TASCAT

TASMANIAN CIVIL &
ADMINISTRATIVE TRIBUNAL

Citation:	EC & DT v BX [2023] TASCAT 71
Division:	General
Stream:	Anti-Discrimination
Parties:	EC & DT (Complainants) BX (Respondent)
Hearing Date:	15 August 2022, 12 September 2022 and 3 October 2022
Hearing Location:	Hobart
Date of Orders:	12 April 2023
Date Reasons Issued:	12 April 2023
Panel:	M Trezise, Ordinary Member
Orders Made:	1. The complaint by EC and DT against BX for direct discrimination and prohibited conduct is substantiated. 2. Within 28 days of the date of this order, BX will provide to EC and DT via their practitioners, Logan and Partners, a legible hand-written apology for his statements and conduct on 5 January 2021 and 27 January 2021 and incorporating his undertaking that he will not again engage in any discriminatory or prohibited conduct towards them in contravention of the *Anti-Discrimination Act 1998*. 3. Costs are reserved.
Catchwords:	Inquiry – Direct discrimination, prohibited conduct and sexual harassment
Legislation Cited:	*Anti-Discrimination Act 1998* (Tas)
Cases Cited:	*Higgins v Orchard* [2021] TASSC 44; *Cain v The Australian Red Cross Society* [2009] TASADT 3; Briginshaw *v Briginshaw* [1938] HCA 34; (1939) 60 CLR 336;

	Campbell v Campbell [2015] NSWSC 784; *Flanagan v Humana Pty Ltd* [2017] TASSCS 50; *Burton v Houston* [2004] TASSC 57 at [23]; *Durston v Anti-Discrimination Tribunal (No.2)* [2018] TASSC 48; *ELG v Trustee for the Sommers Freedom Fund* [2020] NSWCATAD 172	
Representation:	Counsel:	Mr D Loganathan (Complainants)
	Solicitors:	Logan and Partners (Complainants)
File No:	A/2021/30	
Publication Restriction:	The decision has been anonymised for the purpose of publication.	

Amended pursuant to Section 119 of the *Tasmanian Civil and Administrative Tribunal Act 20*

Cover page:
Date of Orders – amended to 12 April 2023
Date Reasons Issued – amended to 12 April 2023

Dated the 24th day of April 2023

M Trezise
Ordinary Member

REASONS FOR DETERMINATION

Introduction

1. The parties to this case became neighbours in 2011. They have, seemingly, embroiled themselves in various disputes, and forms and forums of litigation, ever since.

2. The present issue before the Tribunal comprises EC and DT's complaint against BX for discrimination under the *Anti-Discrimination Act 1998* (Tas) (the Act). It is generally alleged in the complaint that BX discriminated against EC and/or DT by:

   - Offensive, humiliating, insulting or ridiculing conduct against them or either of them on the basis of parental status and family responsibilities; and

   - Sexually harassing DT.

Details of Allegations

3. The complainants' complaint was received by Equal Opportunity Tasmania (EOT), for the Anti-Discrimination Commissioner (the Commissioner), on 5 January 2021. As later defined by the Commissioner, it alleged that:

> 'On 5 January 2021 [BX] said to [EC], "So she misses out on bubs so you can be at home…that's a bit harsh".'
>
> 'Later the same day, [BX] made "oinking"" noises towards [EC] and [DT] and said to [DT], "Hun…So why are you at home? You're at work. Why aren't you being at home with bubs, honey? I mean, really. Shouldn't you be with bubs right now? It's the most important time.'

4. On 24 February 2021, EC provided the following further allegation to EOT:

> 'On the 27.1.2021 at 8.28am, [DT] was leaving for work and was in the driveway of our property when [BX] appeared on his doorstep and said to [DT] "Hun, are you missing out so he can get fatter?'

5. In terms of context, EC stated in his complaint that he and DT were partners and have a 9 month old baby. A nanny cared for the baby while DT was away from home at work and EC worked from home in their family business. Furthermore, for the purposes of these anonymised reasons, EC and DT identify as male and female respectively.

6. As amended, the complaint was accepted on the basis that it disclosed the following possible breaches of the Act:

   - Direct discrimination against EC and DT on the basis of gender and family responsibilities, in connection with accommodation;

   - Conduct that is offensive, humiliating, intimidating, insulting or ridiculing of EC and DT on the basis of gender and family responsibilities, in connection with accommodation; and

   - Sexual harassment of DT, in connection with accommodation.

