EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

Matter Number: 21 of 1998

A **Complainant**

- against -

COCKBURN BOWLING AND RECREATION CLUB (INC) **Respondent**

REASONS FOR DECISION

BEFORE:	Mr N Hasluck QC	President
	Ms R Kean	Member
	Mr D Forster	Member

For the Complainant — Ms Andrews

For the Respondent — Mr Wheatley

HEARD: 11, 12 and 13 August 1999

REASONS FOR DECISION 21 December 1999

REASONS FOR DECISION

The Complainant, Ms A, claims that the Respondent, the Cockburn Bowling and Recreation Club (Inc), discriminated against her on the ground of family responsibility in the area of employment. The complaint arises out of circumstances detailed in a written complaint lodged with the Commissioner of Equal Opportunity dated 23 September 1996 ("the written complaint"). The Complainant was employed by the Club as a bar worker on a casual basis and alleges that her employment with the Club was brought to an end in a discriminatory matter in August 1996 as a consequence of her taking time off work in order to attend to the needs of her daughter. It will be useful to begin by looking briefly at the history and managerial structure of the Club and at the nature of the Complainant's employment prior to the events of August 1996. As a consequence of the suppression order mentioned in the final pages of these Reasons for Decision the Complainant will be referred to throughout as Ms A and the Respondent will be called simply "the Club".

The Club

The Club is an association incorporated pursuant to provisions of the Associations Incorporation Act 1895. The Tribunal received evidence from a foundation member of the Club, Mr Harry Carmody, who said that the Club was founded in the early 1960s and from that time forward has been situated at the same premises in Rockingham Road, Spearwood in the outer metropolitan area of Perth. Mr Carmody and other members confirmed that the Club conducts and competes in competitions for lawn bowls and has a distinguished reputation in that regard. The Club has both male and female members and conducts a range of social activities in which respect the summer months are the busy period. The

Club is governed by elected office bearers constituted as committees with provision being made for employment of a manager and subordinate staff in the course of providing the normal bar facilities.

Former Presidents of the Club included not only Mr Carmody, but also Mr T. Hitchcock, and both of these individuals served as members of the Bar Committee. It seems that after a reorganisation of the Club some changes were made to the names and styles of office bearers. In any event, it appears to be common ground that during the course of 1996 Mr R. Collis was the principal office bearer, being described as Executive Chairman of the Club. The General or Executive Committee of the Club at that time included Mr Hitchcock and Mr L. Williams. The bar manager was Mr Ante (Tony) Krajancic who had held that position since May of 1994. His predecessor was a Mr Watts. According to Mr Krajancic, the effect of his contract of employment was that he had power to hire and fire bar staff, although these powers were generally exercised in consultation with the bar committee. He seemed to accept that the Executive Committee had an overriding authority in respect of any action proposed or taken by the bar committee or by the bar manager.

It was common ground at the hearing that sets of keys were made available to bar staff for the purpose of opening and locking up the bar facilities at the end of the shift. There was, however, a degree of controversy at the hearing as to the circumstances in which sets of keys had to be returned to the bar manager or to the Club. In that regard, the Respondent Club placed reliance upon a minute of the General Committee dated 9 January 1996 in which it was noted that "Keys to premises have now been reduced to two or three keys. Only certain people have access to particular places. Keys cannot be duplicated."

The Complainant

Ms A commenced employment at the Club as a bar worker on 1 January, 1993. She was a single mother and had three teenage daughters. Her residence was only 50 metres or so from the Club so she approached the bar manager at that time, Mr Watts, and was employed by him on a casual basis. Her hours varied according to the pennant season, pennant breaks competitions and so forth, but when the bowling season was open, her hours were usually around 18 to 20 hours per week. According to her, she was normally rostered to work on Wednesday, Thursday, Friday and Saturday, commencing mid-afternoon. She was entrusted with a set of keys within a couple of months which remained in her possession. If occasions arose when she had to vary her shift, then this was done by arranging with one of the other bar staff to cover the hours in question. Her working arrangements generally were flexible. For example, in the quiet winter months, when the level of activity at the Club declined, she often received a phone call saying that there was no need for her to come in for a particular shift.

