

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Gitau & Ng'ang'a v De Soysa Walsh Pty Ltd, Walsh & Boles* [2023] QCAT 189

PARTIES: **JACKSON GITAU**
ROSE NG'ANG'A
(applicants)

v

DE SOYSA WALSH PTY LTD
DAVID WALSH
LEACHIA BOLES
(respondents)

APPLICATION NO/S: ADL054-20, ADL055-20, ADL024-21

MATTER TYPE: Anti-discrimination matters

DELIVERED ON: 22 May 2023

HEARING DATE: 3, 4 and 5 April 2023

HEARD AT: Brisbane

DECISION OF: Member Gordon

- ORDERS:
1. **De Soysa Walsh Pty Ltd and David Walsh did directly discriminate against Jackson Gitau and Rose Ng'ang'a in the accommodation area on the basis of pregnancy by, in emails of 27 and 30 March 2020, threatening eviction proceedings if they brought their baby home after the birth.**
 2. **De Soysa Walsh Pty Ltd and David Walsh did directly discriminate against Jackson Gitau and Rose Ng'ang'a in the accommodation area on the basis of race by:**
 - (a) **in emails of 27 and 30 March 2020, threatening eviction proceedings if they brought their baby home after the birth; and**
 - (b) **between 27 March and 2 June 2020, conducting a campaign against the tenants of surveillance, being constantly picked on, losing the use of a facility, being served with numerous unjustified notices, declining to assist with utilities, being spoken to in humiliating and offensive ways, and by obstructing access.**
 3. **All other complaints in ADL054-20 and ADL055-20**

are dismissed.

- 4. The sexual harassment counter complaint in ADL024-21 is dismissed.**
- 5. ADL054-20 and ADL055-20 shall be listed for a directions hearing on a date to be fixed, to enable the tribunal to decide the question of remedy.**

CATCHWORDS:

HUMAN RIGHTS – DISCRIMINATION LEGISLATION – DIRECT DISCRIMINATION – where tenants asked the lessor for a break lease because they were having a baby and needed somewhere bigger – where the lessor threatened eviction proceedings if they were to bring the baby home – whether the threat was direct discrimination in the accommodation area on the basis of pregnancy and/or race

HUMAN RIGHTS – DISCRIMINATION LEGISLATION – DIRECT DISCRIMINATION – where tenants were of African origin – where the lessor started a campaign against the tenants of surveillance, being constantly picked on, losing the use of a facility, being served with numerous unjustified notices, declining to assist with utilities, being spoken to in humiliating and offensive ways, and by obstructing access – whether direct discrimination in the accommodation area on the basis of race or another attribute

HUMAN RIGHTS – DISCRIMINATION LEGISLATION – INDIRECT DISCRIMINATION – whether lessor imposed a ‘no children’ term on the tenants

HUMAN RIGHTS – DISCRIMINATION LEGISLATION – RACIAL VILIFICATION – where a tenant publicly suffered oral racial abuse – where it is said one of the respondents falsely publicly claimed that the tenant was threatening her – whether the acts were racial vilification

HUMAN RIGHTS – DISCRIMINATION LEGISLATION – SEXUAL HARASSMENT – where a cross complaint of sexual harassment was made some months after the tenants’ complaints – whether there was sexual harassment

HUMAN RIGHTS – DISCRIMINATION LEGISLATION – VICTIMISATION – where the lessors’ campaign continued after allegations of discrimination made by tenants – whether the campaign was because of the allegations

Anti-Discrimination Act 1991 (Qld), s 7, s 10, s 11, s 83, s 119, s 124A, s 130, s 131A, s 133, s 204

Burns v Dye [2002] NSWADT 32

Catch the Fire Ministries v Islamic Council of Victoria Inc

[2006] VSCA 254
Matthews v Woombye Pub Trading Pty Ltd [2022] QCAT 301
McCauley v Club Resort Holdings Pty Ltd (No 2) [2013] QCAT 243
Petrak v Griffith University & Ors [2020] QCAT 351
Ritson v The Giving Network Pty Ltd & Anor [2021] QCAT 81
Sivananthan v Commissioner of Police, New South Wales Service [2001] NSWADT 40
St Helens Metropolitan Borough Council v Derbyshire [2007] UKHL 16
Sunol v Collier (No 2) [2012] NSWCA 44

APPEARANCES & REPRESENTATION:

Jackson Gitau:	Duncan Marckwald (counsel) instructed by DWF (Australia)
Rose Ng'ang'a:	Laura Dawson (counsel) instructed by Legal Aid Queensland
De Soysa Walsh Pty Ltd	By its sole director David Walsh
David Walsh	Self-represented
Leachia Boles	By David Walsh

REASONS FOR DECISION

- [1] This discrimination, racial vilification and victimisation complaint, and an associated sexual harassment counter complaint, concern what happened during a tenancy of a unit in a suburb in North Brisbane.
- [2] The tenants were Jackson Gitau and Rose Ng'ang'a. They had a fixed term residential tenancy from the first respondent, De Soysa Walsh Pty Ltd, a company controlled by the second respondent, David Walsh. The tenants' unit was one of six in a block of units converted from a suburban house about 60 years ago. The third respondent, Leachia Boles, is Mr Walsh's wife and during the currency of the events was a joint owner of the block of units.
- [3] For ease of reference, in these reasons I refer to the three respondents as 'the respondents' although when deciding the question of liability I treat them separately.
- [4] About half way through the fixed term, Ms Ng'ang'a told the respondents that she was pregnant and that they wanted to break the lease because they needed somewhere larger. It was agreed that if a new tenant could be found, then the tenancy would be terminated early.
- [5] A new tenant was not found, and the tenants indicated to the respondents that they would need to stay to the end of the fixed term.
- [6] The baby was due just over six weeks before the end of the fixed term and about a month before the baby was due, the respondents told the tenants that if the baby was

brought to the unit it would be an unauthorised occupant and eviction proceedings would be commenced.

- [7] The tenants allege that at about the same time the respondents started to put them under surveillance, constantly picked on them, withdraw a facility, served them with numerous unjustified notices, interfered with their utilities and declined to assist with the utilities, obstructed their access, humiliated them, called them offensive names, and on one occasion physically attacked one of them.
- [8] The tenants allege that these things happened because of their baby, and because they were of African origin. The tenants sought help from Tenants Queensland and lawyers. Steps were taken to protect the tenants' rights to remain in the premises by applying to the tribunal, bearing in mind the baby was due soon. The tenants say that despite this, the respondents continued their campaign against them.
- [9] Finally, a couple of days before the end of the fixed term tenancy, and when the baby was five weeks old, the tenants moved out of the premises.
- [10] The counter complaint is for sexual harassment. One of the respondents, Ms Boles, says that she was subject over several weeks to unwanted comments and gestures of a sexual nature by Mr Gitau which she found offensive and threatening.

The hearing

- [11] At the commencement of the hearing I discussed with the parties whether it was appropriate to try to hear the evidence in support of remedy, or whether the hearing should be limited to liability in the first instance. I decided that the hearing should be limited to liability in the first instance.
- [12] A witness, a neighbour, was not at the hearing but had filed two affidavits.¹ I decided that I could read these.

The complaints in more detail

- [13] The governing legislation is the *Anti-Discrimination Act* 1991 (Qld) (ADA).
- [14] The first complaint made to the Queensland Human Rights Commission (QHRC) was made on 6 April 2020 by Ms Ng'ang'a for discrimination on the basis of pregnancy. This was joined by a complaint made by Mr Gitau.
- [15] On 24 April 2020 the tenants obtained a temporary restraining order from the tribunal because the lessor had said that if the baby was brought to the unit it would be an unauthorised occupant and eviction proceedings would be commenced.
- [16] Subsequently the complaint of 6 April 2020 was referred to the tribunal and it was later joined by Ms Boles' complaint of sexual harassment.
- [17] A history of the proceedings and relevant directions and orders is given in:

Schedule 1 – history of the proceedings

- [18] The tenants' complaints as amended and permitted to proceed in the tribunal appear in the Amended Statement of Facts and Contentions filed on 6 September 2021 in ADL054-20 (for Mr Gitau) and the Amended Statement of Facts and Contentions filed on 10 March 2021 in ADL055-20 (for Ms Ng'ang'a).

¹ In ADL022-20, affidavit of 14 May 2020. In ADL024-21, affidavit of 25 March 2022.

- [19] It is important that in this decision I keep strictly to the complaints because I only have jurisdiction to deal with the complaints made originally to QHRC as amended with the tribunal's leave. In this respect it is important for me to note that not all complaints in ADL054-20 and ADL055-20 are made against all the respondents, some acts referred to in the evidence are not relied on in the complaints at all, and some acts referred to in the evidence are relied on in some complaints but not in other complaints.
- [20] Two of the acts complained of as less favourable treatment are in the contentions in ADL055-20 but not in the contentions in ADL054-20.² They are however, in the amended complaint made to QHRC in both those proceedings and therefore are within my jurisdiction. They seem to have been omitted from the contentions in ADL054-20 in error. I am going to treat these complaints as being in both these proceedings, because it would not be unfair to the respondents to do this (the respondents have had to answer these complaints anyway).
- [21] In final written submissions one of the complaints is expressly not 'pressed'.³ Some other complaints are implicitly not pressed by being omitted from the submissions. The way the final written submissions are constructed show that they are intended to be the final statements of case for the tenants and since they are prepared by counsel it is right for me to take it that only the complaints referred to are now relied on.
- [22] **The complaint of direct discrimination** is made in the area of accommodation because of the attributes of pregnancy, parental status, family responsibilities and race.⁴ In the amended contentions, the less favourable treatment is divided into the relevant description of the area of accommodation and is said to be less favourable treatment:⁵
- (a) varying the terms of the accommodation and denying a benefit associated with the accommodation by:
 - (i) interfering with the water and electricity supply to the unit;
 - (ii) safe access to the unit;
 - (iii) impairing access to the unit and common areas/amenities; and
 - (iv) seeking access to the unit on multiple occasions.
 - (b) treating the tenants unfavourably in connection with the accommodation by:
 - (i) informing the tenants that their child, once born, would not be authorised to reside at the unit;
 - (ii) informing the tenants that bringing their child to reside in the unit would be a serious breach of the rental agreement and would result in eviction proceedings;

² The allegation that on 5 April 2020 Ms Boles filmed a food delivery to the unit and the allegation that on 18 April 2020 Mr Walsh mocked Ms Ng'ang'a about packing, resulting in a breach notice served by the tenants on 22 April 2020.

³ Mr Gitau's complaint of racial vilification against Mr Walsh.

⁴ Relying on the area of accommodation in section 83, and the attributes in section 7 of the ADA.

⁵ I have amalgamated the complaints made by Mr Gitau and Ms Ng'ang'a, and adjusted wording and numbering slightly to make the allegations slightly easier to follow.

- (iii) seeking multiple entries into the unit to intimidate and harass the tenants; and
 - (iv) issuing multiple notices alleging breaches of the rental agreement.
 - (c) treating the tenants unfavourably in connection with the accommodation by, on 19 and 25 May 2020, using ‘racially discriminatory comments and language towards’ Mr Gitau and by association, Ms Ng’ang’a.
- [23] Allegations (a) and (b) are made only against the company and Mr Walsh. Presumably this is because it is said that only the company and Mr Walsh acted ‘in connection with accommodation’ and this is not said about Ms Boles. Allegation (c) is made only against Ms Boles.
- [24] **Racial vilification and/or serious racial vilification complaints against Ms Boles.** This is for the incidents on 19 and 25 May 2020. It is said that Ms Boles publicly called Mr Gitau a ‘monkey’ on 19 May 2021 and a ‘nigger’ on 25 May 2021 and on that day falsely alleged that he was threatening her.
- [25] In Mr Gitau’s amended contentions it is said that these things amounted to racial vilification in contravention of section 124A of the ADA and serious racial vilification in contravention of section 131A of the ADA.
- [26] In Ms Ng’ang’a’s amended contentions the same matters are said to be racial vilification and serious racial vilification on the basis of her association with Mr Gitau. However, in final submissions filed on behalf of Ms Ng’ang’a it is only calling Mr Gitau a ‘monkey’ on 19 May 2021 and a ‘nigger’ and ‘bush nigga’ on 25 May 2021 that are relied on (falsely alleging that he was threatening her is not relied on).
- [27] **Racial vilification and/or serious racial vilification complaints against Mr Walsh.** In the amended contentions filed on Mr Gitau’s behalf, there were racial vilification complaints against Mr Walsh. There was a complaint that Mr Walsh publicly called Mr Gitau a ‘piece of shit’ on 19 May 2021, and on 25 May 2021 threatened Mr Gitau and hit him with a golf club. These were said to be acts of racial vilification and serious racial vilification of Mr Gitau. However, in final written submissions filed on Mr Gitau’s behalf, these complaints are not pursued.⁶
- [28] The amended contentions filed on Ms Ng’ang’a’s complained that the name calling on 19 May 2021, and the incident on 25 May 2021 were acts by Mr Walsh of racial vilification and serious racial vilification of Ms Ng’ang’a on the basis of her association with Mr Gitau. Again in final written submissions, these complaints do not seem to be pursued.⁷
- [29] The **sexual harassment complaint** appears in a Statement of Facts and Contentions filed by Ms Boles on 5 April 2022 in ADL024-21, referring to her complaint of 13 December 2020 and her affidavit of 30 March 2022. In those documents Ms Boles says that when she was alone, and in February and March 2020 Mr Gitau would invade her personal space, look her up and down, focus particularly on her breasts and crotch area and would smirk at her as she turned away to leave. Towards the end of March 2020 the harassment became verbal, offensive and threatening and in

⁶ Final written submission dated 28 April 2023 filed on Mr Gitau’s behalf paragraph 145.

⁷ Final written submission dated 28 April 2023 filed on Ms Ng’ang’a’s behalf paragraph 151.

April and May 2020 Mr Gitau would intercept her in the garden at the rear of the property and say:

you're a good looking woman. I like women who have a good figure

you're in good shape for a woman of your age

I really like pretty black women like you

What's wrong with you? Don't you like a nice strong black man like me?