7. Under Section 14(2) of the Act, direct discrimination is defined as follows:

> **14. Direct discrimination**
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> …
>
> (2) Direct discrimination takes place if a person treats another person on the basis of any prescribed attribute, imputed prescribed attribute or a characteristic attributed to that attribute less favourably than a person without that attribute or characteristic.

8. The attributes engaged for the purposes of this aspect of the complaint were gender and family responsibilities, in the activity of accommodation (sections 16(e), 16(j) and 22(1)(d) of the Act respectively). The 'connection with accommodation' for the purposes of neighbour interactions was confirmed in *Burton v Houston* [2004] TASSC 57 at [18] – [21].

9. Under section 17 of the Act, prohibited conduct and sexual harassment is defined as follows:

> **17. Prohibition of certain conduct and sexual harassment**
>
> (1) A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute…in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.
>
> (2) A person must not sexually harass another person.
>
> (3) Sexual harassment takes place if a person –
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> (a) subjects another person to an unsolicited act of physical contact of a sexual nature;
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> (b) makes an unwelcome sexual advance or an unwelcome request for sexual favours to another person; or
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> (c) makes an unwelcome remark or statement with sexual connotations to another person or about another person in that person's presence; or
>
> (d) makes any unwelcome gesture, action or comment of a sexual nature; or
>
> (e) engages in conduct of a sexual nature in relation to another person that is offensive to that person –
>
> in circumstances which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

10. On the complaint form, EC relevantly stated, 'My partner considers been called "honey" by a male to be sexual harassment and intimidation.'

11. The same attributes, gender and family responsibilities, and the 'connection with accommodation' by neighbour interactions, applied to these aspects of the complaint.

12. The Commissioner added the allegation referred to in [4] above to the complaint, having already identified possible direct discrimination and possible prohibited conduct on the part of BX. It is noted that BX later contended that this allegation should not form part of the complaint materials before the Tribunal. The Commissioner nonetheless plainly incorporated the additional allegation (that is, in plain words) and was authorised to do under section 65A(1)(b) of the Act. This was not affected by another Tribunal member's brief and inconsequential reference to the earlier allegations only at a subsequent interlocutory step in the proceedings.

13. On 20 August 2021, the Commissioner determined under section 71(1)(c) of the Act that the complaint proceed to an inquiry by the Tribunal. The Commissioner considered the prospects for successful conciliation to be remote.

The Inquiry

14. As to the nature and scope of an inquiry under the Act, it is apposite to set out the following passages from the decision of his Honour Chief Justice Blow in *Higgins v Orchard* [2021] TASSC 44:

> '88…. The relevant provisions of the Act are as follows:
>
> - In s 3, "inquiry" is defined to mean "an inquiry held under Division 4 of Part 6".
> - By virtue of s 13(a), one of the functions of the tribunal is "to conduct an inquiry into a complaint".
> - Sections 69-71 of the Act provide for a complaint to be investigated by the Anti-Discrimination Commissioner or an authorised person.
> - After an investigation, s 78(1) empowers the Commissioner or an authorised person to "refer a complaint for inquiry" in certain circumstances. By implication, the complaint is referred to the tribunal.
> - Division 4 of Part 6 of the Act comprises ss 78-96. Those sections deal with inquiries by the tribunal.
> - Section 86(1) requires the tribunal "to conduct an inquiry with as little formality and as expeditiously as the requirements of this Act and a proper consideration of the matters before the Tribunal permit".
> - By virtue of s 87(4), the tribunal is not bound by the rules of evidence, is required to observe the rules of natural justice, and may inform itself on any matter as it thinks fit.
> - Section 89(1) provides that if the tribunal "finds after an inquiry that a complaint is substantiated", it may make one or more of various types of orders. …
>
> 89 Because of the use of the word "inquiry", it may be that the tribunal sometimes has inquisitorial duties. In Division 4 of Part 6 there are provisions for complainants and respondents to participate in an inquiry, with rights to representation by counsel. The relevant sections contemplate the tribunal receiving oral and documentary evidence and issuing notices requiring the attendance of witnesses or the production of documents. In many respects an inquiry is therefore likely to

