

EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

EQUAL OPPORTUNITY COMMISSION LIBRARY
2nd Floor, Westralia Square
141 St George's Terrace
Perth W.A. 6000
Phone: 264 1971

Matter Number 11 of 1997

IN THE MATTER OF A COMPLAINT BY:

NICOLA HOLDEN

Complainant

- against -

ANTHER PTY LTD trading as
TRANSPORTABLE SITE ACCOMMODATION

First Respondent

and

JAMILE ABUOTHMAN

Second Respondent

REASONS FOR DECISION

BEFORE: Mr N.P. Hasluck, QC President
 Mr D. Forster Member
 Ms V. Kopke Deputy Member

Counsel for the Complainant: Ms H. Andrews

Counsel for the Respondent: Mr J. Hughes

HEARD: 27, 28, 29, 30, 31 October and
 4 November 1997

REASONS FOR DECISION Delivered 27 November 1997

The Complainant, Nicola Holden, claims that she was subjected to unlawful sexual harassment contrary to the provisions of the Equal Opportunity Act 1984. The complaint arises out of her employment as a personal assistant with the Respondent firm, Transportable Site Accommodation, for a period of 6 days in May 1996. The allegation of sexual harassment is principally directed at the Second Respondent, Jamile Abuothman, who was general manager of the Respondent firm at all material times. For ease of reference it will be convenient to speak of Mr Abuothman as the "Respondent" and of Transportable Site Accommodation as the "Respondent firm."

In accordance with directions given by the Tribunal prior to the hearing, Points of Claim were filed on behalf of the Complainant setting out the principal allegations, namely, that the Respondent continuously subjected the Complainant to unwelcome sexual advances, unwelcome requests for sexual favours, and unwelcome conduct of a sexual nature during the course of her employment with the Respondent firm. She rejected his advances and by her manner showed that his conduct was not welcome. She eventually felt obliged to resign her position and it is pleaded on her behalf that the resignation amounted to constructive dismissal. The Complainant says that the Respondent firm is liable for the unlawful sexual harassment and claims compensation against these Respondents.

Points of Defence filed on behalf of the Respondents admit that the Complainant was employed by the Respondent firm as personal assistant to the Respondent and remained in that position until her employment ceased on 13 May 1996. The Respondents deny that the Complainant was subjected to sexual harassment and say further in their points of defence that the Complainant and Respondent engaged in a consensual sexual relationship during the period of the Complainant's employment. The Respondent firm admits that it is responsible for the conduct of the Respondent, but denies

that any unlawful sexual harassment took place and denies that the Complainant is entitled to relief.

Against this background it is necessary to look carefully at the circumstances leading up to the relevant contract of employment and at the events that followed.

Transportable Site Accommodation

Formal records establish that the Respondent firm, Transportable Site Accommodation, commenced business on 10 February 1988 with the nature of the business being described as manufacture of transportables. The corporation carrying on the business is Anther Pty Ltd and the individuals carrying on the business, who are also directors of the company in question, are Denis Martin and his wife, Judith Martin. Mr Martin was born in 1949 and was therefore aged 47 when the relevant contract of employment commenced.

The Respondent firm carried on business at 172 Maddington Road, Maddington, being a suburb in the outer metropolitan area to the south of Perth. The business premises consisted of a house at the front of the site used for office purposes. This was occupied by the general manager, an accountant, a receptionist and such other office staff as were required by the business from time to time. A building used for the manufacture of transportable structures was located behind the office building. Video surveillance cameras had been set up on the premises for security reasons and there was also a surveillance camera mounted on Mr Martin's dwelling on the adjoining land. Mr Martin said in evidence that he was principally responsible for production and the general manager was responsible for liaison with clients and administration. When Mr Abuothman joined the Respondent firm as general manager in August 1995, the firm was going through a period of financial difficulty. Mr Abuothman has acquired a half-share in the business subsequent to the events giving rise to the present claim.

Jamile Abuothman

The Respondent, Jamile Abuothman, gave evidence at the hearing. It emerged during the course of his evidence that he was born in Palestine and came to Australia about 10 years ago. He is a mature man of middle years. At the time he joined the company he was married to an Australian citizen - his wife's name being Antoinette - but it seems that most of his family circle was still in the Middle East, including his father and his son. It seems that his father is an investor with experience in the building industry.

Mr Abuothman suggested in evidence that at the time his employment as general manager of the Respondent firm commenced, he was not fully proficient in the English language although, by then, he had already been living in Australia for a number of years. He was certainly in command of the English language at the hearing before the Tribunal, although he made the point on a number of occasions that his linguistic skills have improved since May 1996. His duties included attending to administrative, legal and taxation matters and liaising with local government bodies and clients. Arrangements were made for him to be aided by a personal assistant as to note taking and other tasks requiring verbal and literary skills.

The Previous Personal Assistants

Mr Abuothman agreed during the course of his evidence that his first personal assistant was Ms R who was already an employee at the time he joined the firm. A week or so after she began working for him as a personal assistant it seems that there was an altercation arising out of the use of a photocopier and, as a consequence of the altercation, Ms R ceased to be employed by the firm. The Tribunal will not attempt to make any determination concerning the rights and wrongs of this matter, but in light of what happened later, and as a matter which might be relevant to the question of relief in these proceedings, it is material to note that from the outset Mr Abuothman had a history of troubled

relationships with young women employed as personal assistants. Mr Abuothman agreed under cross-examination that Ms R advanced a claim for relief as a consequence of her employment coming to an end and it seems that this led to Mr Abuothman holding strong views about industrial laws and union officials.

The evidence showed that as at March 1996 Mr Abuothman was being assisted by another young woman, Ms C, who was 18 years of age. Mr Abuothman said in evidence that the young woman was working for him as a "Girl Friday." It seems that he invited her to accompany him on a trip to Sydney which was not a business trip. The young woman's father became concerned and raised the matter with the principals of the Respondent firm. Mr Martin inquired into the matter and apparently satisfied himself that there was nothing untoward about the proposed trip and obtained a written statement from the young woman which is dated 22 March 1996 and reads in part as follows:

"For the record, I have not authorised my father or anyone else for that matter to interfere with my employment or my personal life. I would like to state that I am very happy with my workplace and the people I work with/for. I have not told anyone that I have been promised anything whatsoever, I have simply expressed my happiness and excitement towards the job and what could be possible if it works out. As I do not live with either of my parents and am 18 years of age, I feel that I am entitled to make my own decisions and feel that neither of my parents have the right to comment on or investigate anything."

The trip took place. Mr Abuothman agreed in evidence that he and his young employee shared the same bed during the course of the trip. He also agreed that during the course of the trip her employment with the Respondent firm came to an end and she did not return to the firm's premises at Maddington. She subsequently lodged a complaint with the police about events which took place while she was employed by the Respondent firm. Again, it is not necessary for the Tribunal to make any determination about this matter. It is

sufficient to notice that, contrary to the expectations voiced in the signed statement mentioned earlier, the job did not work out for Ms C, and it follows from what has been said that on this occasion there can be no doubt that Mr Martin was clearly on notice that Mr Abuothman's involvement with female staff members many years his junior was in need of close supervision.

A month later, on Friday 26 April 1996, Mr Abuothman interviewed a number of female applicants for the position of personal assistant. This appears from entries in his diary on that date which show that 10 women were to be interviewed for the position at roughly 15 minute intervals. One of the applicants was Ms X who gave evidence at the hearing. She was born in November 1974 and was therefore 21 years of age at the time of the hearing. She had previously worked as an electoral assistant for a Federal parliamentarian. She had rung up the Respondent firm to obtain an interview in response to an advertisement she had noticed at the Commonwealth Employment Service, referred to in evidence as the CES.

According to Ms X, when she arrived at the offices of the Respondent firm another candidate for the position was being interviewed. In due course she was interviewed by Mr Abuothman and was eventually offered the job. She said in evidence that during the interview Mr Abuothman kept looking down at her breasts. He asked her whether she had a boyfriend and whether it would be a problem for her to travel with him on business. She replied in the negative to both these questions. Having offered her the job he asked her to go out with him the next day, being a Saturday, to look at various sites.

On the following day she drove around with Mr Abuothman. She described his manner as relaxed and easy to get along with, although at one stage during the drive he produced a marijuana "joint" and had a smoke, and offered some to her. Back at the offices of the Respondent firm he put his arm

around her shoulder, but she did not feel too apprehensive because this gesture seemed to be due to the fact that he was an easygoing sort of person. On the Monday he rang her on his mobile and asked her to meet him and a building contractor on a building site at the rear of his home. After the meeting, Mr Abuothman invited her into his house for a drink where he smoked a marijuana "bong" and told her about his family and his son who were living overseas.

According to Ms X, the Respondent started to cry and came over and sat next to her on the sofa. He put his hand on her thigh and began cuddling up to her. She told him not to do that and moved away from him. She was rather scared by this and left the house as soon as possible. She went to work the next day, determined to leave the job, but he was able to persuade her not to do so by apologising for his behaviour and promising it would not happen again. A day or so later she decided to leave the job and later advised the CES that she had quit the job because of his advances. She said in evidence that she didn't want to say anything to Mr Martin about Mr Abuothman's behaviour because she had seen Mr Abuothman lose his temper and was scared.

The Tribunal pauses to note that Mr Abuothman vigorously denied that there was anything amiss in his dealings with Ms R, Ms C or Ms X. In regard to Ms R and Ms C his position was that they had left the Respondent firm for reasons unrelated to any misconduct on his part as general manager. He strongly denied that he had acted as alleged by Ms X and also contended that she was not an employee in any real sense. According to him, he had met her while watching a football match at the Gosnells Football Club in December 1995 and found out that she was knowledgeable about union and political matters. Subsequently, he let her hang around the Respondent firm and talk to him about employment so that she could satisfy the CES office that she had been looking for a job. According to him, she was never on the payroll and the incidents she had mentioned never took place.

