

EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

Matter Number: 24 of 1995

IN THE MATTER OF A COMPLAINT BY:

Ms S

Complainant

- against -

M

&

Mr P

Respondents

JUDGMENT

BEFORE:

Ms C O'Brien

Deputy President

Ms R Kean

Member

Mr D Forster

Member

Counsel for the Complainant

Ms H Andrews

Equal Opportunity Commission

Counsel for the Respondent

Mr A Hosken

A J Hosken & Co

HEARD:

20/10/95, 11-14/3/97, 3/4/97, 8-10/4/97

REASONS FOR DECISION:

(Delivered: 10 July 1997)

[All statutory references are to the Equal Opportunity Act 1984 (as amended)]

INTRODUCTION

In 1991 the second respondent "Mr P", Mr Nigel Williams ("Mr Williams") and Mr Saharil Amat ("Mr Amat") went into partnership and operated a metal spraying business. Later the first respondent company, called Mining & Industrial Metal Spraying Pty Ltd, was incorporated and the three men became directors of the company.

The complainant was employed by the company from August 1991 until February 1994. The complainant worked in the office attending to book keeping and other administrative duties.

The complainant alleges sexual harassment and, further or alternatively sex discrimination in employment and victimisation against Mr P. The allegation against the company is that it is vicariously liable for Mr P's actions.

In essence, the complainant alleged that from approximately August 1992 until February 1994, Mr P actually undressed in the office in her view, often to the point of being naked. The complainant alleged that she complained about Mr P's conduct to a number of people but most frequently to Mr Williams. As a result of those complaints it is said that steps were taken in an attempt to ensure that Mr P did not change his clothes in the complainant's presence but these attempts proved fruitless.

The complainant alleged, that notwithstanding her objections voiced to Mr Williams, Mr P's conduct not only continued but intensified. Eventually, this came to a head on 16 February 1994 when the complainant and Mr P had an argument resulting in the complainant leaving the office and making a complaint to the police. The complainant did not return to her employment thereafter.

The complainant knew Mr Williams before being employed in the business. Initially, she was employed on a part time basis and later became full time. Basically, her duties were to attend to the accounts of the business and to other tasks of a clerical nature. The operational activities of the business, such as the metal spraying, were conducted in the workshop adjacent to the office.

Initially, the business was located in Sheffield Road in Welshpool. The complainant worked in those premises for about 5 or 6 months before the business moved to larger premises at 73A Division Street, Welshpool. The business moved again, around Christmas 1992, or early 1993, to premises next door at 73B Division Street, Welshpool.

In all locations, there was an office wherein the complainant worked and an adjacent workshop wherein the metal spraying was done. The Tribunal shall describe the premises in more detail later.

Suffice to say that employees of the company, the directors and members of the public had access to the office or to the reception area wherein the complainant worked in all three premises.

THE BASIS OF THE CLAIM

1. Sexual Harassment

In her points of claim, the complainant alleges that between August 1992 and 16 February 1994, Mr P subjected her to sexual harassment contrary to s.24 of the Act. The particulars are outlined as follows:

- (a) Mr P frequently undressed in his office and the complainant saw him naked on about a monthly basis.
- (b) On at least one occasion he stood next to her desk with his overalls unbuttoned so that his pubic hair was exposed.

Further, as a result of taking objection to the conduct, the complainant alleges that she was disadvantaged in connection with her employment in that Mr P -

- (i) undressed more frequently;
- (ii) became increasingly impatient towards her;
- (iii) endeavoured to persuade the other directors to terminate her employment (s.24 (3)(b)).

2. Sex Discrimination

Further or alternatively, the complainant alleges that the company, through the actions of Mr P, discriminated against her on the ground of her sex by treating her less favourably than he would treat persons of the opposite sex in the terms and conditions of employment it offered her and/or by subjecting her to a detriment contrary to s.11.

The complainant repeats the particulars as outlined in relation to the allegation of sexual harassment.

The complainant also alleges that Mr P caused, instructed, induced, aided or permitted the company to unlawfully discriminate against her on the ground of her sex (s.160). That allegation is particularised as follows:

- (a) Mr P is a director of the company;
- (b) it was his behaviour which constituted either the sexual harassment or sex discrimination;
- (c) he failed or refused to desist from the behaviour when asked to do so.

3. Victimisation

Further or alternatively, the complainant alleges that Mr P and the company victimised her contrary to s.67 of the Act. She particularises that allegation as follows:

- (a) the complainant made allegations that Mr P did an act that was contrary to the Act;
- (b) the complainant repeats the particulars outlined above in relation to sexual harassment.

The complainant further alleges in her points of claim that by reason of the sexual harassment and/or sex discrimination and victimisation, she has suffered loss and damage. In particular, she pleads that she suffered financial loss and humiliation and injury to her feelings.

THE COMPLAINANT'S VERSION OF EVENTS

The complainant testified that sometime in August 1992, when the business operated from the premises in 73A Division Street, she approached Mr P's office to give him a message. The door was open and Mr P was in the process of changing his clothes. He had one leg into his overalls but did not have any other clothes on.

The complainant testified she was "a bit shocked", but, on reflection, considered it to be an accident.

The complainant mentioned the incident to Mr Williams. According to the complainant, Mr Williams undertook to speak to Mr P and had indeed asked him to either close the door to his office when he was changing or alternatively to use the men's toilets as a place in which to change. The complainant said that Mr Williams told her that he had spoken to Mr Amat about the incident as well.