Ms A said in evidence that when Mr Krajancic took over as bar manager in May 1994 her work arrangements ran on as before. However, according to her, a number of disagreements arose between herself and the new bar manager which led to some unpleasantness. The Tribunal does not find it necessary for present purposes to define or explore further the exact nature of the difficulties she claimed to have experienced. It is necessary to avert to them briefly, however, as the presence of these difficulties, leading up to a committee meeting held at the end of December 1994, may have a bearing upon the credibility of various witnesses who gave evidence concerning the more significant events of August, 1996.

The existence of a degree of tension between Ms A and Mr Krajancic was corroborated by two other bar workers, namely, Ellen Stoddart, and Jane Vernon. These two witnesses confirmed that Ms A was a popular and reliable worker but was nonetheless often treated in a rather unpleasant and disdainful way by the bar manager, Mr Krajancic. Ms A said in evidence that the atmosphere of disagreement was not due to any fault on her part but the reality was that on some occasions she felt obliged to keep Mr Krajancic at a distance or even to leave her position behind the bar when he was in attendance.

These difficulties came to a head at the end of 1994. According to Ms A, she committed her thoughts about the situation to writing and as a result a meeting of the administrative committee was convened to inquire into this and some matters raised by Ellen Stoddart. Both Ms A and Ms Stoddart said in evidence that the committee did not make any conscientious attempt to get to the bottom of these allegations but, rather, required the two workers to abandon their claims, or be at risk of losing their jobs. According to Ms Stoddart, Mr Collis took an active role in this discussion and said that he wanted the letters written by the bar staff to be thrown away. Certainly, it was common ground at the hearing that as a result of these exchanges, Ms A signed a so-called "agreement of employment" in these terms:

> "I, the undersigned, hereby agree to the following conditions of my employment with the above Club as from the 20th day of December 1994.
>
> (1) If, I, in the opinion of the Club's bar manager or the administrative committee, or both, of this Club, commit any further misdemeanour, or cause any problems which may effect the efficient operation of this Club in providing a service to our members, the Club or its bar manager has the right to discharge me instantly without any right on my part of appeal.
>
> (2) I agree to these conditions without reservation.

(3) I also agree that these conditions placed on me have been brought about by my misconduct on Wednesday the 14th of December, 1994 where I deserted my position with the Club without any reference to management and before my normal time to cease duty."

That agreement was signed by Ms A as the employee, and Mr Hitchcock signed the document as President of the Club.

Apart from this so-called "agreement of employment" there is no other document evidencing the contract of employment. It is apparent from other evidence brought before the Tribunal that Ms A was characterised as a casual employee, employed pursuant to a contract of employment under the Club Workers Award of 1976. The Tribunal understands that her rates of pay and other conditions were determined by reference to the Award. The Tribunal has already noted that according to Ms A she was permitted to retain her bar keys outside of working hours and this applied during temporary breaks in employment. Her evidence in that regard was corroborated by her fellow workers, but contested by witnesses for the Club. Mr Carmody, the long standing member of the Club mentioned earlier, said in evidence that he never considered Ms A to be unreliable in any respect. It is also significant that at a later stage, after the dispute between the parties had arisen, Mr Hitchcock was prepared to sign a document saying that he had found Ms A's work to be satisfactory and "many members of the Club found that (Ms A) was a popular worker."

August 1996

Ms A gave evidence at the hearing concerning certain events that interfered with her normal working schedule for a short period. On 14 August her 13 year old daughter

informed her that she had been sexually assaulted. Alarmed by this, Ms A immediately telephoned the Club to say that she needed a week off work to be with her daughter. It was common ground at the hearing before the Tribunal that Mr Krajancic happened to be in hospital at that time and was therefore unavailable. She spoke to another employee, Ms Yvonne Harding, and explained that she needed a week off work to be with her daughter. She understood that arrangements would be made for someone to take her shift. She did not work her shifts on 14 to 17 August, 1996 inclusive, as she needed to be with her daughter for medical examinations, police interviews, counselling, and general support. The Tribunal pauses to note that by way of corroboration of this part of her evidence a certified copy of a document verifying the conviction of the man named by the daughter as her assailant was received in evidence by the Tribunal.