The Tribunal will return to the evidence of Ms X later when the time comes to evaluate the credibility of various witnesses, including Mr Abuothman. On any view of the matter, however, this was another occasion prior to the employment of the Complainant where matters had arisen which could reasonably be regarded as putting the general manager of the Respondent firm on notice that he had to exercise great care in his dealings with young female employees.

It was at about this time, shortly after Ms X had left, that the Respondent firm advertised in The West Australian for a personal assistant to the general manager. The Complainant, Nicola Holden, was one of those who noticed the advertisement.

Nicola Holden

The Complainant was born on 23 April 1976 and had therefore just turned 20 years of age at the time of her interview. She brought to the interview a curriculum vitae showing that she lived at an address in Greenwood in the northern suburbs of Perth and had been educated at Padbury Senior High School, completing the Tertiary Education Examination (the TEE) in November 1993. She had a good level of academic achievement and during her school years had been involved in a wide range of activities including sport and music. Her community involvement included membership of the Scarborough Junior Concert Band and a period as leader of the Padbury Senior High School Concert Band. In terms of vocational training, she had undertaken the St John Ambulance Basic Life Support course and various computer courses which gave her word processing skills. She had worked at Angus and Robertson Bookstore as bookstore assistant/office clerk and from 1994 to 1996 had worked at the Mount Hospital as a receptionist/secretary and library assistant. The CV described her health as "excellent" and her marital status as "de facto."

The Complainant said in evidence that she had a longstanding personal relationship with Darrell Scaiffe. She had known him at school and this had developed into an intimate relationship. They had lived together briefly in 1995 while minding a house for a friend and early in 1996 they decided to move in together on a permanent basis and rented a house in Greenwood for that purpose. Darrell was working for his father, John Scaiffe, a self-employed contractor and Nicola was working at the Mount Hospital as already mentioned. The joint incomes were necessary in order to cover the rent and general expenses. The Complainant said in evidence that both families were agreeable to these de facto arrangements and this was subsequently confirmed in evidence by Darrell Scaiffe, by Nicola's mother, Mrs Holden, and by Darrell's father, John Scaiffe. It was for this reason that Nicola had described her marital status on the CV as "de facto."

On 1 April 1996 the Complainant's position with the Mount Hospital had been made redundant and in the following week she was on the look-out for employment. She said in evidence that she was not eligible for unemployment relief because of her de facto relationship and she was therefore keen to find a suitable job as soon as possible. She saw the advertisement for a personal assistant to the general manager of the Respondent firm in The West Australian and arrangements were made for her to be interviewed at the firm's premises in Maddington at 10 am, Tuesday 7 May 1996.

The Interview

The Complainant said in evidence that she was interviewed by Mr Abuothman. Two other female applicants for the position were waiting to be interviewed, but they appeared to be about 5 years or so older than the Complainant. She handed Mr Abuothman her CV but he didn't look at it which struck her as odd, although he did say he would read it later. Pay and conditions were discussed, as was the possibility of travel, including a trip to Indonesia. The interview went

well and she was encouraged to remain at the premises while the rest of the interviews were completed. Mr Abuothman then offered her the position and the parties entered into a written contract of employment. The relevant document, dated 7 May 1996, reads as follows:

"This contract is made between TSA and Relocatables WA (employer) and Nicola Michelle Holden (employee). The position of personal assistant to general manager on full-time basis (approximately 40 hours) at the rate of \$428.25 per week. This probationary employment commences on 7 May 1996 and concludes 2 months hence on 7 July 1996. If in that 2 month period either the employer or the employee wishes to terminate this contract, then the termination can be effected by either party giving 1 week notice. At the end of the 2 month period, the employer will indicate to the employee if a permanent position will be offered. If a permanent position is offered and accepted, the employer may review the employee's salary to the next higher level."

The contract document shows that the business of the Respondent firm was described as manufacturers of quality relocatable buildings in steel or timber frame and modular panel transportable houses/buildings - park home annexes - offices - shell - ablution - camps - building transport - site construction.

The First Few Days/The Complainant's Evidence

According to the Complainant, at about midday on Tuesday, 7 May 1996, soon after the contract of employment was entered into, and after she had briefly met the firm's accountant and the receptionist, Daisy, Mr Abuothman took her for a drive to look at building sites and to meet people involved with the Respondent firm. She said that she was wearing a business style skirt, blouse and shoes. She was not sure precisely where they went because she was not familiar with the southern suburbs of Perth, but early on, he commenced touching her leg and holding her hand while he was driving. She objected and removed his hand on each occasion.

He eventually parked the car in a park close to what she believed was South Perth and began to explain that part of her job was to keep him happy and that this would mean that part of her working day would be spent driving around to relieve his stress. He declared that he was attracted to her, but she made it clear that conversations of this kind and his conduct in touching her were not acceptable because she was in a long-standing relationship with her boyfriend. When he placed his hands on her knee, she pushed him away and assumed that he would eventually get the message that such approaches weren't welcome. She was apprehensive about his attitude but as the job was important to her she was left in a state of indecision as to what to do about the matter. Some conversation took place about the difference between love and sex and Mr Abuothman suggested he would change her mind on this point. They went back to the office in due course.

When asked at the hearing before the Tribunal how she felt after the first day of the employment she said: "A little apprehensive, but I figured that if I continued to reject his advances that, you know, he'd finally get the message and I'd still be happy with my job."

On the following day, Wednesday 8 May, the Complainant went to work and almost immediately Mr Abuothman took her to a cafe for coffee where he spoke in Arabic to those who owned the cafe. After this, he started to say how much he loved her and indicated that he would speak in this intimate way to her while they were alone, but would switch into business mode when others were present. On this and the following day he was constantly talking about sex and attempting to touch her. They returned to the office from time to time but there didn't seem to be anything much to do at the office. At some stage he introduced her to Mr Martin, but the exchange was brief. He also showed her around the firm's premises, including the area at the back where manufacturing of transportable units was being undertaken by male employees of the firm.

While showing her around, Mr Abuothman pointed out the surveillance video cameras and told her that it would be part of her job to review the tapes. He said that he could not be close to her within range of the cameras. It became apparent to her that the general manager had previously employed personal assistants because he showed her a file concerning a dispute with one of them. Reference was also made to a proposed trip to Darwin to meet some investors, but in talking about that matter, Mr Abuothman indicated that the firm's budget would only allow for a shared room. He said that the President of a country and his personal assistant usually shared a room. The Complainant made it clear that this was not acceptable to her.

The Complainant said that on one of these two days, probably Wednesday 8 May, Mr Abuothman took her to an address at Riverton to view what she understood to be some units being constructed by the firm behind an existing residence as he wanted her to sort out furnishings for one of the units. The site was deserted and they had to walk across planks in order to enter one of the units which was almost complete in that plastering of the walls was under way, but there were no doors on the unit. Once inside, and out of view, she alleged that Mr Abuothman grabbed her, hugged her, tried to dance with her and began wriggling his hips against her in a form of pelvic thrusting. When she protested he agreed to release her and said it wouldn't happen again. He later took her into the existing residence in front of the almost completed units and it then became apparent that this was his own residence.

At one stage, during these first few days of the employment, and probably Thursday 9 May, Mr Abuothman dropped off his car at a service centre in a suburb south of the river and arranged for a taxi driver - identified as taxi driver Z during the course of the hearing - to convey them to and fro. The taxi driver, who seemed to be a friend of Mr Abuothman, took them to various places including an address in St Georges Terrace in the centre of Perth (where some

documents had to be delivered to a law firm) and also to Mr Abuothman's home address. According to her, she was not involved in any acts of intimacy in the presence of taxi driver Z. While they were in the presence of the taxi driver Mr Abuothman did not persevere with his attempts to touch or caress her and she certainly did not make any approaches towards him. At one stage, while at Mr Abuothman's house after the incident in the half-completed unit, she briefly met Mr Abuothman's wife, Antoinette, who happened to arrive at that moment. According to Ms Holden: "I was walking down the stairs at the front when she (Antoinette) was walking up."

During the course of the driving to and fro, punctuated by occasional visits to the firm's office, the Complainant said that she was instructed to make notes about some of the matters under discussion and this she did. Notes in her handwriting were eventually received in evidence as an exhibit and she is adamant that the notes in question were made in Perth during the first few days of the employment. She said that at some stage, subsequent to the talk about a trip to Darwin, Mr Abuothman foreshadowed the possibility that they might have to make a trip to Kalgoorlie. She was told to make some inquiries about accommodation and because she was aware that her father had made trips to Kalgoorlie in the course of his work as a company representative she rang her father and obtained the names of two hotels. She asked whether she should do anything about booking accommodation, but Mr Abuothman said that he would take care of the arrangements.

The notes made by the Complainant (exhibit 10) are random in appearance but do seem to reflect some of the matters touched on earlier. They include reference to a TV set, a VCR unit and some blank cassettes. They also include details of The Golden Mile Village Hotel and the Hannan's View Motel in Kalgoorlie, reference to a proposed trip to Darwin towards the end of May, details of some costings concerning building sites at Kalgoorlie, documentation

concerning the Martin Trust and a checklist of things to be done on Monday, 13 May 1996 preceded by a notation "flight 8.05 am."

The notes also contain a cryptic statement affirmed by the Complainant's signature: "I am not an undercover cop or tax department." The Complainant said that this was written down and showed to Mr Abuothman as an attempt to alleviate his constant worrying while the notes were being made as to whether she was going to betray him. His worries seemed to be related to the difficulties he had experienced with a previous personal assistant.

