SUPREME COURT OF QUEENSLAND

CITATION:	*Hehir & Anor v Smith* [2002] QSC 092
PARTIES:	**JOHN HEHIR** (first appellant) and **FINANCIAL ADVISERS AUSTRALIA PTY LTD** (second appellant) **v** **SANDRA SMITH** (respondent)
FILE NO:	S 6622 of 2001
DIVISION:	Trial Division
PROCEEDING:	Appeal from Anti-Discrimination Tribunal
DELIVERED ON:	10 April 2002
DELIVERED AT:	Brisbane
HEARING DATE:	22 February 2002
JUDGE:	Wilson J
ORDER:	**Costs and the form of order to be agreed by the parties or determined on a further hearing**
CATCHWORDS:	APPEAL AND NEW TRIAL - APPEAL – GENERAL PRINCIPLES – appeal from the Anti-Discrimination Tribunal – whether Tribunal provided adequate reasons for its decision APPEAL AND NEW TRIAL - APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – where Anti-Discrimination Tribunal reopened proceeding for the hearing of further evidence not available on previous hearing dates – whether decision amounted to denial of procedural fairness – whether the further evidence corroborated the respondent complainant's evidence - whether there was sufficient evidence before Tribunal to make the decision – whether the Tribunal erred in law in permitting the adducing of evidence at the reopening which was not related to the evidence of the additional witness called by the respondent complainant – whether the Tribunal erred in law in refusing to allow the appellants to adduce evidence at the reopening which had been previously available

APPEAL AND NEW TRIAL - APPEAL – GENERAL PRINCIPLES – EXCESSIVE OR INADEQUATE DAMAGES – where respondent complainant awarded $17 000.00 for sexual harassment – whether amount awarded was grossly excessive

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH FINDINGS OF FACT – whether Tribunal erred in law in making findings in respect of allegations not made in the Points of Claim

DAMAGES – GENERAL PRINCIPLES – whether Tribunal confused aggravated and exemplary damages

EVIDENCE – ADMISSIBILITY AND RELEVANCE – IN GENERAL – whether Tribunal erred in law in refusing to allow discovery of an e-mail from a witness to the respondent's solicitor

EVIDENCE – ADMISSIBILITY AND RELEVANCE – SIMILAR FACTS – whether Tribunal erred in law in concluding that a witness's evidence was similar fact evidence – extent to which Tribunal must follow rules of evidence

EVIDENCE – FACTS EXCLUDED FROM PROOF – ON GROUNDS OF PRIVILEGE – PROFESSIONAL CONFIDENCE – LEGAL PROFESSION – whether Tribunal erred in law in ruling that legal professional privilege prevented appellants calling respondent's solicitor to give evidence

EVIDENCE – WITNESSES – EXAMINATION IN CHIEF, CROSS EXAMINATION – whether Tribunal erred in law in allowing respondent complainant's counsel to cross-examine or use leading questions in the examination-in-chief of witness called by the respondent complainant

EVIDENCE – WITNESSES – CROSS EXAMINATION – whether the Tribunal breached the rule in *Browne v Dunn*

Anti-Discrimination Act 1991 (Qld), s 208, s 209(1), s 217
Uniform Civil Procedure Rules 1999 (Qld), chapter 18 part 3

Allied Pastoral Holdings Pty Ltd v FCT [1983] 1 NSWLR 1 at 16, cited.
Baker v Campbell (1983) 153 CLR 52 at 66, considered.
Briginshaw v Briginshaw (1938) 60 CLR 336, cited.
Brown v Moore (1996) 68 IR 176, considered.
Browne v Dunn (1893) 6 R 67, cited.

CDJ v VAJ (No 1) (1998) 197 CLR 172 at 215, followed.
Greenhill Nomineees Pty Ltd v Aircraft Technicians of Australia Pty Ltd [2001] QSC 007, SC No 8540 of 1997, 25 January 2001, considered.
Henry v Thompson [1989] 2 Qd R 412, followed.
Hoch v The Queen (1988) 165 CLR 292, considered.
Hunter Area Health Service v Marchlewski (2000) 51 NSWLR 268 at 285, considered.
Lamb v Cotogno (1987) 164 CLR 1 at 8, followed.
Mannall v New South Wales [2001] NSWCA, No 40011 of 2000, 20 September 2001, considered.
Martin v Osborne (1936) 55 CLR 367 at 375-376, referred to.
Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd (1981) 36 ALR 23 at 28, applied.
Pfennig v The Queen (1995) 182 CLR 461, considered.
Pochi v Minister for Immigration and Ethnic Affairs (1979) 36 FLR 482 at 493, applied.