Ms A said in evidence that she worked two shifts the following week on Wednesday 21st and Thursday 22nd of August and arrangements were made for someone to work her shifts on Friday 23rd and Saturday 24th August. It seems that in the absence of Mr Krajancic various office bearers of the Club, including Mr Collis, as Executive Chairman, and Mr Williams, as a member of the bar committee, were acting in a supervisory manner. According to Ms A, on Thursday morning 22 August 1996 Mr Collis telephoned her to raise a query concerning $600 supposedly in the till that could not be accounted for. This point of difficulty was eventually sorted out. It is significant, however, that Mr Collis seemed to be playing an active role in the management of the Club. It is also significant that at that time he made no mention of her absence from work the previous week. She did not work her shifts on the next 2 days, having regard to the fact that arrangements had been made to cover her shifts and that she was still involved in her daughter's difficulties.

The Tribunal pauses to note that it was common ground at the hearing that the total amount of time taken off by Ms A as a consequence of her daughter's problems was six shifts in all. Both Mr Collis and Mr Krajancic agreed in the course of their evidence that an absence from work for this length of time, if a member of the bar staff was forced to stay away because of ill health, would not normally give rise to criticism by management or threats of dismissal, especially if arrangements had been made for some other worker to cover the shifts in question.

By now, Mr Krajancic had returned from hospital. On Wednesday 28 August, 1996, Ms A telephoned the Club and spoke to Mr Krajancic to inquire about her pay. According to her, he informed her that her pay was ready and asked her to bring her set of keys in when she commenced her shift that day. Reference was made to training new staff but this seemed strange to Ms A because to the best of her knowledge there were various sets of keys available. When she arrived at the premises, and went to Mr Collis to collect her cheque, she asked what hours he wanted her to work that evening, implying that she would be commencing her afternoon shift in the normal way. According to her, Mr Collis responded by saying that a new girl would be working her shift. She asked about the following day and was led to believe that the new girl would be working all of her shifts that week.

The evidence then given by Ms A was as follows:

> "I said to him 'What's going on, Ron? Do I have a job or not?' and he shrugged his shoulders and he said to me, 'There was a meeting last night. You've been unreliable. I guess not. We'll call you if we ever get really busy' were his words.

Ms A said she started crying and in answer to the accusation of unreliability reminded him that she had taken the week off to assist her daughter. He was sympathetic, but that was

the end of it. Her evidence then continued:

> "I walked out of his office crying and went then to the bar where Tony Krajancic was and I said to Tony 'What's going on?' and Tony said to me - he wouldn't look at me - 'It's got nothing to do with me. Goodbye.' As if to say 'Good riddance' as well ... I was very upset at this stage and I said to him, 'You can't do this. You can't treat people like this' ... I knew exactly what happened to me at that point. I knew I was being terminated. I didn't stand there crying and getting upset because I was told I wasn't on a roster. I was told that I had been unreliable when they had needed me and I couldn't help that. I could not understand it. ... They took my keys and I knew from the first time I was asked to bring my keys in that something was up because I knew that was very strange, that I had never in the nearly 4 years I had been there ever been asked to hand my keys in for any reason."

In the course of her evidence, Ms A stated emphatically that she had not ever been told she was unreliable prior to the exchange just described. The Tribunal also pauses to note that evidence was received from a friend of Ms A, namely, Kim Honey, who spoke to Ms A on the day in question, not long after the incident just described, and was able to affirm that Ms A was distraught and stated that she had just been sacked.

Ms A's description of what took place on 28 August was strongly contested by the Respondent, both in cross-examination and through evidence given by Mr Collis and by Mr Krajancic. Mr Collis conceded that on the day in question Ms A called in to collect her pay and that he asked her to hand over her keys. He also conceded that she asked whether she was being sacked, but he said he didn't know, as he had only been asked to retrieve her set of keys. According to him, notwithstanding his role as Executive Chairman, it was not his place to hire and fire staff, this being the responsibility of Mr Krajancic, and he didn't get involved in a debate with her because he had not participated in any decision to sack her and did not know exactly what the position was concerning new staff or shifts being attended to by existing staff. He agreed that Ms A started to cry and made it clear that she thought that she was being terminated, and then went into the bar to cash her cheque. He

accepted that he did not say anything to relieve her anxiety, or to suggest that she was not being sacked, and he did not undertake to find out whether she had been sacked or not.