- [30] Ms Boles says that she used to tell Mr Gitau to leave her alone when he approached her, but after that instead of speaking to her he would leer at her and make low grunting noises when he walked past her.
- [31] Ms Boles is also relying on incidents on 19 and 25 May 2020 as acts of sexual harassment. I have described these incidents elsewhere in these reasons.
- [32] **The complaint of victimisation** relies for the 'protected acts' on communications on behalf of the tenants from Tenants Queensland and their lawyers to Mr Walsh which described some events as discriminatory or which if treatment continued could be victimisation, and also relies on the discrimination complaints made to QHRC.⁸
- [33] In the victimisation complaint brought by both tenants, it is said that, because of the protected acts, all three respondents acted to the tenants' detriment by continuing to seek to inspect the unit and issuing breach notices. These allegations end on 1 May 2020.
- [34] In Mr Gitau's amended contentions however, all the incidents from 27 April 2020 to 25 May 2020 seem to be added as detriments relied on in the victimisation complaint,⁹ and in Ms Ng'ang'a's amended contentions the incidents of 19 and 25 May 2020 seem to be added as detriments relied on in the victimisation complaint.¹⁰ In final written submissions filed on behalf of both tenants however, these added detriments are no longer relied on.
- [35] Mr Gitau has his own discrete victimisation complaint. He says that because of the protected acts Ms Boles made the complaint of sexual harassment but the complaint was 'entirely without basis'.
- [36] **The complaint of indirect discrimination** is also made in the area of accommodation. It is said that the company and Mr Walsh imposed a term that 'no dependent child or children were to reside in the unit'. It is said that a higher proportion of those who were not pregnant such as Ms Ng'ang'a and not a parent, and who did not have family responsibilities such as applied to the tenants, would be able to comply with the term compared with persons not in those categories, and that the term was not reasonable.
- [37] The company's **vicarious liability** is said to arise from Mr Walsh's actions under section 133 of the ADA, that is to say that when he contravened the ADA he was acting in the course of work or while acting as agent for the company.

⁸ Mr Gitau's Amended Statement of Facts and Contentions paragraph 59, and Ms Ng'ang'a's Amended Statement of Facts and Contentions paragraph 63.

⁹ Mr Gitau's Amended Statement of Facts and Contentions paragraph 58.

¹⁰ Ms Ng'ang'a's Amended Statement of Facts and Contentions paragraph 62.

How I have decided these complaints

- [38] There are four separate tribunal files which were not consolidated.¹¹ There was much material in the referral documents, and evidence was provided not only in affidavits and statements of evidence but also (by the respondents) in contentions. Each tenant has separate contentions which only partly match, and which do not wholly accord with final written submissions. There is much duplication of material. Untangling the various complaints and the acts relied on, and the evidential sources was difficult.
- [39] Helpfully, the lawyers put all the material into one hearing bundle with tabs and page numbers starting within each tab. In these reasons, the references to tab numbers refer to the hearing bundle.
- [40] There is much dispute between the parties about what happened, and this requires some careful findings of fact. The hearing was some three years after the events and although Mr Walsh had a good recollection of the events, the other witnesses did not. For the respondents, the earliest material filed was generally more spontaneous and less tainted by semantic argument, thought, and in some cases imagination, than the later material.¹² For the tenants, since they were legally represented from an early stage, their filed material in most cases was consistent but some of it suffered from lack of detail. In both cases, contemporaneous documents were helpful.
- [41] In finding the facts, I was assisted by an examination of the credibility of, in particular, Mr Gitau and Ms Boles.
- [42] As explained in *Petrak v Griffith University & Ors* [2020] QCAT 351,¹³ although in the direct discrimination complaint it is necessary to compare the treatment of the tenants with that of a comparator because of the wording used in the ADA, the reason why the respondents acted in the way they did is central to resolving the complaints.
- [43] I have concluded that although the respondents have tried to justify the way they treated the tenants, this was not sufficient to explain that treatment. I have concluded that instead, there were pressures upon Mr Walsh from his wife Ms Boles, which caused him unconsciously to treat the tenants unfavourably on the basis of race. I was led to that conclusion from Ms Boles' own evidence, which unusually but frankly describes how she regards African males generally, and how she regarded the tenants. The frankness is explained by Ms Boles' belief, as expressed in her submissions, that there is nothing wrong with a person speaking negatively about people on the grounds of their race if this is based on known facts.
- [44] To make these reasons easier to follow I have put each step of the analysis above into schedules at the end of these reasons.
- [45] Firstly I have needed to concentrate on misleading evidence given by Mr Gitau and by Ms Boles, which has affected their credibility. These appear in:

¹¹ That is, ADL022-20 (for the interim order), ADL054-20, ADL055-20 and ADL024-21.

¹² An affidavit from Ms Boles dated 24 March 2023 was filed, and contained much information not previously submitted which sometimes differed in important respects from earlier material. The earlier material is likely to be more accurate and I have treated the contents of this affidavit with caution.

¹³ [40].

Schedule 2 – credibility of Mr Gitau

Schedule 3 – credibility of Ms Boles

- [46] With the assistance of those considerations I have been able to make my detailed findings of fact which are in chronological order in:

Schedule 4 – detailed findings of fact

- [47] Having reached those detailed findings of fact, it was possible to identify a campaign conducted by the respondents against the tenants. Some of the events complained of were not part of the campaign, but most were. I have identified in schedule 4 which events were part of the campaign.

- [48] My analysis of the reasons given for the campaign and whether the reasons were sufficient to explain it are given in the next section of these reasons. The evidence and submissions of Ms Boles which led me to conclude that the real reason for the campaign was race are in:

Schedule 5 – what the respondents say about racial terms

Schedule 6 – Ms Boles’ stated view about African men

- [49] I found that one aspect of unfavourable treatment, that is the direct threat to evict the tenants if they brought their baby to the unit, was on the grounds of pregnancy, but I also think that it was on the grounds of race.
- [50] Finally I was able to reach conclusions on the complaints of racial vilification, sexual harassment, victimisation and indirect discrimination.

The respondents’ campaign against the tenants and the reason for it

The campaign

- [51] From the detailed factual findings in schedule 4 it is possible to identify a definite pattern of behaviour on the part of the respondents, which for the purpose of this complaint can be regarded as having started on 27 March 2020 (when there was a discussion about the clothes dryer) and which continued until the tenants left.
- [52] It is right to describe this pattern of behaviour as a ‘campaign against the tenants’, whereby the respondents put the tenants under surveillance, constantly picked on them, withdrew a facility, served them with numerous unjustified notices, ignored their requests for help with failed water and electricity, spoke to them in humiliating and offensive ways, and attempted to impede their access to the unit and to the car port.
- [53] There is no doubt that the campaign was unfavourable or less favourable treatment. It caused the tenants a considerable amount of misery and upset in the last few weeks of their tenancy at a time when they had better things with which to be concerned, such as preparing to have their baby and all the consequences of the birth.

- [54] In deciding the direct discrimination complaint, I am interested in the substantial reasons for the campaign.¹⁴ In considering this, it should be borne in mind that the real reasons for less favourable treatment may not be known or recognised, and may be covert or unconscious. So it may be necessary to consider what, unknowingly, had influenced those reasons and caused the campaign to be implemented.
- [55] The respondents have attempted to state their reasons for the campaign. I shall consider whether or not these are the real reasons for the campaign.

The stated reasons for the campaign

- [56] The stated reasons for the campaign appear mainly from the Response to Contentions filed on 10 November 2020 in ADL054-20,¹⁵ but the stated reasons are boosted by a considerable amount of hindsight in later documents, in the filed evidence, in evidence given in the hearing and in the final written submissions.
- [57] The stated reasons need to be understood in the context of the developing pandemic at the time. On 29 March 2020 an announcement was made by the Australian Prime Minister that the National Cabinet, representing the Commonwealth, its Territories and States, had agreed that there would be a moratorium on evictions on persons who were in financial distress as a result of Covid-19 for the next six months.¹⁶
- [58] In Queensland this was implemented by the *Residential Tenancies and Rooming Accommodation (COVID-19 Emergency Response) Amendment Regulation 2020* (Qld) which provided a moratorium on eviction for tenants in Covid hardship even if their fixed term ended. For those tenants not in Covid hardship a notice to leave at the end of the fixed term would still be effective.
- [59] When at the end of his evidence I asked Mr Walsh to explain the ‘reason why’ he made much of the tenants’ alleged breaches of the rental agreement, in particular the noise emanating from their unit, and the allegation that while the respondents were away in the USA they had someone else living in the unit. This is also explained in detail in the respondents’ final written submissions.¹⁷
- [60] The tenants accept that soon after moving in they had some friends over and there was some noise and possibly rudeness, but they say that the person who was seen coming and going to the unit when the respondents were in the USA was a relative who merely visited from time to time.
- [61] I have not resolved the factual disagreements about those earlier alleged breaches because even at their highest they do not explain the campaign. The alleged breaches were in the past and any repeat of such alleged breaches could be managed. For example, with respect to noise, the tenants apologised the first time this happened, and responded to later complaints.
- [62] In any case, there was no point in the campaign if it were conducted because of past breaches because the tenancy was due to end on 12 June 2020 anyway.

¹⁴ Section 10(4) of the ADA, which provides that where there are two or more reasons why a person treats another person with an attribute less favourably, the person treats the other person less favourably on the basis of the attribute if the attribute is a substantial reason for the treatment.

¹⁵ Tab 9 page 12.

¹⁶ Tab 9 page 16.

¹⁷ Sent on 21 April 2023 paragraphs 23f.

- [63] In final written submissions the respondents make much of what is said to be a 'demand' made by the tenants for a break lease in emails of 20 December 2019, and on 28 March 2020. It is said that the fact of the 'demand' required the campaign against the tenants. The difficulty with this argument is that no such demand can be found in the tenants' written material, and it is not consistent with the meeting on 27 January 2020 where it was agreed that the unit was not suitable for a couple with a baby, and that the tenants were to find a replacement tenant for the unit, which of course would relieve the respondents from this task at the end of the fixed term.
- [64] In final written submissions the respondents make much of the tenants' failure to find another tenant, showing that they did not really intend to leave before the birth of the baby, and that this justified the campaign. But this is not correct. There is nothing to show that the tenants had any expertise in finding a new tenant. Mr Walsh provided some assistance when it was agreed at the meeting on 27 January 2020 that the tenants could look for a new tenant by advertising on Gumtree giving Mr Walsh's contact details. When that did not work, it was Ms Ng'ang'a who sought the help of a real estate agent to market the unit for rent. It was only when that did not work either and the date of the baby was approaching, that the tenants decided to stay in the unit until after the birth of the baby and to move out at the end of the fixed term.
- [65] The respondents say that one of the reasons why the respondents started the campaign was because they believed that the tenants 'were positioning themselves to make financial demands upon the respondents', which is referring to financial advantage having agreed to a break lease.¹⁸ But this is not correct because the agreement reached on 27 January 2020 dealt with the consequences of the break lease if a tenant were found. When on about 9 March 2020 the real estate agent was engaged, there was the added expense of the letting fee. But Mr Walsh made it clear to Ms Ng'ang'a that she would have to pay this.¹⁹ Although the advertising cost of finding a new tenant was raised with Mr Walsh by Tenants Queensland in a telephone call, no agreement was reached about this,²⁰ and Mr Walsh would have been aware that the tenancy agreement provided that on a break lease the lessor was entitled to reasonable costs incurred by the lessor in reletting the premises,²¹ which benefit the respondents were not relinquishing. So this does not explain the campaign.
- [66] At the end of his evidence, Mr Walsh suggested that a reason was that the tenants appeared to be seeking 'compensation'. In final written submissions this has been explained as meaning that the tenants were 'angling for unwarranted or unjustified financial benefits'. This is not Mr Walsh admitting to having conducted any part of the campaign because the tenants had made a complaint to QHRC, but is the same as the stated belief that the tenants were positioning themselves to make financial demands upon the respondents dealt with in the paragraph just above.
- [67] In final written submissions the respondents say that when they became aware that the tenants were abandoning the search for a new tenant on about 6 April 2020, they were concerned that the tenants might try to stay in the unit past the end of the fixed

¹⁸ As said in one of the early documents, the response to contentions, tab 9 pages 17 to 20, in particular paragraph 38.

¹⁹ Affidavit Mr Walsh tab 1 page 148 with emails at tab 1 page 187.

²⁰ Tab 21 page 273.

²¹ Clause 7(2).

term.²² This is unlikely to be a reason because the respondents had served a notice to leave which would normally mean, as Mr Walsh was well aware, that a termination order could quickly be obtained from the tribunal. The only impediment might have been the Covid-19 eviction moratorium, but this could only be engaged in the case of Covid-19 hardship, and there was nothing to suggest to the respondents had such hardship. Mr Gitau was still working and the rent was still being paid. In addition to this, through Tenants Queensland in an email of 22 April 2020 the tenants confirmed their intention to leave at the end of the fixed term.²³

Was there another reason for the campaign?

- [68] None of the stated reasons for the campaign can be accepted when viewed from an objective standpoint, but that does not mean by itself that there was another reason for the campaign.
- [69] I am led to look at the possibility of another reason for the campaign by two things.
- [70] The first is that the campaign against these tenants was in marked contrast to how the respondents treated another tenant at about the same time. There were issues with this other tenant with unpaid rent, noise, and frequent visitors. But Mr Walsh renewed his lease. Then soon after, when the respondents had evidence that he was dealing with drugs from the premises, instead of going to the police about it, Mr Walsh had a private discussion with him and showed him the evidence that the respondents had gathered (photos, car registrations and dates gathered over the previous 6 weeks). Then man left the premises voluntarily a matter of days later.²⁴ There were no notices, and it appears from the evidence there were no other confrontations with this tenant.
- [71] Although the drug dealer tenant cannot be considered to be a direct comparator because his circumstances were quite different, the difference in treatment makes it more likely that there were other unstated reasons for the campaign.
- [72] The second arises from the respondents' evidence tending to show that there was a total mistrust of the tenants. When analysed, the mistrust seems to be misplaced and therefore, without more, unexplained.
- [73] The mistrust is repeatedly demonstrated from the respondents' written material and oral evidence. Some clear examples are:
- (a) Ms Boles considered that the tenants were deceitful and dishonest upon first meeting them and even before entering into the tenancy agreement. The suggestion was that Ms Ng'ang'a had not mentioned she had a boyfriend earlier on the telephone or in her email and tried to hide this at the viewing on 6 June 2019.²⁵

²² As Mr Walsh put it in cross examination: 'they were attempting to create a situation where they were trying to build a way to stay in the property past the end of their lease'.

²³ Tab 20 page 241.

²⁴ As was explained by Mr Walsh in cross examination. The written evidence supports this: respondents' submissions in ADL022-20 paragraph 17, affidavit of Mr Walsh dated 15 May 2020 tab 1 page 151, and affidavit of Ms Boles 24 March 2023 paragraphs 40, 41. This shows that the tenant left on 4 May 2020 having been given a new lease. This contrasting method of dealing with this tenant overlapped the treatment of the tenants.