Mr Abuothman's anxieties about the need for trust and confidentiality are also illustrated by another exchange which took place in the first few days of the employment. On Thursday, 9 May 1996 Mr Abuothman insisted the Complainant sign a confidentiality agreement which is in these terms:

"I, Nicola Michelle Holden, shall keep confidential all material information coming to my knowledge in the course of the performance of my duties relating to the business associations and transactions of Transportable Site Accommodation with other persons or bodies. The obligation of confidence set out in this clause shall survive the expiration of termination of this agreement."

The Complainant said that she was disturbed by the way in which Mr Abuothman was constantly touching her and his continuing attempts to steer the conversation towards details of their respective sex lives. She voiced her concerns to her partner, Darrell Scaiffe, and to her mother. She described Mr Abuothman as a very "tactile" person. To allay her mother's fears about the prospect of her travelling to Kalgoorlie with Mr Abuothman, she said that she would make sure there was a door between them.

Arrangements were made for Mr Abuothman's friend, taxi driver Z, to collect the Complainant from her home in

Greenwood on Friday morning, 10 May so that she and Mr Abuothman could go straight to the airport later in the day if a decision was taken to proceed with the trip. The Complainant packed an overnight bag and was picked up by taxi driver Z on the Friday morning. She was apprehensive but it was her belief that if the trip to Kalgoorlie did go ahead she could handle the situation. Mr Abuothman had made it clear that if she didn't go to Kalgoorlie, she wouldn't keep the job.

The First Few Days/Respondent's Evidence

The Respondent told a completely different story. According to him, the interview at which he employed the Complainant on Tuesday, 7 May took about 15 to 20 minutes. He didn't have time to read the CV but understood she had managed a book store and had worked in human resources management at Mount Hospital. The various interviews were completed by 11.30 am at which point he decided to employ the Complainant as his personal assistant. The contract of employment was written up at her request.

He agrees that they went for a drive in the company car. He says that they looked at an auction site and spoke to some business acquaintances. He says that she was very confident in her manner and was wearing a very short skirt. When they stopped to buy some soft drinks at a van near St John of God Hospital in Murdoch, she got into the back seat of the car and invited him to join her. When he did so she sold him some marijuana from a sachet she was carrying and they both had a smoke, using her pipe. After a while they pushed the seats forward and had sexual intercourse as a result of her pulling him towards her. They did not remove their clothes but this didn't matter because she was only wearing a G-string which she got rid of by pushing it aside or operating a "button." Everything happened quickly and at about 3.30 pm, that is to say, within the first four hours of her employment on Tuesday 10 May 1996.

The Respondent said that after this act of sexual intercourse, he became wary. He was concerned about what might happen if his wife found out and wondered about Nicola being a union agent. He wanted to revert to a strict business relationship, but she continued to dress and behave in a provocative manner, as illustrated by the fact the firm's workmen made derisive comments about her short skirt, bright underwear and high heels. When they were alone at his house on one occasion he had to push her away. He denied that he said or did anything that could be described as unwelcome and he denied making an unwelcome advance in the half-completed unit behind his house. He said in evidence that on a day when the Complainant was at his house after work sexual intercourse might have taken place between them for a second time had his wife not arrived at the critical moment. He agreed that at an early stage he invited Ms Holden to accompany him on a business trip to Kalgoorlie.

Talk about a trip to Kalgoorlie was related to some prefabricated slabs at the rear of the firm's premises that could possibly be used to build a house in a country centre such as Kalgoorlie on the basis that the house was built in Perth and transported to Kalgoorlie. According to the Respondent, Nicola was more than happy to go to Kalgoorlie. He left it to her to book the tickets and accommodation because of her father's knowledge of Kalgoorlie.

In support of this part of his case the Respondent presented taxi driver Z as a witness. The taxi driver agreed that he was a friend of the Respondent and went on to say that he could recall driving Mr Abuothman and the Complainant to various destinations including an address in St Georges Terrace. He also drove them to Mr Abuothman's house where the Complainant made a cup of coffee for him. He sat and read the paper while Mr Abuothman and the Complainant looked for some documents. His recollection was that in the course of these journeys the Complainant had placed the briefcases she was carrying in the passenger seat at the front of the

vehicle with the result that she and Mr Abuothman sat in the back seat and seemed to have a close relationship. His impression was that they were like a couple who had just had sexual intercourse and Mr Abuothman was like "the cat who'd got the cream." He recalled collecting the Complainant from her home in Greenwood early one morning.

Mr Abuothman also denied that the notes made by the Complainant (Exhibit 10) were made in Perth. He acknowledged that there was an annotation in his handwriting "two rooms single" on that portion of the notes concerning Hannan's View Motel, but says that the annotation was made by him in Kalgoorlie in circumstances which the Tribunal will come to shortly.

The Kalgoorlie Trip/Complainant's Evidence

Nicola said in evidence that they arrived in Kalgoorlie at about 8 pm on Friday 13 May 1996. Mr Abuothman engaged a taxi to take them to the city. He put an arm around her in the back seat of the taxi but she pushed him away. She understood that he had taken care of the arrangements for accommodation, but the first place the taxi took them to was full. The taxi then took them onwards to the Midas Hotel where she waited with their bags while he spoke to the receptionist. It was not until they got upstairs that it became apparent that the accommodation he had been discussing with the receptionist consisted of a unit comprising kitchenette, shower and toilet, a sleeping room with a double bed and a living room area with a sofa that could be used as a bed. Mr Abuothman led her to believe that this was the only accommodation available and she decided that she had no option but to make do with it. It was getting late. She didn't have sufficient money of her own to summon a taxi and go looking for alternative accommodation. She only had \$50 in her pocket.

She said that after taking a shower she changed into a long-sleeved shirt, jeans and boots. When the Respondent emerged

from the shower he was clad in boxer shorts and a singlet and soon began asking why she was wearing so many clothes. While she was seated on the sofa he came across and draped himself on top of her and started trying to kiss her. She shouted at him and he eventually stopped. He then made a telephone call to his son overseas and while he was doing this, she began to write to her boyfriend.

After he finished his telephone conversation, Mr Abuothman insisted upon knowing what she was writing. When she refused to tell him he became furious and accused her of writing evidence that could be used against him and this led to another slanging match. She eventually retired to the bedroom, shut the door behind her (although it could not be locked) and spent the night on the double bed fully dressed because she was apprehensive that he would renew his approaches.

According to the Complainant, in the morning she insisted that more suitable accommodation be found and they eventually obtained separate units at the Hannan View Motel which was situated not far away. She still held the belief that they were about to embark upon a day's business and consistently with that, she agreed to sign the documentation which would enable them to hire a Holden sedan from the Budget Rental firm. She understood that he was unable to sign the relevant form because he did not have a current driver's licence with him. She drove, but wherever they stopped he took possession of the keys.

She said that it then gradually dawned upon her that there was no business to be done in Kalgoorlie. They looked at information posted on the windows of some estate agencies but none of the agencies were open, this being a Saturday morning. According to her, they did not speak to anyone, they drove around rather aimlessly for a while and eventually found their way to a "cosy little restaurant." Mr Abuothman then revealed that what he had in mind in undertaking the trip to Kalgoorlie was that they would have

a happy weekend and he would have sex with her. His words were: "The only reason you're here is because I'm going to have sex with you." Ms Holden's testimony continued as follows: "I questioned him, so, you know, 'Are you really going to admit this to me?' and he said, 'Yes, and there's still plenty of time and I will.'" Ms Holden made it clear that this wasn't going to happen and it was clear that nothing could be achieved by continuing the discussion. Mr Abuothman had been speaking of returning home on Monday but she insisted that they return the following day on Sunday.

By now she was extremely upset. She found her way to her room at the Hannan's View Motel, bolted the door, and spent the Saturday night alone in her room. While there she spoke to her de facto partner Darrell by phone and told him what had been going on. Darrell Scaiffe gave evidence confirming this.

On the Sunday morning they checked out of the Hannan View Motel. According to the Complainant, while they were in the car-park, Mr Abuothman grabbed her from behind, pinioned her hands behind her back and held her like that until it became apparent that he was hurting her. He pushed himself against her and repeated the pelvic thrusts she had experienced on the earlier occasion. After a few minutes, he let her go and handed her the car keys. She told him his behaviour wasn't acceptable, but he said it was his belief he was allowed to treat her this way. She replied that if he was in Australia he had "to accept our rules."

On this day, as on the previous day, she drove the vehicle but every time they stopped, he took possession of the keys. It quickly became apparent that they had nothing in particular to do. According to the Complainant they called in on some friends of Mr Abuothman who owned the Mediterranean Lebanese Takeaway. It turned out that Mr Abuothman had met the proprietors of the business - Marwan and Robia Arabi - on the Saturday night. The Complainant sat mostly alone in the front part of the restaurant while

Mr Abuothman talked to the proprietors. Most of the conversation took place in the kitchen where they were listening to music. She was aware of this because at one stage she walked through the kitchen to reach the toilet at the rear of the premises. They were later introduced to a friend of the proprietors - Adnan Sulejman - who invited them back to his place. While there she sat on the sofa with a child of the family and the men spoke in a foreign language. In due course they left to do some sightseeing.

Ms Holden's evidence was that they drove to Coolgardie and at one stage they stopped at a look-out overlooking the Super Pit which lies between Kalgoorlie and Boulder. She recalls that viewers were protected from the Pit by a length of chicken wire. She also recalls that having left the vehicle, Mr Abuothman grabbed her from behind, pushed her down against an incline and slipped his hands up her shirt and placed her hand on his genitals as he was in a state of arousal. She thought she was going to be raped but she was eventually able to push him off. They returned to the vehicle and drove on. He kept stroking her legs and trying to kiss her. He became distraught and said it was his right to treat her like that and that if she wasn't going to respond properly she might as well drive him into the bush and leave him there so that he could die for her.