The complainant does not rely on the incident at 73A Division Street as part of her case for sexual harassment. She considered it to be carelessness on Mr P's part that she saw him nude.

In January or February 1993 the business moved to 73B Division Street, Welshpool.

The premises at 73B Division Street comprised an open plan office area, part of which was allocated as a reception area and part of which contained the working desks of the three directors. A larger workshop area had a common wall with the reception and office areas. The toilets and lunch room were located with a common wall to the reception area. To reach either of these areas it was necessary to walk through a door at the rear of the reception area and then through the workshop. The workshop was located to the rear of the office area.

Initially, the complainant's desk was positioned in the reception area just inside the glass front door. There was a wall of windows along the entire length of the office area, facing a car park and a road beyond.

When the complainant's reception desk was located just inside the front door, she was able to see Mr P's desk which was directly in front of her. Alongside Mr P's desk was Mr Williams' desk. Mr Amat's desk was located on the rear wall of the office in the same area as the other two desks.

The complainant said that initially, there was no partitioning between her desk and Mr P's desk. However, there was possibly a chest of draws and a photocopier between the two desks. In any event the complainant testified that she had a clear view of Mr P's desk.

The door to the workshop was mostly closed as there was a lot of noise and dust from the metal spraying machines. Up to four people including the directors were employed in the workshop area.

The complainant testified that customers would generally enter the workshop in order to drop off or pick up equipment needing to be sprayed. She said they "very rarely" came into the office. Mr P would come into the office on numerous occasions during the day as would Mr Williams. However, Mr Amat would not visit the office as much as the other two directors as he was more often working on the machines in the workshop.

The complainant said that Mr P would change his clothes at his desk directly in front of her. He would take his clothes off, put them on his chair then put on a T-shirt and overalls. If he was changing out of his dirty clothes he would leave them in a heap on the floor by his desk. He did not wear underwear and he did not tell the complainant that he was about to change.

The complainant said that when Mr P changed in the office she got up and walked away and into the workshop. If Mr Williams was around she would tell him what was going on and ask him to put a stop to it. She testified that as far as she was aware Mr Williams then went and spoke to Mr P about his habit of changing, telling him that the complainant was unhappy and uncomfortable with the situation. She said that she did not speak to Mr Amat personally but Mr Williams told her that he had spoken to Mr Amat about Mr P's habit of changing his clothes in the office.

The complainant said that Mr Williams attempted a solution to the problem by purchasing some lockers which were set up outside the men's toilets. This was about 6 months after the company moved to 73B Division Street. The complainant said that Mr P was advised of the reason for the lockers being purchased but that he did not alter his habit of changing his clothes in front of her.

Accordingly, the complainant said that she moved her desk from the area just inside the front door, diagonally across the reception area to a place adjacent to the door leading to the workshops. She then placed a line of filing cabinets alongside her to form a barrier between her desk and Mr P's desk.

Despite doing this, Mr P continued to change his clothes in the office. She was unable to see him over the filing cabinets if he was at his desk and she was seated at hers. However, on occasions, it was necessary for the complainant to use the photocopying machine near Mr P's desk and also to place various documents or message on the directors' desks. On these occasions, she was able to see Mr P change his clothes.

On one specific occasion the complainant said that Mr P approached her desk in his overalls. The overalls were unbuttoned and she could see his pubic hair.

She said that as far as she was aware Mr P did not change his clothes in front of any other people in the office.

The complainant testified that when this behaviour went on in 73B Division Street she thought it was directed at her personally and that it was "some sort of attack" on her. She said she was quite intimidated by the behaviour, that her heart would pound and she would become hot and flushed. The complainant testified that the changing in front of her would occur about once a week.

At one time, a woman worked in the office on work experience for a couple of months and the complainant said during that time she did not see Mr P change his clothes in the office.

Generally, Mr P's attitude towards the complainant was "fine" but at other times the complainant felt that Mr P resented her because she felt that he would prefer to have been in the office doing her work himself. She said that he was moody; at one minute he was "okay", and the next, he was antagonistic towards her.

The complainant did not believe her own work performance was an issue. She said that Mr P only spoke to her on one occasion about her work. This appears to have been at 73A Division Street. It is not necessary to recount the details of that incident as the Tribunal is of the view that it has no impact one way or the other the issues to be determined. Suffice to say that apart from that particular incident the other directors were always pleased with the complainant's work and told her so.

The complainant said that after July 1993 she thought about leaving her job at the company. She said that she was unable to deal with Mr P's conduct any more. She spoke to Mr Williams about it and she found him to be sympathetic. However, he told her that Mr P was thinking of selling his share and that it might be worth staying until the transfer was completed.

The complainant never complained directly to Mr Amat. She found it difficult to communicate with him because of "his religion" - he is a Muslim.

In late 1993 Mr David Coombes joined the business as an employee. After a short time he showed interest in buying into the business. Mr Williams then offered his share for sale. When it became clear that Mr Coombes wanted to buy a share of the business and the complainant spoke to him about Mr P changing in the office.

She spoke to Mr Coombes together with Mr Williams. She said that Mr Coombes was shocked but supportive and she got the feeling that Mr Coombes would do his best to stop the behaviour but that he would be in a better position to do so when he had become a director of the company. The complainant recollected that she spoke to Mr Coombes in January 1994 although it could have been earlier. The complainant said that Mr Coombes told her that he had spoken to Mr P after work about his habit of changing his clothes in the office but that Mr P had shrugged his shoulders and walked off.