COUNSEL: DP O'Gorman for the appellants
SJ Keim for the respondent

SOLICITORS: Lynch & Company for the appellants
Susan Moriarty for the respondent

[1] **Wilson J:** This is an appeal against orders made by the Anti-Discrimination Tribunal that the appellants (the respondents before the Tribunal) pay the respondent (the applicant before the Tribunal) $17,000.00 compensation for sexual harassment and for costs.

[2] The course of the proceedings before the Tribunal may be summarised as follows –

19.11.99	Complaint referred to Tribunal
04.02.00	Telephone directions hearing
12.04.00	Claim and points of claim filed
28.04.00	Points of defence filed
12.05.00	Unsuccessful conciliation conference
21, 22.08.00	Hearing – decision reserved
26.10.00	Application to reopen filed
09.11.00	Application to reopen heard – decision reserved
13.11.00	Decision to reopen
15.11.00	Further directions hearing
13, 14.12.00	Resumed hearing – decision reserved
26.06.01	Decision handed down.

[3] An appeal may be brought from a decision of the Tribunal to this Court only on a question of law: *Anti-Discrimination Act* 1991 s 217. The appropriate procedure is that contained in the *Uniform Civil Procedure Rules* chapter 18 part 3. At the commencement of the hearing of the appeal, I ordered that the appellants have leave to amend the originating application, and that the amended application be treated as if it were a notice of appeal.

[4] The appellants abandoned two grounds of appeal (paras 1(c) and 1(e)(iv)), and I received oral and written submissions on the following –

1. That the orders made by Mr P. Tahmindjis sitting as a member of the Anti-Discrimination Tribunal of Queensland made on 26 June 2001 be set aside pursuant to s. 217 of the *Anti-Discrimination Act* 1991 on the following grounds:-

(d) Further or alternatively, the Member erred in law in awarding the Respondent $17,000.00 as compensation for loss or damage caused by the contravention in circumstances in which the damages awarded were grossly excessive having regard to the findings of fact made by the tribunal.

(e) The Member erred in law in re-opening the proceedings after he had reserved his decision because:

(i) he denied the applicants natural justice; and/or
(ii) there was no legal basis to conclude that the evidence of witness Francis corroborated the evidence of the respondent in her application for re-opening; and/or
(iii) there was insufficient evidence before him to make such decision.

(f) The Member erred in law in allowing the respondent's counsel to cross-examine and/or use leading questions in the examination-in-chief of witness Hill on 14 December 2000.

(g) The Member erred in law by breaching the rule in *Browne v Dunn*.

(h) The Member erred in law by not providing adequate written reasons.

(i) The Member erred in law in ruling that legal professional privilege prevented the appellants from calling the respondent's solicitor to give evidence.

(j) The Member erred in law in refusing to allow the discovery of the E-mail of witness Francis to the respondent's solicitor.

(k) The Member erred in law in concluding the evidence of witness Francis was similar fact evidence.

(l) The member erred in law in not allowing the appellants to adduce similar evidence to that of witness Francis.

(m) The Member erred in law in permitting the respondent to adduce evidence on 13 and 14 December 2000 on issues unrelated to the evidence of witness Francis.

(n) The Member erred in law in making findings in respect of any events alleged to have occurred on 22 February 1999 when such allegations were not alleged in the Points of Claim.

[5] The second appellant was a financial services company, and the first appellant was its manager. Between 4 February 1999 and 22 February 1999 the respondent was employed by the second appellant as a telemarketer. The Tribunal found that the first appellant unlawfully sexually harassed her on three occasions:

(i) on or after 8 February 1999 he touched her "in the form of rubbing her shoulders in a way similar to a massage";

(ii) on 22 February 1999 he placed his arm around her shoulders and consoled her as she was crying;

(iii) on 23 February 1999 he touched her in a manner which was unwelcome and made suggestions with sexual connotations; more particularly, he massaged her shoulders and back "more intensely [than on the previous occasions] and near her breasts", asked her whether she would like a "proper massage"; put his arm around her shoulder and pressed his lips against the side of her head."

The Tribunal awarded –

Special damages	$ 5,000.00
General damages	$ 9,000.00
Aggravated damages	$ 3,000.00
	$17,000.00.

[6] On the hearing of the appeal the parties made oral submissions (supplementing their written submissions) on grounds (e)(i), (ii) and (iii), (k) and (l), and relied on their written submissions on the other grounds. I shall deal first with those grounds on which oral submissions were made.