²⁵ Affidavit of Ms Boles of 24 March 2023 paragraphs 4, 25. This is contrary to Ms Ng'ang'a's evidence that she told Mr Walsh on the telephone she had a partner: signed but unsworn affidavit of 7

- (b) In December 2019, Mr Gitau failed to respond to Mr Walsh's question whether he too wanted to break the lease because they were having a baby. To the respondents, this was suspicious.²⁶
- (c) In recent submissions, the respondents say that the tenants 'demanded' a break lease and made only 'parlous' attempts to find a replacement tenant, the implication being that they were pretending that they wished to leave earlier than the end of fixed term. As discussed above, these things are incorrect.
- (d) Mr Gitau said in his email of 28 March 2020 that 'with everything else going on at the moment (corona and expecting a new born) we cannot afford to pay rent here and get a new house'. The respondents viewed this at the time, and later in their written material, as exploiting Covid-19 as a means to avoid the lease terms and to gain financial benefit,²⁷ as 'unacceptable bad faith behaviour and dishonest',²⁸ and as a 'total lack of bona fides'.²⁹
- (e) When Mr Gitau said in his email of 28 March 2020 that we want 'to leave this place peacefully so we are open to fair negotiations', the respondents regarded this as a threat of physical violence if terms favourable to the tenants could not be reached.³⁰
- (f) In the view of the respondents, the complaint to QHRC of 6 April 2020 was not that the tenants felt aggrieved about the apparent campaign, or needed protection from eviction on discriminatory grounds, but was for 'an ulterior and improper purpose, that is, to obtain benefit from the respondents and to avoid meeting the obligations they had contracted pursuant to their lease'.³¹
- (g) When on 14 April 2020 the tenants' NBN contractor was rude to Mr Walsh, the respondents believed that tenants were being rude to Mr Walsh because in some way the tenants were responsible for the acts of the NBN contractor.³²
- (h) When on 17 April 2020 Mr Gitau complained of no water in the unit saying that 'with corona and not being able to flush the toilet is making things

May 2020. It is notable that Ms Boles' account in this affidavit of what was said on the tenants' viewing of the premises on 6 June 2019 differs from what was said on 15 May 2020 by Mr Walsh. He says that Ms Ng'ang'a was accompanied on the view by a male she introduced as 'Jack' and she stated that he was her 'boyfriend'. From this it can be seen that Ms Ng'ang'a was not trying to hide the fact she had a boyfriend. It is likely she did mention him to Mr Walsh on the telephone as she says.

²⁶ Mr Walsh's email of 22 December 2019 tab 14 page 91. In fact, there was nothing suspicious about this because Ms Ng'ang'a explained that both of them wished to move out, and then Mr Gitau participated in a meeting in the unit on 27 January 2020 about the terms of the break lease and sent an email of 28 March 2020 confirming they were looking to break the lease, explaining that they wanted to avoid having to pay two rents at the same time.

²⁷ Response to Contentions tab 9 page 20.

²⁸ Mr Walsh's email of 30 March 2020 tab 1 page 33 for a full copy.

²⁹ Respondents' final submissions sent on 21 April 2023 paragraph 81.

³⁰ Response to Contentions tab 9 page 18 and Ms Boles' affidavit of 24 March 2023 paragraph 53. This was an extreme interpretation of what was said by Mr Gitau. On my finding there was nothing sinister intended. As Mr Gitau explained in cross examination, his poor use of words was because English is his third language. It should have been obvious to the respondents that Mr Gitau's English was not perfect because he referred in this email to the unit as a 'house'.

³¹ Mr Walsh's response of 22 June 2020 to QHRC complaint.

³² Mr Walsh said in cross examination that he believed that the contractor had been indoctrinated by Ms Ng'ang'a so that he was 'hair trigger ready' to launch his stream of invective and abuse against him.

difficult' this, according to Mr Walsh in an email at the time, was a deceitful and ludicrous attempt to exploit the current national crisis for personal benefit.³³

- (i) When on 20 April 2020 Tenants Queensland asked Mr Walsh on the telephone whether he would agree to a break lease by agreement, this was the tenants 'not acting bona fide and attempting to manipulate the situation to gain an unfair and improper financial advantage while ignoring their lease obligations'.³⁴
- (j) When on 7 May 2020 the tenants complained of no electricity in the unit, the respondents thought that this was not because there was no electricity in the unit but was because the tenants were 'dishonest and deceitful people who can't be believed'.³⁵
- (k) The baby was born on 5 May 2020. This was 9 days after the date the tenants originally gave Mr Walsh. Mr Walsh therefore said that the original date was 'inaccurate' and that it could have been to mislead him in order to gain some advantage with the dates.³⁶

[74] The way it is put in the respondents' final written submissions is:³⁷

The lessor's reasonably held view as at the end of March, given their reaction to the served Form 12, was that the applicants had demonstrated a propensity to deceive and dissemble. The applicants were not acting bona fide. They could not be believed, from an objective assessment, prepared to play both sides against the middle to gain any advantage they thought they could.

and

It is the lessor's reasonably held view the applicants had flagged they intended to stay at the property as long as possible, cause as much disruption to the lessor as possible in that time and in so doing, extract as much money as possible from the lessor as the price to get the applicants out of the premises and off the property.

[75] In the written material and oral evidence referred to above it is possible to discern that the respondents had a distorted perception with things relating to these tenants. Since there is no evidence that the respondents had distorted perceptions about things not relating to these tenants, this leads to an enquiry why the respondents had this distorted perception. This is the key to understanding the real reason why the respondents conducted the campaign, and therefore why the respondents treated the tenants unfavourably.

The real reasons for the campaign

[76] I do not think the baby was the reason for the campaign. In this respect I agree with Mr Walsh that the baby was 'irrelevant',³⁸ and with Ms Boles when she said in

³³ Mr Walsh's email of 17 April 2020 where he suggested that the hot water tank could be used to fill the cistern.

³⁴ Response to Contentions tab 9 page 23.

³⁵ Affidavit of Ms Boles dated 24 March 2023 paragraph 59.

³⁶ Cross examination of Mr Walsh day 3 late morning.

³⁷ Respondents' final written submissions sent on 21 April 2023 paragraphs 29 and 145.

³⁸ Submissions in ADL022-20 paragraph 12.

evidence the baby had ‘nothing to do with it’. This differs therefore from the threat made in the emails of 27 and 30 March 2020 which as I have found elsewhere, was about the baby.

[77] I do not think the reason for the campaign was some misunderstanding of the chances of obtaining a warrant for possession. Mr Walsh had practiced as a solicitor for about 10 years in total, and had 30 years’ experience in property letting in Queensland and his paperwork in this complaint reflects this. His breach notices and notices to leave demonstrate that he knew his way around the applicable law, and there was an abundance of information available on the internet for tenants and lessors.³⁹

[78] I think that the real reason appears from the respondents’ own evidence about Ms Boles’ attitude towards Africans, to African men in particular, and towards the tenants. In schedule 6 it can be seen that she mistrusted the tenants from the outset because they were from Kenya. She must have told Mr Walsh at that time because she says that he answered:

being from Kenya was no reason to discriminate against the applicants

[79] She considered that the tenants exhibited the same type of poor behaviour and attitudes as she had perceived from Africans when she lived in the USA. This is why she called Mr Gitau a ‘bush nigga’ who would be a person she would not trust and was dishonest and disreputable.

[80] When at the end of his evidence I asked Mr Walsh about the influence of Ms Boles on his decision making, although he skirted round this he did finally accept that he would have taken her views into account. Although he denied that it would not have altered his decision making, I think he underplayed this. Ms Boles has an obvious strong character⁴⁰ and knows how to influence Mr Walsh as shown by what happened on 25 May 2020. In the hearing this manifested itself as her repeated prompting of him when he was cross examining the witnesses. Her own evidence shows that she has influence on Mr Walsh on matters concerning tenants.⁴¹ These things and her intense dislike of African men and intense mistrust of the tenants leads me to find that she did influence Mr Walsh on his decision making. Effectively, Mr Walsh’s suspicions about the tenants being dishonest and disreputable were fed by Ms Boles.

[81] In any case, this must be my conclusion by reaching an inference in the circumstances. When this can be done was explained in *McCauley v Club Resort Holdings Pty Ltd (No 2)* [2013] QCAT 243.⁴² In the absence of a more probable explanation for the campaign and by a process of rational deduction (and not mere speculation, guesswork or assumption) to support the inference, it may properly be inferred that the reason why the respondents held the tenants in such suspicion and why they were considered to be so dishonest and disreputable, and hence that it was necessary to conduct the campaign, was Ms Boles’ views. There is no other plausible explanation.

³⁹ In the Response to Contentions tab 9 page 21 Mr Walsh said that he had examined the relevant legislation [referring to the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld)].

⁴⁰ In final written submissions filed on her 28 April 2023 on her behalf it is said that she is not a ‘shrinking violet’: paragraph 38.

⁴¹ Affidavit of 24 May 2023 paragraphs 47 to 50.

⁴² [34].

- [82] I cannot say that Mr Walsh intentionally acted on the basis of race. I believe he was alert to the possibility of race discrimination, as can be seen from his remark to Ms Boles when she expressed reservations about the tenants when she first met them.⁴³ However, section 10(3) clearly makes it irrelevant that the perpetrator has no such intention. The reason is that the perpetrator may well act unconsciously.
- [83] On my finding therefore the campaign was conducted on the basis of race. In this respect I note that the attribute of ‘race’ includes colour, descent or ancestry, ethnicity or ethnic origin and nationality or national origin.⁴⁴ As required by section 10 of the ADA I ask whether the respondents would have conducted the campaign against tenants in the same circumstances as the applicant tenants but who were not of African origin and I answer this in the negative.
- [84] Having regard to my findings of fact it is now possible to decide the various complaints.

The direct discrimination complaints against the company and Mr Walsh

The threat of eviction in emails of 27 March 2020 and 30 March 2020

- [85] The emails of 27 March 2020 and 30 March 2020 read together make the extraordinary statement that the baby when born was not authorised to be at the premises, that this would be a serious breach of the lease, and that it would result in eviction proceedings.
- [86] Irrespective of the precise legal rights which applied to the situation, the threat of eviction if the tenants brought their baby home after the birth was undoubtedly unfavourable treatment. As he explained when giving evidence, this threat caused Mr Gitau to seek help. He explained that he did not know how the law worked, and he was concerned that the family would be turned out of the premises. In the circumstances it was reasonable for him to seek help.
- [87] On the face of it, the threat of eviction was made because of the pregnancy. It might be said that the pregnancy merely provided an opportunity to be forthright about the effect of the birth on the tenancy, but bearing in mind that at that time the tenants were clear that they wanted to leave before the end of their fixed term, there was no reason to describe that effect. In Mr Walsh’s response to contentions, it is suggested that the threat was a reservation of rights should the tenants not leave at the end of the fixed term, it being uncertain whether they would leave, or possibly to show that the respondents were not going to be intimidated in any way.⁴⁵ Again there was no need to reserve such rights or to show such strength. It was the threat that was the unfavourable treatment and there was no need to make such a threat.
- [88] Assessing this by applying the terms of section 10 of the ADA, it is necessary to ask whether the respondents would have made this threat to tenants in the same circumstances as these tenants, but who were not about to have a baby. The answer is clearly no.
- [89] Section 10(4) of the ADA contemplates more than one ‘substantial reason’ for less favourable treatment. I have found above, and immediately below, that the

⁴³ He said that being from Kenya was no reason to discriminate against the Applicants: affidavit of Ms Boles 14 May 2020 tab 4 page 23.

⁴⁴ Dictionary in the schedule to the ADA.

⁴⁵ Tab 9 pages 20, 21.

campaign against the tenants was motivated by race. I regard the emails of 27 and 30 March 2020 as part of the campaign and they were therefore also motivated by race. Both the fact of the pregnancy and race were ‘substantial reasons’ for those emails. In the terms of section 10 of the ADA, I ask whether the respondents would have made the threat in the emails to tenants without the attribute of race, and the answer is no.

- [90] Hence I find that the company and Mr Walsh did discriminate against the tenants on the basis of pregnancy and race by making the threat in the emails of 27 March and 30 March 2020 that they would be evicted if they brought the baby to the unit.

The campaign against the tenants

- [91] I have found that there was a campaign against the tenants, and that Mr Walsh was strongly influenced by Ms Boles’ mistrust of the tenants because of their race and this is why the campaign was conducted.
- [92] As explained in schedule 4 not all the events complained of by the tenants should be considered as part of the campaign, and not all the events are in fact relied on.
- [93] It is my finding therefore that the company and Mr Walsh did directly discriminate against the tenants on the basis of race (in addition to the threat of eviction proceedings in the emails of 27 and 30 March 2020) by conducting a campaign against them consisting of a breach notice dated 29 March 2020 issued about the clothes dryer, locking the tenants out of the laundry room on 30 March 2020, issuing a breach notice about the bin collections on 1 April 2020, filming Ms Ng’ang’a on 5 April 2020, issuing a breach notice about water being thrown off the balcony on 11 April 2020, issuing a breach notice about allegedly false complaints about loss of water on 14 April 2020, not dealing quickly with the tenants’ problems with water on 14 April 2020, issuing a breach notice about repeated breaches on 16 April 2020, not dealing quickly with the tenants’ problems with water on 16 April 2020, speaking mockingly to Ms Ng’ang’a on 18 April 2020, issuing a breach notice about a visit by an NBN contractor on 20 April 2020, by an inspection of 24 April 2020 and the issue of a breach notice on 24 April 2020, filming Ms Ng’ang’a on 27 April 2020, not dealing quickly with the tenants’ problems with electricity on 7 May 2020, calling Mr Gitau a piece of shit on 19 May 2020, placing an iron sheet near the front of the car port and placing a trailer in an inconvenient position for the tenants and not responding to Mr Gitau’s emails of 19 and 22 May 2020 about this, and obstructing the car port with a trailer on 2 June 2020.
- [94] By itself such discrimination is not actionable. It must come within one of the areas of the ADA for there to be an actionable contravention. Here it can be seen that all the acts of direct discrimination come within either section 83(b) (denying or limiting access to any benefit associated with the accommodation) or section 83(d) (treating a person unfavourably in any way in connection with the accommodation).
- [95] The liability of the company arises from the provisions of section 133 of the ADA that is to say that when he contravened the ADA he was acting in the course of work or while acting as agent for the company.
- [96] Agent as used in section 133 are defined in the schedule to the ADA as:

agent means a person who has actual, implied or ostensible authority to act on behalf of another

- [97] Mr Walsh agreed when giving evidence that in making the residential tenancy agreement the company was acting as trustee for the De Soysa Family Trust. Since the company was the named lessor in the residential tenancy agreement and Mr Walsh was its sole director and shareholder, in anything to do with the tenancy he was obviously acting as the agent of the company, and section 133 is obviously engaged.
- [98] Mr Walsh however, submits that section 133 does not apply because he was not an agent for the company, that the company's only role was as corporate trustee of the trust.⁴⁶ Since the company was the lessor, and therefore had given the tenants the right to occupy the unit, and a company must act through other people,⁴⁷ I cannot see how these submissions can succeed.

Complaints made against Ms Boles

- [99] From the evidence it can be seen that Ms Boles holds deeply held prejudices against, and stereotypical views about African people, and African men in particular. She had a deep distrust of African men. She had 'reservations' about the tenants upon first meeting seemingly because they were from Kenya,⁴⁸ and from her perception these views were reinforced as time went on so that at least by 25 May 2020 she openly called Mr Gitau a 'bush nigga' which in her understanding meant that he was completely disreputable and unworthy.
- [100] Ms Boles was remarkably frank and open about her views to the tribunal. This is rare. Usually such views are not openly expressed in a formal setting. And in many cases such views are not even recognised and understood by those holding them, but are acted upon unconsciously.
- [101] The reason why Ms Boles was so frank and open was because she sees nothing wrong with expressing her views. She believes her views state the truth. This is reflected in her submission that expressing negative views about Africans, where such views are as a result of personal experiences and direct knowledge, should not be labelled as racist.⁴⁹
- [102] The premise of this submission does not accurately describe the position in Queensland nor does the submission itself reflect the law of Queensland which I need to apply.
- [103] This is because there is no room for any defence of 'justification' or 'truth' when making offensive remarks about somebody which would not be made about somebody of a different race.
- [104] The whole point of direct discrimination law is that such views should not disadvantage a person on the basis of an attribute in the areas of the ADA, however justified the perpetrator thinks it is to hold those views. One difficulty of course is that the views may be completely wrong. Another difficulty is that it is quite unfair to apply such views to all Africans. So instead, the views must be suppressed and

⁴⁶ Submissions tab 10.