After her complaint to Mr Coombes, the complainant said that Mr P's behaviour got worse. She recalled speaking to Mr Coombes on a Friday and it was on the following Monday that Mr P undressed before her on four occasions before midday. She thought that he was asserting his power over her, his behaviour being a way of showing her that he could do what he wanted to do, and that she would, in effect by his actions, suffer the consequences of complaining about his behaviour.

On Monday, 7 February 1994 the complainant contacted the Equal Opportunity Commission ('the Commission') and was told that Mr P's behaviour constituted sexual harassment and probably a criminal offence. She was advised to contact the police. There is a note to this effect in the complainant's diary dated 7 February 1994.

The complainant testified that she made a complaint to the police. She was accompanied by Josephine Houlahan who worked in the premises next door. This complaint appears to have been made in early February 1994. The complainant's diary note records it as being at 4pm on 7 February. The complainant said the police advised her to make a note of any further incidents in her diary. The police also told her to take a photograph of Mr P when he was undressed and offered to provide a camera for that purpose. After complaining to the police there were at least two other incidents, one of which she said she noted in her diary. Her diary records that at 8.15am on Friday 11 February Mr P "*again got undressed in the office - absolutely naked. I advised Mr Coombes and Mr Williams immediately*". There was no evidence of when the diary entries were actually made.

The tension between the complainant and Mr P came to a head on 16 February 1994. Mr Amat and Mr Coombes were out of the office and Mr Williams was on holidays. The complainant said that Mr Coombes had by then purchased Mr Williams' share in the company and Mr P had bought Mr Amat's shares. Mr Williams and Mr Coombes had told the complainant that telephone calls from customers should be put through to Mr Coombes so that he could familiarise himself with the company's clients. Further, Mr Williams and Mr Coombes told the complainant to stop personal calls regarding a Citroen Car Club being put through to Mr P.

The complainant said that Mr P approached her desk in an irate state at about 9 or 9.30 on that morning. He complained about the complainant stopping business calls being put through to him. She attempted to explain the discussion she had had with Mr Coombes and Mr Williams. However, she said that Mr P became very aggressive, called her a liar, said that she was being surly towards Mr Amat and him and became verbally abusive. The verbal abuse included an expression of disgust about Mr Williams and the complainant and he commented that she was "dirty". The complainant said that she did not know what Mr P was talking about and was trying to calm him down.

At one point during the heated discussion the complainant said to Mr P *"you're the one that has been undressing and you know it upsets me. Why wouldn't you stop?"*. The complainant said Mr P's retort was *"You just like to watch... you shouldn't be looking"*.

The complainant said the situation was totally out of control and she indicated to Mr P that she had "dobbed" him in. She then got her handbag and ran to the premises next door. She was sobbing and telephoned the police and Mr Coombes, who was visiting a client out of the office.

The police attended the office and spoke to Mr P and Mr Coombes first and then interviewed the complainant.

The complainant did not return to work that day but went to see her doctor who gave her a certificate certifying that she was unfit for work.

The complainant again consulted the Commission. She said that she told Mr Williams and Mr Coombes about that and according to her they were very "supportive". This was some time after she left work.

The complainant said that as a result of Mr P's conduct she lost her job and consequently a lot of wages. Further, she was not eating, was having bad dreams and sleep walking, she had headaches and was depressed. She felt unable to return to any sort of work until April 1994 when she commenced to work part time with her father. After 6 months she started full time work.

MR P's VERSION OF EVENTS

Mr P testified that when the business was operating in Sheffield Street there were no problems in the working relationship with the complainant. Mr P denied that the complainant had ever seen him naked when they were working at 73A Division Street. When the business moved and as time went on, Mr Williams and the complainant formed a very close relationship. Mr P described there being two power blocs in the business, with the complainant and Mr Williams forming one, and he and Mr Amat forming the other. Indeed, Mr Williams described his relationship with the complainant as "excellent" and said his wife referred to them as "soul mates".

When working at 73B Division Street Mr P said that he never stripped naked in the office when the complainant was there. On occasions he would change his clothes and be naked but this was always in the change room and never in the office. Further, he contended that there was never anyone else around - it was on weekends or after hours. He said that he was too embarrassed even to be naked in front of Mr Williams. Indeed, other witnesses called on Mr P's behalf who worked with him denied ever seeing Mr P naked at work.

Mr P said that he would come to work wearing working pants or jeans and a shirt. On arrival he would take off his shirt and place it over his chair at his desk. He would then change into a T-shirt from a supply he kept at the office and then pull his overalls over his work pants and T-shirt.

On extremely hot days, Mr P said he would not wear anything under his overalls especially if he was metal spraying. He estimated that this would occur about 10 days a year. He said that for most of the year he would wear his overalls over his long work pants or jeans. On those rare occasions when he did not wear his jeans under his overalls, he changed behind his desk and occasionally in the staff room. There were occasions when he would only be in underpants and T-shirt but he always made sure that the complainant was not in the vicinity when he changed.

At night after work had finished, Mr P said that he would take his overalls off and put his shirt back on. He would leave his overalls beside his desk on the floor. There were occasions when he would change from his work clothes to "street clothes" which he kept in one of the lockers.

Mr P did not think that the complainant could have seen his pubic hair as he leaned over her desk as she described. He said that there were times when he had to come into the office to answer the phone or work at his desk. In order to protect his chair, he rolled down the top half of his overalls so that the clean inside area would be against the chair. He vehemently denied ever taking his clothes off in front of the complainant or anyone else in the office area or at all.