Towards the end of the afternoon they called in at the Boulder Foodhall where they again spoke to Marwan Arabi. It seems that Mr Arabi had an interest in these premises also. While there, Mr Abuothman chanced upon some friends of his, Simon and "Kiwi", and arrangements were made for them to be dropped off at their place of residence. During these various exchanges it seems that the Complainant had an opportunity to access Mr Abuothman's mobile phone and thus she managed to put through a hurried telephone call to Darrell Scaiffe in which she reported on her concerns and the various incidents that had happened. She also managed to speak briefly to her mother.

Both Darrell Scaiffe and Mrs Holden gave evidence at the hearing confirming that these calls were made and that the substance of them was as described by the Complainant.

The long day was coming to an end. The Complainant said that they dropped off the hire car and waited at the airport. The flight was delayed and this gave the Complainant a further opportunity to speak to Darrell and her mother by telephone. They confirmed that these calls were made. In regard to Mrs Holden the Tribunal digresses briefly to note that earlier in the day Darrell Scaiffe had called in to give Nicola's mother some flowers for Mother's Day. Mrs Holden said that in the first telephone call she received from Kalgoorlie Nicola was subdued but in the second call made from the airport Nicola was very upset and complained vehemently about Mr Abuothman being horrible and not leaving her alone. In particular, he had taken her to an open-cut mine where he had been very forceful.

On the flight back to Perth Mr Abuothman developed chest pains and suffered an ulcer attack. He attributed this in evidence to the fact that Ms Holden as his personal assistant had failed to bring the pills he needed to treat his condition. In any event she, together with the cabin crew, rendered first aid assistance. Nonetheless an ambulance met the flight at Perth airport and Mr Abuothman was taken to hospital. Ms Holden was left with no option but to take a taxi home and this she did, having first stopped at Mr Abuothman's home to inform his wife of her husband's condition. The Complainant herself did not arrive home until after midnight and was obliged to pay the taxi fare of \$55 personally. By now, she was utterly exhausted.

The Kalgoorlie Trip/Respondent's Evidence

Again, the Respondent presented a different version of events. He agreed that he had not personally arranged any accommodation in Kalgoorlie. According to him, he had

expected his personal assistant to attend to this. The taxi took them to two hotels which were full and eventually he was able to find one room remaining at the Midas Hotel which was the only accommodation available. He denied having attempted to hug the Complainant in the back of the taxi.

He said that after they moved into the room the Complainant had a shower and emerged eventually in a pink, floating nightie. He was in short summer pyjamas. According to him, she gave him a big smile and came to sit beside him on the sofa. She leaned over and began touching and stroking his face, but at that point he fell asleep. When he woke up next morning he was alone on the sofa. He was determined that out of fairness to his wife the act of sexual intercourse which had occurred some days earlier should not be repeated so he immediately rang the Hannan View Motel and booked two single rooms. It was at this moment that the notation "two single rooms" was written on exhibit 10 by him.

They checked into the new accommodation, hired a car and proceeded to their business which involved obtaining information from estate agents and looking at pieces of land which might be suitable for development. He had in mind to look at one piece of land on which a structure manufactured by the firm had been established, but unfortunately his personal assistant had lost the address. His recollection was that one of the estate agencies was open but under cross-examination he was obliged to say that he could not name any person that he spoke to in Kalgoorlie about business matters on the Saturday. He denied saying to Ms Holden that the purpose of bringing her to Kalgoorlie was to have sex with her.

He also said that on the Saturday morning he bought a jumper because it was cold. The change from buying the jumper was \$50 which he gave to her to buy marijuana. He also gave her \$200 because they had saved some money by sharing a room. His evidence included reference to making a telephone call

to Mr Martin during the course of the day. Mr Martin said in evidence that such a call was made and said further that he spoke briefly to Ms Holden who made no complaint about the way in which she was being treated. Mr Abuothman went on to say that towards the end of the Saturday his personal assistant wanted to visit friends of hers in Kalgoorlie. He agreed to this. She spent the latter part of the Saturday in his room at the Hannan's View Motel but eventually went to her own room at his request. He was still troubled by the possibility that his wife might find out about the relationship. In the evening he went alone to the Mediterranean Lebanese Cafe and made the acquaintance of the proprietors, Mr and Mrs Arabi.

The Respondent couldn't remember precisely how they spent their time on the Sunday, but said that he was not interested in sightseeing and did not participate in any sightseeing apart from driving to Coolgardie. He said that they did call in at the Mediterranean Lebanese Cafe and spoke to the Arabi's and as a consequence of that visit were invited to visit Mr Adnan Sulejman. He denied visiting a look-out overlooking the Super Pit and consequently denied having made any sexual approach of the kind described by the Complainant in her evidence. He said that on the return plane flight to Perth he was affected by his ulcers and during the course of the seizure the Complainant gave him mouth to mouth resuscitation. The suggestion accompanying this evidence was that Ms Holden was concerned for his welfare because she was attracted to him. He denied having kept possession of the car keys and said that as the driver of the vehicle she could have taken off at any stage if she had wished to do so.

In support of his version of events evidence was adduced on his behalf from Mr and Mrs Arabi and from Mr Sulejman.

Marwan Arabi recalled seeing Mr Abuothman at his premises on the Sunday. He was accompanied by Ms Holden and Mr Arabi recalled seeing their legs touch under the table and it

seemed to him there was a close relationship between them. He recalled her sitting on a crate in the kitchen at one stage. Mrs Arabi went further and testified that at one stage in the kitchen she had seen the Complainant sitting on Mr Abuothman's knee. Mr Sulejman agreed that they had visited him at his home and he referred to an incident with a cigarette in which the woman with Mr Abuothman seemed to be in charge of whether he smoked or not. His evidence suggested that they had been sitting reasonably close together on the sofa in his living room, but he agreed under cross-examination that a child of the household was on the sofa also and Ms Holden had been interacting in a friendly way with the child.

The thrust of Mr Abuothman's case was that he had no reason to believe that the Complainant was dissatisfied with anything that had happened at Kalgoorlie and he expected her to be back at work on Monday. It seems that his ailment was not sufficient to prevent he himself returning to work on Monday morning.

The Complainant's Resignation

Nicola said that she was extremely distressed as a consequence of the Kalgoorlie trip and telephoned Mr Denis Martin on Monday morning in order to tender her immediate resignation. She said in evidence that it was because she couldn't handle Jamile's behaviour but she was in "too much of a state to go into details." According to her, he said, "Oh, that's okay. I understand that." Mr Abuothman phoned about four times later in the day to ask why she was leaving him but she refused to have anything further to do with him. She listened for no more than a minute and just hung up. "In the end, I couldn't even respond to him." Darrell had to be brought home from work because by now she was hysterical.

Ms Holden told her mother and her boyfriend Darrell Scaiffe what had happened and as a consequence they went to the

police and made a formal complaint. It seems that the police weren't prepared to prefer any charges in the absence of any physical injury and having regard to the lack of corroborative evidence. They recommended she contact the Equal Opportunity Commission. This she did and a telephonic record held by the Equal Opportunity Commission shows that she contacted that body on Tuesday, 14 May. On the same day she wrote a lengthy letter to Denis Martin setting out particulars of her allegations and it is noteworthy that the various allegations listed in that letter correspond with the evidence she gave to the Tribunal at the hearing. She claimed wages due to her and reimbursement of the taxi fare mentioned earlier.

On Thursday 16 May, by now having the relevant documentation which had been sent to her by the Equal Opportunity Commission, Ms Holden laid a complaint of sexual harassment with that body, particulars of which were said to be reflected in her earlier letter of 14 May. In addition, she said that she was "constantly feeling uncomfortable and disgusted by Jamile's actions." She said that in the weeks that followed she was "a wreck" and jumped every time the phone rang. She was afraid Mr Abuothman was going to come after her.

In the meantime, according to the evidence he gave at the hearing, Mr Martin had approached Mr Abuothman about the allegations contained in the letter of complaint but received an assurance that there was no substance in the allegations. No reply to the allegations was sent by the Respondent firm to the Complainant, and it seems from Mr Martin's evidence that at this early stage Mr Abuothman did not suggest that the disaffected employee had been a willing participant in a consensual relationship.

Mr Abuothman gave evidence at the hearing that he was contacted by the Complainant's boyfriend, Darrell Scaiffe, who indicated in a somewhat threatening manner that the claim could be settled if the Respondent firm was prepared

to pay \$10,000. Darrell Scaiffe stoutly denied having made any such call. He said that he mentioned the fact that Nicola was owed money by her former employer to his father, John Scaiffe, who took it upon himself to contact the general manager of the Respondent firm to see whether the claim for unpaid wages and reimbursement of the taxi fare would be met. John Scaiffe gave evidence at the hearing before the Tribunal that he made a brief call to Mr Abuothman to this effect, but was told the claim would not be met.

The Tribunal pauses to note in regard to this aspect of the matter that Mr Abuothman also gave evidence that a telephone call was made to him in a threatening manner by a union official called John in which demands upon the Respondent firm were made. He was not prepared to yield to the demands and he also confirmed that no payments were made to the Complainant. According to him, she had resigned without giving proper notice and, in any event, she had received from him the total amount of \$250 he had paid to her in cash in Kalgoorlie. He says he contacted the Equal Opportunity Commission with a view to complaining about her conduct.

Subsequent Events

Officers of the Equal Opportunity Commission obtained full particulars of the allegations from Ms Holden and eventually submitted these to the Respondent firm and requested an answer or explanation. It is apparent from the evidence that the Respondent firm instructed a solicitor, Mr Heitman, to reply to the allegations and it is also apparent that Mr Abuothman played a part in giving the solicitor instructions relevant to the matter.