When cross-examined further about the crucial exchanges, he agreed that he was aware Ms A had taken time off work because her daughter had been raped, and that he was informed of this by Yvonne Harding. He could not recall any discussion with Mr Williams or Mr Krajancic about Ms A, after Mr Krajancic's return from hospital on Tuesday 27 August, 1996. He agreed that there could have been a bar meeting at which a decision to dismiss Ms A had been made but according to him, if there was such a meeting, he did not know of it. He said that when she asked whether she still had her job he said words to the effect that he was not in a position to know that and that she should see Tony. He agreed that, after she left him, in a state of upset, he did not go to Mr Krajancic to find out whether she had been dismissed or not. He agreed that Mr Krajancic did not volunteer any information concerning her future employment and he did not press Mr Krajancic for details.

Mr Krajancic said in evidence that he returned to work from the hospital on Tuesday 27 August, 1996. He said that he rang up Ms A and asked her to bring in her keys on the basis that they might be needed for another girl. His understanding was that she was still having problems concerning her daughter and it was against a background of some uncertainty as to her availability that he wanted her to bring in the keys, as there were only three other sets beside his own set, having regard to the tightening up action taken earlier in the year. He had no ulterior motive in asking her to return the keys and as far as he was aware there was no meeting at which a decision was taken to dismiss her. Nor did he personally take any decision in that regard. He agreed that he saw her at the bar on Wednesday 28 August in a state of upset. This seemed to be related to her daughter's

difficulties and, on his evidence, she did not complain of being sacked. According to him, he had certainly not given any instruction to the Executive Chairman, Mr Collis, to sack her.

Ms A's case was that on the following day, Thursday 29 August, she telephoned Mr Collis to ask him why she had been dismissed. Mr Collis informed her that she had misunderstood him during their previous conversation and offered her one shift per week, each Thursday. Ms A replied that she was upset and confused as to why her shifts had been reduced and that she was not sure about accepting reduced work of this kind. As far as she was concerned, as a single parent, shift work of 1 day a week was not a viable option in financial terms and she made this clear to Mr Collis.

She went on to say in evidence that at the beginning of the following week, Monday 2nd September, Mr Krajancic telephoned and asked her if she intended to work the shift on offer. She again indicated that she was not sure about this. She also spoke to Mr Collis about the situation. She then received a letter signed by Mr Collis is his capacity as Executive Chairman of the Club dated 4 September, 1996 in these terms:

> "Further to our conversation on the telephone Wednesday 4 September, 1996 when you were asked if you would be attending work on the following day I have been advised to seek a meeting with you at our Club on Tuesday 10 September, 1996 to discuss the position of your employment with our Club. Our Club will be represented at this meeting by Mr T. Crossley from Crossley and Associates and if you are being represented we request you nominate your representative."

It is apparent from the letter that by this time the Club was in the hands of a skilled adviser. Not surprisingly, Ms A also obtained some legal advice and concluded that it would be unwise to attend a meeting of the kind proposed. The stand she adopted at that time, and

subsequently maintained, was that Mr Collis and Mr Krajancic by their words and conduct dismissed her from her employment and that this dismissal was due to discriminatory conduct on the ground of family responsibility, that is to say, that she was dismissed because of her absence from work following the sexual assault of her daughter. Implicit in this notion was the contention that she was treated less favourably than another employee would have been treated in the same circumstances in that she would not have been dismissed if she had been absent from work on short notice for a legitimate reason other than her family responsibility, such as illness.

Complaint

As mentioned earlier, Ms A lodged a complaint with the Commissioner of Equal Opportunity on 23 September 1996. In due course a summary of the main allegations was submitted to the club and it is apparent from evidence given at the hearing before the Tribunal that the Club, by Mr Collis and Mr Krajancic, proceeded to instruct Mr Crossley of T.C. Crossley and Associates to respond to the allegations. Under cross-examination both Mr Collis and Mr Krajancic agreed that the letter written by Mr Crossley on behalf of the Club dated 3 December, 1996 reflected their instructions ("the Crossley letter"). This letter includes the following passages:

> "We state that at no time did the Club dismiss either by implication or direct action, Ms A. It appears to the writer that Ms A invented the unfortunate situation of her daughter's rape to deviate from the real issue about why the Club was concerned about her poor work performance. Ms A has neglected to inform you that management of the Club has requested several times orally, and at least once in writing, to hold a meeting with Ms A to discuss a number of concerns they had about her continuation of employment ... the Club's formal position is that she has not been dismissed. Her status as an employee is casual in nature. She would not be offered any more work on a casual basis until she attends a meeting with management."