Mr P said that Mr Williams and Mr Amat spoke to him about leaving his clothes around the office. He recalled that Mr Williams mentioned this when they were working at 73A and 73B Division Street and recalled that Mr Amat mentioned it to him at 73A Division Street. There were never any complaints or any conversations about him changing his clothes in the office and certainly no one ever mentioned to him that the complainant was upset about him being naked in front of her.

Mr P said he did not change his ways as a result of being spoken to as he considered the complaint to be trivial. He never spoke to the complainant about the complaints that she had apparently made to Mr Williams.

Mr P said that in the two or so weeks leading up to 16 February 1994, he noticed that telephone calls were not being put through to him by the complainant. On 16 February he was in the office and heard the complainant say to a telephone caller that there was no one in the office. He confronted her about what she had said. A heated exchange followed. Mr P said he was not happy with the complainant's manner. The complainant, in turn, accused him of buying Mr Amat's share behind Mr William's back. There were various other matters raised but both Mr P and the complainant experienced difficulty in recalling exactly what was said and the sequence of the conversation.

Mr P denied that the complainant was crying and said the conversation ended when he left the office area. He denied making any reference to the relationship between the complainant and Mr Williams and denied alleging that they were having an affair.

Mr P said that the police came to the office later in the day and put the complainant's allegation to him and he denied it. He said that the police were very sceptical and very aggressive. Neither police officer took notes. They spoke to Mr Coombes and then left.

Mr P testified that he is a practising homosexual and that the complainant had no attraction for him whatsoever. He conceded that his sexual preference had nothing to do with the issue and that it would be offensive for him to change into the nude in front of the complainant regardless of sexuality.

THE LAW

It is trite law that in cases before the Tribunal the burden of proof is on the complainant, the standard of proof being the balance of probabilities. Section 5 provides that a reference to the doing of an act by reason of the particular matter includes a reference to the doing of an act by reason of two or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act.

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 relevantly, as a result of the other person's taking objection to the conduct, the other person is disadvantaged in any way in connection with the other person's employment.

As to the principles applicable to sexual harassment, the Tribunal adopts without repeating it the analysis of this Tribunal in the case of *Ashton and Wall and Beechers Pty Ltd* No.4 of 1991 delivered on 10 July 1992 and in particular at pp51-60 of the unreported decision.

If in this case the Tribunal was satisfied on the balance of probabilities that Mr P undressed in front of the complainant to the point of being naked or that she, believing that he was about to undress, left the office, then this would constitute sexual harassment. The issue of Mr P's sexual preference is irrelevant in the context of this case as Mr P was in a position of power in relation to the complainant and was exposing his genitals, according to the complainant, with the intention of offending her and did in fact offend her.

By section 11(2) it is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, relevantly, by subjecting the employee to a detriment.

By section 8(1), a person ("the discriminator") discriminates against another person ("the aggrieved person") on the ground of the sex of the aggrieved person if, on the ground of (relevantly) 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.

It is clear from the case of *O'Callaghan v Loder* (1984) EOC 92-023 that sex discrimination can constitute sexual harassment. The Tribunal decides that, if the complainant's version of events is believed, that as a matter of law, Mr P's conduct would constitute sex discrimination.

Section 67(1)(f) makes it unlawful for a person ("the victimiser") to subject another person to any detriment on the ground that person victimised, relevantly, has made an allegation that a person has done an act that is unlawful by reasons of a provision of Part II, III or IV. It is not necessary in order to prove victimisation to expressly assert a statutory right with reference to the Act. It is sufficient that what was asserted was an objection to something happening but which was in fact unlawful under the Act (*Horne and Anr v Press Clough Joint Venture and Anr* (1994) EOC 92-591; *Regan v Kalgoorlie Taxi Car Owners Association (Inc)* (1996) EOC 92-644). In this case, it would be sufficient in order to prove victimisation that the complainant had complained to one or more of directors about Mr P's alleged conduct and that as a result, she was subjected to a detriment.

However, pursuant to s67(2), subsection (1)(f) does not apply if it is proved that the allegation was false and was not made in good faith.

The complainant alleges that the company is vicariously liable for the conduct of Mr P. Section 162 provides that:

"where, for the purposes of this 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 the body corporate in the matter so acted on that ground.

Section 161 of the Act makes an employer vicariously liable for the actions of its employees or agents. It was submitted on behalf of the complainant that Mr P was acting as an agent of the company. It is said that because he was a director of the company at the relevant time, he was its agent and accordingly the company was responsible for Mr P's actions.

It is also said that Mr P is personally liable for any proved unlawful conduct pursuant to section 160 . However, the Tribunal does not consider that it is necessary for the complainant to rely on this section. Indeed, we cannot see that in the circumstances of this case it applies in any event.

FINDINGS

The primary issue in this case is whether the complainant's account of Mr P's behaviour is accurate and true. There was much evidence called at the hearing which the Tribunal finds to be irrelevant in making a decision about the primary issue. For example, evidence which the Tribunal did not find particularly helpful included evidence as to the company's policy in relation to birthday gifts to the staff; the use of fuel cards by staff; repairs done to the complainant's car at company expense; loans made to the complainant to finance a rental bond; the complainant's use of an upstairs area at 73A Division Street as a residence for some time; the presence of "bikie" magazines in the office which contained photographs or illustrations of naked people; the complainant accidentally viewing Mr Williams' genitals as he climbed a ladder; and the complainant's manner on dress of one occasion which apparently offended Mr Amat. This evidence did however, help the Tribunal to understand the workplace environment of both the complainant and Mr P.