⁴⁷ Small business guide in the *Corporations Act* 2001 (Cth), Section 1.7.

⁴⁸ She expressed those reservations to Mr Walsh who said that being from Kenya was no reason to discriminate against them: affidavit of Ms Boles 14 May 2020 tab 4 page 23.

⁴⁹ Applicant's response to respondent's response to contentions filed in ADL024-21 paragraph 7.

not acted on. This is enforced by the direct discrimination law and is the only way to stop such disadvantage from happening.

- [105] Ms Boles' submission alone demonstrates that in all likelihood decisions and actions by Ms Boles adverse to these tenants were racially motivated.
- [106] Such decisions and actions are only actionable as discrimination if they are in an 'area' of the ADA. The relevant area is that covered by section 83 of the ADA:

83 Discrimination in accommodation area

A person must not discriminate against another person—

- (a) in any variation of the terms on which accommodation is supplied; or
- (b) in denying or limiting access to any benefit associated with the accommodation; or
- (c) in evicting the other person from the accommodation; or
- (d) by treating the other person unfavourably in any way in connection with the accommodation.

- [107] So when deciding whether any direct discrimination that Ms Boles subjected the tenants to amounts to actionable discrimination, I will need to decide whether the discrimination comes within section 83.
- [108] It can be noted that section 82 of the ADA protects people with an attribute from disadvantage when applying for accommodation, section 84 protects people with an impairment who need to alter accommodation, and section 85 protects people when applying for or who are in accommodation who rely on a guide hearing or assistance dog.
- [109] Section 83 covers people with an attribute who are already in accommodation. The clear intention of subsections (a), (b) and (c) is to ensure that victims are not disadvantaged in the ways set out in those subsections. In this context subsection (d) seems to be a 'catch all' provision for circumstances similar to, but not covered by (a), (b) or (c). In legal terms it would appear that the interpretation ought to be *ejusdem generis* (of the same kind).
- [110] In no matter prior to 19 May 2020 is it said on the tenants' behalf that decisions and actions of Ms Boles were in the accommodation area of the ADA.
- [111] It is said that she treated the tenants unfavourably 'in connection with accommodation', and therefore within section 83(d) on 19 and 25 May 2020 by using 'racially discriminatory comments and language towards' Mr Gitau and by association, Ms Ng'ang'a.
- [112] **The complaint for 19 May 2020** is that she called Mr Gitau a monkey, but I have found in the relevant part of schedule 4 that this did not happen. Although Ms Boles volunteers that she used the expression 'bush nigga' towards Mr Gitau on 19 May 2020, this does not form part of the complaint and I do not think the expression is sufficiently close to the word monkey for it to be substituted in the complaint in my decision.
- [113] **The complaint for 25 May 2020** is that she called Mr Gitau a 'nigga' or 'nigger' and 'bush nigga'. I have found that Ms Boles did use these words to Mr Gitau on that day. I have considered the meaning of these words and their variations from the

evidence presented in schedule 5, and I have found that to Mr Gitau the words were very offensive and racist and that it was reasonable for him to regard the words in that way. Using the words was clearly less favourable treatment of Mr Gitau on the basis of race.

- [114] The real difficulty here however, is whether on 25 May 2020 Ms Boles treated Mr Gitau ‘unfavourably in any way in connection with the accommodation’ within the terms of section 83(d).
- [115] Although Ms Boles was not legally the tenants’ lessor (the company was) she was a joint owner of the block of units and so she had a direct interest in the block and who lived in it. As spouse of Mr Walsh, who was the sole director of the company she was in a position of influence, which as I have found above, she exercised. She was not however, a beneficiary of the trust of which the company was the corporate trustee.
- [116] The incident on 25 May 2020 however, was not about the accommodation. The offending words used by Ms Boles was in response to Mr Gitau approaching her and speaking to her. He did not speak to her about the accommodation. She did not use the offending words because of the accommodation or by reference to the accommodation. She did not use the offending words as lessor, or as the lessor’s agent. Hence using the offending words was not ‘in connection with the accommodation’. If it is said that shouting out that she was being threatened was a disadvantage uttered on the basis of race, again I would say that this was not ‘in connection with the accommodation’ either.
- [117] When considering this, I have regard to the fact that there is no provision for racial harassment in the ADA, as can be found in many other jurisdictions and which would probably have made the use of the words that day actionable. This is in contrast with the fact that there are provisions protecting against sexual harassment, that is done with the intention or effect of offending, humiliating or intimidating the other person. It is clear that a contravention of section 83 is quite different from such harassment, and it would be wrong to try to read section 83 to include it.

Racial vilification

- [118] This complaint is now only against Ms Boles. By section 124A of the ADA it is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person (of relevance here) on the ground of the race of the person. Section 131A of the ADA (serious vilification) applies when the vilification results in a threat of physical harm.
- [119] Of importance here, it is the ‘incitement’ which needs to be ‘on the ground of the race of’ the person vilified, in the sense that there must be a causal connection between the hatred or serious contempt incited by the act and the race of the person.⁵⁰
- [120] **The complaint for 19 May 2020** is that she called Mr Gitau a monkey, but I have found in the relevant part of schedule 4 that this did not happen. Although Ms Boles volunteers that she used the expression ‘bush nigga’ towards Mr Gitau on 19 May 2020, this does not form part of the complaint and I do not think the expression is

⁵⁰ Neave JA in *Catch the Fire Ministries v Islamic Council of Victoria Inc* [2006] VSCA 254, [143].

sufficiently close to the word monkey for it to be substituted in the complaint in my decision.

- [121] **The events of 25 May 2020** are relied on as racial vilification and/or serious vilification. It is true that this incident was a public one. The likely audience was not only Mr Walsh and the neighbour who was close nearby, but also the other tenants in the units and possibly those in the neighbouring houses.
- [122] It is said that there is direct proof of incitement to hatred towards, serious contempt for, or severe ridicule of, Mr Gitau and Ms Ng'ang'a by association. The incitement is said to be proved by Mr Walsh's 'physical and extreme reaction towards Mr Gitau' (attacking him with a golf club) as shown in video 2.⁵¹ I note that actual proof of incitement is not necessary to show vilification under the ADA, because it is the capacity of the act to incite, viewed objectively, which needs to be considered.⁵²
- [123] In so far as the act of racial vilification is said to be the use of the words nigga or nigger or bush nigga, the question is then whether these words had the capacity to incite hatred, severe contempt or ridicule of Mr Gitau on the grounds of his race. In this respect, it is not sufficient merely to show that the words used express hatred, serious contempt for, or severe ridicule of a person on the grounds of Mr Gitau's race: the relevant public act must be one which could encourage or spur others, that is an ordinary member of the likely audience, to harbour such emotions.⁵³
- [124] I do not think that the words nigga or nigger or bush nigga could affect an ordinary member of the likely audience to react on the ground of Mr Gitau's race. In so far as such an ordinary member of the likely audience was enlightened and accepting of multi-culturalism, the words would come as a shock and would not incite but would instead attract sympathy. In so far as such an ordinary member of the likely audience was not enlightened and not accepting of multi-culturalism, then again I cannot see that Ms Boles' public expression of what she thought about Ms Gitau could have any effect on such a person. I note that a similar view was reached in *Burns v Dye* [2002] NSWADT 32 in respect of alleged homosexual vilification in that case.⁵⁴
- [125] The audience included Mr Walsh but I cannot see he would be influenced by the words any more than he had already been influenced by Ms Boles.
- [126] As said earlier in these reasons, there is no law in Queensland covering racial harassment and so a person is not protected in Queensland's discrimination laws from racially offensive or intimidatory remarks of this sort, unless they come within the racial vilification definitions. It is clear that the intention of the legislature when passing the ADA was not to be all-embracing, and it would be wrong to read into the vilification laws anything more comprehensive than its terms.
- [127] Accordingly I dismiss the complaints of racial vilification and/or serious racial vilification brought by Mr Gitau and Ms Ng'ang'a against Mr Boles because of her use of the racially offensive words on 19 and 25 May 2020.

⁵¹ Final written submissions filed on 28 April 2023 paragraph 160.

⁵² *Sunol v Collier (No 2)* [2012] NSWCA 44, [29].

⁵³ *Sunol v Collier (No 2)* [2012] NSWCA 44, [28], [32], [33].

⁵⁴ [66].

- [128] In so far as the act of racial vilification is said to be Ms Boles shouting out that she was being threatened by Mr Gitau, which Mr Gitau says was an invention, we know that this did in fact incite Mr Walsh to hatred and severe contempt for Mr Gitau and that it caused Mr Walsh to attack Mr Gitau. I accept his evidence that the reason he attacked Mr Gitau was because he reasonably believed that Mr Gitau had threatened his wife. His reaction therefore was not on the grounds of race. I cannot see that the words would have incited to hatred etc. on the grounds of race the neighbour who heard the words, or anyone else who may have heard them.
- [129] Although that would be enough to dispose of the vilification complaint with respect to the attack, it is an application of a strict causation test. If the causation test should be looser, the vilification complaint also fails because it has not been shown that Ms Boles shouted out that she was being threatened by Mr Gitau on the grounds of his race. To decide this one way or the other we would need to know what happened just before the start of video 2 which prompted her to shout these words, and as found elsewhere Mr Gitau probably removed that part of the video. Mr Gitau has the burden of proof to show this element⁵⁵ and cannot satisfy this.
- [130] Accordingly I also dismiss the complaints of racial vilification and/or serious racial vilification brought by Mr Gitau because Ms Boles shouted out ‘he’s threatening me’ on 25 May 2020.

Sexual harassment counter complaint

- [131] The difficulty is that the evidence from Ms Boles is difficult to accept. In schedule 3 I referred to the quite different accounts given by Ms Boles about what happened on 25 May 2020 between video 1 and video 2, which is one of the main allegations in the sexual harassment complaint. She was asked in cross examination why she did not mention the alleged sexual harassment on that day (which is version 2 of what happened that day) to the police in the statement made on 29 May 2020. Her explanation was that she did mention the sexual harassment to the police officer who was taking the statement but was told that it was not appropriate for inclusion in the statement. This seems inherently unlikely, and it does not accord with her explanation for the delay in raising the sexual harassment at all, which was that she did not want Mr Walsh to know about it and she only felt strong enough to tell him about it towards the end of November 2020. It is much more likely that Mr Boles did not mention sexual harassment to the police officer at all, if she was trying to keep it from Mr Walsh, because he had control of preparing the evidence for the tribunal and this included her statement to the police.
- [132] Ms Boles’ complaint of sexual harassment is not helped by her considerable exaggeration of what she was alleging. When asked in cross-examination why she appeared in the video to be calmly walking away from where the sexual harassment was alleged to have happened, she said:

I’d just been sexually assaulted – one step away from being raped.

- [133] It is suggested in final written submissions written on behalf of Ms Boles that this should not affect her credibility – it ‘was obviously a statement as to how Ms Boles felt at the time’.⁵⁶ But this is precisely the difficulty with this evidence – if at a time

⁵⁵ Section 204 of the ADA.

⁵⁶ Final written submissions filed on 28 March 2023 paragraph 70.

when Ms Boles is obliged to provide truthful evidence (to the tribunal) she says something based on how she felt at the time without explaining that she is doing so, then it casts doubt on whether the allegations describe something that actually happened.

- [134] Ms Boles accepted in cross examination that she told the police that Mr Walsh did not have a golf club in his hands when he went for Mr Gitau near the end of video 2. She said that the reason for this was that she did not see the golf club. But then, in contradiction to this, she said that she saw the golf club in his hands after the fight. Further discrepancies emerged about this when asked about what she had said in her affidavit in support of the sexual harassment complaint.⁵⁷ I did not find Ms Boles' answers to these questions satisfactory and they tend to reduce the value of her evidence about the sexual harassment.
- [135] One weakness is why the sexual harassment complaint was not made earlier. There was no hint of any such allegation until the QHRC complaint of 13 December 2020, yet this complaint referred to incidents which occurred from about March 2020 onwards. It is suggested by Mr Walsh in contentions filed on Ms Boles behalf that she did refer to the complaint before.⁵⁸ But that is a reference to this statement:⁵⁹

Mr Gitau ... would approach me when I was on my own in the rear garden of the property and would harass me with race-based comments on the theme of 'why are you with that white man?' Initially I would ignore him and walk away but found this behaviour increasingly intolerable when (they were claiming pregnancy and parenting discrimination, had made false claims about water and electricity disruption, abuse in the NBN incident and the noises they made)

It can be seen it is not a good point at all to refer to this earlier material which makes no suggestion of sexual harassment.

- [136] Ms Boles and Mr Walsh were aware that some explanation for the delay would be required and so an affidavit was prepared.⁶⁰ The explanation in that affidavit was that she did not want to tell Mr Walsh about the sexual harassment and only felt strong enough to do so towards the end of November 2020. When asked about this when she was giving evidence, she said that she did not want to tell him about it because she would have to tell him about other aspects of her life. Although this might make some sense from an emotional standpoint,⁶¹ logically it makes no sense and further weakens the explanation.
- [137] My conclusion about the sexual harassment complaint is that the evidence from the complainant Ms Boles is not sufficiently cogent or reliable to prove the basic facts of the complaint. The complaint fails and is dismissed.

⁵⁷ Affidavit of 30 March 2022, tab 29 page 25.

⁵⁸ Applicant's response to respondent's response to contentions filed in ADL024-21 on 14 June 2022 paragraph 3.

⁵⁹ Response to contentions filed by Ms Boles on 10 November 2020.

⁶⁰ Affidavit of Ms Boles dated 11 February 2022 tab 24 page 340.

⁶¹ And Ms Boles explains in her affidavit of 24 March 2023 in paragraph 73 that she had been advised about this at church.