> resemble an adversarial court proceeding. However it remains an inquiry, and arguably circumstances can arise in which the tribunal should take on an inquisitorial role.
>
> 90 There used to be similar provisions relating to inquiries in the Disability Discrimination Act 1992 (Cth) and the Racial Discrimination Act (Cth). In Soares v Human Rights and Equal Opportunity Commission (1998) 53 ALD 74 a commissioner had refused to adjourn an inquiry and had proceeded with it in the complainant's absence. In judicial review proceedings in the Federal Court, it was argued that she had breached her duty of procedural fairness by not calling two witnesses of her own motion. Tamberlin J concluded, at 82, that there was no indication that the two suggested witnesses could give any further evidence which would assist the complainant's case, and that it was therefore not necessary, as a matter of procedural fairness, for the commission to summons them. At 79 he referred to statutory provisions whereby the commission was not bound by the rules of evidence, could inform itself on any matter as it thought fit, and was required to conduct an inquiry with as little formality and technicality and with as much expedition as the requirements of the legislation and a proper consideration of matters before it permitted. He said:
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> "This latter requirement makes it clear that a balance is to be struck between an expeditious inquiry and a full consideration of the matters before the commission."
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> 91 Questions as to whether and when statutory tribunals have a duty to undertake inquiries in a way normally associated with inquisitorial justice can be very difficult. See Groves, The Duty to Inquire in Tribunal Proceedings [2011] SydLawRw 9; (2011) 33 Sydney Law Review 177. In cases relating to reviews conducted by the Refugee Review Tribunal, the High Court has left open the possibility that that tribunal might have a duty to make particular inquiries in particular circumstances: Minister for Immigration and Citizenship v SZIAI [2009] HCA 39, 259 ALR 429 at [25]; Minister for Immigration and Citizenship v SZGUR [2011] HCA 1, 241 CLR 594 at [22].
>
> 92 In this case, the opening words of s 89(1) of the Act are of critical importance. … Those words make it clear that an inquiry is conducted for the purpose of determining whether the allegations contained in a complaint are substantiated. …'

15. It therefore rests primarily upon the parties to present and prove their respective cases at an inquiry conducted under the Act. The onus is upon a complainant to prove the allegations raised in the complaint according to the civil standard; that is, on the balance of probabilities: see *Cain v The Australian Red Cross Society* [2009] TASSADT 3 at [22]. The approach to be followed by the Tribunal is that set out in *Briginshaw v Briginshaw* [1938] HCA 34; (1939) 60 CLR 336 at 361-362:

> "When the law requires the proof of any fact, the Tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality ... it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the Tribunal. But reasonable satisfaction is not a state of mind, it is attained or established independently of the nature and consequences of the fact or facts to be proved.
>
> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular

> finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal."

16. Given the serious nature of the allegations, it follows that the Tribunal should not lightly make a finding that a respondent has engaged in the conduct alleged.

17. The inquiry in this case commenced on 15 August 2022, with submissions taken on 12 September and, finally, 3 October 2022. The complainants were represented by Mr Loganathan. BX was self-represented. That disadvantage was acknowledged by the Tribunal. All parties gave oral evidence and were cross-examined, documentary evidence was received, and submissions were made. All of that material has been considered.

18. The documents received by the Tribunal comprised:

- Complaint to EOT dated 5 January 2012;
- Response from BX dated 27 May 2021 and annexures;
- EOT Investigation Decision and Reasons for Decision dated 20 August 2021;
- Signed statement from EC dated 20 February 2022;
- Signed statement from DT dated 20 February 2022;
- Material tendered by BX (various dates comprising pages 31 – 132 of the hearing book); and
- Exhibits:
  - (i) Security/surveillance footage dated 5 January 2021 at 2.47pm ('C1')
  - (ii) Security/surveillance footage dated 5 January 2021 at 9.28pm ('C2')
  - (iii) iPhone footage dated 5 January 2021 at 9.28pm ('C3')
  - (iv) Security/surveillance footage dated 27 January 2021 at 8.28am ('C4')
  - (v) 'Google' printout regarding available voice synthesiser software supplied by BX ('C5')

EC's Evidence

19. EC gave evidence to the Tribunal that on 5 January 2021 at 2.47pm he had been standing on the driveway of his property and had seen BX on his backdoor step. He said that BX had looked at him and made some remark which he did not hear. He then heard BX say, 'So she misses out on bubs so you can stay home. That's a bit harsh.' Later that day, at 9.28pm, he stated that he was with his partner, DT, in the front yard of their property when he heard BX on his backdoor step, laughing and making 'oinking' noises. EC then stated that he heard BX say, 'So why are you at home. You're at work. Why aren't you being at home with bubs, honey? I mean, really. Shouldn't you be with bubs right now? It's the most important time'.