The Tribunal was impressed with the manner in which both the complainant and Mr P gave their evidence. Each was articulate, each appeared to have a clear recollection of events and each was equally adamant that their versions of events were true. However, the Tribunal found the evidence of the other witnesses to be most helpful in deciding which version of events to accept. There were several significant areas of evidence which persuade the Tribunal that the complainant's evidence about Mr P undressing in front of her in both the manner alleged, and the frequency thereof, is not credible.

Before considering these areas of the evidence we refer to the evidence of two psychiatrists.

There was evidence from Dr Chiu who saw the complainant after she was referred by her own general practitioner. Dr Chiu saw the complainant primarily for therapeutic reasons, that is, to treat the various systems with which she presented. He was of the view that she was suffering from post traumatic stress syndrome as a result of Mr P's behaviour. Another psychiatrist, Dr Mustac, who was called by Mr P to counter the evidence of Dr Chiu, saw the complainant once, took a history from her and caused certain computerised psychological tests to be performed. He saw her at the request of the insurer who was investigating her claim for workers compensation. Dr Mustac disputed the diagnosis of post traumatic stress syndrome.

The Tribunal does not intend to refer to the psychiatric evidence in any more detail. We consider that even if we accept Dr Chiu's diagnosis of post traumatic stress syndrome, his evidence does not cause us to doubt the findings we have made about the complainant's credibility after considering all of the evidence of the complainant, the evidence of Mr P and that of the other witnesses whose evidence touches on objective facts.

We now address the evidence which we consider impacts on the complainant's credibility:

Complaints by the Complainant about Mr P

There was evidence from many witnesses concerning complaints the complainant made about Mr P's conduct. The Tribunal found this evidence conflicting and confused. For example, Mr Williams' wife was called as to a complaint made by the complainant about Mr P's behaviour. However the complainant gave no evidence of such a complaint. Other more significant areas of conflicting evidence are outlined below.

In the criminal jurisdiction, on the prosecution of a sexual offence, evidence of the complainant that he or she complained of the conduct at the earliest reasonable opportunity, is admissible on the issue of the complainant's credibility. It can never amount to corroboration of the conduct the subject of the charge and it is not evidence of the truth of the complaint. The evidence is relevant because it is said to show consistency of the complainant's behaviour with his or her present testimony (*R v Lillyman* [1896] 2QB 167 at 178); *Kilby v R* (1973) 129 CLR 460 at 466). In this case, it is debatable as to whether the conduct complained of, if proved, would constitute a criminal offence. However, the Tribunal is of the view that the evidence by the complainant of complaints made after each incident and her evidence of complaints to a number of people is relevant to her credit as it is capable of showing consistency in conduct. The evidence of complaint is relevant only to the extent that in the ordinary course of events, one would expect that complaints would be made to someone given the behaviour alleged. However, for example, if her complaints varied in substance from person to person, or if the persons to whom she said she complained did not confirm the fact of complaint or the substance of it, then these are matters which the Tribunal can properly take into account when assessing the credibility of the complainant's evidence.

We acknowledge that there will be occasions when complaints are not made about such behaviour for a variety of reasons. For example, the complainant might have a fear of reprisals, be embarrassed, have a desire to deal with the matter privately and so on. However, apart from not confronting Mr P directly about the matter, the evidence of the complainant was that she complained to numerous people about Mr P.

As the complainant alleged that Mr P's conduct happened over 15 or more months, it might be expected that ordinarily someone in her position might confront Mr P about it or at least express disapproval of it to him in some meaningful way. The complainant testified that she did not confront Mr P about his behaviour because of the effects on her of an incident, unconnected with Mr P, which occurred when she was 15 years old. The Tribunal will not detail the evidence of that incident as it ordered that this section of the evidence not be published due to its intimate and sensitive nature.

In view of other more compelling evidence which persuades the Tribunal not to accept the complainant's version of events, we do not need to resort to a consideration of why no complaint was made to Mr P by the complainant. She did say, however, that every time Mr P undressed in front of her she got up and left the office making it clear to him that she was not happy.

The complainant said that on each occasion that Mr P undressed in front of her she complained to Mr Williams and he told her that after each complaint that he had raised the matter with Mr P. She said that Mr Williams was sick of her being hurt by Mr P's behaviour. She also said that she told Mr Coombes about Mr P's conduct and made it clear to him that when Mr P changed in front of her he was in the nude. She said she told Mr Coombes about the matter before he bought a share in the business because she was concerned about him doing so without knowing that Mr P was undressing in front of her. Mr Williams and perhaps one other person was with her when she spoke to Mr Coombes.

Mr Coombes said that the complainant made a comment about Mr P changing in the office but never mentioned him being naked. He said that Mr Williams had mentioned that he had had words with Mr P about his changing but again there was never any reference to nudity. Mr Coombes said that he politely suggested to Mr P that he change his clothes where everyone else changed, namely in the area of the lockers or in the toilets.

There is a note in the complainant's diary for 7 February 1994 to the effect that Mr P "again got undressed in the office - absolutely naked" and that she immediately told Mr Coombes and Mr Williams. Again, the fact that Mr Coombes' evidence does not support the note in the diary causes the Tribunal not only to suspect the correctness of the diary entries but also to doubt the complainant's evidence that she complained to Mr Coombes about Mr P being naked.