Victimisation complaints

- [138] Victimisation is governed by section 130 of the ADA, and protects from detriment those who have done or intend to do what might be called a ‘protected act’. A protected act could be where a person refuses to commit discriminatory acts, alleges that they have suffered discrimination or other things covered by the ADA, or is involved in proceedings under the Act.
- [139] The protected acts relied on are communications on behalf of the tenants from Tenants Queensland and their lawyers to Mr Walsh which described some events as discriminatory or which, if the treatment continued, could be victimisation, and also relies on the discrimination complaints made to QHRC.⁶²
- [140] More specifically, it is my finding that the respondents first became aware of a complaint to QHRC under the ADA by an email from Tenants Queensland to Mr Walsh of 22 April 2020.⁶³ In that email the complaint was referred to as a potential one, whereas in fact a complaint had already been made. On 27 April 2020 Mr Walsh received an email from Caxton Legal attaching the directions made by the tribunal on 24 April 2020 including an order prohibiting any steps to interfere with the tenants right to occupy the unit. The email explained that any breach of the order could be an act of victimisation under the ADA. There were other, subsequent, communications referred to the amended contentions and the final written submissions. I accept what the respondents say, that they were not aware of the details of the discrimination complaint made to QHRC on 6 April 2020 until late April 2020.
- [141] The information received by the respondents as set out above was sufficient to be a protected act for the purposes of section 130 of the ADA (victimisation).
- [142] There are two parts to the victimisation complaint:
- (a) That the sexual harassment counter complaint was a detriment to Mr Gitau and was made because of the protected acts.
 - (b) Everything that happened after 22 April 2020 was victimisation by Mr Walsh, Ms Boles and the company⁶⁴ because they were done because of the protected acts.

Sexual harassment counter complaint

- [143] As for (a), it seems to be said on behalf of Mr Gitau that the counter complaint for sexual harassment was made because of the protected acts and it was a detriment, and therefore irrespective of the success or otherwise of the counter complaint it is victimisation.
- [144] Reliance was placed in this passage in Ms Boles’ affidavit:⁶⁵

⁶² Mr Gitau’s Amended Statement of Facts and Contentions paragraph 59, and Ms Ng’ang’a’s Amended Statement of Facts and Contentions paragraph 63.

⁶³ Tab 20 page 241.

⁶⁴ Amended Statement of Facts and Contentions filed on Ms Ng’ang’a’s behalf on 10 March 2021 paragraph 64, and Amended Statement of Facts and Contentions filed on Mr Gitau’s behalf on 6 September 2021 paragraph 60.

⁶⁵ Tab 24 page 343 paragraph 16.

David and I discussed the issues further and then filed my complaint with Human Rights Commission and requested the referral to QCAT given Mr Gitau's persistent denials and on-going claims of victimhood.

- [145] I have found in discussing such matters in another complaint that responding to a discrimination complaint in an honest and reasonable way would not be a detriment and therefore cannot be victimisation.⁶⁶
- [146] In the context of this matter, this means that a genuine and valid counter complaint cannot be a 'detriment' within section 130. Otherwise it would mean that a respondent to a discrimination complaint, who wished to respond to the complaint by making a genuine and valid counter complaint would be unable to do so without contravening section 130.
- [147] This means that a person complaining that they had suffered a detriment by reason of a counter complaint, and had therefore suffered victimisation under section 130, would have to prove that the counter complaint was not genuine and valid. This follows from the fact that the complainant has the burden of proof.⁶⁷
- [148] Was the sexual harassment complaint brought by Ms Boles not genuine and valid? Although I have dismissed Ms Boles' sexual harassment complaint, this does not mean that it was not genuine and valid. I dismissed it because the evidence in support was insufficient for me to find it proved, bearing in mind she has the burden of proof to prove the complaint.
- [149] In the victimisation complaint, equally I do not find Mr Gitau's evidence where he denies the sexual harassment allegations made against him, to be sufficient to show that the sexual harassment allegations were not genuine and valid. This is because, as I have said above in schedule 2, his credibility has been damaged, mainly because of the evidence about the gap between video 1 and video 2.
- [150] Considered from the point of view of the burden of proof provisions, there is no inconsistency in these two findings.
- [151] But this does mean that Mr Gitau is unable to show any detriment, sufficient for his victimisation complaint to succeed. I dismiss his victimisation complaint in so far as it relies on the sexual harassment counter complaint.

Events occurring after 22 April 2020

- [152] As referred to above, the first protected act was 22 April 2020. This was when the respondents first became aware of a complaint to QHRC under the ADA.
- [153] The things relied on by the tenants as detriment because of the protected acts are difficult to identify from the amended contentions and final written submissions, because there is no separation between those things alleged to be protected acts, those things which are merely background information, and those things which are said to be detriment. As best I can I have identified the things which appear to be relied on as detriment in schedule 4.
- [154] I have found some of the acts complained of after the protected acts did in fact happen. I have found those which did happen to be acts of direct discrimination

⁶⁶ *Ritson v The Giving Network Pty Ltd & Anor* [2021] QCAT 81, [110].

⁶⁷ Section 204.

done on the basis of race. It is conceivable that those acts could also be acts of victimisation, because it is possible to have two or more reasons for doing an act. This is contemplated in the ADA for direct discrimination.⁶⁸

- [155] It is my view however, that the offending acts which occurred after 22 April 2020 were done predominantly because of the tenants' attribute of race. Although it can be discerned from the contemporaneous written material and from the respondents' evidence that the respondents were niggled because the tenants had sought help from Tenants Queensland and from lawyers, and because the tenants had made a complaint to QHRC, the effect this had upon the respondents was to confirm their existing belief that the tenants were trying to gain an advantage over them in one way or another. It reinforced the respondents' view that the tenants were dishonest and disreputable.
- [156] For the most part therefore, I cannot see a different reason for the unfavourable or less favourable treatment, and therefore in the terms of section 130 (victimisation) detrimental treatment, after 22 April 2020. On my finding, the reason was the same as before, the attribute of race.
- [157] Although in the tenants' amended contentions certain things were relied on as detriments in the victimisation claim, in both of the final written submissions the things relied on in the victimisation claims end on 1 May 2020, and the only thing relied on in Mr Gitau's victimisation claim against Ms Boles is the sexual harassment complaint.⁶⁹
- [158] For the above reasons the victimisation complaints, as now limited, do not succeed.

Indirect discrimination complaint

- [159] As slightly reformulated in the final written submissions it is said that in the emails of 27 and 30 March 2020 the respondents imposed a term that:
- no dependent child was to reside at the unit
- [160] It is said that this term was discriminatory under section 11 of the ADA (indirect discrimination) because those with children would be unable to comply, and so the term had a disparate effect on them.
- [161] I do not think this term was imposed. And I do not think that any similar term (capable of being regarded as imposed on the basis of an attribute) was imposed either.
- [162] What was being said in the emails was that the maximum number of occupants permitted by the tenancy agreement was two,⁷⁰ and therefore bringing the baby back to the unit when born would be a breach of the agreement and would result in eviction proceedings.⁷¹
- [163] I have found elsewhere that this extraordinary statement was directly discriminatory on the grounds of pregnancy because it would not have been said to tenants who

⁶⁸ Section 10(4).

⁶⁹ Final written submissions for Mr Gitau paragraph 130.

⁷⁰ Item 15 of the residential tenancy agreement tab 14 page 80.

⁷¹ In fact a breach of clause 23 of the general terms, which specified the maximum number of persons who may reside at the premises.

were not expecting a baby. I have also found elsewhere that it was also made on the grounds of race and was directly discriminatory for that reason.

[164] But for the purpose of indirect discrimination it cannot be said that the emails imposed any new term. The emails simply repeated the effect of a term in the residential tenancy agreement limiting the maximum number of occupants permitted to reside in the unit. It was not imposing a term that the baby could not reside in the unit. This is because (for example) if the baby resided in the unit but Mr Gitau lived elsewhere, there would be no breach of the tenancy agreement.

[165] For these reasons the indirect discrimination complaint fails and is dismissed.

[166] In passing, I should mention *Matthews v Woombye Pub Trading Pty Ltd* [2022] QCAT 301, [32] where Member Lumb expressed the view, citing authority, that the same conduct cannot support both a direct discrimination claim and an indirect discrimination claim under the ADA. This issue was mentioned in QHRC's Review of Queensland's Anti-Discrimination Act: Discussion Paper where some authorities were cited.⁷² Because of my finding about the 'term' above, it has not been necessary to consider how this issue might impact upon the outcome of the complaint.

Conclusion

[167] I conclude that the direct discrimination complaints succeed but that none of the other complaints do so.

[168] I shall give directions about remedy in a directions hearing. Meanwhile the parties may wish to consider other ways finally to resolve the matter.

SCHEDULES

Schedule 1 – history of the proceedings

[169] On 24 April 2020 the tenants applied to the tribunal for an order under section 144 of the ADA for a temporary restraining order. This relied on the threat of eviction proceedings if the baby was brought to the unit. The application was supported by affidavit evidence, although the copies in the hearing bundle are not witnessed. This application caused file ADL022-20 to be opened in the tribunal.

[170] On the same day, 24 April 2020, a restraining order granted on an interim basis was issued by the tribunal. The respondents then filed affidavit evidence. The affidavits filed in ADL022-20 have been relied on in this complaint before me.

[171] By the return day for the temporary restraining order in ADL022-20, the baby had been born and the fixed term of the tenancy was about to come to an end, and so the application was dismissed by Member Traves with reasons, on 9 June 2020. This decision was not published.

[172] Meanwhile the complaint of 6 April 2020 progressed through the QHRC but was not resolved by conciliation and was referred to the tribunal as ADL054-20 for Mr Gitau's complaint and as ADL055-20 for Ms Ng'ang'a's complaint.

- [173] The tribunal made standard directions in those complaints requiring the making of contentions. On 24 November 2020 Ms Ng'ang'a applied to join Ms Boles to her complaint, something she said was intended from the outset but which had not happened for one reason or another. Before that was dealt with by the tribunal, on 1 December 2020 there was a compulsory conference in both complaints and directions were given on that occasion for submissions to be filed about whether Ms Boles should be joined as a respondent to Ms Ng'ang'a complaint in ADL055-20.
- [174] On 13 December 2020 Ms Boles made her sexual harassment complaint to QHRC against Mr Gitau.
- [175] On 23 December 2020 the application of 24 November 2020 was dealt with: an order was made joining Ms Boles as a respondent to the complaint ADL055-20. Directions were made that the applications should remain separate but would be heard together.
- [176] On 24 February 2021 Ms Ng'ang'a was given leave in ADL055-20 to rely on amended contentions and these were filed on 10 March 2021.
- [177] On 23 July 2021 Ms Boles' sexual harassment complaint was referred to the tribunal and given the application number ADL024-21. On 25 August 2021 directions were made that ADL024-21 should be heard with ADL054-20 and ADL055-20.
- [178] On 24 January 2022 Mr Gitau was given leave to amend the complaint In ADL054-20 to rely on the amended statement of contentions which had been filed earlier. This included that the sexual harassment complaint made by Ms Boles was an act of victimisation because it was untrue, and that it was made because the tenants had brought their complaints.
- [179] On 17 February 2023 all parties were given leave to be legally represented in the proceedings. Ms Boles was given leave to be represented by Mr Walsh in the hearing.

Schedule 2 - credibility of Mr Gitau

- [180] I start with an unfortunate incident which happened on 25 May 2020. This was quite late in the events, being 3 weeks after the baby was born and about 3 weeks before the end of the fixed term. It was about four weeks after the tribunal's interim order restraining any eviction proceedings. All parties knew by this time that there was an anti-discrimination complaint to be dealt with by QHRC and that this might need to be resolved in the tribunal. However, Ms Boles' sexual harassment complaint had not yet been made – indeed she had not mentioned the sexual harassment to anyone at that time.⁷³
- [181] In brief, Mr Gitau says that he decided on that day to challenge Ms Boles about something she had said to him six days before, on 19 May 2020. He says that when he challenged Ms Boles she shouted out that she was being threatened, causing Mr Walsh to come out and attack him with a golf club hurting him on the hand.

⁷³ She said in evidence she had mentioned it to the police in May 2020 but as can be seen above I do not think this happened.

[182] Mr Gitau put in evidence two videos taken from his mobile phone on that day which have been called video 1 and video 2.⁷⁴

[183] The first thing that happened at the beginning of the second video is that Ms Boles can be heard shouting:

He's threatening me, David, he's threatening me

[184] If anything was threatening Ms Boles to cause her to shout this out, this is missing from the footage because it would be at the beginning of video 2.

[185] In contentions filed in the tribunal in the sexual harassment complaint, Ms Boles described the videos as 'staged' and questioned why there was a break in the recording.⁷⁵ This was something which needed some explanation because the videos seem to follow on in time, but there was a gap between the two, and Ms Boles was saying that something happened between herself and Mr Gitau just before video 2 causing her to shout out that she was being threatened. In other words, her contentions suggested that there was a break in the recording and something important was missing.

[186] In response, Mr Gitau did provide an explanation for the break in the recording. He said that in fact there were 'several hours' between the two videos.⁷⁶ He repeated this in later evidence. He was also firm about this in cross examination, explaining that video 1 was taken when he was putting out his washing to dry on the rack in the carport, and video 2 was taken when he was collecting his clothes after they had dried. This explanation seemed to differ from his earlier evidence about this. Prior to that date Mr Gitau recited on two different occasions what had happened on 25 May 2020.⁷⁷ It is significant that it was not said on those occasions that there was large gap in time between the two videos.

[187] The respondents have constantly submitted that it is possible to see from the shadows on the two videos cast by the sun that they were taken very close in time. The respondents are right about this. It can be seen particularly from the shadows cast by a traffic cone and by a metal sheet in the yard appearing on video 1 between 24.0 and 26.0 seconds and appearing on video 2 between 9.0 and 13.0 seconds and between 41.5 to 42.0 seconds. The shadows point in the same direction on both videos.

[188] So Mr Gitau is incorrect when he says that there was a long gap between the two videos. The truth is that the gap between the two videos is only a matter of seconds or minutes as Ms Boles said in her oral evidence.

[189] It seems to me that the only possible explanation for this is that Mr Gitau deliberately decided to change his evidence after receiving the respondents'

⁷⁴ Filed with the tribunal on 21 April 2021.

⁷⁵ Tab 30, [7].

⁷⁶ Affidavit of 15 November 2022 tab 26 page 409 paragraph 20(2)f).

⁷⁷ Amended complaint of 3 June 2020, tab 16 page 19 and affidavit of 19 April 2021, tab 20 page 214

evidence in order to explain why there were two videos and not one video. The truth of this, I think, is that either Mr Gitau stopped filming at some time soon before Ms Boles shouted that she was being threatened or that he edited the video by removing the footage immediately before this, ending up with two video files. The latter seems more likely because Mr Gitau confirmed in cross examination that he had transferred the videos from his mobile phone to his computer. As a jet engine technician, he has a technical background and would have been able to split the video into two in order to edit out something he did not want the tribunal to see.

[190] Mr Gitau's change of evidence and attempt to pretend that the two videos were spaced by some time leads me to conclude that not only does he have an understanding of the subtleties in this complaint, and the need for evidence to support the complaint, but a willingness both to mislead and to manipulate the evidence before the tribunal.

[191] This means I cannot wholly rely on Mr Gitau's allegations to decide this complaint. I would require his evidence to be corroborated before I can rely on it.

Schedule 3 - credibility of Ms Boles

[192] Ms Boles has been quite inconsistent describing what happened between video 1 and video 2 to cause her to shout out that she was being threatened.

