SUPREME COURT OF QUEENSLAND

CITATION:	*Oaks Hotels & Resorts Limited v Knauer & Ors* [2018] QCA 359
PARTIES:	**OAKS HOTELS & RESORTS LIMITED** ACN 113 972 366 (applicant) **v** **NATASHA CORAL KNAUER** (first respondent) **OAKS HOTELS & RESORTS (QLD) PTY LTD** ACN 107 331 813 (second respondent) **BILL BARTON** (third respondent)
FILE NO/S:	Appeal No 4129 of 2018 QCATA No 446 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal – [2018] QCATA 29 (Sheridan DCJ and Member Roney QC)
DELIVERED ON:	21 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	2 August 2018
JUDGES:	Fraser and Gotterson JJA and Bond J
ORDERS:	**1. Grant leave to appeal limited to ground 1 in the draft notice of appeal.** **2. Dismiss the appeal.** **3. The applicant is to pay the first respondent's costs of the application and the appeal.**
CATCHWORDS:	HUMAN RIGHTS – DISCRIMINATION LEGISLATION – GROUNDS OF DISCRIMINATION – SEX DISCRIMINATION – SEXUAL HARASSMENT – where the first respondent was employed by the second respondent, a wholly owned subsidiary of the applicant – where the director and chief executive officer of the applicant arranged for the first respondent to reside free of charge with the third respondent in a two bedroom unit the third respondent occupied at another property which was provided by, and operated by, the applicant – where the third respondent was employed by the applicant as a night caretaker – where the first respondent

awoke to find the third respondent naked in her bedroom and the third respondent then indecently assaulted her – where a member of QCAT held that the applicant was vicariously liable to the first respondent for a contravention of the *Anti-Discrimination Act* 1991 (Qld) by the third respondent and ordered the applicant and the third respondent to pay the first respondent compensation for loss and damage caused to her by that contravention – where the Appeal Tribunal dismissed the applicant's appeal – whether the tribunal misapplied the meaning of the words "in the course of work"

Anti-Discrimination Act 1991 (Qld), s 132, s 133(1)
Sex Discrimination Act 1984 (Cth), s 28B, s 106

Jones v Tower Boot Co Ltd [1997] 2 All ER 406; [1996] EWCA Civ 1185, approved
South Pacific Resort Hotels Pty Ltd v Trainor (2005) 144 FCR 402; [2005] FCAFC 130, considered
The Commonwealth v Lyon (1979) 24 ALR 300; (1979) 1 CCD 172, applied

COUNSEL: R Perry QC, with J Merrell, for the applicant
D P O'Gorman SC, with R E Reed, for the respondent

SOLICITORS: Aitken Legal for the applicant
Maurice Blackburn for the respondent

[1] **FRASER JA:** A member of the Queensland Civil and Administrative Tribunal (Ms Ann Fitzpatrick) held that the applicant was vicariously liable to the first respondent for a contravention of the *Anti-Discrimination Act* 1991 (Qld) by the third respondent and ordered the applicant and the third respondent to pay the first respondent compensation for loss and damage caused to her by that contravention. The Appeal Tribunal (Sheridan DCJ, Deputy President, and Member Roney QC) dismissed the applicant's appeal against the member's decision. The applicant has applied for leave to appeal against the Appeal Tribunal's decision. Such an appeal is available only by leave and only upon a question of law: *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 150(3).

[2] The issue concerns the meaning of the words "in the course of work" in s 133(1) of the *Anti-Discrimination Act*, which renders a person and the person's worker or agent jointly and severally civilly liable if the worker or agent contravenes the Act "in the course of work or while acting as agent". "Agent" is defined to mean "a person who has actual, implied or ostensible authority to act on behalf of another". "Work" is defined to include work described in nine paragraphs. In this case the relevant paragraph is (b), "work under a contract for services". Other paragraphs comprehend, for example, work in a relationship of employment, work on commission, voluntary work, work under a statutory appointment, a work experience arrangement, a vocational placement, or an occupational training or retraining program.