The reply prepared by K. Heitman and Co by letter dated 31 July 96 reads in part as follows:

"We act for Mr D.R. Martin, a director of Anther Pty Ltd of Maddington and also Mr Jamile Abuothman, the

general manager of Transportable Site Accommodation in relation to the above complaint...each of our clients denies the allegations made by the abovenamed...Mr Martin has no personal knowledge of the matters raised by the abovenamed other than the receipt of a letter of complaint following the resignation by the abovenamed...we have taken our clients' instructions in relation to the allegations by Miss Holden and for the purposes of response advise as follows:

(a)...

(b) As regards to the specific details of sexual harassment alleged, our clients deny the Perth incidents alleged and our client, Mr Abuothman, says in relation to the Kalgoorlie incidents that the same are factually incorrect and for the period Thursday 9th May to Sunday 12th May Miss Holden and himself were carrying on a consensual affair. Mr Abuothman denies at any time behaving in any manner would which be capable of being categorised as sexual harassment.

(c) Mr Abuothman states that the parties engaged in one act of sexual intercourse on the 9th of May 1996 and smoked cannabis together on several occasions.

(d)...

(e) On balance given the factual issues which our clients deny, our clients deny any liability whatsoever to Miss Holden and state that the allegations are fabricated and malicious.

Mr Abuothman has submitted to the writer a detailed statement concerning his relationship with Miss Holden and has provided details of construction workers present at the Riverton units, office workers employed by the company, acquaintances and business associates in Kalgoorlie and the airline stewardesses on the flight from Kalgoorlie to Perth who, it is said, can confirm that Mr Abuothman was not acting in any improper way and in fact it was Miss Holden who in Perth was behaving in a provocative and coquettish manner and in Kalgoorlie acted towards Mr Abuothman in an affectionate and consenting manner..."

The Tribunal will return to this letter later in evaluating the credibility of the witnesses. It is important to note in passing at the outset, however, that contrary to the evidence given by Mr Abuothman at the hearing this letter suggests that the alleged act of sexual intercourse occurred not on Tuesday 7 May 1996 within a few hours of the commencement of the employment as he suggested at the

hearing, but two days later on Thursday 9 May 1996. There is also a suggestion that Mr Martin had no personal knowledge of the matters raised in the letter of complaint although according to the evidence he gave at the hearing he himself spoke to the Complainant by mobile phone while she was in Kalgoorlie and it therefore seems surprising that no mention of this was made in the solicitor's letter. Finally, one notes the counter-allegation that the complaint of Ms Holden was "fabricated and malicious" and that she had behaved in a "provocative and coquettish" manner. This has been the stance adopted by the Respondent firm and by Mr Abuothman throughout this matter and at the hearing.

The Complainant's Health

Ms Holden said in evidence that she was deeply distressed by what occurred and found that this affected her intimate relationship with her partner, Darrell Scaiffe. She also began to develop various physical symptoms which eventually forced her to confer with her doctor, Dr Robert Turnbull. The evidence Dr Turnbull gave at the hearing is reflected in his written report which reads in part as follows:

"Nicola Holden has been a patient of this practice since 1980 and a patient of mine since 1991. I first became aware of this matter on 2nd September 1996. Nicola presented with a number of musculoskeletal aches and pains and stress...when I saw her on 2nd September 1996 we discussed her physical pains and I made the diagnoses of fibromyalgia based on the clinical findings. I questioned her about the alleged incident but she preferred not to discuss the details with me. She was clearly under considerable stress when I mentioned this and I recommended she seek counselling for this and options were discussed...I next reviewed her on 16 September 1996. She was enjoying her job and sleeping well with Amitriptyline. However, her fatigue and aches and pains were worse. I decided to refer to a rheumatologist for assessment of her pain and Mr Tony Schneider, clinical psychologist, for counselling and stress management related to the alleged incident. Again, details of the incident were not revealed to me.

She next saw me on 19th November 1996. She had seen Dr Paul Zilko, rheumatologist and he had confirmed my diagnosis of fibromyalgia. In his letter, Dr Zilko

stated, 'I think there is little doubt that she has generalised fibromyalgia almost certainly related to the sexual harassment.' I discussed Paul Zilko's letter with her and principles of management of fibromyalgia.

I saw her for unrelated matters, including her asthma management, in early 1997 and next discussed her stress issues with her on 20 May 1997. She had ceased her medication some 2 months earlier and presented feeling miserable, exhausted, sleeping poorly and depressed...I believe Nicola has suffered considerable psychological stress as a result of this alleged incident and this has also been reflected physically in the form of fibromyalgia. It is likely that resolution of the matter will considerably aid in the management of both her psychological and physical distress."

Evidence was also received from Mr Paul Zilko who confirmed the diagnosis of fibromyalgia and his belief that it was "almost certainly caused by stress related to the sexual harassment." The clinical and educational psychologist, Mr Tony Schneider, gave evidence and affirmed that in his view the experiences of the week of the employment were traumatic in nature, and were responsible for the subsequent intensive and extensive stress reactions which were experienced over a number of months. The various opinions were consistent in pointing to the Complainant having experienced over a substantial period recurrent patterns of poor sleep, poor appetite, loss of motivation, mood swings and depression accompanied by physical symptoms in various areas of the body and general exhaustion. The Complainant herself gave evidence consistent with the symptoms documented by her medical advisers.

She also gave evidence concerning her financial loss. The case for the Complainant was that she could have reasonably expected to be employed by the Respondent firm for the full probationary period mentioned in the written contract of employment and to have received certain agreed figures concerning the employment itself together with reimbursement of the taxi fare and medical expenses. She managed to obtain employment on a casual basis from the Perth Clinic in West Perth in the period 17th June 1996 to 30th May 1997.

She also obtained some employment with remuneration on an hourly basis at Princess Margaret Hospital between 16th October 1996 and 23rd April 1997. The income she received from these employers was brought to account in mitigation of her claim for financial loss.

The relevant figures were set out in a schedule of losses amounting to \$8329.15 to which she added a claim for medical expenses of \$996 thus producing a total claim in respect of special damages of \$9325.15.

The evidence of the Complainant was that she had been in good health prior to the commencement of the employment and this was the view of her medical advisers also. She said at the hearing that she was still experiencing the symptoms associated with the fibromyalgia condition. The Tribunal also pauses to note that during the conduct of the hearing the Respondent constantly reiterated the contention that the claims against him were fabricated and that he was the victim. This attitude was clearly a cause of further upset to the Complainant. The Respondents did not present any evidence seeking to rebut these figures relating to financial loss or in contradiction of the professional medical opinion.

Statutory Provisions

Section 24 of the Equal Opportunity Act 1984 provides that it is unlawful for a person to harass sexually an employee of that or any other person or a person who is seeking employment by that or any other person. A person shall, for the purposes of the section, be taken to harass sexually another person if the first-mentioned person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or engages in other unwelcome conduct of a sexual nature in relation to the other person and (a) the other person has reasonable grounds for believing that a rejection of the advance, a refusal of the request or the taking of objection to the conduct would

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

By section 25(4) a reference to conduct of a sexual nature in relation to a person includes a reference to the making to or in the presence of a person of a statement of a sexual nature concerning that person, whether the statement is made orally or in writing.

A number of decided cases indicate that a person can be said to be disadvantaged in his or her employment as a result of conduct amounting to sexual harassment if the environment at the workplace becomes so unpleasant or unfriendly that the person subjected to the harassment is disadvantaged in comparison to other employees. Navidad v Myer Fashions (1987) EOC 92-189. Further, in Freestone v Kozma (1989) EOC 92-248 it was held that a sexually permeated work environment was sufficient to constitute a detriment. In Hall v Sheiban (1989) EOC 92-250 Wilcox J said that it could amount to sexual harassment for a female to have the ardour of her male employer constantly pressed upon her if such declarations were unwelcome and she apprehended that any protest might jeopardise her continued employment.

By section 127 of the Act, after holding an inquiry, the Tribunal may dismiss the complaint that is the subject of the inquiry or find the complaint substantiated and make orders in favour of the complainant including an order that the respondent do pay to the complainant damages not exceeding \$40,000 by way of compensation for any loss or damage suffered by reason of the respondent's conduct. By section 129 any amount ordered to be paid by the Tribunal

may be registered as a judgment debt in a court of competent jurisdiction.

Principles

The decided cases indicate that where an allegation of sexual harassment is made the Tribunal should apply the ordinary civil standard of proof on the balance of probabilities, although it is permissible to take account of the gravity of the allegations and the serious consequences to a respondent following any adverse findings in determining whether the evidence meets that standard. See O'Callaghan v Loder (1984) EOC 92-024. As the Tribunal in that case pointed out at page 75-513:

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

The Tribunal will follow this approach in the present case. In doing so, however, it notes also that in Fenwick v Beveridge Building Products Pty Ltd (1985) 62 ALR 275 the Human Rights Commission held that the Complainant bears the onus of proof of making out the complaint but, in doing so, he or she may, in the absence of direct evidence, use in support inferences drawn from the primary facts. The question of whether the sexual conduct complained of is "unwelcome" must be viewed objectively and cannot be determined simply by reference to the Complainant's subjective response to an advance. Thus, one must look for evidence that the employee took steps to make known to the Respondent that she was not a willing participant in the conduct complained of.

In reviewing the evidence in the present case the Tribunal also notes that during the course of the hearing evidence was admitted of alleged acts of unwelcome sexual advances and other conduct calling for an explanation involving employees employed by the Respondent firm prior to the Complainant. In dealing with this evidentiary issue the Tribunal relies on the following passage from Ligertwood; Australian Evidence (1988 Ed) where the following passage appears at para 3.60:

"In other cases information revealing the disposition or propensity of a party in a civil case may be received if of sufficient relevance. The reasons...as providing the basis for an exclusionary rule in criminal cases do not apply to the revelation of the disposition or propensity of a party in a civil case. Civil cases seek to reach decisions probably correct, not correct beyond reasonable doubt, and can rest upon all information of sufficient relevance to the material facts and issues. The risk of convicting an innocent person does not exist to demand exclusion of information where its probative value is difficult to assess and it is appropriate to take difficult decisions and not to insist that probative value is pellucidly clear...thus information relevant to either propensity or disposition of a party disclosed by it is generally treated on its merits and admitted if of sufficient relevance."