[193] The first account was in a statement to the police made on 29 May 2020, just four days after the event. In that statement she said that Mr Gitau came up to her and pushed his shoulder directly into her right shoulder, forcing her backwards and her fall was broken by her car. She said that a while later, maybe a few seconds, Mr Gitau moved back towards his car. Hence she shouted out about being threatened. She said that due to being pushed there was an exacerbation of a pain in her back from a previous injury. There was no mention of sexual harassment in the statement.

[194] The second account was in her complaint to QHRC about Mr Gitau's sexual harassment, dated 13 December 2020. She said that Mr Gitau came up to her on 25 May 2020 and was smirking and he said 'you're black, why don't you like a good looking black man like me'. She ignored him and he turned around went back to his unit and a moment later came back out and walked up to her holding his crotch and said:

What's wrong with you. Can't handle a good piece of black meat like I have?

[195] She said in the complaint that at that point she shouted out about being threatened. There is no mention of any physical contact between Mr Gitau and Ms Boles at all and no mention of a car.

[196] Ms Boles was asked in cross examination about why the complaint did not mention any physical contact and her explanation was that the complaint was only about sexual harassment.

[197] I do not think this is a good explanation bearing in mind the gravity of the allegation as it later emerged when Ms Boles gave evidence in the hearing. She said:

I walked passed him onto the boot of my car to check whatever I was checking for and as I was leaning down doing whatever I was doing I felt something coming up behind me and as I'm coming up (Mr Gitau) came to me and pushed me into the car, as he was pushing me into the car he was grabbing his private parts looking at me, sneering, and said what's wrong with you don't you like a good piece of black meat like I have. All of this was happening at the same time. As Mr Gitau was doing that I was saying 'help, help, help'. By that time (the neighbour) is coming down the stairwell, I'm pushing passed Mr Gitau going where I was going, Scott was coming down the stairs and I said he's threatening me.

- [198] This account is unlikely to be true either, because if as Ms Boles told the police, the physical assault was sufficient to exacerbate pain in the back from a previous injury, merely shouting out:

He's threatening me, David, he's threatening me

would have considerably understated what happened.

- [199] My conclusion is that the inconsistency in the accounts given by Ms Boles makes it impossible to find as a fact what happened to cause her to shout out that she was being threatened. This has an impact on the sexual harassment counter complaint, considered above.

Schedule 4 – detailed findings of fact

11 June 2019 to 12 June 2020 the residential tenancy

- [200] The residential tenancy agreement was for a fixed term of 11 June 2019 to 12 June 2020 and named De Soysa Walsh Pty Ltd as lessor and Ms Ng'ang'a and Mr Gilau as tenants.⁷⁸

28 June 2019 party and breach notice following

- [201] Just a few days after the tenancy started, Mr Gitau and Ms Ng'ang'a had some friends over. The neighbours complained, and a breach notice was issued stating the following grounds:⁷⁹

On Friday 28 June evening multiple guests arrived at the rental address. The tenants and guests made excessive noise throughout the evening inside and outside the premises. After complaints regarding the noise being made, the guests eventually left (continuing their noise) around 12.20am. The tenants have contravened their lease by adversely impacting the amenity of neighbours.

- [202] After receiving the breach notice, Ms Ng'ang'a sent a text message to Mr Walsh and apologised for the noise and the rude guests and said that an apology email would follow.⁸⁰ The next day, on 1 July 2019, Mr Gitau sent an email to Mr Walsh apologising for the noise and the behaviour of the visitors. He promised to do his best to make sure it would not happen again.⁸¹

⁷⁸ Tab 14 page 79.

⁷⁹ Tab 37.

⁸⁰ Tab 1 page 139.

⁸¹ Tab 1 page 171.

[203] Mr Walsh replied:⁸²

Appreciate your email.

As I said when we first met, this is a very quiet and peaceful environment. It will stay that way if everyone respects the peace and privacy of everyone else. As Leachia said to Rose – now it's clear what can and can't be done. We're happy to have you as residents but will not accept breaches of the rules.

Hope you have a great day, David.

[204] This breach notice is not relied on in support of any of the complaints.

29 July 2019 respondents away

[205] From 29 July 2019 until their return on 22 January 2020 Ms Boles and Mr Walsh were away in the USA.

20 December 2019 – pregnancy email

[206] On 20 December 2019 Ms Ng'ang'a emailed Mr Walsh in the USA and informed him that she was pregnant and she was expecting a baby soon. She said 'Kindly let me know how I can break my lease as I need a bigger place to accommodate the baby', and then on Mr Walsh querying what was happening with the co-tenant Mr Gitau, she said 'We want to get a bigger place together kindly advise the way forward'.⁸³

[207] Mr Walsh then sought to check directly with Mr Gitau about what he wanted to do about his lease, but there was no reply to this.

27 January 2020 - meeting

[208] After the respondents' return from the USA they met with the tenants in the unit to discuss the break lease. What was agreed was recorded by Mr Walsh in an email the next day.⁸⁴ The baby was due on 27 April, and the tenants confirmed that they needed to move to somewhere larger. It was agreed that as soon as a new tenant had signed a new lease the tenants lease would be terminated and subject to the usual handover rules, their bond would be refunded. To find another tenant, the tenants could advertise the unit on Gumtree giving Mr Walsh as the contact person.

January 2020 - additional resident

[209] After returning from the USA, Mr Walsh and Ms Boles had seen someone else who seemed to be living in unit 5, and soon afterwards Mr Walsh saw the person leave with suitcases and then returning on occasions to pick up mail. At the meeting in the unit Mr Walsh saw a double mattress behind the sofa.⁸⁵

[210] The respondents did not take any action about this.

⁸² Tab 1 page 170. In final written submissions sent on 21 April 2023 paragraph 37, the respondents point out that the "we're" in this email refers to Mr Walsh and to Ms Boles.

⁸³ Tab 14 page 91.

⁸⁴ Tab 1 page 167.

⁸⁵ Affidavit Mr Walsh tab 1 page 140.

January 2020 - noise complaints

- [211] Although some neighbours complained to Mr Walsh about noisy parties in unit 5 continuing until the early hours of the morning, no action was taken about this.⁸⁶

9 March 2020 - attempts to find another tenant using real estate agent

- [212] Ms Ng'ang'a asked a real estate agent to assist in finding a new tenant by advertising the unit more widely,⁸⁷ and Mr Walsh assisted in this process by liaising directly with the agent and authorising listing the unit for rent.⁸⁸ He made it clear to Ms Ng'ang'a however, that she would have to pay the agent's letting fee.⁸⁹

27 March 2020 to 30 March 2020 correspondence, including form 12 notice to leave

- [213] On 27 March 2020 following a text message from Mr Gitau to Mr Walsh, Mr Walsh emailed the tenants, and asked Mr Gitau to confirm in writing that he wanted to break the lease (something which Mr Gitau had not yet done), and chased up an email expected from Ms Ng'ang'a. Then Mr Walsh said:⁹⁰

To avoid doubt please note that your lease authorises the two of you as tenants. Your child, once born, is not authorised to be at the premises.

- [214] On 28 March 2020 a notice to leave on form 12 without grounds was given to the tenants.⁹¹ It had a handover day of 12 June 2020 which was the end of their fixed term.

- [215] On 28 March 2020 Mr Gitau replied to the notice to leave by email. He said:⁹²

Rose has suggested that we move to a bigger house if we get somebody to take this house. With everything else going on at the moment (corona and expecting a new born) we cannot afford to pay rent here and get a new house.

We really want to leave this place peacefully so we are open to fair negotiations.

- [216] On 30 March 2020 Mr Walsh replied attaching a list of larger properties for the same rent in the area and stating (amongst other things):⁹³

I suggest that for you to cite "corona and expecting a new born" as a factor requiring me to financially subsidise your moving to a another premises is a transparent attempt to benefit from the current national emergency circumstances in a way that is not just unacceptable bad faith behaviour, but dishonest.

Please inform me as to your intentions as bringing a child to reside at the premises is a serious breach of your lease that will result in my instigating eviction proceedings.

⁸⁶ Affidavit Mr Walsh tab 1 page 140, also tab 1 page 126.

⁸⁷ Response to contentions tab 9 page 15.

⁸⁸ Affidavit Mr Walsh tab 1 page 148.

⁸⁹ Affidavit Mr Walsh tab 1 page 148 with emails at tab 1 page 187.

⁹⁰ For a complete copy of this email tab 1 page 47.

⁹¹ Tab 39. It is possible from the evidence, that only the first page of this was sent on that day with page 2 being sent on 4 April 2020.

⁹² Tab 1 page 46.

⁹³ Tab 1 page 33 for a full copy.

- [217] It was this email which threatened eviction proceedings if the tenants brought the baby to the unit which caused Mr Gitau and Ms Ng'ang'a to seek help. A short time later, very late in the evening of 5 April 2020, but probably into 6 April 2020, a complaint was made to QHRC and on 24 April 2020 an application was made to the tribunal for an interim order to restrain any such eviction proceedings.
- [218] The emails of 27 March 2020, the notice to leave of 28 March 2020 and the email of 30 March 2020 are all relied on by the tenants as less favourable treatment in the direct discrimination claim.
- [219] At the hearing Mr Walsh stated his belief that having given the notice to leave of 28 March 2020, the tenants could have terminated their tenancy by giving 2 weeks notice.⁹⁴ He questioned why the tenants had not done this. But he also questioned why the tenants had not applied to the tribunal for a termination order on the grounds of exceptional circumstances, which was more pertinent.
- [220] It was put to Mr Walsh in cross examination that, having regard to his belief that giving the notice to leave of 28 March 2010 enabled the tenants to leave earlier than the end of the fixed term, it was therefore part of his desire for the tenants to leave, with the implication that it was therefore unfavourable or less favourable treatment.
- [221] I have to consider whether the giving of the notice to leave of 28 March 2020 was objectively unfavourable or less favourable treatment. There is nothing to show that the tenants also misunderstood the legal effect of the notice to leave and they were being advised by Tenants Queensland soon after. I do not think the giving of the notice to leave of 28 March 2020 was unfavourable or less favourable treatment.
- [222] I have decided however, as explained earlier in these reasons, that the combined effect of the emails of 27 and 30 March 2020 were directly discriminatory on the grounds of pregnancy and race.

27 March 2020 – clothes dryer discussion and 29 March 2020 breach notice

- [223] On 27 March 2020 Ms Ng'ang'a had put a wire clothes dryer on the balcony. She says that Mr Walsh approached her and asked her to put the dryer in the shed which she did.⁹⁵ Mr Walsh says that he asked for the dryer to be moved to the car port not the shed, and it was not the first time he had had to ask for it to be moved, since it blocked the access of a neighbour to his unit.⁹⁶ It seems likely that when Ms Ng'ang'a referred to the 'shed', she was referring to the car port.
- [224] There is a disagreement whether the tenants immediately complied with the instruction. The tenants received a breach notice dated 29 March 2020 stating:
- Tenants have been told previously (most recently Friday 27 March 2020) not to leave portable wire clothes dryer and drying laundry on flat's balcony. The wire dryer and some laundry remains on the balcony at the time of service of this breach notice.
- [225] The breach notice is relied on by the tenants as less favourable treatment in the direct discrimination claim. In the context of other events which happened later, I think this was the beginning of the respondents' campaign against the tenants.

⁹⁴ This was a misunderstanding of the legal position.

⁹⁵ Affidavit tab 14 page 70.

⁹⁶ Tab 1 page 110.

30 March 2020 locked out of laundry room

- [226] On 30 March 2020 Mr Walsh informed Ms Ng'ang'a that the tenants were locked out of the laundry room in the common parts because it was not in the lease and she had broken the washing machine twice.⁹⁷ Ms Ng'ang'a denies breaking it and says that Mr Walsh was present when she last used it.⁹⁸ The only suggestion here is that the washing machine may have been overfilled. Mr Walsh agreed in cross examination that he had seen that Ms Ng'ang'a had overfilled the machine. The obvious thing would then have been to explain to her the limit of the washing machine rather than removing the facility altogether.
- [227] Locking the tenants out of the laundry room is relied on as less favourable treatment in the direct discrimination claim brought by Ms Ng'ang'a, and although it is not entirely clear it also seems to be relied on as less favourable treatment in Mr Gitau's direct discrimination complaint.
- [228] I accept that the tenants may not have had a legal right to the use of the laundry room but since this could have been managed in a much better way, in the context of the other events this does seem to be part of the campaign against the tenants.

1 April 2020 community rules about bins and breach notice following

- [229] Because he and Ms Boles were going to the USA, Mr Walsh prepared Community Rules for the units, and gave them to each tenant on 29 June 2019. One of the rules was that tenants had to take turns to put the bins on the curb for rubbish collection, but the only tenants doing this were two elderly tenants.
- [230] On 1 April 2020 a breach notice was given on these grounds:

This is the third occasion you have breached your lease terms by not obeying the Community Rules – you are, when it is your turn, obliged to put the rubbish bins out for collection and promptly take them in once the BCC has collected the rubbish/recycle. The bins have, at the time of serving this Form 11 been left out for 24+ hrs since they were emptied by the BCC.

- [231] There is no evidence that a similar notice was given to any other tenant, or that the rule about the bins was enforced at any other time.
- [232] This breach notice is relied on as less favourable treatment in the direct discrimination claim. Taken in context it seems to me that this was the respondents picking on the tenants as part of the campaign.

5 April 2020 – Ms Boles filming Ms Ng'ang'a's food delivery

- [233] Ms Ng'ang'a ordered some food to be delivered and when it arrived she saw that Ms Boles was filming the delivery.⁹⁹ Ms Boles agrees that she did this, saying that she wanted to obtain evidence to show that the tenants were not under financial hardship as they claimed.¹⁰⁰
- [234] For reasons given earlier I am treating this as relied on by both tenants as less favourable treatment in their direct discrimination complaints.

⁹⁷ Affidavit of Mr Gitau tab 20 page 210, Mr Walsh tab 1 page 146.

⁹⁸ Affidavit of Ms Ng'ang'a tab 14 page 71.

⁹⁹ Affidavit tab 14 page 71.

¹⁰⁰ Affidavit tab 1 page 134.

- [235] Filming this delivery was not justified at all. Since Ms Boles was gathering evidence for use by the lessor in legal proceedings with the tenants or in some way in connection with the accommodation, I think she did this as part of the lessors' campaign against the tenants and on behalf of the lessor.

6 April 2020 complaint to QHRC

- [236] Very late in the evening of 5 April 2020, but probably into 6 April 2020 the tenants made a discrimination complaint to QHRC.

6 April 2020 Mr Gitau moved in full time and search for new tenant abandoned

- [237] Before this date, Mr Gitau had partially been living in other premises with his 'kids' and so he was only in the unit about three times a week, but the lease to those premises expired and so he moved into the unit fully.¹⁰¹
- [238] On 6 April 2020 the real estate agent who had been advertising the unit for another tenant sent an email to Mr Walsh saying:¹⁰²

(as discussed on the phone) Rose has decided that her partner will remain in the property until the end of her tenancy and therefore does not require our services to secure a tenant on your behalf.

As per her instructions we have removed the property from the internet and have stopped taking enquiry.

