

EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

Matter Number 16 of 1997

IN THE MATTER OF A COMPLAINT BY:

SHANNON DAWSON

Complainant

- against -

DAQUI INVESTMENTS PTY LTD

First Respondent

and

STEVEN MUSTICA

Second Respondent

REASONS FOR DECISION

BEFORE: Mr N Hasluck, QC
Ms R Kean
Ms R Scolaro

President
Member
Deputy Member

Counsel for the Complainant

Mr A R Macdonald

Counsel for the Respondents

No appearance

HEARD: 8 October, 1997

REASONS FOR DECISION

Delivered 8/12/97

The Complainant, Shannon Dawson, claims that she was subject to unlawful sexual harassment in the area of employment contrary to Section 24 of the Equal Opportunity Act 1984. The complaint is brought against her former employer, Daqui Investments Pty Ltd, trading as Pasta and Vino Italian Restaurant in Bunbury and Steven Mustica who was a fellow employee.

Shannon Dawson was 19 years of age when she commenced work at the restaurant towards the end of November 1994. She was with a girlfriend at a nightclub in Bunbury one evening when she got talking to Steven Mustica who mentioned that there might be casual work available at the restaurant. She had never seen Steven Mustica before and nor had she met the proprietor of the restaurant, Charles D'Aqui, who interviewed her for a position as a permanent part-time waitress. It was a small business managed by Charles and Rose D'Aqui on behalf of Daqui Investments Pty Ltd. The kitchen staff consisted of Charles D'Aqui himself, another cook called Ian, Steven Mustica who operated the deep fryer and griller, and a kitchen hand called Tony. There were various other waitresses employed and it was necessary to commute back and forth between the restaurant area and the kitchen. Shannon usually worked from Thursday through to Sunday, sometimes five nights a week, sometimes three, depending upon whether the restaurant was busy or not. At knock-off time she would usually be told whether she was required on the following night.

Before turning to the details of the alleged sexual harassment it will be useful to pause briefly and look at the procedural history of this matter. The employment ceased on 25 February 1995. The Complainant subsequently commenced proceedings in the Industrial Relations Court of Australia for relief arising out of an alleged wrongful termination of her employment. The complainant and her mother gave evidence at the hearing. Mr & Mrs D'Aqui gave evidence for the Respondent to the claim with the Respondent being represented by Mrs D'Aqui. The court made a full inquiry into the allegations of sexual harassment advanced by Shannon at the hearing as a necessary prelude to determining whether Shannon's resignation amounted to a constructive dismissal. The court eventually concluded that there was no valid reason for the termination of the employment and awarded compensation in the sum of \$2,000 comprising \$1,000 for loss of

remuneration and \$1,000 for emotional distress caused by the manner in which the employment was terminated. The court said expressly that "it would not be appropriate in this case to compensate the Applicant for all of the emotional distress caused by the sexual harassment which she suffered from the chef." It is apparent from the Reasons for Judgment handed down by the court on 30 January 1996 that the court left open the question of whether compensation could be obtained for sexual harassment in another forum.

In late January 1996 Shannon lodged a complaint with the Commissioner of Equal Opportunity supported by statements made by herself and her mother. The allegations in the complaint correspond to the allegations dealt with by the Industrial Relations Court. Those allegations were referred to the Respondent for comment and a reply was received from Mrs D'Aqui on behalf of the First Respondent in April 1996. The fact and period of the employment was admitted but the allegations which principally concerned the conduct of Steven Mustica were denied.

A reply was also received from Steven Mustica. The Tribunal will return to this document in due course. For the time being, however, it is sufficient to note that in his reply he dealt with each allegation in turn, essentially denied the allegations accusing him of misconduct, and was obviously aware of the nature of the allegations being made against him.

The Commissioner was unable to resolve the dispute and the matter was referred to this Tribunal on 8 May 1997 together with the Commissioner's report in the manner allowed for by the Act. The report included, inter alia, the Reasons for Judgment handed down by the Industrial Relations Court and the exchanges of correspondence just mentioned. The full procedural history of the matter from that point on is detailed in the transcript of proceedings before this Tribunal dated 8 October 1997 from which it appears that both Respondents were sent all the usual notices and were clearly advised that findings and orders adverse to them could be made if they failed to comply with orders and directions given by the Tribunal or failed to appear at the hearing.