The decision to re-open (ground (e))

[7] Subsequent to the hearing on 21 and 22 August 2000 the respondent's solicitor obtained information from two other persons (Ms JA Wilson and Ms AJ Francis) about their dealings with the first appellant. The solicitors for the respondent filed an application to reopen the hearing on the following grounds –

1. That new evidence corroborating the testimony of Sandra Smith had been brought to the attention of her counsel and instructing solicitor on the day after the conclusion of the two day hearing on 22 August 2000;

2. that the witness providing the new evidence had now provided a formal affidavit in relation to the evidence;

3. that the new evidence of the witness had itself been corroborated by the provision of an affidavit affirming the new evidence;

4. that the evidence had been in no way reasonably available to the complainant or her lawyers until the day after the conclusion of the hearing;

5. that the evidence was directly relevant to the matters in dispute between the parties, principally the allegations of sexual harassment brought against the first respondent by the complainant;

6. that it was in the interests of justice that the hearing be re-opened to permit the evidence to be admitted and tested by cross-examination.

[8] Although the application which was filed referred to "the witness [singular]" and to the provision of an affidavit which "corroborated" the evidence of the new witness, on the hearing of the application to reopen it was clear that –

(a) there were two new witnesses – Ms Wilson and Ms Francis;
(b) the respondent's solicitors held an affidavit sworn by Ms Wilson;
(c) the respondent's solicitors held a facsimiled copy of statement signed by Ms Francis;
(d) neither the affidavit of Ms Wilson nor the statement of Ms Francis had been made available to the appellants;
(e) the appellants were unaware of the substance of Ms Francis' statement.

[9] On the hearing of the application, no point was taken about there being two new witnesses rather than one. Nor was it suggested that the evidence had been reasonably available at the time of the hearing in August.

[10] Counsel for the respondent informed the Tribunal that he wished to call Ms Wilson and Ms Francis and their spouses, and that he wanted subpoenas to be issued to recall two other persons referred to in Ms Francis' "affidavit" – Catherine Hill and Nevin Wright. He told the Tribunal that Ms Francis' allegations were "in our view, very, very similar to those made by ..[the respondent]..". He did not elaborate on the content of those allegations, except to say that they related to June 2000, and that they would "corroborate" the respondent's evidence.

[11] Counsel for the appellants pointed out several times that she had no idea of the content of Ms Francis' evidence. However, she did not ask to see the statement held by the respondent's solicitor, and she did not expressly take the point that the Tribunal could not determine the application to reopen without knowing at least the substance of the evidence sought to be adduced. Indeed, both the Tribunal and the parties proceeded on the assumption that the Tribunal was receiving submissions just on the law, and apparently on the premise that the content of the new evidence was not germane at that point.

[12] Counsel for the appellants argued against reopening to allow the evidence of Ms Wilson on the basis that it could not amount to corroboration, and further that it should not be allowed in as similar fact evidence. She submitted that it was not in the interests of justice for the matter to proceed indefinitely.

[13] In the upshot the Tribunal declined to reopen to allow the evidence of Ms Wilson (who had her own complaint before the Anti-Discrimination Commission) to be called, but made these orders –

> "1. Leave is granted to re-open this matter with respect to new evidence from Ms AF only.
> 2. ……..
> 3. The representatives of the parties will attend by telephone a further direction hearing, to be arranged by the Registry as expeditiously as possible."

In his reasons for so ordering the Member observed –

> "The complainant alleges that the evidence of these people will corroborate her complaint if there are any doubts as to her version of the events. In general it is alleged that, in these cases, the respondent sexually harassed women who were alone, in his employment or associated with his work.
>
> The evidence thus adduced would not go directly to the truth or otherwise of the facts alleged by the complainant in this case. Rather, if admitted, they would be in the form of similar fact evidence…
>
> In a case such as this which will turn on the facts and the credibility of the witnesses, it is also not evidence which would be simply used to fortify a case. Rather, it may be crucial to the balance of the burden of proof where some of the alleged incidents were not witnessed by anybody else. I am conscious of the inconvenience and expense which may be occasioned to the respondent by a reopening of the matter, but I am equally conscious of the fact that in cases turning on facts and evidence, all reasonably available probative evidence should be examined and tested. Such new evidence might indeed make a difference to the outcome of the case."

[14] The decision to reopen was an exercise of the Tribunal's discretion on a procedural matter. Appellate courts are reluctant to interfere with such decisions, even in strictly curial proceedings, and will generally do so only where there has been some error of principle. Success on an application to reopen court proceedings usually involves satisfying the court that the further evidence sought to be adduced is relevant to one or more of the issues, that it has the potential to affect the outcome, and that it was not reasonably available at the time of the earlier hearing. The Tribunal is not a court, and clearly the Legislature did not intend that proceedings before it should be redolent with all the procedures and formalities of court proceedings. Its over-riding duty is to accord procedural fairness to the parties; what is required in that regard will vary according to the circumstances.