The letter goes on to address the allegations summarised by the Commissioner of Equal Opportunity and suggests that it was standard practice when an employee was going to be away off duty for a period of time that keys should be surrendered. The letter then continues:

> "Mr Collis assures me he can prove that this particular employee has had a long history of being unreliable for turning up to work when required, well before the rape of her daughter ever occurred. It was for this reason that the Club has considered reducing her hours, or terminating her services ... as a result of the employee's failure to attend the meeting, the Club's management committee resolved that they offer her no further casual work until such time as she attend a meeting with management to discuss important work-related issues concerning her future employment with the Club. Once again, we reiterate that this had nothing to do with her daughter's rape, but instead her actual work performance and reliability, pursuant to her contract of employment under the Club Workers Award of 1976."

It is also important to note that, apparently during the course of the Commissioner's investigation, a written statement was brought into existence signed by Mr Krajancic in the presence of Mr Crossley and dated 30 November, 1997 concerning the various matters in issue. Mr Krajancic's statement is set out in numbered paragraphs and includes these passages:

> "6. During 1995 and early 1996, I became aware of domestic problems involving Ms A's ex-husband, boy friends and her daughter which unfortunately were brought into the workplace. These distractions caused a deterioration of work. She became unreliable in turning up to work when rostered, failing to advise the Club of her unavailability to work, and not giving any explanation why she was not at work. ...
>
> "7. These things happened on more than one occasion and resulting in Ms A being spoken to about her time keeping and poor work performance. She received oral warnings. Nothing was put down in writing. ...
>
> "12. As far as I am concerned, Ms A's last day was on or about the 22nd August, 1996. At that time, I was off work on sick leave in hospital for an operation. Around that date I was contacted by Mr Len Williams, the Club Treasurer, concerning Ms A and it was nothing to do with her claim that she was dismissed by the Club. ...

"13. Mr Williams informed me in hospital that Ms A had on that day requested 'unspecified time off work because her daughter had been raped.' The concern the Club had was that there was no specific time sought by Ms A for the time off. As she was a casual this would have been leave without pay. Even if she was a permanent worker, the Award did not allow for special paid leave. The 'unspecified time off work' was the prime concern. ...

"20. I have checked the Club's records for the period 14, 15, 16 and 17 August 1996. There is no record of Ms A asking for compassionate or special leave for these dates. As far as the Club records are concerned the worker was absent from duty. It appears to us that the rape for the leave on the 23rd August 1996 was an afterthought. I also believe the alleged dismissal is an afterthought to link up with the rape.

"21. If I was to dismiss Ms A in August 1996 it would be for poor time keeping as a breach of her contract of employment. Her abandonment of employment on the 23rd August, 1996, is in my view, another ground for dismissal. However, I again state that I did not dismiss her nor any of my staff.

"27. I believe by asking for the keys back we had a right to protect our Club members' property and also to be in a position to service our members' needs. It is unreasonable for an employer to wait indefinitely for an unreliable employee to return to work in her own time and have no consideration for the employer's needs and requirements."

The Commissioner's investigation did not bring an end to the dispute with the result that the matter was referred to this Tribunal to conduct an inquiry. As a consequence of programming orders and directions made at a preliminary hearing pleadings were brought into existence in the form of Points of Claim filed on behalf of Ms A and Points of Defence filed on behalf of the Respondent. It is significant that the Points of Defence, in their original form, broadly described, reiterate the stance reflected in the Crossley letter and in the Krajancic written statement, that is to say that Ms A's work was characterised by irregularity and she had used an alleged assault upon her daughter as an excuse to justify her unlawful absence from work. This stance was maintained for many months, but at the commencement of and during the hearing before the Tribunal the Points of Defence were substantially amended to withdraw allegations of this kind against Ms A.

The line of defence principally relied upon by the Respondent Club at the hearing, as summarised by counsel for the Club in his closing address, was to this effect. Ms A was never in fact dismissed. She was in an upset state and overreacted to her communications with Mr Collis and Mr Krajancic in August 1996 by treating a request for return of keys as a dismissal. She was never in fact dismissed as evidenced by the fact that work was offered to her on the 29th of August and further, and in any event, it cannot be said that she was dismissed on the ground of family responsibility. She simply withdrew her services and decided to work elsewhere. The Club did not proffer any evidence at the hearing to substantiate its earlier allegations that Ms A was an irregular and unreliable worker and the Tribunal notes in passing that the evidence from Ms A and other witnesses, as mentioned earlier, was to the contrary.