For present purposes it is sufficient to say that as a consequence of orders made at a preliminary hearing on 5 June 1997 the First Respondent filed and

served Points of Defence in answer to the Complainant's allegations but no response was received from Steven Mustica. The Respondents were not represented and did not appear at the hearing before the Tribunal held in Bunbury on 8 October 1997 although it was apparent from discussions concerning settlement held a few days before the hearing date that the First Respondent at least was well aware that the matter had been listed for hearing. The President of the Tribunal noted, in the summary that appears in the transcript, that if respondents to a complaint simply ignore the formal process then a point may be reached where it can become an injustice to the complainant not to proceed. Accordingly, the Tribunal proceeded to receive evidence from the Complainant and her witnesses notwithstanding the failure of the Respondents to appear.

The materials before the Tribunal included not only the evidence given by the Complainant and her witnesses but also the Commissioner's report and the Points of Defence filed by the First Respondent. It follows from earlier discussion that notwithstanding the absence of the Respondents at the hearing the Tribunal was left in no doubt that both Respondents knew the nature of the case being advanced against them. The Tribunal was also in a position to take account of the line of defence which had been advanced before the Industrial Relations Court and in later documents. Nonetheless, in reviewing the evidence given by the Complainant and her witnesses at the hearing it must be kept in mind that the testimony was not subjected to cross examination, although members of the Tribunal, conscious of the line of defence reflected in the Commissioner's report and other documents, asked a number of questions of the witnesses with a view to testing the reliability of the evidence. It is against this background that the Tribunal now turns to the case advanced by the Complainant.

Shannon Dawson gave evidence in support of the allegations reflected in the Points of Claim filed on her behalf. She said that soon after the employment commenced, in early December 1994, Steven Mustica asked her if she would go out with him. She declined the invitation on the basis that she had a boyfriend and was not interested. Not long afterwards he began subjecting her to the unwelcome conduct which she described as sexual harassment. He referred to her "sexy legs" on a number of occasions. On another occasion, whilst she was working in the kitchen, he said in a seductive voice "let's go down the beach and play tonsil hockey", a remark which caused

Charles D'Aqui who was nearby to laugh. On a number of occasions Steven Mustica came from behind her and grabbed her waist with both hands and on other occasions he rubbed his hands across her buttocks. This physical contact occurred on average about four or five times each night although it would vary from night to night. Steven Mustica also initiated a joke shared by the other male members of the kitchen staff about a song which is called "I Don't Want No Short Dick Man". At one stage he turned around and said to the Complainant "you wouldn't want no short dick man would you, Shannon?" The Complainant said that she was upset by this remark.

Shannon said she didn't say much about this conduct because she was scared of Steven Mustica. She said "I never used to say much because I didn't think he would take much notice of me. I would just throw evil looks at him." When she gave such looks or moved away from him "he would laugh sometimes or have a smirk on his face." She was not aware of anyone else knowing or observing what was going on. She was not inclined to approach Mr and Mrs D'Aqui because she thought they would probably get rid of her on the basis that she was the last to have been employed and was someone that had brought problems to the restaurant. In addition, it appeared to her that they were good friends with Steven Mustica because they all used to laugh at his jokes and get along with each other quite well.

The Tribunal pauses to note that the First Respondent on its documents asserted that Shannon made no complaint to them about Steven Mustica's comments prior to the events leading up to termination of employment and they said further that they were not friends of Steven Mustica. He was simply their employee. On the other hand, there is no evidence on the Respondents' side to contradict the Complainant's case that Charles D'Aqui went along with the back chat and repartee in the kitchen, some of which was at Shannon's expense and made her feel uncomfortable.

Steven Mustica in his reply to the allegations said that he was not a friend of the D'Aquis but was treated by his employers in the same way as others who worked for them and he denied responsibility for any unwelcome sexual harassment. He said:

"I never showed any interest in Shannon Dawson ... I consider myself to be a little more refined with a great more etiquette than what has been stated by Shannon Dawson ... up until Shannon left Pasta e

Vino her attitude towards me had not changed as I did address her the same way I did all the other workers."

Shannon said that on 24 February 1995, being about three months after she started work at the premises, Steven Mustica was again harassing her by touching her buttock in a way which made her upset. After work she went home and saw her mother and told her what was going on. She also told her flat mate, Kirsty King, about the unpleasant time she was having. As a result of the conversation with her mother she went to work the next day determined to do something about the situation if anything happened.