This passage justifies the reception of evidence concerning Mr Abuothman's previous personal assistants. Further, and in any event, the evidence in question has a bearing upon the question of whether, viewed objectively, the Respondent's approach was unwelcome and whether the Respondent firm had taken any steps to protect their employees from unwelcome sexual conduct. The statutory provisions are aimed at exploitation and abuse of power. The greater the disparity between the age and sex of the parties involved, the greater the obligation on the part of the employer to respect and take account of any unwillingness or reluctance shown by the employee, especially if, as in the present case, the employer has been put on notice as a result of previous experiences with

former employees that intimate approaches are often unwelcome or likely to cause distress.

Credibility

In determining how the different stories given by the Complainant and the Respondent measure up to standards of consistency and probability, the Tribunal notes immediately that Nicola Holden was an impressive witness. She was calm, steady under cross-examination, orderly in her presentation of the essential facts, not inclined to prevaricate or exaggerate, and was convincing when it came to matters of detail. For example, she provided a graphic description of walking across planks on the building site to reach the half-finished unit where the first serious assault was said to have taken place. She was able to say without hesitation that the reason why she did not realise that only one room was available at the Midas Hotel in Kalgoorlie was because she was left to mind the bags after the taxi which had brought them from the airport had departed while Mr Abuothman talked to the receptionist. She gave a clear picture of the terrain at the Super Pit lookout where the final serious assault was said to have taken place and the incline where the incident occurred. No significant inconsistencies in her testimony were exposed by cross-examination or by questions asked of her by Tribunal members. It was consistent with her demeanour and general steadiness of character that she persevered in the employment and believed she could handle the situation in Kalgoorlie. The medical witnesses noted her tendency, if anything, to minimise her concerns and this too was consistent with the overall picture of a young woman who was not inclined to panic or to exaggerate and had a clear vision of what was going on around her.

The Tribunal also notes her story was consistent with and backed up by the evidence given on her behalf by her de facto partner, Darrell Scaiffe, and her mother, Mrs Holden. Both these witnesses confirmed that Nicola made known her

misgivings about Mr Abuothman at an early stage, before she went to Kalgoorlie, and made the telephone calls she mentioned in her evidence. These witnesses were comparatively mild-mannered people and, this being so, it is not surprising that they did not take or recommend more resolute or dramatic action as events unfolded. The same can be said of Darrell's father, John Scaiffe. Like his son, it doesn't seem to the Tribunal that he was given to acting in a threatening manner (contrary to the allegations advanced against him by Mr Abuothman). The Tribunal accepts that there was a friendly relationship between all these witnesses, as illustrated by the fact that there was no objection within the two families to Darrell and Nicola moving in together early in 1996 and by the additional fact on Mother's Day, Sunday 12 May 1996, Darrell brought a gift of flowers to Mrs Holden.

Against this background, the Complainant's story sounded convincing. She had done well at school and had a good track record at her previous job. She aspired to do well in her new position as personal assistant to the general manager of the Respondent firm, but was soon obliged to repel her employer's unwelcome advances. She persevered with the employment because she needed money, having just moved into rented accommodation with her de facto partner, and was therefore persuaded to accompany Mr Abuothman on a trip to Kalgoorlie, notwithstanding her reservations about him. When it became apparent that his intentions were predatory, and the unwelcome sexual conduct was likely to continue, she immediately resigned. It is significant that the allegations made in her resignation letter of 14 May 1996, which she wrote for herself immediately after the events described, correspond exactly to the allegation she made at the hearing. The letter was written before she was fully familiar with the provisions of the Equal Opportunity Act.

Against this, one sets the evidence adduced on behalf of the Respondent. Mr Martin, as a principal of the Respondent

firm, was not closely associated with the events giving rise to the central allegations. Nonetheless, it was apparent from his general indifference to matters of concern raised by his employees that his evidence should be viewed with caution, including the evidence he gave that he spoke to the Complainant by telephone while she was in Kalgoorlie and had no reason to believe that she was upset. This important matter is not reflected in the letter subsequently written by the firm's solicitor, Mr R.C. Heitman, although it is apparent from the letter that the solicitor had been carefully instructed in regard to a number of very serious allegations of sexual harassment of a young female employee by the firm's general manager, Mr Abuothman.

When one turns to the testimony given by Mr Abuothman at the hearing before the Tribunal it appears to be flawed in many respects. In demeanour, he was constantly bad tempered and excitable and was obviously far more concerned about his own reputation and personal feelings than in trying to get the facts right and provide the Tribunal with a clear account of what occurred. Much of what he said was vague and contradictory. He suggested that the Complainant came to the initial interview dressed virtually like a prostitute, although there was nothing in her background to suggest that this was likely. His initial description of the alleged act of sexual intercourse was vague. Under cross-examination, when pressed about the details of the alleged act in the back of the company car he often paused before producing an answer to the question, and it didn't seem that he was speaking from memory but was, rather, trying to visualise how it might have happened. It took him a long time to recall whether he was sitting behind the driver's seat or the passenger's seat shortly before the alleged act of intercourse occurred.

His explanation as to how it came about, on his version of events, that a young woman from a respectable background should dress in that way and have sexual intercourse with him in the back seat of the company car within the first few

hours of her employment was not convincing. The account he gave sat uncomfortably with his evidence that a few days later, at the Midas Hotel in Kalgoorlie, he fell asleep while having his brow stroked by the Complainant who, to the best of his recollection, was clad only in a pink nightie at the time. It will be recalled that, contrary to the account that he gave at the hearing, the letter written by the firm's solicitor indicated that the alleged act of sexual intercourse occurred not on the first day of the employment but on Thursday, 9 May 1996 being the third day of the employment.

On many other points Mr Abuothman's evidence was equally unconvincing. When confronted with an inconvenient question he was inclined to bluster and prevaricate. For example, when asked whether he had accosted the Complainant in the car-park of the Hannan View Motel, he answered not with a denial but with a question of his own designed to open up debate as to whether it would be sensible to do a thing like that in public view. The notion that he felt uncomfortable and conscience-stricken after the initial act of sexual intercourse may have served to explain why he fell asleep in the room at the Midas Hotel but it sat awkwardly with other evidence given on his behalf by taxi driver Z and Mr and Mrs Arabi that Mr Abuothman and the Complainant were carrying on in an affectionate fashion like a pair of lovers.

The assessment of these witnesses ultimately comes down to a question of credibility. Taxi driver Z, contrary to the Respondent's assertion at the hearing, conceded that he was a friend of Mr Abuothman. He was obviously inclined to speculate in a way he thought would be favourable to the Respondent's cause (but without being sufficiently familiar with the evidence overall to be conscious of certain inconsistencies). For example, he didn't hesitate for a moment in making the confident assertion that a glance or two was enough to tell him that Mr Abuothman and the Complainant were carrying on like a couple who had just had

sexual intercourse. The Tribunal did not regard him as a reliable witness and disbelieves his testimony.

The Tribunal also attaches little weight to the evidence of Mr and Mrs Arabi. They saw the Respondent and his personal assistant for a brief time only. It was apparent from Mr Abuothman's demeanour at the hearing that he was a physically active person, inclined to move about repeatedly and impulsively and it is quite possible that if, as the Complainant contends, he was constantly attentive to her, with a propensity to touch her, then his actions may well have been misconstrued by a stranger to the relationship and been characterised as part of a mutual undertaking when in fact it was one-sided. Mrs Arabi spoke of the Complainant sitting on the Respondent's knee but it is significant that her husband, although offered ample opportunity to recall the scene in the kitchen of the Arabis' restaurant, couldn't recall such a striking incident. It was Mrs Arabi who had been interviewed at length by the agent hired by Mr Abuothman for the purpose. She seemed to think that she saw the parties on both the Saturday and the Sunday although the evidence of other witnesses is overwhelming that the Respondent was only in her restaurant on the Sunday. This casts doubt upon her story. Their friend, Mr Sulejman, the bystander who invited the parties to his house saw nothing of real significance relevant to the existence of an intimate relationship of the kind contended for by the Respondent.

The Tribunal is also obliged to take account of the Respondent's tendency to exaggerate. He spoke of threatening demands made by Darrell Scaiffe for \$10,000 after the Complainant resigned. This was not only denied by Darrell Scaiffe but seemed to be entirely inconsistent with the character of the witness in question. Likewise, Mr Abuothman suggested that Darrell's father behaved in a threatening manner. This was not only denied but also clearly inconsistent with Mr Scaiffe's character.

Mr Abuothman spoke of going to Kalgoorlie for a business trip but couldn't identify any business associate he communicated with or describe precisely the nature of the business he wished to do. His suggestion that on the plane flight back to Perth the Complainant seized the opportunity afforded by his fainting fit to attend to his needs seemed fanciful, to say the least, as was the notion that within a day of being employed by the Respondent firm, according to him, the new 20 year old assistant seemed to know more about the business than he did and he was soon being controlled by her "like a dog on a leash." The Tribunal also takes account of the evidence concerning his ill-fated relationship with three previous personal assistants, two of whom were very young. When asked about these matters, he brushed the queries aside and it was apparent that he did not seem to accept that as an employer he was obliged to exercise care in his dealings with junior female employees. This added to the picture of a man who was not accustomed to speaking truthfully and accurately about matters affecting him. The Tribunal formed the view that the evidence given by the former personal assistant, Ms X, was truthful and this tended to corroborate Ms Holden's story.