- [239] Ms Ng'ang'a said in her evidence that at this time they had realised they could not find another tenant because of the pandemic and so they decided to stay in the unit.¹⁰³
- [240] Ms Boles says that she tried to talk to the tenants about their change of mind on 7 April 2020 but they told her it was none of her business.¹⁰⁴

11 April 2020 water thrown off balcony incident and breach notice following

- [241] The tenants received a breach notice in these terms:

On Friday April 11 evening one or either Rose or Jackson chose to throw a bucket of water over their balcony such that it landed precisely where another tenant who lives in the unit below (Ms Boles) was sitting in her chair with the result that the water and mud from the garden bed splashed on Ms Boles. The tenant had to walk out of unit 5 and down the balcony to accurately pick the spot opposite Ms Boles.

- [242] Ms Ng'ang'a says that this never happened and so this breach notice was contrived.¹⁰⁵ There is little evidence about this incident from Ms Boles. In her affidavit she describes water 'landing' and why she suspected the tenants, but the evidence is insufficient for me to find that the tenants did act in the way alleged.¹⁰⁶ My finding therefore is that, as Ms Ng'ang'a says, this never happened.

¹⁰¹ Affidavit Mr Gitau tab 26 page 405, Ms Ng'ang'a tab 14 page 67.

¹⁰² Tab 1 page 188.

¹⁰³ Affidavit Ms Ng'ang'a tab 14 page 68.

¹⁰⁴ Affidavit Ms Boles tab 1 page 133.

¹⁰⁵ Signed but not witnessed affidavit of 7 May 2020 tab 2 page 7.

¹⁰⁶ Affidavit Ms Boles tab 1 page 134.

[243] This breach notice is relied on as less favourable treatment in the direct discrimination claim, and it does appear to have been part of the campaign against the tenants.

14 April 2020 no water in unit and breach notice following

[244] On 14 April 2020 the tenants had no water in the unit. They contacted Urban Utilities who inspected the property and who found that there was no problem with the water supply to the building. Urban Utilities spoke to Mr Walsh and told him unit 5 said they had no water. There was still no water in the afternoon so Ms Ng'ang'a contacted the Residential Tenancies Authority who advised her to contact the police. They said that water was essential particularly because of the pandemic. So Mr Gitau went to the police. Ms Ng'ang'a says that the police telephoned Mr Walsh who told them that the tenants were lying about the water.¹⁰⁷

[245] On 14 April 2020 the tenants received a breach notice which had the following grounds:¹⁰⁸

Contrary to the lease and Community Rules, the tenants have infringed the amenity and peaceful enjoyment of David Walsh and Leachia Boles by, on 14 April 2020 make 2 false complaints to government authorities: 1) Urban Utilities – lunchtime and 2) Boondall Police Station – received call from police officer 5:28pm stating “Jackson” was at counter claiming their “water had been turned off”.

[246] On the evening of 14 April 2020 Mr Gitau emailed Mr Walsh to say that there was still no water in the unit and asked him to address the matter as landlord. Mr Walsh's response just accused the tenants of a pattern of 'misstatements and dissembling' and required them to serve a breach notice on him.¹⁰⁹

[247] The breach notice of 14 April 2020 is relied on as less favourable treatment in the direct discrimination claim.

[248] The respondents say that the tenants have made up the water failure because there is only one meter for the whole block and whenever any work needs to be done to the water supply the water supply to the whole block needs to be turned off. However, when giving evidence in the hearing Mr Walsh explained that there were individual taps for each unit but at the time they were cemented over and unusable. There is a photograph of an old pipe which seems to show such a tap in the affidavit of Ms Boles dated 24 March 2023, which she describes as 'corroded, jammed with rust residue and inoperable'.¹¹⁰ This also shows the work which has now been done to the pipes and the new taps which have been added now so that each unit can be controlled separately.¹¹¹

[249] The respondents also say that they heard water in the pipes from unit 5, but it seems to me that if they did hear water, this could easily have been from a different source.

¹⁰⁷ Signed but not witnessed affidavit Mr Gitau tab 3 page 18, affidavit Mr Gitau tab 20 page 211, signed but not witnessed affidavit Ms Ng'ang'a tab 2 page 7, affidavit Ms Ng'ang'a tab 14 page 71. Ms Boles in cross examination confirmed that Urban Utilities attended and spoke to Mr Walsh and told him that unit 5 said they had no water.

¹⁰⁸ Tab 43.

¹⁰⁹ Tab 1 page 175.

¹¹⁰ Paragraph 60 and pages 18 and 19.

¹¹¹ Paragraph 61 and pages 20 and 21.

- [250] The water supply was restored but there is no evidence about how this happened.
- [251] My finding about the water supply is that if the tenants water supply had not failed that day it would be very unlikely that they would contact Urban Utilities. The water supply had failed. Since the taps were stuck in one position it is very unlikely that the tenants could have turned the water off themselves. I think on the balance of probabilities something caused a temporary blockage in the water supply pipe which then cleared.
- [252] As for whether there was any justification for the breach notice given on 14 April 2020, it only needs a moment's thought to realise that the likelihood was that there was an interruption of the tenants' water supply in unit 5 and that it needed attention. Instead, the respondents chose to threaten the tenants with eviction for seeking help. The breach notice was not justified at all.
- [253] In addition to this it seems to me that the respondents' reluctance to deal with the loss of water quickly, when taken in context, is part of the campaign against the tenants. On my finding therefore rather than put forward as a variation of the terms of the accommodation by denying the water supply, this item of complaint should be moved into 'treating the tenants unfavourably in connection with the accommodation'.

14 April 2020 noise and breach notice following

- [254] On 14 April 2020 the tenants received a breach notice which had the following grounds:¹¹²

Contrary to the lease and Community Rules, the tenants make excessive noise during the night (after 10:00pm) and in the early hours of the morning such as it disturbs the sleep of other tenants, compromising those other tenants' amenity and peaceful enjoyment of their premises.

- [255] Mr Walsh says that there was noise justifying the giving of this notice.¹¹³ The tenants deny that there was any noise. The block was not soundproofed. Since he and Ms Boles were downstairs from the tenants, they would have heard noise from above. I think there probably was some noise. Since the respondents tended to issue a breach notice for noise, as shown by the breach notice of 29 June 2019, it cannot be said that this was part of the campaign against the tenants.

16 April 2020 repeated breaches breach notice

- [256] On 16 April 2020 the tenants received a breach notice which had the following grounds:¹¹⁴

Tenants have made RT Act s.299(1) Repeated Breaches resulting in breach of RT Act s.184(c). Additional detail of the most recent breach is contained in covering email by which this Form 11 is served on the tenants.

- [257] This breach notice is relied on as less favourable treatment in the direct discrimination claim.
- [258] As far as I am aware the email referred to in this notice is not in the evidence.

¹¹² Tab 44.

¹¹³ Tab 1 page 150.

¹¹⁴ Tab 45.

- [259] 'Repeated breaches' is not something that enables a breach notice to be served. Mr Walsh accepted in cross examination that he looked at section 299 before issuing the notice so he would have seen that this notice was inappropriate. Also this notice seems to refer to other earlier alleged breaches, which is probably a reference to at least one earlier unjustified breach notice. For these reasons this breach notice should be regarded as part of the campaign against the tenants.

16 April 2020 no water in unit and breach notice following

- [260] In the evening of 16 April 2020 the water in unit 5 failed again.¹¹⁵ Mr Gitau emailed Mr Walsh about this the next day and asked for a plumber to attend.¹¹⁶ Mr Walsh's response was argumentative and unhelpful. He denied that there was an issue, accused Mr Gitau of deceit, and threatened to take 'remedial action without any further notice to you' because of the tenants breaching the terms of the lease.¹¹⁷
- [261] Mr Walsh attached a breach notice dated 17 April 2020 which had the following grounds:¹¹⁸

Tenants continue to make false claims as to interruption of water supply to third parties interfering with my amenity and peaceful enjoyment of the property. Additional detail of the most recent breach is contained in covering email by which this Form 11 is served on the tenants.

- [262] Again, I think that a moment's thought would indicate to the respondents that there was probably a problem with the water in the unit because this was not something that a tenant could readily pretend to be the case. The breach notice was quite unjustified.
- [263] This breach notice is not relied on however in the contentions filed on the tenants' behalf and so cannot be regarded as part of the campaign against the tenants. The complaint must be limited to failing to deal with the tenants' problems with water at this time. I think this was part of the campaign against the tenants.

18 April 2020 tenant's dispute resolution request

- [264] Seemingly prompted by Mr Walsh's threat in his email of 17 April 2020 to take remedial action without notice to the tenants on the breach notices, on 18 April 2020 the tenants completed a Dispute Resolution Request form on Residential Tenancies Authority Form 16,¹¹⁹ showing the dispute as a false breach accusation on 17 April 2020.

18 April 2020 Mr Walsh spoke to Ms Ng'ang'a and breach notice following

- [265] This allegation is that Mr Walsh mocked Ms Ng'ang'a about packing to leave and for getting help from Tenants Queensland. This resulted in the tenants serving a breach notice on 22 April 2020.
- [266] For reasons given earlier I am treating this as relied on by both tenants as less favourable treatment in their direct discrimination complaints.

¹¹⁵ Although Mr Gitau says this was on 17 April 2020 at tab 26 page 406 this is incorrect.

¹¹⁶ Tab 1 page 177.

¹¹⁷ Tab 1 page 177.

¹¹⁸ Tab 46.

¹¹⁹ Tab 47.

[267] Immediately after the conversation, Ms Ng'ang'a told Mr Gitau about it and recorded this.¹²⁰ This is not that valuable as evidence. The most useful evidence to analyse whether what happened amounted to a discriminatory act comes from Mr Walsh's written response to the tenants' breach notice.¹²¹ He said that all he did was to remind Ms Ng'ang'a that there was a notice to leave and to ask when she would begin to pack up as she had moved so many belongings into the unit. When Ms Ng'ang'a said 'All this means you want us to leave', Mr Walsh laughed.

[268] On the assumption that Mr Walsh's description of what happened can be relied on, it can be seen that there was no need for Mr Walsh to ask the question that he did, bearing in mind the tenants still had seven weeks before the notice to leave that he was referring to took effect. Taken in the context of the other things happening, this was part of the campaign against the tenants.

20 April 2020 telephone call with Tenants Queensland

[269] On 20 April 2020 a representative of Tenants Queensland telephoned Mr Walsh. There is an agreed transcript of this call.¹²² The representative explained that efforts were being made to find the tenants alternative accommodation and they asked whether Mr Walsh was interested in a mutual termination agreement, that is for the tenants to give two weeks' notice and the lease to terminate when handing over at the end of two weeks, so that there would be no ongoing rent, no break lease fees and no advertising costs.

[270] From the transcript it can be seen that Mr Walsh was argumentative and unhelpful, and did not accept the proposal.

[271] This is not relied on as less favourable treatment in the direct discrimination complaints.

20 April 2020 notice to leave because of NBN visit

[272] On 20 April 2020 the tenants received a notice to leave on Form 12 which had the following grounds:¹²³

On 14 April 2020 the Tenants' associate came to the premises claiming to me that he was an NBN technician and would need to "go into the roof and drill the walls" in order to connect Unit 5. When told "no" the person left screaming abuse and threats against me and the property. Police attended 16 April and as Rose would not identify their associate, police could take no further action. This is the 3rd occasion on which the tenants have threatened the lessor, threat to lessor is ongoing.

[273] The notice to leave gave a handover date of 4 May 2020.

[274] This notice to leave is relied on as less favourable treatment in the direct discrimination claim.

[275] Although there is evidence to show that the contractor was offensive to Mr Walsh on that day, the suggestion in the notice to leave that the contractor was the tenants' 'associate' and there was a threat made by the tenants to the lessor on 14 April 2020

¹²⁰ Affidavit tab 15 page 123.

¹²¹ Signed but not witnessed affidavit of 7 May 2020, tab 2 page 9.

¹²² Tab 21 page 267.

¹²³ Tab 48.

or at any earlier time was incorrect in fact and law. Mr Walsh should have been aware of this. It may also be noted, although nothing turns on this, that Ms Ng'ang'a did identify the contractor to the police so the notice is incorrect in that respect.

- [276] This notice to leave was clearly inappropriate and was part of the campaign against the tenants.

24 April 2020 inspection and breach notice following

- [277] By an entry notice given on 22 April 2020, the tenants were notified of a planned visit on 24 April 2020 to carry out routine repairs or maintenance (24 hours notice) and to comply with the smoke alarm law (24 hours notice).¹²⁴
- [278] On 24 April 2020 the tenants were given a Form 11 breach notice on the grounds that:¹²⁵

The 24 April 2020 inspection showed the following breaches: (1) extensive mould over parts of bathroom ceiling (2) battery removed from smoke alarm by tenants (3) tenant refused entry to living area of unit so that lessor might complete notified inspection.

- [279] The fact of the inspection and the issuing of the breach notice is relied on by the tenants as less favourable treatment in the direct discrimination claim and as detriment for the purpose of the victimisation claim.
- [280] The respondents claim that the inspection was justified because they found that the battery was removed from the smoke alarm. The tenants agree that the smoke alarm was working at the commencement of the tenancy.¹²⁶ On the balance of probabilities the battery was removed during the tenancy either by the tenants themselves or by one of their guests at the unit.
- [281] However, the respondents had no set schedule for such inspections, and bearing in mind the fixed term tenancy was due to end about seven weeks later in any case, there was no need for this one. Item (3) in the breach notice was not fair bearing in mind Ms Ng'ang'a was heavily pregnant and had asked, though Tenancies Queensland, to remain in the living room to reduce the chance of catching Covid-19, which request was reasonable. Taken in the context of other events, the inspection and the breach notice were part of the respondents' campaign against the tenants.

24 April 2020 interim order from the tribunal

- [282] On 24 April 2020 on the tenants' application that the tribunal issued directions in an application made under section 144 of the ADA (applications for orders protecting complainant's interests (before reference to the tribunal) which included the following order:¹²⁷

Until the application for an interim order is determined by the tribunal, (the respondents) are prohibited from taking any steps to interfere with (the

¹²⁴ Tab 50.

¹²⁵ Tab 51.

¹²⁶ This can be seen from the entry condition report and was also confirmed by Ms Ng'ang'a when she gave evidence.

¹²⁷ Tab 20 page 249.

applicants') right to occupy the (rental property) and are restrained from ending the tenancy agreement.

- [283] On 9 June 2020 the application for an interim order was dismissed by Member Traves. This was on the basis that the circumstances had changed. Ms Ng'ang'a was no longer pregnant and the lease was to expire in 3 days time.

25 April 2020 noise complaint and breach notice following

- [284] On 25 April 2020 one of the tenants in a neighbouring unit complained to the respondents about being woken up by noise from unit 5 in the early hours of the morning. That complaint resulted in a breach notice of that date on the grounds that:¹²⁸

During the early morning of 25 April the tenants, between approximately 2.30 to after 3:00 am caused loud bumping, thumbing (sic) and banging noises that woke other residents up and kept them awake until the noises stopped. The noises emanated from the living area of unit 5. The noise the tenants caused breached their lease by infringing the amenity and peaceful enjoyment of other residents of the property.