In order to complete the narrative the Tribunal is obliged to say that in the weeks following receipt of Mr Collis' letter dated 4 September 1996 Ms A looked for alternative employment. She was eventually able to obtain alternative employment at the bowling club where she commenced working on 3rd October 1996. Accordingly, as part of her case, she presented in evidence a schedule of financial loss in respect of the 5 weeks of lost income. The claim of loss of income amounts to $787.86, such figure being calculated by reference to the scales of pay applicable to her casual work and the average hours which it is estimated she would have worked if her employment had been continued. These figures were not seriously contested by the Club.

Statutory Provisions and Principles

Before turning to its findings, it will be useful to look briefly at the relevant provisions of

the Equal Opportunity Act bearing upon a case of this kind. By section 4 of the Equal Opportunity Act family responsibility in relation to a person means having responsibility for the care of another person, whether or not that person is dependent, other than in the course of paid employment, or the status of being a particular relative or the status of being a relative of a particular person. By section 35A a person discriminates against another person on the ground of family responsibility if, on the ground of the family responsibility of the aggrieved person, the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who does not have such a family responsibility or family status. By section 35B it is unlawful for an employer to discriminate against a person on the ground of a person's family responsibility by dismissing the employee or by subjecting the employee to any other detriment.

Various provisions have an effect upon the way in which these concepts apply in commercial situations. By section 5 of the Act, the conduct said to constitute the discriminatory act complained of need not be the dominant or substantial reason for the doing of the act. There are also various provisions concerning vicarious liability. By section 161 where an employee or agent of a person does an act that would be unlawful if done by the employer then liability can be attached to the employer. By section 162 where it is necessary to establish that a body corporate has done an act on a particular ground, it is sufficient to establish that the person who acted on behalf of the body corporate in the matter so acted on that ground.

The decided cases indicate that the complainant bears the burden of satisfying the Tribunal on the balance of probabilities that the provisions of the Act concerning discrimination on

the ground of family responsibility have been infringed. A causal connection must be made out between the discriminatory conduct alleged and the adverse consequences relied on as a basis for relief. In other words, in order to give proper weight to the words "on the ground of" appearing in section 35A of the Act, the aggrieved person has to satisfy the Tribunal that the conduct complained of was based on or is referrable to the unlawful consideration of family responsibility. See *University of Ballarat v Bridges* (1995) 2VR 418 at 436. Inferences can be drawn from the primary facts in order to substantiate a plea of discrimination, although discrimination cannot be inferred when more probably innocent explanations are available on the evidence. *Fenwick v Beveridge Building Products Pty Ltd* (1986) EOC 92-147; *Walley v Homeswest* (1999) EOT (WA) unreported at page 33.

In considering the circumstances of the present case, the Tribunal is conscious that it should also keep in mind the reasoning manifested in various decided cases concerning dismissal, bearing in mind that it is often difficult to determine whether or not, in somewhat ambiguous circumstances, the events relied on amount to a dismissal or not. The relationship between the parties can often be complicated by various subtleties of behaviour. In that regard it seems that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. To constitute a breach of this implied term, it is not necessary to show the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. See *Woods v WM Car Services (Peterborough) Ltd* (1981) ICR 666 at 670.

It is also material to note this passage from the recently decided case of *Russian v Woolworths (SA) Pty Ltd* (1995) 62 IR 169 at 174:

> "In the instant matter the employer sought to change the terms pursuant to which the Applicant worked. The changes proposed by the employer were no small matter of detail, but were fundamental and went to the very heart of the parties' relationship involving as they did a fundamental change to the position held by the Applicant and a significant reduction in the rate of remuneration. In our view the changes proposed satisfied the higher test propounded by Lord Denning in the *Western Excavating* case as constituting 'a significant breach going to the root of the contract of employment, or ... (as showing) ... that the employer no longer intended to be bound by an essential term of the contract'. In addition, if that be the test, the changes proposed by the employer also satisfied the wider test embraced by the employment appeal Tribunal as constituting conduct likely to destroy or seriously damage the relationship of trust between employer and employee. In either case the applicant would be entitled to treat himself as discharged from any further performance of the contract. If he did so then he would terminate the contract by reason of the employer's conduct and thus would be constructively dismissed."