[3] The following facts are drawn from the tribunal member's findings, none of which were disturbed by the appeal tribunal. In 2010 the first respondent was employed by the second respondent, a wholly owned subsidiary of the applicant. At a time

when the first respondent was due to commence work in Brisbane at a property the applicant managed and operated, the director and chief executive officer of the applicant, Mr Pointon, suggested to the first respondent that she reside free of charge with the third respondent in the two bedroom unit the third respondent occupied at another property operated by the applicant in Brisbane, the Oaks Lexicon Hotel.

[4] The applicant had engaged the third respondent to provide daily after-hours caretaking services between 10.00 pm and 6.00 am at the Oaks Lexicon Hotel, in consideration for which the applicant permitted the third respondent to occupy the unit rent free and paid his electricity and telephone costs. Under that contract, the third respondent was obliged during those hours to: provide an on-call service for late guest arrivals and emergencies; be available for after-hours call outs to respond to emergencies; respond to emergencies in the building during the evening, for example fire-alarms, lift breakdown, mechanical failure, and security complaints; be close enough to the hotel to be able to respond within a suitable time period to any call upon him; remain vigilant for and deal with or advise the building manager about situations that could cause a safety risk; ensure all accidents on the property were reported to the hotel manager; and remain sober and present in a professional manner. The third respondent may not have been required to be awake during those hours but he was required to be ready and able to respond when called upon.

[5] At Mr Pointon's request, a meeting was organised between the third respondent and the first respondent to ensure that they were comfortable about sharing the unit. After that meeting the first respondent moved into the unit. That night she retired to sleep in the spare bedroom. At 5.00 am on the following day the first respondent awoke to find the third respondent naked in her bedroom. The third respondent then indecently assaulted her. The first respondent told him to stop and leave the room and she broke down crying. The third respondent left the room, saying words to the effect that he would let her get changed, but he returned shortly afterwards and said that "this can be our little secret".

[6] The first respondent commenced proceedings in the tribunal against the applicant and the second and third respondents. The third respondent did not appear and the claim against the second respondent was settled. The applicant did not contest the first respondent's claim that the third respondent contravened the provision in s 118 of the *Anti-Discrimination Act* that "[a] person must not sexually harass another person". The applicant also did not seek to invoke s 133(2), which provides a defence for a respondent to a proceeding under s 133(1) who proves on the balance of probabilities that the respondent took reasonable steps to prevent the worker or agent contravening the Act. The applicant contested the claim upon other grounds, including by its contention that the third respondent's contravention was not committed in the course of work under his contract for services with the applicant.

[7] The tribunal member referred to *The Commonwealth v Lyon*[1] and *South Pacific Resort Hotels Pty Ltd v Trainor*[2] and concluded that "in the course of work" in s 133(1) should be given a wide interpretation in light of the remedial nature of the *Anti-Discrimination Act*. The tribunal member rejected the applicant's submission that the third respondent was working only whilst he responded to a call, alarm, incident or issue, found that the third respondent was working between 10.00 pm and

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1 (1979) 24 ALR 300.
2 (2005) 144 FCR 402.

6.00 am pursuant to his engagement whilst waiting for any such call, alarm, incident or issue to arise, and held that he was therefore engaged in the work he was required to perform at the time of the sexual assault and his contravention of the Act occurred "in the course of work". The tribunal member reached that conclusion without reference to the question whether the sexual assault occurred in the third respondent's place of work. The tribunal member found, however, that in addition to the unit being the third respondent's residence, it was a place of work for him; that was so because it was within the hotel building for which the third respondent had responsibility between 10.00 pm and 6.00 am. The tribunal member considered that this added force to the conclusion that the third respondent committed the sexual assault in the course of his work.

[8] The appeal tribunal endorsed the tribunal member's reasoning and also articulated some other reasons for the same decision.