She said that on the evening of Saturday 25 February while she was polishing cutlery in the kitchen Steven Mustica came up behind her and jammed her between a counter and the kitchen door and started fondling her buttocks. She turned and gave a disgusted look whereupon he backed away and left. She complained bitterly to another waitress, Elaine, and within minutes of that conversation Rose D'Aqui came in and said "that if I was going to start any hassles like this I should leave". Shannon said that no one should have to put up with what she had experienced in the working area. At that, Rose D'Aqui said: "Look. You're better off leaving." The Complainant then left the premises straight away, believing her employment had been terminated.

The Tribunal pauses to note that according to the Reasons for Judgment given by the Industrial Relations Court Mrs D'Aqui conceded in her evidence to that court that she made an assumption, after talking to Elaine, that Shannon was complaining about the chef touching her leg and told Shannon that if she was going to be silly about things like that, and cause problems, she wasn't wanted as an employee. The court found that Shannon was "subjected to behaviour of the chef as she described and that it was totally unwarranted." The court did not accept, however, that Mr & Mrs D'Aqui tolerated sexual harassment in the work place and made a finding that "Mrs D'Aqui, in particular, had no awareness whatsoever of the fact that the applicant had been sexually harassed by the chef." The court accepted further "that if Mrs D'Aqui had understood the true nature of the problem she would have reacted differently." In other words, had she known the full extent of the allegations she might have taken steps to discipline the chef.

Shannon said in evidence that she was upset by what had occurred. She started to drink heavily. She explained to her boyfriend what had happened but the relationship broke up because she couldn't handle the pressures of a relationship in which her boyfriend, being jealous, couldn't seem to understand the nature of what had occurred. Because she was staying home and drinking heavily her social life suffered. She didn't take any medical or professional advice but her mother and her flatmate Kirsty King confirmed that the effect upon her was as she had described. It emerged during the course of evidence that the misconduct she complained of brought back painful memories of an incident in her childhood involving a family member where she had felt compelled to stay silent and not complain about matters which were upsetting her.

The Tribunal pauses to note that no evidence was received at the hearing concerning loss of income because issues of this kind had been dealt with by the Industrial Relations Court. The case for the Complainant was presented on the basis that the question of whether the Complainant was entitled to general damages for sexual harassment during the course of the employment was an issue which had been left open by the Industrial Relations Court, although compensation in the sum of \$1,000 had been granted by that court in respect of the events on the evening of Saturday 25 February comprising what was found to be an unwarranted termination of the employment.

The Tribunal now turns to the relevant legal principles. By Section 119 of the Equal Opportunity Act the Tribunal may adopt any findings, decision or judgment of a court or tribunal that may be relevant to the inquiry and may receive in evidence the Commissioner's report. The Tribunal is not bound by the rules of evidence and may inform itself on any matter it thinks fit. By Section 120 it shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms. Nonetheless, the decided cases indicate that where an allegation of sexual harassment is made the Tribunal should apply the ordinary civil standard and 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 *Briginshaw v Briginshaw* (1938) 60 CLR 336; *O'Callaghan v Loder* (1984) EOC 92-024.

Section 24 of the Act provides that it is unlawful for a person to harass sexually an employee of that or any other person. A person shall, for the purposes of the section, be taken to harass sexually another person if he or she makes an unwelcome sexual advance, or makes an unwelcome request for sexual favours, or engages in other unwelcome conduct of a sexual nature and the other person has reasonable grounds for believing that a rejection of the advance or the taking of objection would disadvantage the other person in any way in connection with the employment. 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 work place becomes unreasonably unpleasant as a consequence of constant sexual references or misconduct.

In the circumstances of the present case, certain provisions of the Act concerning vicarious liability are important. Section 161 provides that where an employee of a person does an act that would, if it were done by the person, be unlawful then the Act applies in relation to that person as if that person had also done the act, unless it is established that the person took all reasonable steps to prevent the employee from doing acts of the kind complained of. In other words, a company or business proprietor can be held liable for the acts of an employee which are held to amount to sexual harassment unless it be established that the company or business proprietor took all reasonable steps to prevent misconduct. The effect of these provisions concerning vicarious liability often means in practice that employers will be vigilant and take steps to ensure that certain of their employees are not misconducting themselves in relation to other employees.