20. EC said that these comments had been recorded on his home security camera system and also on his iPhone. He stated that he had two "cloud recording" security cameras with audio and video capability. He said that the data was normally stored for a period of three months and could not be 'manipulated' in the cloud. He described a substantial metal fence adjoining the two properties but said that BX was visible when standing at his back door. The Tribunal will return to this later.

21. EC told the Tribunal that he found the comments allegedly made at 2.47pm to be upsetting and offensive, calling into question what he does as a parent. He said that he was self-employed with his office at the home. He uses sub-contractors but his home remains his work base. His partner, DT, works as a municipal corporate governance officer on a full-time basis. Their then 9 month old child was in child-care, outside the home, on a 4/7 basis each week. He said that he saw BX, from a distance of some 10 metres, and was in no doubt that BX's words were directed at him.

22. According to his evidence, the comments allegedly made by BX at 9.28pm made EC feel 'ridiculed and humiliated'. He observed that DT was very upset and humiliated. Their child was then inside their home asleep. He speculated that BX had waited for him and DT to be together, within earshot, and that his comments were calculated to cause injury and insult to them both. He said that he felt "ridiculed as a father – ineffective – ridiculing everything that I do'.

23. EC could not personally attest to the comments allegedly made on 27 January 2021. He was inside the house and did not hear what was allegedly directed at DT by BX as she left the home for work. He first became aware of the alleged comments (i.e. 'Hun, are you missing out so that he can get fatter') when DT arrived at work and sent him a message, presumably a SMS communication. He told the Tribunal that, as a self-employed working male, he found the remarks to be offensive, frustrating and humiliating. He referred to the 'fatter' appellation with obvious chagrin but, apart from observing that 'No one other than [BX] would make those comments', expressed no particular sense of injury from it.

24. The security and iPhone footage was introduced in the course of EC's evidence in chief. EC gave evidence that he had downloaded the footage from his security camera 'cloud' storage and from his iPhone. In total, four items of footage were played and received in evidence as exhibits. The first item, C1, depicted a view which EC described to the Tribunal as looking into the backyard of his property, depicting his house and his car in the driveway in daylight hours. BX was not visible in the footage. The words 'that's a bit harsh' are audible.

25. The second item of footage, C2, was recorded near night time. Again, BX is not visible. The words, 'So why are you at home. You're at work. Why aren't you home with bubs. I mean really. Shouldn't you be at home with bubs right now. It's the most important time' are audible. The last words carried a rising inflection.

26. The third item, C3, was a secondary recording of C2 taken on EC's iPhone. EC told the Tribunal that he was returning home in his car from a supermarket when DT called him to say that BX was at his backdoor and appeared to be intoxicated. EC said that he then engaged his iPhone to 'record'. It shows EC in his car, arriving to his property and coming to his house. Once again, BX is not visible. The same words heard in C2 are audible.

27. The third item, C4, is in daytime. BX is not visible. The words, 'Hun, are you missing out so that he can get fatter' are audible.

28. EC was cross-examined by BX. It commenced with BX seeking to introduce some historical audio recordings, allegedly of EC in heated exchange with BX. The Tribunal ruled the material to be irrelevant to the present issue. It was then suggested to EC that he had 'generated' BX's voice in the Exhibits C1 – C4 by means of a voice synthesiser device. EC denied this and denied that someone else could have done that for him. It was suggested to EC that DT had used a pre-recorded message of BX's voice to create the exhibits and that the material was fabricated. EC denied this. EC was then taken to a photograph, said by BX to have been taken on 18 March 2021, depicting a section of the metal fence between their properties and some adjacent foliage. It was suggested to EC that his asserted view of BX on 5 January 2021 was obscured by the foliage. EC responded that the foliage was not present at that time and that he had seen BX. When it was suggested to EC that he had no corroborating evidence, EC replied that the evidence was very clear. EC agreed that there was a history of litigation between himself and BX but disagreed that his complaint was 'vindictive'. EC's evidence was unshaken. There was no re-examination.

DT's Evidence

29. DT told the Tribunal that she worked as a manager/governance in a municipal office, overseeing a team of fellow employees engaged in risk management, insurance and legal governance.