[15] Although the Tribunal arguably erred in allowing the application when it was unsupported by an adequate statement of the substance of the further evidence, there was no denial of procedural fairness. It ordered a further directions hearing. That occurred, and directions were given for the evidence-in-chief of the new witness to be on affidavit and an opportunity for affidavits in reply. On the resumed hearing, Ms Francis was cross-examined, the witnesses Hill and Wright were recalled and further examined and cross-examined, and the new witnesses called in reply to Ms Francis' allegations (Worland, Rosa, Inglis and Keys) were cross-examined. There was no vitiating error of law in the circumstances.

The evidence of Amanda Jane Francis (ground (k))

[16] Ms Francis was employed by the second appellant as a trainee financial adviser between April and June 1999 – ie outside the period of the respondent's employment. She gave evidence of unnecessary touching and inappropriate remarks by the first appellant. The appellants called a number of witnesses to contest her account – Warland, Wright, Roser, Keys and Inglis. After a careful analysis of the evidence, the Tribunal accepted Ms Francis's account. The following appears in the judgment:

> "… I must now consider the extent to which I can take the evidence of Ms Francis into account in determining whether Ms Smith has discharged her onus of proof. While the allegations of Ms Francis and the complainant are not identical, there is a considerable amount of similarity between them. They both involve unnecessary and unwelcome touching and also inappropriate sexual remarks. Often, the circumstances in which these incidents allegedly occurred to both women were in a similar context: usually after normal business hours when no-one else was present and perpetrated by an employer on a new employee with little experience. The probative value of similar fact evidence is usually more relevant in criminal than in civil cases. The Tribunal is not bound by the rules of evidence (s 208) and may inform itself on any matter as it considers appropriate. It should, however, accord appropriate weight to any evidence depending upon its relevance, reliability and the rules of natural justice *(Director-General of Education v Atkins & ors* (1989) EOC 92-263; *Qantas Airways Ltd v Gubbins & ors* (1992) EOC 92-454). I consider that the evidence of Ms Francis is both relevant to this case and on the whole reliable. In particular it indicates that the first respondent [the first appellant] is a person who has had a tendency to "test the waters" with young female employees in circumstances where they are dependent on him for a livelihood and away from the observation of witnesses. In such circumstances, similar fact evidence which is particularly cogent to the matter at hand can be admitted in a court where the rules of evidence do formally apply (see PK Waight and CR Williams: *Evidence: Commentary and Materials,* 4th Edition, 1995, pp. 391-3; *Pfennig v The Queen* (1995) 182 CLR 461). The balance which must be drawn is between the probative value of the similar facts and the potential for prejudice to the respondent. In the present circumstances, in my opinion, the latter is outweighed by the former. I consider that this is particularly the case where the allegations of Ms Smith and Ms Francis have both been corroborated

> by the later testimony of Ms Hill which was not entirely congruent with some of her earlier observations, particularly those in her statutory declaration which had been written by Mr Hehir. I am also assisted in coming to this conclusion by the decision of the Human Rights and Equal Opportunity Commission in *Turner v Bowling & BHB Tax Services Pty Ltd* (2000) EOC 93-092. That case also involved sexual harassment by massaging where there were no witnesses. Commissioner Carter QC, finding that the alleged incident had occurred, held that he could use evidence of allegations against the respondent which, while not corroborative in the strict legal sense, had value in demonstrating the consistency of the complainant's allegations particularly when compared to a lack of similar consistency of the respondent's evidence."

The Tribunal then referred to the onus on the respondent (the complainant before the Tribunal) to prove her case on the balance of probabilities, and to the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336.

[17] There was no error of principle in the Tribunal's use of the evidence of Ms Francis. The starting point must be s 208 of the *Anti-Discrimination Act 1991* which provides –

> "**208 Evaluation of evidence**
>
> **(1)** The tribunal is not bound by the rules of evidence and—
>
> (a) may inform itself on any matter as it considers appropriate; and
>
> (b) must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; and
>
> (c) may give directions relating to procedure that, in its opinion, will enable costs or delay to be reduced and will help to achieve a prompt hearing of the matters at issue between the parties; and
>
> (d) may draw conclusions of fact from any proceeding before a court or tribunal; and
>
> (e) may adopt any findings or decisions of a court or tribunal that may be relevant to the hearing; and
>
> (f) may receive in evidence a report of the commissioner, but only if the commissioner has provided a copy to each party to the hearing; and
>
> (g) may permit any person with an interest in the proceeding to give evidence; and

> (h) may hold a hearing in the absence of a party who was given reasonable notice to attend, but failed to do so without providing a good reason; and
>
> (i) may permit the commissioner to give evidence on any issue arising in the course of a proceeding that relates to the administration of the Act.
>
> **(2)** Nothing said or done in the course of conciliation can be admitted as evidence in a hearing before the tribunal."