When these principles are applied to the circumstances of the present case, the Tribunal is satisfied that Shannon Dawson was subjected to sexual harassment and that liability can be attached to both Respondents. The Tribunal accepts Shannon Dawson's uncontradicted evidence that Steven Mustica made sexual comments and touched or fondled the Complainant in a manner that was unwelcome to her. A degree of reticence about what was

complainant. Nonetheless, the Tribunal is satisfied that Steven Mustica was made aware at an early stage that his attentions were unwelcome as a consequence of Shannon having rejected his invitation to go out with him and having subsequently moved away from him and given him disapproving looks whenever he made the unwelcome comments and advances. The Tribunal finds support for this view of the evidence in the findings of the Industrial Relations Court. The Tribunal also finds that the sexual harassment caused distress and that Shannon felt humiliated and was severely affected by what occurred at the workplace during her employment and in the months that followed the termination of the employment.

The Tribunal finds, as did the Industrial Relations Court, that Shannon did not raise the matters causing distress directly with her employers, Mr & Mrs D'Aqui, apart from the oblique reference to what was going on conveyed to Mrs D'Aqui by another waitress on the evening of Saturday, 25 February 1995. The Tribunal has already noted a finding by the Industrial Relations Court that the business proprietors did not tolerate sexual harassment at the workplace. Nonetheless, the Tribunal has to keep in mind that the Industrial Relations Court, in the course of reviewing the evidence before it, was not required to give consideration to the rules concerning vicarious liability reflected in Section 161 of the Equal Opportunity Act or to make a finding as to whether the First Respondent as employer "took all reasonable steps to prevent the employee" - in this case Steven Mustica - from doing acts which the Tribunal on its earlier finding is satisfied amounted to sexual harassment. The evidence before the Tribunal showed that Mr D'Aqui allowed back-chat with sexual overtones to take place in his presence in the kitchen and it is apparent that when Mrs D'Aqui was put on notice that something untoward had happened her inclination was to require the Complainant to leave. In these circumstances, the Tribunal is satisfied that the acts of the employee, Steven Mustica, can be attributed to the employer in the manner allowed for by Section 161 of the Equal Opportunity Act because it has not been established to the Tribunal's satisfaction by the employer that all reasonable steps were taken to prevent sexual harassment of the kind alleged taking place. The employer, via Mr D'Aqui, seems to have been indifferent to the risk that one of his comparatively junior female employees would be prejudiced by what was happening in the kitchen. Accordingly, the Tribunal is satisfied that the Respondents are jointly and severally liable for any compensation awarded by the Tribunal.

By Section 127 of the Act the Tribunal 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 statutory torts 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 sufficiently proximate to it. It is important that awards should not be minimal because that would tend to diminish the respect for public policy implicit in the legislative provisions. See *Allegretta v Prime Holdings Pty Ltd* (1991) EOC 92-364.

In the circumstances of the present case the Tribunal is satisfied that the distress described by Shannon Dawson in her evidence did occur and was caused not simply by the circumstances of her dismissal, although that was a factor, but by the constant sexual harassment over a seven week period. As previously indicated, the Tribunal is not required to look at the financial consequences of the matters complained of, or other issues of special damage, and it must take account of the fact that the Industrial Relations Court has previously awarded the sum of \$1,000 by way of general damages to compensate for the circumstances surrounding the dismissal.

A number of previously decided cases shed some light on an appropriate award of general damages in cases of sexual harassment. For example, in *Smith and Mitchell v Sandalwood Motor Inn* (1994) EOC 92-577 two female singers who were subjected to sexual abuse while performing in a bar and were unable to remedy the situation owing to the indifference of the company's business manager were able to obtain an award of \$8,000 each. Ultimately, however, each case must be decided according to its own facts. The Tribunal is satisfied that an appropriate award by way of general damages for the Complainant in the present case is the sum of \$4,000 to cover her distress and the subsequent emotional injury described in her evidence as a consequence of the sexual harassment complained of including the sexual harassment on the final evening of her employment. The Tribunal considers, however, that this figure must be reduced by the sum of \$1,000 previously awarded by the Industrial Relations Court to compensate for the distress and events leading up to and comprising the termination of the employment.

Accordingly, the Tribunal will award to Shannon Dawson the sum of \$3,000 by way of general damages as an amount which can be recovered from the Respondents, or either of them, on the basis that the liability is joint and several for the reasons previously given.