Finally, in weighing up the Respondent's credibility, the Tribunal has to take account not only of the vagueness and inconsistencies in his testimony of the kind already mentioned, but also to keep under notice the fundamental implausibility of his account. Counsel for the Complainant drew attention to this aspect of the matter in her closing address in which she summarised the gist of Mr Abuothman's evidence as follows:

"She (the Complainant) attends this interview dressed in a tiny mini-skirt, which is so short that her underwear is visible and the underwear, his evidence is, consists of a G-string. She has bare legs and very high heels, and, in his words, is dressed like a prostitute...now, you might consider that a young woman who is extremely anxious to obtain employment, who has no idea who the person is who's going to interview her, would not attend an interview dressed in that fashion.

His evidence further is that she dazzles him with her experience, claims to be practically running Mount Hospital, has these amazing contacts, insists on waiting for the interviews to be over and insists on a trial that day...as soon as they get into the car and start driving around - and he came up with this in cross-examination, you might recall - she starts to touch him; and as I say, I would remind you that this is a young lady anxious to get employment. She has no idea what sort of reaction she would get to that behaviour.

She asked to be allowed to drive. She calls him 'cute' and 'a legend'. She eventually parks in a public place, apparently hops into the back of the car, inveigles him into the back, once there they have a discussion about cannabis, and she produces a sachet of cannabis to this total stranger, who is also her employer, on her first day of work.

She announces to this complete stranger that her partner grows and supplies it, and proceeds to sell it to him for \$20. When they have smoked the cannabis, she apparently seduces him and has sexual intercourse in a public park in broad daylight, following the fact that another car has been in the park, and is parked nearby.

She continues to behave in such a provocative manner that the Respondent finds it embarrassing, but he does nothing about it...she apparently then continues her behaviour in Kalgoorlie by encouraging the use of a shared room, wears a very skimpy robe, and strokes him to sleep. Now, I just summarise that to really put to the Tribunal whether that is credible, that a young woman so anxious to have employment would behave like that on her first day of work and continue such behaviour...in the face of her employer...trying to withdraw from the behaviour."

Findings

For the reasons that have already been indicated, the Tribunal is satisfied that Nicola Holden was a completely reliable witness and that the account she gave to the Tribunal of what occurred during the course of her employment is true. The Tribunal has made a careful assessment of the credibility of Mr Abuothman and is not prepared to give any weight to what he says. The Tribunal disbelieves his account of events generally and in regard to the most significant issues, including the various sexual

assaults complained of, regards him as a self-serving and untruthful witness. For the reasons previously indicated, the Tribunal gives very little weight to the various witnesses called on his behalf and, in particular, does not regard taxi driver Z as a reliable witness. In every case where there is a significant contradiction between the account provided by the Complainant and the version offered by Mr Abuothman, the Tribunal unequivocally prefers and accepts the evidence given by the Complainant. The Tribunal also accepts in its entirety the evidence given by Mr Abuothman's former personal assistant, the witness described as Ms X, and further accepts that his involvement with two previous personal assistants was along the lines described earlier in these Reasons for Judgment.

It follows from the central findings that at the time Mr Abuothman employed Nicola Holden as his personal assistant, on Tuesday 7 May 1996, he was clearly on notice, because of three previous controversies with female personal assistants, the last of which had occurred a week earlier, that he should exercise care in any approaches on a personal or intimate nature and that such approaches were likely to be unwelcome eventually, even if made in an apparently friendly way to begin with. The Tribunal finds as a fact that, notwithstanding these previous difficulties, Mr Abuothman decided at the initial interview to employ Nicola because he was attracted to her, and within the first few hours of the employment proceeded to touch and talk to her repeatedly in a manner that was sexually threatening.

The Tribunal also finds that throughout these early days of her employment she made it clear to him that his approaches were unwelcome and there was nothing provocative in her dress or manner which could possibly have given him any encouragement. The Tribunal has little doubt that she carried out her formal duties in a confident manner and engaged in whatever pleasantries were necessary with colleagues at the place of employment and the firm's business associates but in a way which was appropriate to

the role assigned to her. Her conduct was entirely consistent with normal behaviour at a place of employment. Unfortunately, Mr Abuothman's expectations were abnormal and his conduct steadily deteriorated. The Tribunal finds that Ms Holden was subjected to repeated sexual harassment contrary to the provisions of the Equal Opportunity Act during the first few days of her employment by the Respondent firm and in circumstances where she was led to believe that rejection of the advances would be to her disadvantage. The harassment included a serious sexual assault which took place in a half-completed unit on a building site adjacent to the Respondent's home. The Tribunal is satisfied that Mr Abuothman seized her and engaged in the forceful pelvic thrusting described in her evidence.

In dealing with this early phase of the employment, the Tribunal unequivocally rejects the fanciful suggestion made by Mr Abuothman that within the first few hours of the employment Ms Holden inveigled him into having sexual intercourse with him in the back seat of the company car in broad daylight in a public parking area. Mr Abuothman's evidence in regard to this matter was so outrageous and so utterly unconvincing that the Tribunal would not normally be inclined to devote much space to such a fantasy. Unfortunately, however, the hearing before the Tribunal received widespread publicity and it is necessary to dispose of this fiction in the clearest possible terms.

When the Tribunal turns to the Kalgoorlie trip it is necessary to speak with equal clarity. The Tribunal finds as a fact that on Saturday evening, 11 May 1996, Mr Abuothman confided to his personal assistant Ms Holden, that he had brought her to Kalgoorlie under the pretext of a business trip with a view to seducing her. When this admission is considered against a background of his controversial and disastrous relationships with three previous female personal assistants, the admission has to be viewed in an extremely serious and sinister light. The

Tribunal is satisfied that at some stage within the first few days of the employment Mr Abuothman formed a predatory intention and devised the Kalgoorlie trip as a way of luring Ms Holden away from a circle of family support which he was well aware of, namely, a longstanding de facto partner who she was presently living with, and her parents, so that he could proceed with the seduction he had in mind. It is to the great credit of Ms Holden that she was able to deal with his advances and by her steadiness of character not to panic in the face of continuing and gradually escalating sexual advances and intimidatory behaviour.

The Tribunal accepts Ms Holden's account of what transpired in Kalgoorlie and is therefore satisfied that consistent with his predatory design Mr Abuothman sexually assaulted her on the Friday evening in the room at the Midas Hotel in the way that she described in her evidence. He assaulted her again in the car-park of the Hannan's View Motel and forcefully assaulted her near the vantage point overlooking the Super Pit by forcing her to the ground, putting his hand up her shirt, and placing her hand on his genitals. The Tribunal also finds that the letter of resignation written by Ms Holden dated 14 May 1996 contains an accurate summary of the various indignities she was subjected to from which it follows that the principal assaults the Tribunal has just referred to were also accompanied by a host of unwelcome sexual indignities each of which amounts to sexual harassment within the language of the Act.

The Tribunal is more than satisfied that, viewed objectively, Mr Abuothman knew that his approaches were unwelcome, but chose to disregard the message being conveyed to him. Again, for the sake of completeness, it follows from earlier observations that the Tribunal completely rejects the fanciful suggestion made by Mr Abuothman in the course of his evidence that Ms Holden approached him in a nightie at the Midas Hotel, that she sat upon his knee in the kitchen of a restaurant in Kalgoorlie and that she gave him mouth-to-mouth resuscitation on the plane flight back to

Perth as an indication of her interest in him. She did not behave in a "provocative and coquettish" manner. All of these matters seem to have been simply the product of an over-heated imagination long after the events in question when it became necessary for Mr Abuothman to concoct some form of excuse to meet the complaint being advanced against him. The plain fact is that in a calculated and most cynical way he tried to take advantage of a 20 year old female employee which turned the six days of her employment with Transportable Site Accommodation into a nightmare.

The Tribunal is also satisfied that the principal in the Respondent firm at that time, Mr Martin, is not free from responsibility. The Points of Defence filed on behalf of the Respondent firm mentioned earlier clearly establish that the firm is willing to accept vicarious responsibility for the actions of its general manager as a matter of formality, and a finding to that effect can now be made. In addition, it has to be said, however, that the conduct of Mr Martin in the circumstances of this case although he was not personally associated with the acts of sexual harassment complained of, is reprehensible. There were clear indications that his general manager had a propensity to prey upon the young women employed by the Respondent firm as personal assistants to the general manager. Mr Martin himself had inquired into one of these incidents and knew of the risks involved. Mr Martin knew that his newly-appointed general manager came from the Middle East and may not have been fully conversant with the law and customs of this country in regard to the treatment of women and the obligations of an employer in the workplace, but there is no evidence to suggest that Mr Martin took any steps whatsoever to instruct his general manager in the proper codes of conduct or to institute a policy which would guard against infringement of the Equal Opportunity Act and sexual harassment in particular.

When Ms Holden complained, first by telephone, and then by the lengthy letter dated 14 May 1996, Mr Martin not only

failed to make any adequate inquiry into the allegations the subject of the complaint but also, at a later stage, lent his name to the counter-allegation contained in a letter written by the firm's solicitor in which it was suggested, as a matter of complete fabrication on the Tribunal's finding, that Ms Holden had engaged in an act of sexual intercourse, described as a consensual affair, within the first few days of her employment. There can be little doubt that Mr Martin simply turned a blind eye to what was clearly going on around him. The fact that Mr Abuothman now owns a portion of the business, after a preceding period of financial difficulty, strongly suggests that Mr Martin placed financial considerations far above the need to treat his employees in a humane manner. In these circumstances, it is entirely appropriate that any compensation awarded against both Mr Abuothman and the Respondent firm is a matter of joint and several liability.