[9] The applicant's draft notice of appeal from the appeal tribunal's decision contains 12 grounds, but the applicant's central contention is stated in ground 1: the appeal tribunal erred in law in finding that the contravening conduct of the third respondent occurred in the course of work within the meaning of s 133(1) of the *Anti-Discrimination Act*. Six grounds[3] are in the nature of arguments in support of ground 1 and are taken into account in my consideration of that ground. The remaining five grounds[4] challenge the other justifications for the member's decision articulated by the appeal tribunal. It is not necessary to consider those other matters. The applicant has not established any error of law in the tribunal member's decision.

[10] The construction propounded by the applicant is that the word "work" in the phrase "in the course of work" connotes only "active" obligations; it does not comprehend "passive" obligations of the kind the third respondent owed under his contract for services before there was any call, alarm, incident or issue. The word "work" is capable of bearing a variety of different meanings. In some contexts it connotes an operative activity. In other contexts it connotes employment or a job. The applicant argued that the tribunal member erred by adopting the second meaning, which gives s 133(1) a broader scope for operation.

[11] In *Trainor*, the Full Court of the Federal Court considered whether conduct in contravention of the *Sex Discrimination Act* 1984 (Cth) occurred "in connection with the employment of the employee" so as to render the employer vicariously liable under s 106 of the *Sex Discrimination Act* 1984 (Cth). Kiefel J, as the Chief Justice of Australia then was, referred to the importance of context and the general purpose and policy of a statutory provision as guides to its meaning.[5] The aim of s 106, which reflected the requirement for the elimination of sexual harassment that "employers take positive steps to eliminate it from the workplace and make clear to their staff that it cannot be tolerated",[6] required a wide operation to be given to the words "in connection with the employment of the employee".[7] Kiefel J considered that it was consonant with the purpose of s 106(1) to read the words "in connection with the employment of the employee" as "requiring that the unlawful acts in

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3 Grounds 2-4 and 9-11.

4 Grounds 5-8 and 12.

5 Kiefel J at [62] cited *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].

6 (2005) 144 FCR 402 at 413-414 [63], quoting from the second reading speech addressing amendments to the *Sex Discrimination Bill* 1983 (Cth).

7 (2005) 144 FCR 402 at 414 [64].

question be in some way related to or associated with the employment"; once that was established, it was for the employer to show that, in terms of s 106(2), the employer took all reasonable steps to prevent the conduct occurring.[8] Similarly, Black CJ and Tamberlin J described the expression "in connection with" in the context of s 106(1) as "a broad one of practical application".[9] The necessary connection with the transgressor's employment with the applicant was found in the circumstance that the situation in which the complainant and the transgressor were placed, and which provided the opportunity for the sexual harassment, "arose in connexion with work-related activities".[10]

[12] Section 117 of the *Anti-Discrimination Act* provides that one of that Act's purposes is to promote equality of opportunity for everyone by protecting them from sexual harassment, and amongst the ways in which that purpose is to be achieved is the prohibition of sexual harassment. The particular statutory purpose underlying s 133 is expressed in s 132. It is "to promote equality of opportunity for everyone by making a person liable for certain acts of the person's workers or agents", such purpose being achieved "by making a person civilly liable for a contravention of the Act by the person's workers or agents". When that is understood in the context of the defence in s 133(2) for a respondent who proves on the balance of probabilities that the respondent took reasonable steps to prevent the worker or agent contravening the Act, it can be seen that the policy underlying s 133 comprehends persons described in s 133(1) taking positive steps to eliminate sexual harassment by those who work for them. The reasoning in *Trainor* supports the view that the word "work" in the limiting requirement in s 133(1) that vicarious liability for a contravention by a person's worker is imposed only if the contravention occurs "in the course of work" should not be given the narrow construction advocated by the applicant.

[13] The consequences of the applicant's construction also militate against its acceptance. To take just one of the innumerable obvious examples that spring to mind, it seems most unlikely that, for example, although s 133(1) imposes vicarious liability upon an employer whose employee sexually harasses a passer-by whilst painting a building, it would not apply whilst the painter is waiting for a co-worker to finish some task which is required before the paint may be applied. Such a construction would be distinctly inapt to achieve the purpose expressed in the Act of "promoting equality of opportunity for everyone".[11]

[14] Accordingly, the construction of "work" propounded by the applicant should be rejected. That word comprehends the more general meaning "employment" or "job".