Mr Coombes recalled one incident when the complainant came to him in the workshop and said "he's doing it again". He did not know what the complainant was talking about but investigated the issue as it appeared that she was upset. He immediately went into the office and found Mr P sitting at his desk talking on the telephone with the top of his overalls down. It is clear that the complainant must have been complaining about the state of his overalls and not Mr P undressing in front of her, as according to Mr Coombes, there was not enough time for Mr P to have dressed before he went into the office from the workshop.

The Tribunal uses this evidence to support its view that the complainant disliked intensely Mr P's habit of rolling down his overalls in the office. However we find her dislike was directed at the untidiness of the habit and at his leaving his dirty clothes in the office area.

Mr Amat said that the complainant never complained to him that Mr P was stripping naked in front of her. He said that if that happened he would call the police. He said that Mr Williams told him that the complainant was complaining about Mr P leaving his filthy work clothes in the office. Mr Williams never mentioned that the complainant's complaint was about Mr P undressing in front of her. He said that he never spoke to Mr P about it.

There was evidence from Mr Coomb's wife of a meeting at the complainant's house at which Mr Coombes, the complainant, Trevor Grieves and herself were present. At this meeting, Mr Coombes asked the complainant if Mr P had actually appeared nude in front of her and she had said emphatically "No". Under cross examination Mrs Coombes said she was absolutely certain of this. This meeting was sometime after 16 February 1994.

The complainant has been in a relationship with Trevor Grieves for 5 years and started living with him shortly after the events of 16 February 1994. Mr Grieves testified that the complainant complained to him about 2 or 3 times about Mr P's undressing in front of her. In both his evidence in chief and in cross examination, he made no mention at all that the complaint was about Mr P being naked in front of her. It was only when pressed by the Tribunal about what the complainant had actually said to him that Mr Williams said that the complaint was that Mr P was basically stripping naked. That he did not volunteer that aspect of the complaint causes the Tribunal to doubt whether in fact the complainant did make such a specific complaint to him.

When questioned by the Tribunal as to whether the complainant offered any explanation to Mr Grieves about Mr P's behaviour, he said that she did say that Mr P did not want to get changed in the other areas because it was dirty and that he wanted to get changed in the office. Later on, she said she thought that Mr P did it to provoke her, that it was something that he been asked not to do and he continued to do it as a provocation towards herself.

Mr Grieves said they discussed ways of dealing with the problem. However, he was very vague about what was discussed. The Tribunal finds it unusual to say the least that if the conduct continued for such a long time and with such frequency and was so upsetting for the complainant that her complaints to her boyfriend were not more specific especially given the complainant's account of the increase in Mr P's behaviour after her complaints to Mr Williams. Overall, the Tribunal did not find Mr Grieves' evidence as being particularly supportive of the complainant's allegations.

Mr Williams was called to support the complainant's case. He said that the first complaint about Mr P was when the business was operating from 73A Division Street. However, the complainant had brushed it off as a misunderstanding or mistake. Mr Williams said he spoke to Mr P about keeping his door shut or changing in the toilets. Mr P's response was to the effect that he would try to do something about it. He was asked whether the behaviour stopped and Mr Williams said he did not think it did as "clothes were still strewn about the office". That indicates to the Tribunal that the complaint was more focused on the untidiness of changing in the office and leaving clothes around. Mr Williams also made mention of smelly socks and untidiness and the need to take customers into the office area. When questioned by the Tribunal, he said that there were two aspects to the complaints. One was that Mr P was exposing himself and the other was the unsightliness of clothes left around the office.

Mr Williams said that when they moved to 73B Division Street the complainant continued to complain. The complaints were that Mr P was still removing his clothes or entering the office with his overalls down by his waist or sitting at his chair with his overalls down around his waist at his desk which was then in full view of the complainant.

He said that "at the first stages" the complainant did not complain about anything other than Mr P wearing his overalls down by his waist.

When asked if the complainant made further complaints, Mr Williams said that one of them was that Mr P would come up to her desk, lean forward and she was able to see that he had nothing on under his overalls. It was then that he decided to tell Mr Amat about the matter as he thought that his fellow director might be able to deal with the situation.

Mr Williams said that there were further complaints about Mr P undressing or approaching the desk in his overalls. He said that he didn't speak to Mr P but decided to install the lockers instead. He then spoke to Mr P about using the lockers. However the complaints continued.

Mr Williams' evidence was not very convincing. He was vague and uncertain. When pressed by the Tribunal he said that the complaints were to the effect that there was a risk that when Mr P changed in the office, the complainant could have got up, walked around the filing cabinets and seen him naked. As well, there was the complaint about Mr P standing over her with his overalls unbuttoned. Then he said that she complained that she had walked around the filing cabinets and had actually caught him undressing.

Overall, if the complainant's evidence is accepted, given the time over which Mr P's behaviour is said to have occurred, his deliberate provocation, the distress it caused to the complainant and the frequency of her complaints to Mr Williams and their admittedly close friendship, the Tribunal would expect that at least Mr Williams would recall such events in more detail.

Further, the fact that neither Mr Amat nor Mr Coombes said they were never made aware that Mr P was allegedly undressing to being naked, sheds considerable doubt on the complainant's evidence that in fact her complaints were to that effect. We think it more likely that the complainant was upset and irritated by Mr P's habit of leaving his clothes around and wearing his overalls rolled down to his waist and refusing to change his ways even after being spoken to by Mr Williams and Mr Coombes.