Findings

Against this background, we now return to the circumstances of the present case. The Tribunal must first examine the credibility of the various witnesses. Ms A impressed the Tribunal as an honest and forthright witness and it is significant that, notwithstanding an extensive cross-examination, she was not shaken in her account of the principal events, especially in regard to the crucial exchanges between herself and Mr Collis, and subsequently involving Mr Krajancic, on Wednesday the 28th of August, 1996. In various significant respects her testimony was corroborated by other witnesses in the manner already noted by the Tribunal, including witnesses called on behalf of the Respondent Club. It seems clear that at all stages of her employment she was a reliable and responsible employee and it is significant that even during the month of August 1996, when her

daughter had been subjected to extreme trauma, Ms A was only absent for a period of 6 days in all prior to her cessation of employment with the Respondent Club. The Tribunal accepts that in circumstances where work arrangements were casual and quite flexible appropriate arrangements were made for her shifts to be covered by other workers.

In reviewing her testimony, the incident in December 1994 must also be kept in mind. The Tribunal finds as a fact that, without any fault on Ms A's part, and without having made a proper inquiry into the circumstances of that matter, the General Committee of the Club required Ms A to sign the so-called "agreement of employment" with Mr Collis having played an active role in the preceding debate. The effect of that agreement was to allow for the possibility that she could be instantaneously dismissed if it were thought by those in authority that she had caused any problems which might "effect the efficient operation of this Club". Accordingly, against that background, it is perfectly understandable that when she was required to bring in her keys, she should treat this requirement with apprehension. The Tribunal finds as a fact that, notwithstanding the minute of 9 January 1996, it was a departure from the usual conventions of the Club for her to be required to deliver up her keys in circumstances where it was quite clear that she was prepared to go on working for the Club. She had simply sought a brief period of compassionate leave but there was nothing else in her conduct which could have warranted a conclusion that she intended to absent herself from the workplace for an indefinite period.

Put shortly, then, the Tribunal attaches considerable weight to the evidence given by Ms A about what happened on Wednesday 28 August, and her understanding that a decision had been taken to sack her because she was allegedly unreliable.

When the Tribunal turns to the testimony of Mr Collis and Mr Krajancic the matter has to be viewed in an entirely different light. In the case of both these witnesses their credibility is severely impaired by the fact that they instructed Mr Crossley to make the allegations of irregularity and unreliability reflected in the Crossley letter, and maintained those allegations for a considerable period, when it is quite apparent that they had no means of substantiating such allegations, and failed to do so. Even on his own version of what took place on Wednesday 28 August, it is significant that Mr Collis made no attempt to reassure Ms A that she had not been sacked (when on his account he had not been advised of any such decision) and made no attempt to inquire into the matter. It is also significant, and a matter weighing strongly against the testimony given by Mr Collis and Mr Krajancic, that the written Krajancic statement reflects an assumption on the part of Mr Krajancic that Ms A's employment had, in any event, come to an end prior to Wednesday 28 August as a result of her absenting herself from the workplace. When all these matters are brought together, the Tribunal is obliged to conclude that little weight should be attributed to the version of events given by Mr Collis and by Mr Krajancic. Accordingly, the Tribunal finds that on or about Wednesday 28 August Mr Collis and Mr Krajancic decided to dismiss Ms A, or proceeded on the basis that they were no longer obliged to employ her as a casual worker at the rate of approximately four shifts per week, and their stance in that regard was conveyed to her by Mr Collis initially, and then by Mr Krajancic in his conversation with her at the bar, on Wednesday 28 August. In other words, the Tribunal accepts the account given by Ms A as to what happened on that day in preference to the evidence given by Mr Collis and Mr Krajancic and is satisfied that Ms A was dismissed on that day.