[15] I would add that it should not be assumed that the applicant would escape liability in this case even if the narrower construction were adopted. The third respondent's obligations during his work hours were not confined to passively waiting for calls and actively performing tasks in response to calls. He was obliged at all times during his working hours to remain sober, to stay in or near the hotel, and to be vigilant for situations that could cause a safety risk. The applicant emphasised that the third respondent's contract did not preclude him from sleeping during the hours he was on-call. But whether the third respondent was awake or asleep, by being in

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8 (2005) 144 FCR 402 at 415 [70].
9 (2005) 144 FCR 402 at 409-410 [41].
10 (2005) 144 FCR 402 at 415 [72].
11 *Acts Interpretation Act* 1954 (Qld), s 14A(1).

his unit in the hotel he was fulfilling his contractual obligation to be in or near the hotel; and his obligation to be vigilant for situations that could cause a safety risk (to take the most obvious example) was as much a part of his work under the contract for services as was his obligation to respond to calls.

[16] Although I have so far given separate consideration to the meaning of "work", it is necessary to consider its meaning together with the expression "in the course of work". In this respect, the applicant argued that "in connection with" in s 106(1) of the *Sex Discrimination Act* comprehends a broader range of relationships than does "in the course of" in s 133(1) and that the construction of s 133(1) should take into account the common law principles of vicarious liability in torts involving intentional criminal conduct which were discussed in *Prince Alfred College Incorporated v ADC*.[12] In *Trainor*, Kiefel J observed that the words "in the course of employment" in a Canadian statute directed to the prohibition of discriminatory practices "might be thought to suggest a closer analogy to tort law than those of the SDA (in connection with the employment), but I do not think anything turns upon the difference in language … [because] [t]he provisions are directed to the same purposes".[13] Ultimately Kiefel J did not accept that it was appropriate to construe s 106 of the *Sex Discrimination Act* by reference to an analogy with vicarious liability in tort.[14] Black CJ and Tamberlin J observed that the expression in s 106(1) "would seem, on its face, to be somewhat wider than the familiar expression "in the course of" used with reference to employment in cases about vicarious liability at common law or in the distinctive context of workers compensation statutes" and that cases in those other fields had at best only limited value in the different context of the *Sex Discrimination Act*.[15]

[17] It is inappropriate to construe the *Anti-Discrimination Act* by analogy with common law principles about the vicarious liability of an employer for the negligent or intentional criminal acts of an employee. One reason why that is so is that the Act was enacted in circumstances in which there was considerable uncertainty about the content of those principles.[16] More fundamentally, and consistently with the statutory purposes expressed in the Act, the expression "in the course of work" in s 133(1) appears in a context in which "work" is not confined to an employee's work for an employer. In relation to a similar provision in the *Race Relations Act* 1976 (UK), the Court of Appeal in *Jones v Tower Boot Co Ltd*[17] held that, because the word "employment" in the expression "in the course of his employment" in that statute comprehended relationships extending beyond master and servant, that expression should not be confined by reference to analogies drawn from the law of vicarious liability in tort. The same is true in relation to the expression "in the course of work" in s 133(1).

[18] Some guidance may be derived from cases about the scope of similar provisions in different statutory contexts, although it is always necessary to bear in mind any differences in statutory language and context. The applicant did not cite any such case that might support its argument. The tribunal member referred to *The*

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12 (2016) 258 CLR 134 at [38]-[83].
13 (2005) 144 FCR 402 at 414 at [67].
14 (2005) 144 FCR 402 at 414 [65] and at 415 [69].
15 (2005) 144 FCR 402 at 410 [42].
16 See *Prince Alfred College Incorporated v ADC* (2016) 258 CLR 134 at [38]-[39].
17 [1997] 2 All ER 406 at 410D-H and 411C-D (McCowan LJ) and 411E, 414D-F (Waite LJ).