She also said that she complained to David Johnson in the neighbouring office about half a dozen times. He was someone she trusted. He was not called to give evidence. Josephine Houlahan said on one occasion (which must have been on 16 February 1994) the complainant came to her very upset and said that she was sick of Mr P, that she kept telling him not to do it (presumably undressing) and that Mr Williams had been telling him not to do it. However, the complainant was quite adamant that she never mentioned her problem to Mr P until the "blow up" on 16 February.

The complainant testified that when she complained about Mr P's conduct, the frequency of his changing his clothes in front of her would increase as if in retaliation for her complaining. In her points of claim she alleged that Mr P also became increasingly unpleasant towards her and that he endeavoured to persuade the other directors to terminate her employment. However, there was evidence from Mr Williams that he only spoke to Mr P twice about his behaviour, from Mr Amat that he did not confront him and from both Mr Amat and Mr Coombes that they never received a complaint about him being in the nude. Indeed, no director confronted Mr P about being in the nude. There was no unequivocal evidence which supported the assertion that Mr P attempted to persuade the other directors to terminate the complainant's employment, let alone in response to objections he made to his alleged undressing in front of her. This is another aspect of the evidence which impacts on the complainant's credibility.

In her evidence to the Tribunal, the complainant testified that Mr P would change his clothes in front of her at times on a weekly basis. However, her points of claim, alleges that it was on a monthly basis. She testified that every time she complained to Mr Williams about the matter, he told her that he would speak to Mr P about it and in fact did so. However, Mr Williams said that he raised the matter with Mr P on only two occasions. Either the complainant has not told the truth about Mr Williams' response to her complaints or Mr Williams has not been truthful with the complainant when he told her that he had confronted Mr P. Whatever the case, it is another reason for the Tribunal to be wary of the evidence of these witnesses.

The Likelihood of Mr P Being Naked in the Office

We confine our consideration of this issue to the allegation which relates to conduct at 73B Division Street as the complainant does not rely on Mr P being naked in 73A Division Street as part of her claim.

There was evidence from a number of witnesses that members of the public, sales representatives, staff members and even family members of staff would come and go through that office area many times a day. People would enter the office area either through the front door or through the door leading into the workshop, often without warning.

The inside of the office was visible through the bank of windows which fronted Mr P's desk, albeit perhaps not absolutely clearly.

The complainant said that before her desk was moved away from the door, Mr P would undress right in front of her. However, he did not do so when any other person was in the office. However, we find that Mr P would not know when people were expected to enter the office area and would be taking a high risk of being caught naked by people other than the complainant.

Given the number of people entering the office, the frequency of the undressing and the 15 months or so this conduct is said to have gone on, it is surprising to say the least that no one else stumbled across Mr P naked in the office or at least in a state of undress that might cause some concern.

Further, the Tribunal assessed Mr P as a man who valued and indeed guarded his privacy and a man who had respect for professional standards of behaviour in the office. The Tribunal cannot accept that he would have risked being caught naked by others in broad daylight in his office. It simply defies belief especially if the complainant alleged that on one occasion after she complained Mr P undressed four times before midday on that day.

It might have been possible that on an isolated occasion that when Mr P was bending over the complainant's desk in his overalls she caught sight of his pubic hair. However, the Tribunal is absolutely satisfied that if this happened, it was not the result of any deliberate action by Mr P but rather occurred in the same accidental way in which the complainant caught sight of Mr Williams' genitals as he was climbing a ladder. On that occasion she was not offended but regarded the incident as a joke.

The Change to the Layout of 73D Division Street

The complainant said that her desk was moved from just inside the front door to across the office so that she did not have a direct view of Mr P. The filing cabinets were erected as a screen between her and Mr P. Under cross examination, she said that the sunlight in the afternoon was a problem with viewing her computer screen but the windows were tinted and matchstick blinds were put up which stopped this problem. She said that Mr P's behaviour, not the problem with the sun prompted the moving of her desk.

However, Mr Williams' evidence was clearly to the effect that there was a dual reason to move the desk. One was to avoid the problem with the sun. The other was so that the complainant could sit with her back to the rest of the office "*so she didn't have to.....view maybe Mr P sitting there with his overalls down by his waist with no top on*". Again, it is significant that this was given as a reason for moving the desk rather than a desire to avoid seeing Mr P naked when changing. If the latter was the reason, then we would expect that it would have been firmly expressed as such by Mr Williams.

Mr P said that the tinting of the windows and installation of the blinds was not entirely successful. Mr Amat also said that the window tinting did not solve the problem of the sun. As well, when the front door was open Mr P said the wind would blow papers off the desk. In his view, the desk was in a bad location. Mr Amat also said that the desk was in an inconvenient position because of the sun and wind problems. When asked by the Tribunal why the desk was moved, he gave those as the reasons.

The Tribunal finds that the desk was moved not so that the complainant could avoid seeing Mr P naked but because it was not conveniently located due to problems with the sun and wind. The moving of the desk might have had a side benefit for the complainant in that she would not have a direct view of Mr P. However, we find that her desire was not to see Mr P sitting at his desk in his overalls and perhaps putting on and taking off his overalls over his other clothes from time to time.

We reject the complainant's evidence as to why her desk was moved. That evidence is one part of a body of evidence which causes the Tribunal to reject the complainant's account of Mr P being naked in front of her.

Rumours

One other aspect of the complainant's evidence supports our assessment of her credibility. She testified that after she left the company she heard a number of rumours about her (for example, that she had had an affair with Mr Williams). She noted in her diary that on 18 February 1994, Mr Williams telephoned her to say that Mr P had started "more rumours" including that she had outstanding loans owed to the company. It is significant that Mr Williams testified in his evidence-in-chief that he did not hear any rumours about the complainant. This causes us to doubt the accuracy and credibility of the diary entry and the complainant's evidence on this.