30. When referred to the complaint, she said that she found BX's alleged comments to be sexist and offensive. She told the Tribunal that she had 'worked hard to get where I am' and that she could be both a mother and a full-time worker. She said that she had reflected upon the alleged, 'So why are you at home?' comment and said that it had 'stuck in my mind'. She told the Tribunal that she was nearly 40 years of age and that she and EC had wanted a child for many years. She described her child as a blessing. She said that she and EC chose to work but that she questioned that decision every day. She said that she had been very upset by the implied suggestion that she was neglecting her child.

31. DT gave direct evidence to the Tribunal about the comments allegedly made on 27 January 2021. She said that she usually left for work by 8.30am and, as she was leaving her home, she heard and saw BX say, 'Hun, are you missing out so that he can get fatter?' She told the Tribunal that she had never given BX permission to call her 'Hun' or 'Honey' and that she felt 'completely revolted' by his use of that term. She took the balance of the remark to be a reference to her work/parenting choices. She said that she recognised BX's voice, saw him and had later told EC what had been said. She expressed regret that BX 'chose to come out again and humiliate me'.

32. DT was taken to C2. She said that was then standing towards the front of her house and recognised BX's voice. She confirmed that she had heard him say the words which are the subject of that part of the complaint. She told the Tribunal that she felt humiliated and upset. She added that she was 'completely amazed, even after all these years – we don't live in the 1950's' and that 'women working is very normal now'. She said that in her managerial role she was very alert to the spectre of sexual harassment and discrimination in the workplace.

33. DT was cross-examined by BX. It was put to her she had purchased a software package to generate BX's voice from a pre-recorded message. She responded, 'Definitely not'. It was pointed out to her that she had not submitted an image of BX. She replied that she did not have her phone on. In response to the suggestion by BX that the exhibits were a fabrication, she said that it was definitely BX's voice, 'the same as your voice right now'. When it was suggested that she would not have been able to see BX on 5 January 2021, having regard to foliage obscuring her view, DT responded that she could clearly seeand that she saw BX. A challenge was made to EC and DT's motivations for the complaint. She told the Tribunal that it was 'us standing up' to BX and holding him accountable. DT's evidence was unshaken and there was no re-examination.

BX's Evidence

34. BX told the Tribunal that he was 52 years of age and had been married for 31 years. He and his wife had started trying to have children when he was 28 and now had three children. He gave their ages and referred to the time and effort which parenthood entailed for him. He said that he worked part time by choice as he wants to be involved as a parent.

35. Relevantly, BX firmly denied the allegations, stating that he had simply never spoken any of the words which formed the basis for the complaints. He told the Tribunal about the ready availability of voice synthesising software/devices on the internet and sites such as YouTube, and applications that can alter times and dates on photos and video footage. He said that the audio evidence presented by the complainants was fabricated, presumably by those means. He said that he frequently has visitors to his home, whether as guests or friends looking after his home and pets when travelling away. In reference to the exhibits, he said, 'It's the voice of someone, not me.' He also refuted the complainants' oral evidence that he had been observed by them at his back door, claiming that it would not have been possible for them to do so from where they were situated.

36. BX was cross-examined by the complainants' counsel, Mr Loganathan. BX said that he sometimes has guests staying at his home after 9.30pm. He did not ask his guests to make statements to his neighbours. He could not recall whether he travelled away from his property on 5 January and/or 27 January 2021.

37. C1 was played. BX said it was not his voice. He maintained that the audio was a fabrication. He referred again to the voice synthesising applications which he said were freely available on the internet. He said that, while he had never purchased such devices himself, he was aware that a recording of a person's voice could be used to effectively generate other recordings of statements in that person's voice. He said that his voice must have been generated in such a manner, adding, 'It doesn't sound like my voice'. C2 was then played. Again, BX said that it was not his voice but, when challenged, said, 'I don't recall saying any such thing.' In another exchange, he said that he 'thought about going down the alibi path' in response to the complaint, presumably by asserting that he was not at his home at all on the relevant dates. This was somewhat troubling for the Tribunal. Some discomfort was also observed by the Tribunal when BX stated that he was '100% sure' that he had not spoken the words alleged in the complaint.

38. In response to a question, BX said that the distance between the respective residences was 6 – 10 metres. Nothing turned on that.

39. When taken again to the alleged statements, BX expressed a 'belief' that the audio recording was fabricated. He then reaffirmed that he had not spoken the words and that the complainants were responsible for a fabrication.

40. BX agreed that 'the words' could be considered to be rude and inconsiderate. He maintained his denial before the Tribunal that he had ever said them.