[18] While the Tribunal was not bound by the strict rules of admissibility, it would have erred in law had it acted on evidence that was not logically probative: *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 493. In my view there was no vitiating error in this regard. The evidence of Ms Francis bore sufficient similarity to that of the respondent for there to be a probability, or increased probability, judged rationally upon common experience, that the first appellant had engaged in the conduct alleged by the respondent.

[19] In criminal proceedings, propensity evidence is not admissible unless it is sufficiently highly probative of a fact in issue to outweigh the prejudice it may cause. This is illustrative of the Court's discretion in weighing the probative value of evidence against its prejudicial effect. See *Pfennig v The Queen* (1994-95) 182 CLR 461; *Hoch v The Queen* (1988) 165 CLR 292.

[20] In civil proceedings it is doubtful that the Court has such a discretion to refuse to admit evidence: see *CDJ v VAJ (No 1)* (1998) 197 CLR 172 at 215 per McHugh, Gummow and Callinan JJ, footnote 106. The basic test is that of relevance, subject to well known specific rules of exclusion. In *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23 the applicant alleged that a number of misleading and deceptive representations had been made to induce it to enter into two leases of shops in a shopping centre. Northrop J admitted similar fact evidence of representations made to eight other tenants. His Honour began by identifying the substantive question as whether the evidence proposed to be given by the eight witnesses had any probative force in relation to a fact in issue. He said at 28 –

> "…The general principle is that proof of "similar facts" done by a party to litigation does not tend to prove that the party did a particular act in issue alleged in litigation. The general principle is stated in Cross on Evidence, Second Australian Edition, para 14.2, p 342, as follows: 'Evidence of the misconduct of a party on other occasions (including his possession of incriminating material) must not be given if the only reason why it is substantially relevant is that it shows a disposition towards wrongdoing in general, or the commission of the particular crime or civil wrong with which such party is charged, unless such a disposition is of particular relevance to a matter in issue in the proceedings.'
>
> This is a general principle and there are many instances where evidence of "similar facts" is admissible. Thus evidence of "similar facts" is admissible where the facts include "circumstances whose

> relation to the fact in issue consists in the probability or increased probability, judged rationally upon common experience, that they would not be found unless the fact to be proved also existed"…."

He then quoted the discussion of the principle by Dixon J in *Martin v Osborne* (1936) 55 CLR 367 at 375-6.

Refusal to allow appellants to adduce evidence similar to that of Francis (ground (l))

[21] At the directions hearing on 15 November 2000 (following the decision to reopen), the first appellant raised his wish to introduce fresh evidence going to the character or reputation of the respondent. The Tribunal refused to allow this: it had been available to the time of the application to reopen, and there was a need for finality. There was no error of principle in the Tribunal's exercise of its discretion.

Discovery of email from Francis to respondent's solicitor (ground (j))

[22] In her affidavit, Amanda Francis deposed –

> "…
> 5. Sometime in September 2000, I was contacted by a solicitor, Susan Moriarty, who informed me that she had been informed that I had been sexually harassed by John Hehir.
>
> 6. I told Ms Moriarty that it was true that I had been sexually harassed by John Hehir and that I had been attempting to locate the complainant's lawyers so that I could tell them my story.
>
> 7. I then emailed Ms Moriarty a statement of events surrounding my employment with Financial Advisers Australia P/L which she then converted into a Statement for me to sign.
>
> 8. Unfortunately, when I checked the Statement I did not pick up that the dates were out by a year so that in my Statement I indicate that my husband and I moved to Maroochydore in August 1999 when in fact we arrived in August 1998.
>
> …"

[23] The Tribunal was correct in refusing an application by the appellants for discovery of that email primarily on the ground of relevance (record p 391). Moreover, the contents of the email were privileged, being evidence obtained for the purpose to the litigation: *Baker v Campbell* (1983) 153 CLR 52 at 66; *Greenhill Nominees Pty Ltd v Aircraft Technicians of Australia Pty Ltd* [2001] QSC 007, SC No 8540 of 1997, 25 January 2001.