This brings the Tribunal to events subsequent to Ms Holden's resignation in circumstances which, in the Tribunal's view, amounted to a constructive dismissal. The working environment in which she found herself was permeated with unwelcome sexuality and this, of itself, amounted to a severe detriment for which damages can normally be recovered. More importantly, the Tribunal is satisfied on the balance of probabilities that in the days and weeks and months following the brief, ill-fated period of employment by the Respondent firm Ms Holden was grievously affected by what had occurred. As a young Australian who had already displayed competency and professionalism in her previous jobs, she had a legitimate expectation that she would be able to develop her skills and confidence in a new position, being as yet on the threshold of her working life. Within a week of the employment commencing those aspirations had been swept away and utterly subverted by the predatory aspirations of an employer who had no real interest in her skills and viewed her as a sexual target. She was devastated by what occurred, her self-esteem was grievously affected, and there is still a risk that the cynicism which

accompanied the maltreatment she experienced will leave a lasting mark. The evidence certainly established to the Tribunal's satisfaction that her relationship with her de facto partner was adversely affected, she became withdrawn, even within her family circle, and her confidence was severely impaired. To this must be added the uncontradicted medical evidence that her health began to suffer and she is presently affected by the chronic medical condition known as fibromyalgia. The expert evidence available to the Tribunal indicated that a condition of this kind, occurring in a person who had previously been in good health, is probably linked to a traumatic incident. Mr Zilko, a well-qualified specialist, gave evidence "that she has generalised fibromyalgia almost certainly caused by stress related to the sexual harassment."

The injury suffered by Ms Holden has been severe and her loss of enjoyment of life is significant. The Tribunal is satisfied on the evidence that the discomfort she has previously experienced and continues to experience was caused by the events at her place of employment in early May 1996. In addition, she was obliged to sit through a hearing during the course of which she was subjected to abuse and histrionics by Mr Abuothman (while he advanced a story which the Tribunal finds to be entirely false) and these antics clearly had an upsetting effect. She had to sit quietly while he attempted to persuade the Tribunal that she was a malevolent accuser and that he, Mr Abuothman, was an innocent victim. The Respondent's tantrums and melodramatic displays of self-pity went on for hour after hour and she and her family were then obliged to read about his fanciful allegations in the newspapers. She endured the ordeal with considerable fortitude, but it may leave her with a feeling that the legal system is not even-handed if the overall effect of Mr Abuothman's histrionics means that she is more disadvantaged than when the hearing began.

Damages

The Tribunal has already noted that under the Act it has power to award damages when a finding has been made in favour of a Complainant. The decided cases indicate that in the case of a statutory tort such as sexual harassment it is permissible to award damages for humiliation, emotional distress, embarrassment, hurt feelings and the like, where and to the extent that the injury asserted and the loss claimed for can be shown to be caused by the wrongful act and are sufficient proximate to it. See Allegretta v Prime Holdings Pty Ltd (1991) EOC 92-364. 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 implicit in the legislative provisions. See Hall v Sheiban Pty Ltd (1989) EOC 92-250.

This Tribunal has previously noted that because men are rarely sexually harassed, it is often difficult for a man to understand the feelings of revulsion and violation unwanted sexual attention can produce. Nonetheless, respected literature in this field documents damage to victims' health that sexual harassment can cause, including anxiety, tension, irritability, depression, deterioration of personal relationships, hostility, sleeplessness and fatigue. Many of these elements appear to be present in this case.

To date, the decided cases provide little guidance in regard to the question of aggravated or exemplary damages although this concept is well-known in the field of defamation. If the defendant to a claim of defamation continues to assert the truth of a statement that is ultimately held to be false then a court will often take this into account in determining what is a proper measure of compensation and may, in some circumstances, award exemplary damages in addition to what might otherwise be awarded, in recognition of the extra damage done to the plaintiff's reputation as a consequence of the litigation being defended in that manner.

The Tribunal must exercise great care in translating such an approach to cases of sexual harassment because, in many such cases, there is a degree of ambiguity about the events in question and a respondent, in the context of a comparatively new area of the law, may be influenced by a genuine misunderstanding as to what constitutes infringing conduct. On the other hand, in a case such as the present where the Tribunal has found that the line of defence is a fabrication and the advancement of that line at a public hearing was likely to cause distress, as in fact happened in the present case, then the Tribunal is minded to add to the award a sum representing compensation for the additional injury.

In a number of previously-decided cases this Tribunal has awarded significant amounts by way of general damages within the range of \$8000 to \$16000 in circumstances where the sexual harassment complained of was severe. See Lyon v Godley (1990) EOC 92-287; Smith and Mitchell v Sandalwood Motor Inn (1994) EOC 92-577; Horne v Press Clough Joint Venture (1994) EOC 92-591. The Tribunal also notes that in an earlier case under the New South Wales legislation Hill v Water Resources Commission (1985) EOC 92-127 a complainant received \$27,500 for injury to feelings, pain and suffering and loss of enjoyment of life. In those cases the matters complained of were severe but some of the events complained of seemed to happen spontaneously and in circumstances where the complainants in question had opportunities to seek protection. The circumstances were not accompanied by quite the same element of calculation and predatory design which the Tribunal finds to be present in the circumstances of the present case. In addition, there is nothing in the reports of those previous cases to suggest that the defence was conducted in the intimidatory and the belligerent manner that the defence was conducted in the present case.

In giving consideration to what is an appropriate award of damages it will also be useful to take account of recent decisions in other Australian jurisdictions. In Watkins v Fryer (1995) EOC 92-685 a female secretary recovered \$20,000

pre-existing medical condition was aggravated by the stress. In Lin v Kirlappos 1995) EOC 92-711 a recently arrived female migrant from China was subjected to lewd comments, proposals that she become the employer's mistress, and an attempt to kiss her. The Commission in that case took account of the fact that the employee was in a position of "special invulnerability" and awarded \$10,000 for pain and suffering, psychological trauma and economic loss. In B v Stratton (1997) EOC 97-893 a young female receptionist was awarded \$12,000 for general damages where she was subjected to lewd comments, touching and unwanted gifts of "sexy" lingerie by a middle-aged manager.

These cases do not seem to be as extreme as the circumstances of the present case, although it is significant that in one case emphasis was placed upon the fact that the employee was in a position of vulnerability. It follows from the findings of the Tribunal in the present case that as a matter of premeditated design the Respondent, having unsuccessfully canvassed with Ms Holden the possibility of an inter-state trip with shared accommodation, then arranged for her to accompany him to Kalgoorlie with a view to having sex with her. The inference is inescapable that this was done (as it had been done in the case of his previous personal assistant, Ms C) so that she would not have access to her usual circle of family support, namely, her de facto partner, Darrell Scaiffe, and her mother. This resulted in her being placed in a position of special vulnerability.

The Tribunal also notes, in reviewing the recent case law, that in Phillips v Leisure Coast Removals (1997) EOC 92-900 the Commission awarded the complainant \$12,000 for general damages having regard to the volatile nature of the firm's manager and the abuse of the relationship of trust between employer and young employee. These factors exist in a more extreme form in the present case. Further, in Greenhalgh v National Australia Bank (1997) EOC 92-884, where a bank employee was awarded \$14,000 by way of general damages, the

Commission recognised that aggravated damages might be awarded where a complainant has been put to the expense and distress of having to establish the facts of the sexual harassment (although no award was made on that ground on the facts of the matter).

In the final analysis, comparison with other cases, while useful to some extent, at best affords only some guide to an appropriate award. Each case necessarily depends very much on its own facts. In the circumstances of the present case, having regard to the matters already mentioned and the fact that Ms Holden and her medical advisers have been able to point to a specific form of injury endured over a long period, namely, the condition known as fibromyalgia, the Tribunal will award \$30,000 by way of general damages to which it will add a further amount of \$4000 by way of aggravated damages, which brings the total figure to this point of the reasoning to \$34,000. The Tribunal is satisfied that the claim for financial loss described earlier in these reasons amounting to \$9325.15 by way of special damages should also be recovered.

This amounts to a total award of \$43,325.15. As the jurisdiction of this Tribunal is limited to an award of \$40,000 it follows that, in practical terms, the amount constituting the judgment of the Tribunal will be \$40,000. The Tribunal has already noted that pursuant to section 129 of the Act any amount ordered to be paid by the Tribunal may be registered as a judgment debt in a court of competent jurisdiction. Thus, for the sake of clarity, and consistently with observations made earlier in these Reasons for Judgment, the Tribunal notes that the award of \$40,000 is an amount payable by the Respondent, Mr Abuothman, and the Respondent firm, Anther Pty Ltd trading as Transportable Site Accommodation, jointly and severally, from which it follows that the amount in question can be recovered from either of the two Respondents just named.

General Observations

Because of the way the defence was conducted, the Tribunal, in closing, wishes to make it absolutely clear that it accepted Ms Holden's version of events without qualification, from which it follows that without any impropriety on her behalf whatsoever she has been the victim of a serious form of sexual harassment. It sometimes happens in this area of the law where intimate relationships between men and women are involved that there is room for debate about the nature of sexual harassment and whether, in circumstances of ambiguity, relief should be granted to a complainant. Customs in the community change from time to time and this may lead to different views about the proper application of the Equal Opportunity Act. In the present case, however, the matters under consideration, on the Tribunal's finding, are of an entirely different order. Ms Holden was preyed upon in a manner which no fair-minded employer in the Australian community would contemplate or tolerate. Now that the Tribunal has conducted a full and careful evaluation of the evidence it feels obliged to say as plainly as possible that Ms Holden was the entirely innocent party. The Tribunal envisages that a forthright statement of this kind will go some way towards restoring her reputation which was in grave danger of being prejudiced by the unjustified attacks upon her during the course of the hearing.