Further evidence

41. After the closure of BX's case, two things happened. First, Mr Loganathan sought leave to re-open the complainants' case to lead evidence in rebuttal concerning the immutability of the security footage downloaded from their security system. He rather extravagantly described that rebuttal evidence as 'vital'. After some consideration, that leave was given by the Tribunal. The evidence was led from DT and something like a demonstration was attempted. It amounted to little more than lay assurances to the Tribunal that the material could not be altered once recorded. It was not particularly helpful evidence. Secondly, BX sought and was given leave to tender an exhibit regarding the availability of voice synthesising software. That was tendered on 3 October 2022 and received as C5.

Credit/Conclusion on the evidence

42. The parties' evidence is plainly at odds. A determination on the credibility of the witnesses is required. In *Campbell v Campbell* [2015] NSWSC 784 his Honour Justice Sackar at [73]-[79] summarised the following principles applying to the assessment of the credit of a witness:

- where a trial judge is faced with a stark choice between irreconcilable accounts, the credibility of the parties' testimony, the trial judge's assessment of the character of witnesses and the manner in which the witnesses give evidence are all matters of primary importance;

- the rational resolution of an issue involving the credibility of witnesses will require reference to, and analysis of, any evidence independent of the parties which is apt to cast light on the probabilities of the situation;

- in cases involving events which occurred long before the litigation, a court usually prefers to rely upon contemporaneous, or near contemporaneous, documents, which will often provide valuable, and, usually, more revealing, information than what may be flawed attempts at recollection of those facts by persons with an interest in the outcome of the litigation. Greater weight is usually accorded to such documents, as often they provide a safer repository of reliable facts, particularly when it is clear that they have been prepared by a person with no reason to misstate those facts in the documents and where there is no suggestion that the documents are other than genuine.

43. In this case, the Tribunal resolves the factual issues in favour of the complainants. That is, the Tribunal is satisfied on the balance of probabilities that the statements alleged in the complaint were made by BX and in the circumstances alleged. In assessing the oral evidence of the parties, the complainants both impressed the Tribunal as truthful witnesses. Their evidence concerning the matters in issue was consistent, unshaken and reliable. In contrast, BX's evidence was less than convincing. His denials under cross-

examination moved at one stage to an absence of recollection. At another stage, his assertions regarding the fabrication of evidence by the complainants moved to an expression of belief. On occasions, his responses to direct challenges were observed to be difficult for him to make. And, as noted earlier, BX's possibly inadvertent reference to the 'alibi path' was also troubling for the Tribunal. The better path to take must always be candour and meticulous truth-telling.

44. The complainants' evidence was, moreover, corroborated by the contemporaneous security and iPhone footage which were received as exhibits. It must be emphasised that the footage was an adjunct only to the evidence given directly by EC and DT, although it undoubtedly assisted their recollections. It was nonetheless persuasive evidence. The Tribunal agrees with DT that the voice heard in the audio recording was remarkably like BX's not indistinctive voice, with similar tone, inflection, and mode of delivery. The Tribunal does not accept the allegation that the footage was fabricated by the complainants in the manner asserted by BX. While the allegation could not quite be regarded as fanciful, it is sufficient to say that no cogent evidence was given to the Tribunal to accept such a serious allegation and that, again, the complainants were unmoved in their rejection of that suggestion.

Did the statements constitute direct discrimination?

45. The terms of section 14(2) of the Act have been set out above. In *Cain v The Australian Red Cross Society* [2009] TASADT 3 the Anti-Discrimination Tribunal ('ADT') held that section 14 requires that the complainant must establish that:

- the true reason or genuine reason for the respondent's conduct was on the basis that the complainant had one or more of the prescribed attributes under section 16 of the Act or a characteristic imputed to the attribute or attributes.

- there was a different treatment of the complainant when compared with the treatment of a comparator; that is, a notional person similarly placed to the complainant, and in similar circumstances, but without the prescribed attribute.

- the complainant has suffered a detriment that is a disadvantage that is real, a matter of substance and not trivial.