The Toilets

Mr P testified that he did not change in the male toilets because they were dirty. When questioned about the cleanliness of the male toilets, the complainant said they were not dirty as she was the one who cleaned them. However, Mr P said that he cleaned the toilets generally once a week or some times fortnightly and that they got dirty fairly quickly in between cleans. As well, Mr Williams said that the complainant did not clean the men's toilets, that either the "young lad" or (implicitly) one of the male members of staff would do so. Again, the complainant's evidence is at variance with Mr Williams who was called to support her case.

The Erotic Story

There was evidence that during the period of her employment the complainant entered a competition to write an erotic short story for a magazine. She testified that she requested Mr P to correct the spelling in the story but that she did not give him the erotic section. Mr P said that he was given the whole story.

If the complainant's evidence of the undressing were true and that she was distressed and intimidated by it, we find it very strange that she should request Mr P to spell check an erotic short story. Whilst this evidence is not of great significance in itself, it points to the complainant's evidence being at least unreliable.

The Complainant's Fears of Losing Her Job

The evidence from the complainant and Mr Williams indicates that the complainant was very interested in the business, took pride in her work and, according to her, was prepared to lend Mr Williams funds to buy Mr Amat's share. There was evidence from a person approached by Mr Williams who told him that Mr P wanted to sell his share and that he would like the complainant to have a small share of the business. Whether this was to be a gift or a sale does not matter. The fact is, it supports the finding that the complainant had an interest in the business above and beyond her duties as a receptionist and bookkeeper.

The complainant said that from the start, Mr P wanted to do the office work but that she was employed because he did not have the time to do everything in the business. It is clear that the complainant and Mr P did not get along. Their relationship became a tense one. According to the complainant, Mr P was inconsistent in his dealings with her, one day being reasonable and the next being rude and abrupt. It is clear that when the issue of the sale of Mr Amat's shares arose, the complainant was concerned that Mr Williams might not have the same role in the company if they were bought by Mr P. However, when Mr Williams decided to sell his share to Mr Coombes, the complainant became very anxious that her position in the business was tenuous.

The complainant said that in late 1993 or early 1994 she became aware that there was a possibility that she would be retrenched. She said that it was initially raised with her by Mr Williams who said that her hours might be reduced and that Mr P would take over the position in the office because she was not making any money for the company.

The complainant said that Mr Williams was not in favour of her being retrenched but that he would have to agree to it under duress. She said that she did not mind having her hours reduced. However, she was unable to say how she felt about retrenchment and went on to say that she had put a lot of time into the business. It is quite clear to the Tribunal that she felt aggrieved that there was a prospect of her retrenchment.

Mr Williams said that there was talk of retrenching the complainant due to "the finances". He also said that the complainant was very upset and got tearful when he indicated that he was leaving the business.

Mr Coombes said that prior to him buying Mr Williams' share he met with Mr Williams and their respective wives. Mr Coombes said that most of the conversation focused on whether the complainant would be removed from her position. Mrs Williams testified that both she and her husband were concerned that if Mr Williams left then the complainant would be sacked immediately. She said that they asked Mr Coombes to make sure that this did not occur. In the end, there was no decision made about the issue.

Mr P said that there was a directors' meeting around November 1993 when the possibility of the complainant's retrenchment was discussed. He said that he had no longer any confidence that Mr Williams would keep their discussions confidential from the complainant. He said that thereafter her attitude changed remarkably towards him. He said that this was because she realised that he had intentions of retrenching her.

The Tribunal finds that the complainant was very concerned about her prospects of future employment both in terms of whether it would continue and in terms of the working relationship with Mr P when it became clear that Mr Williams was going to sell his share. She attributes Mr P's alleged behaviour as a means of getting rid of her. The Tribunal cannot accept this. We accept that their relationship was not particularly cordial or relaxed. However, Mr P was a director of the company and an equal share holder. The issue of the complainant's retrenchment had been discussed and, according to the complainant, Mr Williams would have gone along with it, albeit reluctantly. There was no need for Mr P to resort to a campaign of harassment to drive the complainant to leave either because he did not like her or because he wanted to do the office work himself. Further, Mr P did not impress the Tribunal as a man who would embark on such a campaign. He made the point more than once that as the complainant had control of the computer records of the company, he did not want to antagonise her. Further in view of the office layout and the number of people entering the office, he would run a real risk of being caught naked.

We do not make any positive findings as to the complainant's motive in making the allegations against Mr P. We do find that Mr P continued his habit of leaving his clothes around the office and sitting in his chair with his overalls rolled down after being spoken to by his fellow directors. This was irritating and seemingly provocative to the complainant. Tensions might have been defused had he desisted from this habit. However, it may be that the apparently long term undercurrent of hostility between the two, culminating in the complainant hearing that she would lose her job, or her standing in the business, caused her to exaggerate, in her own mind, the nature and intent of Mr P's behaviour.

For all of these reasons, the Tribunal does not accept the complainant's evidence that over a period of months, Mr P continually got undressed at the point of being naked in front of her and that after she complained his behaviour increased in its frequency.

Further, we are satisfied on the balance of probabilities that to the extent that she did complain about Mr P changing his clothes in front of her (or fearing that he would do so) that such complaints were not true.

The complaint is therefore dismissed.