Examination in chief of Hill on 14 December 2000 (ground (f)).

[24] Mrs Hill was a fellow employee of the respondent. She was still in the employ of the second appellant at the time of the hearing. On 24 June 1999 she made a statutory declaration in which she referred to an incident in which the first appellant had touched her breast when brushing her hair aside. She said that the first appellant had not sexually harassed her, and that she had not witnessed him sexually harassing anyone else. That statutory declaration was used by the appellants as part of their response to the complaint made to the Anti-Discrimination Commission. When the matter came before the Tribunal Mrs Hill appeared under subpoena as a witness for the respondent (the complainant). She was not very helpful to the respondent. By the time the hearing was reopened, she had given a statement dated 20 May 2000 to the solicitors for the respondent which was much fuller than the statutory declaration. In it she revealed that the respondent had given her a detailed account of the first appellant's conduct towards her, and further that at the time of making the statutory declaration she had felt "very afraid and unsure of both ..[her].. position in the company and of John Hehir himself".

[25] When the hearing was reopened, counsel for the respondent recalled Mrs Hill, and was allowed to question her on matters relevant to the evidence of Mrs Francis. He asked a series of leading questions apparently designed to show that she was still reluctant to tell the whole truth because of fear for her job. The Tribunal and the first appellant (who appeared unrepresented when the proceeding was reopened) were alert to what was happening and there was argument about it. In the upshot the Tribunal decided to allow counsel for the respondent "some latitude".

[26] In my view the Tribunal did not err in so doing. Not bound by the rules of evidence or the procedural rules applicable to court proceedings, it was clearly within its discretion to allow that questioning. In all the circumstances the appellants were not unfairly prejudiced by the way the discretion was exercised, and this ground of appeal has not been made out.

Refusal to allow appellants to call respondent's solicitor (ground (i)).

[27] The appellants wanted to call the respondent's solicitor Ms Moriarty in relation to some alleged impropriety in her dealings with Mrs Hill. The Tribunal refused to allow this on the ground of legal professional privilege.

[28] The respondent would have been entitled to claim privilege had Ms Moriarty been called (*Baker v Campbell)*, and her counsel made it clear that the point would be taken. In the circumstances the Tribunal did not err in refusing to allow Ms Moriarty to be called.

[29] In any event, the first appellant developed his concern about interference with a witness during his cross-examination of Mrs Hill; it was not shown to be of any substance.

Evidence on 13 and 14 December 2000 on issues unrelated to the evidence of Francis (ground (m))

[30] This ground of appeal relates to –

(a) the receipt of Mrs Hill's statement of 20 May 2000; and

(b) cross-examination of Inglis about his being present when the first appellant allegedly touched Mrs Hill's breast.

[31] The statement was tendered during the reopened proceeding. The Tribunal queried its relevance to the evidence of Ms Francis, and counsel for the respondent replied that it was relevant to the issue of the first appellant's power over Mrs Hill. There was no error in admitting the statement on that basis.

[32] In an affidavit sworn on 4 December 2000, Mr Inglis gave evidence as to the good character of the first appellant and in denigration of Mrs Francis. He said he had never seen the first appellant behave in the manner alleged by Mrs Francis. In those circumstances, the Tribunal was correct in allowing counsel for the respondent to cross-examine him about his presence on the occasion when the first appellant touched Mrs Hill's breast.

The rule in *Browne v Dunn* (ground (g))

[33] In his written submissions counsel for the appellants submitted that the Tribunal had breached the rule in *Browne v Dunn* (1893) 6 R 67 in the following ways –

- it was not suggested to Ms Grice that she was "…..in an awkward position, having left the employment of FAA but wanting a job there again," and consequently she was prepared to swear a Statutory Declaration that she knew to contain an error (AB pp 102.9 – 103.2);

- it was not suggested to Ms Hill that she "…..considered herself to be "the meat in sandwich" (AB p 109 ll. 4-5) (although see her statement – AB p90).

- it was not suggested to Mr Wright that his evidence was affected by the fact that he enjoys an advantageous financial relationship with Mr Hehir in the form of elastic contra deals for rent (AB p 111.8 – 111.9);

- it was not suggested to Mr Hehir that he "…..took active measures to distort the documentary evidence of several witnesses by writing their Statutory Declarations or Affidavits in a way to put him in the best possible light and to ignore some relevant detail" (AB p 117.7 – 117.8);

- it was not suggested to Mr Hehir that this alleged distortion etc "has been done to mislead" (AB p 117.8).