46. The discussion by her Honour Justice Wood in *Flanagan v Humana Pty Ltd* [2017] TASSC 50 regarding the potential intricacies of the 'comparator test', and the error articulated and applied by the ADT in that case, is noted. Those intricacies do not arise here. The identified attributes here are gender and family responsibilities *per se*. The Tribunal is satisfied that the complainants, but particularly DT, would not have incurred the statements made by BX had they not been the working parents of an infant child and, in DT's case, a woman working outside the home while her child was in the care of third parties. The treatment was less favourable when compared to persons without family responsibilities and, in these circumstances, DT's gender. The detriment was real and not trivial. The references to 'the most important time', 'missing out', 'you're at work', 'harsh', 'shouldn't you be with bubs right now' could only be intended and received as an exposure and criticism of the working choices made by the complainants in the context of their family responsibilities and DT's gender as a woman. The Tribunal easily accepts the complainants' evidence that the remarks were offensive, insulting and humiliating. The fact

that the remarks could be said to have been confined to a private rather than public venue is irrelevant. See *Burton v Houston* [2004] TASSC 57 at [23].

47. Direct discrimination is established.

Did the statements constitute prohibited conduct?

48. The terms of section 17(1) of the Act have also been set out above. In *Durston v Anti-Discrimination Tribunal (No.2)* [2018] TASSC 48, his Honour Justice Brett said:

> 63. Section 17(1) is also a provision which prohibits conduct. By its terms, it is apparent that the provision has an extremely wide ambit of operation. Some aspects of this are as follows:
>
> (a) The scope of conduct is unlimited. It encompasses "any conduct" which falls within the description contained in the section. However, the section will almost always be concerned with conduct which involves communication in one form or another.....
>
> (b) Read literally, the words "offends, humiliates, intimidates, insults or ridicules" are vague terms which have the potential to encompass a broad range of subjective emotions and feelings. The emotional response will vary from one person to another. However, judicial interpretation of the words "offend, insult, humiliate or intimidate" in respect of similar but not identical provisions under s 18C of the Racial Discrimination Act 1975 (Cth) suggests that the operation of the section is more restricted than the literal meaning of the words would suggest. In Eatock v Bolt [2011] FCA 1103, 197 FCR 261, Bromberg J endorsed judicial statements which require the conduct caught by s 18C to have "profound and serious effects and not to be likened to mere slights" His Honour also said:
>
> "[267] In my view, 'offend, insult, humiliate or intimidate' were not intended to extend to personal hurt unaccompanied by some public consequence of the kind Part IIA is directed to avoid. That public consequence need not be significant. It may be slight. Conformably with what I regard as the intent of Part IIA, a consequence which threatens the protection of the public interest sought to be protected by Part IIA, is a necessary element of the conduct s 18C is directed against. For the reasons that I have sought to explain, conduct which invades or harms the dignity of an individual or group, involves a public mischief in the context of an Act which seeks to promote social cohesion."
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> 64. However, the basis of the public aspect was explained as follows:
>
> "[263] The ordinary meaning of these words is potentially quite broad. To 'offend' can mean to hurt or irritate the feelings of another person. If the concern of the provision was to fully protect people against exposure to personal hurt, insult or fear, it might have been expected that the private domain would not have been excluded by the phrase 'otherwise than in private' found in the opening words of s 18C(1). The fact that it is, suggests that the section is at least primarily directed to serve public and not private purposes: Coleman at [179]. That suggests that the section is concerned with consequences it regards as more serious than mere personal hurt, harm or fear. It seems to me that s 18C is concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public's interest in a socially cohesive society."

> Of course, a significant difference between ss 18C and 17(1) is that the latter does not contain the words "otherwise than in private". It will extend to private communications.
>
> (c) It is not required that the person engaging in the conduct intend or even subjectively foresee that the conduct may have the said effect. The qualification requires objective foreseeability or anticipation. This requirement places some limit on the ambit of the provision, but places an obligation on the communicator to think through the potential effect of the proposed communication....
>
> (d) To fall within the section, the conduct must offend, humiliate, intimidate, insult or ridicule another person "on the basis of an attribute" as defined. The connection required between the conduct and the attribute, is that the conduct is done by reference to the attribute, rather than the stronger and more direct causal relationship required by some other formulations, such as "because" or "by reason of" This also tends to broaden the application of the prohibition applied by the section ".

49. The same attributes, gender and family responsibilities, have been identified for this aspect of the complaint. On the evidence received, the Tribunal is comfortably satisfied that BX's conduct did offend, humiliate and insult the complainants on the basis of gender and family responsibilities. It repeats the findings made in [46] above. The Tribunal must then consider whether a reasonable person, having regard to all the circumstances, would have anticipated that the complainants would be offended, humiliated, intimidated, insulted or ridiculed by his conduct in making the statements. Again, the Tribunal is comfortably satisfied that a reasonable person would have anticipated that statements directed towards their working choices, while having the family responsibility of caring for an infant child, DT's gender as a woman and the suggestion of a detriment to the child, would be offensive, humiliating and insulting to the complainants. It is difficult not to observe that the reference in section 17(1) to 'having regard to all the circumstances' could reasonably include considerations of the longstanding conflict and obvious animus between the parties and the possibility that BX actually intended to offend, humiliate and insult the complainants. The Tribunal finds it unnecessary to take that any further.