The decided cases mentioned earlier are entirely consistent with such a finding. Mr Collis and Mr Krajancic acted in a manner which inevitably eroded the basis of trust which ought

to have existed between employer and employee and their conduct amounted to constructive dismissal. Likewise, the telephone conversations on subsequent days when Ms A was offered a more limited form of employment, namely, the promise of one shift per week, cannot be regarded as a reinstatement of the employment, or putting it another way, such conduct of itself can be characterised also as a form of constructive dismissal because, against a background of troubled relations between the parties of the kind described in these reasons, the offer of one shift per week was such a fundamental departure from the previous nature of the employment that it amounted to a repudiation by the employer of its contractual obligations. The relevant statutory provisions concerning the vicarious liability are sufficient to establish that liability can be attached to the Club as a consequence of the actions taken on its behalf by its Executive Chairman and by the bar manager, both of whom can be regarded as agents of the Club in effecting the dismissal.

This leaves the question of whether a sufficient causal link has been established between the dismissal and Ms A's family responsibility. In other words, can the Tribunal be satisfied on the balance of probabilities that it was Ms A's concern for her daughter's well being that brought about her dismissal? In dealing with this issue the Tribunal has no difficulty in finding as a fact that Ms A was a satisfactory and reliable employee and that, as at August 1996, there was no other explanation as to why her employment might be terminated. She had worked well in the past and the evidence does not suggest that the Club had embarked upon any program of cutting down its staff. This opens the way to an inference that something must have happened in the week or so preceding the events of 28 August which precipitated the dismissal. The only event of any consequence was Ms A's need to absent herself from the workplace at short notice for a period because of her daughter's difficulties, being an avowal of her family responsibilities.

It is also quite clear from the Krajancic written statement that Mr Krajancic regarded this assertion of family responsibility as a black mark against the employee. His written statement and subsequent actions, according to the Tribunal's findings, make it clear that both he and Mr Collis interpreted the request for compassionate leave as a declaration that Ms A intended to absent herself from the workplace for an indefinite period at her discretion. On the Tribunal's findings, there was no justification for such an extreme view of her actions and it is therefore quite clear, in the final analysis, that there is a sufficient causal link between Ms A's assertion of family responsibility and the consequences which were then visited upon her some days later in the form of a constructive dismissal. It is apparent from the evidence that she was treated less favourably than her fellow workers because both Mr Collis and Mr Krajancic conceded that bar staff would not normally be criticised or sacked because they were off work for six days or so due to ill-health. Accordingly, the Tribunal finds that the complaint of discrimination on the ground of family responsibility in the field of employment has been made out.

Relief

The Tribunal now turns to the question of relief. Section 127 of the Equal Opportunity Act provides that after holding an inquiry the Tribunal may find the complaint substantiated and then provide various forms of relief including ordering the respondent 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. Previously decided cases have indicated that the Tribunal must give careful consideration to the adverse consequences experienced by the complainant, especially in circumstances where the complainant has been subjected to a degree of hurt and humiliation, because the damages are intended to be

compensatory. Further, in order to underline the importance of the concepts reflected in the legislation, the decided cases suggest that awards of damages should be more than nominal. The Tribunal should not automatically apply principles of tort to the assessment of damages in this statutory jurisdiction, although those principles may in some cases be helpful. *Capodicasa v Herald and Weekly Times Ltd* (1999) EOC 92-969 at 79,178.

Ms A gave evidence to the effect that she was severely affected by her dismissal. She had believed she was part of a team of employees and was generally respected by members of the Club to whom she provided service on a regular basis. This belief was subverted by the dismissal, and her confidence was shaken. On the day of the dismissal, she was distraught. Nonetheless, she was soon able to resume work. In the circumstances, the Tribunal considers that she is entitled to recover the sum of $5000 by way of general damages. To this must be added the special damages of $787.86 previously mentioned. Accordingly, the total amount to be awarded to Ms A by way of damages is the sum of $5787.86.

Finally, the Tribunal is obliged to remind the parties and others with an interest in the case that a suppression order remains in force the effect of which is to require that the matter is not to be reported in a way which will enable the parties to be identified, this being thought necessary in order to protect the reputation of Ms A's daughter who is not a party to these proceedings. The precise terms of the order are that at the hearing of the inquiry and until further order pursuant to the powers allowed to the Tribunal in sections 121 and 122 of the Equal Opportunity Act, the names of the parties and any evidence or information that might enable anyone who has appeared before the Tribunal to be identified shall not be published and in that respect the Complainant will be simply identified by the initial A and the Respondent will be identified only as a bowling club in the metropolitan area of Perth.