[34] This ground of appeal is premised on a misunderstanding of the rule in *Browne v Dunn*, which was expressed in these terms by Hunt J in *Allied Pastoral Holdings Pty Ltd v FCT* [1983] 1 NSWLR 1 at 16 –

> "It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn."

[35] In the present case the real point is whether these conclusions of fact could validly be drawn from the evidence. In my view they were open to the Tribunal, and no error of principle was made.

Findings in respect of events on 22 February 1999 (not in points of claim) (ground (n)).

[36] This ground of appeal is quite unmeritorious. In the points of claim it was alleged that the offending conduct occurred between 4 and 22 February 1999, and that the respondent did not return to work after the incidents on 22 February 1999. There was an error in the points of claim, in that "23 February" should have appeared instead of "22 February". The appellants did not draw attention to this or object to evidence of events on 23 February at the hearing before the Tribunal. The Tribunal made no error of law in this regard.

Whether Tribunal provided adequate written reasons (ground (h)).

[37] On 26 June 2001 the Tribunal gave its decision and published lengthy and well reasoned written reasons, which ran to 18 pages of single lined typescript. Findings on material questions of fact and the evidence on which those findings were based were clearly set out. There can be no question of any relevant inadequacy on the part of the Tribunal.

Quantum (ground (d))

[38] Pursuant to s 209(1)(b) of the *Anti-Discrimination Act* -

> "**209 Orders the tribunal may make if complaint is proven**
>
> **(1)** If the tribunal decides that the respondent contravened the Act, the tribunal may make 1 or more of the following orders -
>
> (b) an order requiring the respondent to pay to the complainant .... , within a specified period, an amount the tribunal considers appropriate as compensation for loss or damage caused by the contravention."

As White J observed in *Brown v Moore* (1996) 68 IR 176, an award of damages pursuant to s 209(1)(b) is an exercise of discretion. Since an appeal lies only on a question of law (s 217(1)), the appellants must demonstrate that the Tribunal acted on a wrong principle which led to the award being beyond the limits of what the exercise of a sound discretionary judgment could reasonably adopt.

[39] The only special damages claimed related to past economic loss. The appellants submitted that there was insufficient evidence to justify the Tribunal's award of $5,000.00, and that the respondent's counsel had acknowledged that that level of special damages was not warranted.

[40] At the time of the sexual harassment the respondent had two children. She did not have a history of steady employment. After she ceased employment because of the harassment and before the hearing, she married and had a third child who was born in March 2000. The Tribunal's assessment of her likely earning capacity but for the harassment at $260.00 per fortnight was open on the evidence. More problematical is the extent to which she would have exercised that capacity. The Tribunal allowed one year's loss of wages (up to one month before the birth of her third child) and discounted it for annual leave, time off at the time of her marriage, and her unsteady work history. It is true that her own counsel had submitted that an award less than that would have been appropriate: 24 weeks at $155.00 per week ($3,720.00). Generous though the Tribunal's award of special damages was, it was really a factual conclusion which was open on the relevant evidence. No error has been demonstrated in this regard.

[41] The Tribunal allowed $9,000.00 general damages and $3,000-00 aggravated damages. Both these heads of damage are compensatory in nature. In *Lamb v Cotogno* (1987) 164 CLR 1 at 8 the High Court said -

> "Aggravated damages, in contrast to exemplary damages, are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like. Exemplary damages, on the other hand, go beyond compensation and are awarded 'as a punishment to the guilty, to deter from any such proceedings for the future, and as proof of the detestation of the jury to the action itself'."

See also *Henry v Thompson* [1989] 2 Qd R 412. Of course, aggravated damages may serve punitive and deterrent functions at the same time as providing compensation: see *Hunter Area Health Service v Marchlewski* (2000) 51 NSWLR 268 at 285. As Mason P observed in *Marchlewski*, aggravated damages have been awarded in a range of torts including defamation, intimidation, trespass to the person and malicious prosecution, although it is unclear whether they may be awarded in a negligence action. It is arguable that an award of aggravated damages in anti-discrimination proceedings could amount to double compensation, since general damages are customarily awarded for such damage as humiliation and insult. However, the point was not argued before me, and so I have made no determination in relation to it.