50. Prohibited conduct is established.

Did the statements constitute sexual harassment?

51. The terms of section 17(2) and section 17(3) are set out above. As stated earlier, in the complaint form submitted to EOT, EC stated that, '[DT] considers being called "honey" to be sexual harassment and intimidation.' To be specific, the findings of the Tribunal are that BX directed the terms 'Hun' and 'Honey' towards DT on 5 January 2021 and the term 'Hun' towards DT on 27 January 2021. In submissions, Mr Loganathan urged the Tribunal to find that this infringed section 17(3) of the Act, specifically that BX had made 'an unwelcome remark or statement with sexual connotations' to DT.

52. The Tribunal is in little doubt that DT found the terms 'Hun' and 'Honey' to be unwelcome. There must also be a determination that the terms carried sexual connotations. The following passage from the decision of *ELG v Trustee for the Sommers Freedom Fund* [2020] NSWCATAD 172 is of some assistance:

> 34 To be sexual harassment, the conduct must be conduct of a sexual nature. This must be determined objectively. "The characterisation of conduct as sexual harassment cannot depend upon the subjective response of its object except insofar as the section requires it to be unwelcome": *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72; [1989] 20 FCR 217 at 277 per French J. It follows that it is not [the complainant's] own view of the conduct which determines whether it is of a sexual nature.
>
> 35 In *Yelda v Sydney Water Corporation; Yelda v Vitality Works Australia Pty Limited* [2019] NSWCATAD 203, the Tribunal held that conduct may be of a sexual nature if it was not intended to have a sexual connotation but if it is likely to be, or if it is reasonably capable of being, sexual in nature, such as wording in a poster which could be interpreted by a reasonable person to have a sexual meaning *(Yelda v Sydney Water Corporation)*.
>
> 36 As noted by Raphael FM in *Font v Paspaley Pearls & Ors* [2002] FMCA 142 at [134] with regard to the *Sex Discrimination Act*, the ADA is:
>
> "...designed to protect people from the type of behaviour which other members of the community would consider inappropriate by reason of its sexual connotation. It is the actions themselves that have to be assessed, not the person who is carrying them out.
>
> …
>
> 38 Accordingly the test we have applied in determining whether the conduct was of a sexual nature is whether the actions …, viewed objectively, were sexual in nature or reasonably capable of conveying a sexual meaning.

53. Mr Loganathan was taken by the Tribunal to other well-known (dare it be said) 'butcher shop' terms of endearment such as 'Sweetheart', 'Lovely' or 'Darling'. He was asked whether those terms could reasonably be said to carry a sexual connotation. His response was that the terms had to be considered in context and, in this case, the longstanding animosity between the parties was relevant and should be taken into account. While this is superficially attractive, it is the Tribunal's view that it reverses the tests to be applied at this step, putting the subjective cart before the objective horse.

54. In a difficult evaluative exercise, the Tribunal has not been persuaded that, objectively, the terms 'Hun' and 'Honey' are terms of a sexual nature. They may well be considered to be 'tacky', stupid, thoughtless, unwelcome and even demeaning but, in the Tribunal's view, something more is required in order to engage the disapprobation of law under this rubric.

55. The Tribunal need go no further. Sexual harassment is not established.

Disposition

56. In closing submissions, Mr Loganathan requested that, if the complaints were found to be substantiated, the outcome sought by the complainants in their original complaint to EOT be applied, specifically:

- a written apology from BX; and

- an undertaking from BX that he will not engage in any discriminatory conduct in relation to the complainants nor sexually harass DT again.

57. Having regard to the Tribunal findings and conclusions, it is ordered that:

1. The complaint by EC and DT against BX for direct discrimination and prohibited conduct is substantiated.

2. Within 28 days of the date of this order, BX will provide to EC and DT via their practitioners, Logan and Partners, a legible hand-written apology for his statements and conduct on 5 January 2021 and 27 January 2021 and incorporating his undertaking that he will not again engage in any discriminatory or prohibited conduct towards them in contravention of the *Anti-Discrimination Act 1998*.

3. Costs are reserved.

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