospects were. Thus, although in reviewing the question of special damages, the Tribunal will accept the figure of \$3,528.00 in respect of each Complainant for cancelled earnings, a degree of estimation is required in respect of projected earnings beyond the cancelled bookings. A figure of \$11,000.00 (which includes the sum of \$3,528.00 in respect of cancelled earnings) is thought to be the appropriate measure of compensation.

In the circumstances of this case, then, the Tribunal considers that each Complainant should receive the sum of \$8,000.00 by way of general damages, and the sum of \$11,000.00 in respect of special damages, making an award of \$19,000.00 to each Complainant.