[42] Be that as it may, I consider that there was an error of principle in the application of the distinction between exemplary damages and aggravated damages. The following passage appears in the Tribunal's reasons for judgment -

> "In this case the first ..[appellant].. has not merely denied the allegations of sexual harassment; he also took active measures to distort the documentary evidence of several witnesses by writing their Statutory Declarations or Affidavits in a way to put him in the best possible light and to ignore some relevant detail. The instances of this I have detailed above. In my opinion, this goes beyond a legitimate process of asserting one's innocence, requiring that the ..[respondent].. discharge her burden of proof. It has been done to mislead. It has unnecessarily protracted a case which, in my opinion, could have reasonably been settled by conciliation but which instead has caused the ..[respondent]..the extended stress of these hearings, including the re-opening of the case to hear the evidence of Ms Francis and others because of the nature of the balance of the evidence tendered up to that point. I consider that an award of aggravated damages is appropriate, and I award the ..[respondent].. $3,000 under this head."

Despite the reference to causing the respondent "the extended stress of these hearings", these were findings of reprehensible conduct which might perhaps have warranted punishment, rather than findings of the infliction of hurt, insult and humiliation. In short, there was an error of law in the awarding of aggravated damages, and that part of the damages award must be set aside.

[43] The appellants submitted that the award of $9,000.00 general damages was so manifestly excessive as to amount to an error of law. They submitted that the Tribunal was attempting "to create new law", and focussed on this passage in the reasons for judgment -

> "It is, in my opinion, significant - and unacceptable - that Australian cases dealing with sexual harassment have tended to be parsimonious with respect to damages unless they have been framed in more traditional legal forms (see for example *Barker v Lord Mayor, Alderman and Citizens of the City of Hobart, Paul Barrat, Bruno Gentile and James Stacey and Anor*, Supreme Court of Tasmania, unreported, No 1501/1990, while the highest reported amount of damages for sexual harassment in an anti-discrimination case in the same year in Australia was $16,200.00, of which $4,200 was for lost wages: *Murphy v Ramus Pty Ltd* (1990) EOC 92-308.)"

[44] Of course, if proceedings are brought in tort, it is incumbent on the plaintiff to prove the elements of the tort, and if he or she does so, then the Court will make an award of damages in accordance with the extent of the proved compensable loss. In cases of assault or negligence, mere distress and/or humiliation, in the absence of a recognised psychiatric illness or some other compensable damage on which it is parasitic, is not compensable. See, for example, *Mannall v New South Wales* [2001] NSWCA, No 40011 of 2000, 20 September 2001. However, anti-discrimination proceedings are legally of a different character. Where a complainant proves a contravention of the *Anti-Discrimination Act*, the Tribunal may make one or more of the orders set out in s 209(1), including the payment of compensation. The loss or damage for which compensation may be awarded need not be of a such a character that it would be compensable if proceedings were brought in tort, and so mere

distress and or humiliation may warrant an award. In the passage in its reasons for judgment on which the appellants focused the Tribunal ignored this basic distinction. However, it was an obiter dictum.

[45] The Tribunal summarised the facts on which it based the award of general damages in this way -

> "The ..[respondent].. testified that he felt violated by Mr Hehir's actions. Her husband testified that she was depressed following her time at FAA. Certainly the ..[respondent].. felt offended and humiliated by the actions of the evening of 23 February 1999. The feeling of offence and humiliation with respect to the actions occurring on 8 February and 22 February was, however, of a delayed nature. I do not consider that this should necessarily lessen the amount of general damages she might receive. It is already well settled in Australian discrimination law that actions which amount to harassment can be considered in a global sense when assessing the level of pain and suffering experienced by a complainant (see *Hill v Water Resources Commission* (1985) EOC 92-127; *Boldra v Metropolitan (Perth) Passenger Transport Trust (No 2)* (1992) EOC 92-458)."

Those factual findings were open on the evidence, and there was no error in the statement of principle. The amount awarded was within the range of a sound discretionary judgment, and demonstrates no error of law.

Conclusion

[46] It seems unfortunate that proceedings which resulted at first instance in an order for the payment of a relatively modest sum by way of compensation ($17,000.00) should have taken as many as four hearing days (as well as time taken on directions hearings). The legal costs on both sides of the record are likely to have far exceeded the amount recovered. The whole saga of the proceedings seems out of step with the Tribunal's implied charter to provide efficient, prompt and low cost resolution of matters in dispute.

[47] The appeal should be allowed. The order of the Tribunal that the appellants pay the respondent the sum of $17,000.00 by way of compensation within 60 days of the date of the order should be set aside. In lieu thereof it should be ordered that the appellants pay the respondent the sum of $14,000.00 by way of compensation. I will hear counsel on the period within which that sum should be ordered to be paid: see s 209(1)(b) of the *Anti-Discrimination Act* which requires the period to be specified. I will hear counsel on costs (both costs of the proceeding before the Tribunal and costs of this appeal).