Commonwealth v Lyon.[18] In that case an employee was injured playing rugby league for a team of employees in a game during working hours which was encouraged by the Bureau of Customs. Deane J held that it was open on the evidence to find that the employee sustained his injury in the course of employment by the Commonwealth and was therefore entitled to compensation under the *Compensation (Commonwealth Government Employees) Act* 1971 (Cth). That case concerned a more tenuous connection between injury and employment than the connection between contravention and work in this case. Deane J endorsed an expansive construction of the words "in the course of" in the expression "injury in the course of employment":

> "Injury in the course of employment means an injury sustained while the worker is engaged in the work which he is employed to do *or in something which is a concomitant of, or reasonably incidental to, his employment to do that work. The course of employment is a temporal concept and it is unnecessary that there be any causal connection between the work which the employee is employed to do and the injury which he sustains.* The scope of what is within it depends upon 'the sufficiency of the connection between the employment and the thing done by the employee' which 'cannot but remain a matter of degree, in which time, place and circumstances, as well as practice, must be considered together with the conditions of the employment'."[19]

[19] The words "in the course of work" in s 133(1) should be construed at least as broadly in light of its text and statutory purpose. Applying the construction endorsed by Deane J, the tribunal member cannot be said to have erred in law in finding that the third respondent's contravention occurred in the course of work in circumstances in which he contravened the Act during his defined hours of work, he was then obliged to fulfil the contractual obligations (including the obligations to be on-call and vigilant for safety risks) which constituted his work under the contract for services, and he was then in fact fulfilling at least his contractual obligation to remain in or near the hotel by being in the unit supplied to him by the applicant under the contract for services.

[20] It remains necessary to refer to two other arguments advanced by the applicant.

[21] The applicant referred to s 28B of the *Sex Discrimination Act*, which makes sexual harassment unlawful in a narrower range of circumstances than does the *Anti-Discrimination Act*. Section 28B limits the prohibition to cases which, to put it in very general terms, involve relationships of employment, commission agency, contract worker, partnership, and workplace participant. The applicant argued that the circumstance that the definition of "work" in the *Anti-Discrimination Act* allows for vicarious liability for another person's sexual harassment to be imposed in a very broad range of work-related cases, whereas the *Sex Discrimination Act* allows for vicarious liability for another person's sexual harassment to be imposed only in the comparatively narrow range of work-related cases described in s 28B of that Act, suggests that "in the course of work" in s 133(1) should be given a narrower construction than "in connection with the employment" in s 106 of the *Sex Discrimination Act*. That argument is not persuasive. The legislative choice to

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18 (1979) 24 ALR 300.

19 (1979) 24 ALR 300 at 303-304. Emphasis added. I have omitted citations.

impose vicarious liability under s 133(1) of the *Anti-Discrimination Act* in a broader range of work-related cases than is covered by the *Sex Discrimination Act* is consistent with a policy that favours the extension by the State Act of much the same policy underlying the Commonwealth Act to cases that are not within s 28B of that Act.

[22] The applicant also argued that under the tribunal member's construction the applicant would be vicariously liable for a contravention by the third respondent between 10.00 pm and 6.00 am but he would not be liable for the same conduct amounting to a contravention if it occurred shortly before or after that period. Whether or not that would be so might depend upon other facts, but upon that premise the applicant submitted that the tribunal member's construction of the Act resulted in a logical absurdity. Why such a result would be absurd was not explained. If the fact that contravening conduct occurred outside defined hours of work proved to be decisive for a conclusion in a particular case that the conduct did not occur in the "course of work", that could not reasonably be regarded as being illogical or absurd. It would simply reflect the appropriate application of the statutory policy expressed in the Act to the distinctive facts of the case.

Disposition and order

[23] I would grant leave to appeal limited to ground 1 in the draft notice of appeal, dismiss the appeal, and order the applicant to pay the first respondent's costs of the application and the appeal.

[24] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[25] **BOND J:** I agree with the reasons for judgment of Fraser JA and with the orders proposed by his Honour.