- [285] The issuing of the breach notice is relied on by the tenants as less favourable treatment in the direct discrimination claim and as detriment for the purpose of the victimisation claim.

- [286] Although the tenants deny making any noise that night, the fact of the noise is supported by the evidence of the neighbour and of Mr Walsh.¹²⁹ On the balance of probabilities there was noise from unit 5 that night which justified the giving of the breach notice.

27 April 2020 Ms Boles filming Ms Ng'ang'a's return from hospital

- [287] On 27 April 2020 Ms Ng'ang'a had an appointment at the hospital as she was due to give birth, but she did not give birth and returned home. On her return she found that Ms Boles was filming her as she returned to the unit. Ms Boles did not feel safe and took refuge in a neighbour's unit until Mr Gitau arrived.¹³⁰

- [288] This is relied on by the tenants as less favourable treatment in the direct discrimination claim and as detriment for the purpose of the victimisation claim.

- [289] Ms Boles agrees that she was filming Ms Ng'ang'a but explains that she wanted to gather evidence about Ms Ng'ang'a failing to socially distance and wear a mask in an Uber in the light of the pandemic.¹³¹

- [290] Since the only possible use of this evidence was in legal proceedings with the tenants or in some way in connection with the accommodation, she did this as part of the lessors' campaign against the tenants and on behalf of the lessor. Trying to gather this evidence was not justified at all and was part of the campaign against the tenants.

¹²⁸ Tab 52.

¹²⁹ Tab 1 page 127 and tab 1 page 150.

¹³⁰ Tab 14 page 73.

¹³¹ Tab 1 page 134.

28 April 2020 entry notice

- [291] This was a notice on Form 9 seeking entry to the unit on 1 May 2020 to inspect completed repairs and smoke alarm compliance.¹³²
- [292] The issuing of this form is relied on by the tenants as less favourable treatment in the direct discrimination claim and as detriment for the purpose of the victimisation claim.
- [293] This notice resulted in a letter from the tenants' lawyers providing Mr Walsh with a copy of the tribunal's interim order and there was correspondence between the tenants' lawyers and Mr Walsh as to whether a further inspection was justified or lawful and whether the attempts to gain entry were discriminatory or could constitute victimisation.¹³³ The upshot was that the respondents did not enter the unit for the inspection and so I cannot see that this was unfavourable or less favourable treatment.

2 May 2020 shoulder rubbing incident in chemist

- [294] The tenants allege that Mr Walsh followed them when they drove to the chemist and that he rubbed his shoulder against Mr Gitau in the chemist on his way out.¹³⁴
- [295] Mr Walsh denies following the tenants but agrees he was in the chemist that day. He says it was crowded and he left quickly.¹³⁵ In his oral evidence he denied any contact with Mr Gitau. Although Ms Ng'ang'a went with Mr Gitau that day and mentioned this incident in an affidavit,¹³⁶ it is not clear from her evidence whether she actually saw the incident.
- [296] This is relied on by the tenants as less favourable treatment in the direct discrimination claim and was originally relied on as detriment for the purpose of the victimisation claim.
- [297] Although Mr Gitau denied that the chemist was crowded that day, I accept what Mr Walsh says about this. It is conceivable that Mr Walsh may have accidentally brushed past Mr Gitau on his way out and I think this is the most likely reconciliation of the evidence. I cannot see that this was part of the campaign against the tenants.

5 May 2020 birth of baby

- [298] Ms Ng'ang'a gave birth.

7 to 11 May 2020 loss of electricity

- [299] Mr Gitau says that he returned to the unit in the evening of 7 May 2020 with Ms Ng'ang'a and their baby girl.¹³⁷ This is not correct because Ms Ng'ang'a says she was still in hospital at that time and did not come back to the unit until 11 May.¹³⁸

¹³² Tab 53.

¹³³ This correspondence is conveniently summarised in Mr Gitau's Amended Statement of Facts and Contentions tab 23 page 333 paragraphs 51 to 57.

¹³⁴ Affidavit of Mr Gitau tab 20 page 213,

¹³⁵ Affidavit of Mr Walsh tab 1 page 149.

¹³⁶ Affidavit 19 April 2021 tab 14 page 74.

¹³⁷ Affidavit tab 26 page 406.

¹³⁸ Affidavit tab 14 page 74.

- [300] Mr Gitau says he found that on the evening of 7 May 2020 there was no electricity in the unit. He telephoned Energex who said there was no problem in the area, and he could see that the lights were on in other units. He says he did not have access to the meter. The following day, which was a Friday, his lawyers sent an email to Mr Walsh about this.¹³⁹ Mr Gitau says that despite this, the electricity was not restored until 4 days later on 11 May, which was a Monday.¹⁴⁰
- [301] The loss of electricity is relied on by the tenants as less favourable treatment in the direct discrimination claim and was originally relied on as detriment for the purpose of the victimisation claim.¹⁴¹
- [302] The respondents do not accept that the power to the unit was off. In affidavits made just a few days after the event, Ms Boles and Mr Walsh say that they had seen lights on in the unit at the weekend and Ms Boles says that she saw that the tenants had done a lot of washing.¹⁴² The respondents believe the allegation was contrived because, although it is feasible for an individual unit not to have power because each unit has its own meter and switch, they say that Mr Gitau was aware of this and either knew where the switch was or could easily find out.
- [303] Mr Gitau's lawyers' email sent on the Friday asked where the meter was and asked for access to it. Although Mr Walsh's reply was argumentative, he described the position of the meter room, provided a photograph of it, and said it was unlocked.¹⁴³ This reply was on Saturday and was sent to the lawyers.
- [304] When giving evidence about this Mr Gitau was very vague about how and when the power was restored. In his affidavit made some 2½ years later he says that it was restored on the Monday but he is not sure how this happened, but in that same affidavit he says that he came home with Ms Ng'ang'a and the baby on 7 May which we know was wrong.
- [305] Since Ms Boles and Mr Walsh saw a light in the unit over the weekend, and washing having been done, it seems likely that Mr Gitau saw Mr Walsh's reply to the lawyers over the weekend and was then able to turn the switch to 'on'. This accords with Mr Walsh's evidence that when he looked at the switch he found it to be 'on',¹⁴⁴ and Ms Ng'ang'a's evidence that Mr Gitau told her that there was no power, but it was back on when she returned to the unit with the baby on Monday. It does not accord with Mr Gitau's evidence under cross examination that he did not hear about the position of the meter room till the Monday and that he did not turn the power back on, but the hearing was some 3 years later and Mr Gitau seemed to have had a poor recollection of this particular incident.
- [306] On the balance of probabilities therefore, there was nothing sinister here at all. It appears that the safety switch probably clicked over for one reason or another, and over the weekend sometime, after Mr Gitau discovered where the switch was, he was able to switch it back on.

¹³⁹ Email of 8 May 2020 at 12.09pm tab 1 page 182.

¹⁴⁰ Affidavits of Mr Gitau tab 20 page 213, tab 26 page 406.

¹⁴¹ In the Amended Statement of Facts and Contentions the date is wrongly given as 8 June 2020.

¹⁴² Affidavit of Ms Boles tab 1 page 132, Mr Walsh tab 1 page 145.

¹⁴³ Tab 1 page 182.

¹⁴⁴ Affidavit tab 1 page 145.

[307] However the respondents' reluctance to deal with the loss of electricity quickly once they knew about the problem on the Friday, when taken in context, is part of the campaign against the tenants. On my finding therefore rather than put forward as a variation of the terms of the accommodation by denying the electricity supply, this item of complaint should be moved into 'treating the tenants unfavourably in connection with the accommodation'.

19 May 2020 monkey comment

[308] Mr Gitau says that Ms Boles called him a monkey on 19 May 2020 and Mr Walsh called him a piece of shit. These are relied on as acts of direct race discrimination, racial vilification and were originally relied on as detriment for the purpose of the victimisation complaint.

[309] The respondents deny the allegations.

[310] According to Mr Gitau, what happened on 19 May 2020 was that he was unloading his car in one of the car ports in the yard of the units and Ms Boles said he was 'a monkey' and Mr Walsh said that he was a 'piece of shit'.¹⁴⁵ Having seen the evidence of Ms Boles about this incident, Mr Gitau says that he now recalls that the words were said when he was doing weights on the grass.¹⁴⁶ He says that another tenant was there.

[311] For reasons given earlier, I would require some corroboration that the comments were made.

[312] Mr Gitau says that he told Ms Ng'ang'a what they had said. This is confirmed by Ms Ng'ang'a in her evidence, but there is a weakness in her evidence, which would otherwise corroborate Mr Gitau about what happened on 19 May 2020, because she also says that Mr Gitau told her on 25 May that Ms Boles had called him a monkey, but Mr Gitau does not make this allegation.¹⁴⁷ It seems to me on the balance of probabilities that Mr Gitau told Ms Ng'ang'a on 25 May that Ms Boles had called him a monkey, and not before. So this is not corroboration for what happened on 19 May.

[313] I believe that Ms Boles' denial that she used these words may be given stronger weight than some of her other evidence because she accepted in cross examination that using the word would be a considerable insult, and this was in marked contrast to her other evidence referred to below when she told me that using the words 'nigga' or 'bush nigga' was not an insult.

[314] The only other corroboration may be from video 1, recorded on 25 May 2020, in which Mr Gitau can be heard challenging Ms Boles at least on two occasions in these terms:

why would a black person call another black person a monkey

and

how does a black person call another black person a monkey

followed soon after with

¹⁴⁵ Affidavit of 19 April 2021 tab 20, page 214.

¹⁴⁶ Affidavit of 15 November 2022 tab 26 page 407.

¹⁴⁷ Affidavit of 19 April 2021 tab 14 page 74.

in front of white people

[315] Mr Gitau relies on this because he says that Ms Boles did not respond to the challenge, and in particular she did not at the time, deny saying this.¹⁴⁸

[316] Ms Boles was asked about this in cross examination. Her explanation was that she was puzzled by the challenge, and she did not want to engage with Mr Gitau at all. When considering whether this explanation is satisfactory, it is important that the question was not a direct challenge to Ms Boles – ‘why did *you* call *me* a monkey?’. Instead, it was a general question ‘why would a black person call another person a monkey?’. Viewed from the perspective of someone who had not called Mr Gitau a monkey then the question would be puzzling as Ms Boles said. Ms Boles’ explanation therefore has a sufficient ring of truth about it to be accepted. On that basis, the fact that she did not deny the monkey comment when challenged on 25 May 2020 does not corroborate Mr Gitau’s evidence about this.

[317] Mr Walsh denies that the monkey comment was made. I think it is likely he would recall it, if it had been made and he had heard it. On balance I find that the monkey comment was not made.

19 May 2020 piece of shit comment

[318] I set out above the circumstances when this was alleged to be said by Mr Walsh, and in respect of which complaint this comment is relied on.

[319] We know that Mr Walsh is capable of saying such a comment from video 2 which was recorded on 25 May 2020.

[320] Material filed by the respondents says:¹⁴⁹

(Mr Walsh) does not admit using this phrase to Mr Gitau, and though it is possible that (he) used the phrase in another context it was never in the presence of the Applicants. Even if it was used as alleged it is not a racist remark. An opinion held by (Mr Walsh) that Mr Gitau was or is a ‘piece of shit’ does not depend in any way on Mr Gitau’s race. Any person of any race is capable of being perceived by anyone else, including people of the same race, as being a ‘piece of shit’. It is an assessment by one person of another person’s character or personality and cannot be characterised as a ‘racial’ or ‘race based’ observation.

[321] When Mr Walsh cross examined Mr Gitau he put these points to him. He asked Mr Gitau:

Do you accept that I’ve got the right to have the view that my opinion of you is that you are a piece of shit?

and

If I have formed the opinion, myself, that you are a piece of shit, and some event occurs that causes me to verbalise that, why do you insist that this is racist?

¹⁴⁸ Mr Gitau’s cross examination.

¹⁴⁹ Response to Contentions filed on 10 November 2020 tab 9 page 34.

[322] Although when giving evidence Mr Walsh denied saying that he had in fact called Mr Gitau a piece of shit, this was not very convincing, and in the light of his questions of Mr Gitau the denial is not acceptable.

[323] Ms Ng'ang'a confirms in her evidence that on 19 May 2020 Mr Gitau told her that Mr Walsh had said word to the effect of a piece of shit.¹⁵⁰

[324] I think these words were said on that day. Viewed objectively, nothing had happened which justified this remark at all. It made Mr Gitau feel 'bad'. This was part of the campaign against the tenants.

19 May 2020 bush nigga comments

[325] The version of what happened on 19 May 2020 which is relied on in support of Ms Boles' sexual harassment counter complaint is that she was in a car port in the yard of the units with Mr Walsh and a neighbour. Mr Gitau came down the stairs and started a flexing routine with weights about 3 metres away.¹⁵¹ She says that Mr Walsh stared directly at Mr Gitau and said sarcastically 'wow that's impressive isn't it Leachia' and that then she said:¹⁵²

yeh, not bad for a bush nigga

[326] The evidence of Ms Boles is that the neighbour asked her what she had said to Mr Gitau and she said to the neighbour:¹⁵³

nothing much, just that he behaves just like a bush nigga

whereupon the neighbour laughed and said:

yeh, that's what we call being a real smart arse

[327] It can be seen therefore, that Ms Boles volunteers that she used the words 'bush nigga' that day. Although in his filed contentions Mr Gitau recalls that Ms Boles used the word 'nigga' that day,¹⁵⁴ this is not in his evidence in reply to the sexual harassment allegations,¹⁵⁵ or in any earlier material.

[328] I have found elsewhere in these reasons that the sexual harassment complaint fails, so the version of events set out above would only be relevant if they were relied on in the racial vilification, direct race discrimination or victimisation complaints, but they should not be regarded as in those complaints, and so they are not before me.

19 and 22 May 2020 access and obstruction issues

[329] On 19 May 2020 Mr Gitau sent an email to Mr Walsh asking him not to leave things in the yard and especially in front of his parking bay as they could injure people. He complained that the last couple of days the trailer was in front of the stairs and now there were iron sheets in front of the parking bay which was a hazard because the lights in the yard were not working.¹⁵⁶

¹⁵⁰ Affidavit tab 14 page 74.

¹⁵¹ Ms Boles accepted in cross examination Mr Gitau was 3 metres away and not very close as stated in her affidavit evidence.

¹⁵² Affidavit of 30 March 2022, tab 29 page 23.

¹⁵³ Affidavit of 30 March 2022, tab 29 page 24.

¹⁵⁴ Tab 33 page 38.

¹⁵⁵ Affidavit of 15 November 2022 tab 26 page 408.

¹⁵⁶ Tab 26 page 414.

- [330] On 22 May 2020 Mr Gitau sent an email to Mr Walsh complaining of the trailer in front of the stairs being a safety hazard because the lights in the yard were not working. Also there were pallets left in the yard with nails facing out. Mr Gitau asked Mr Walsh to provide a safe environment for the tenants.¹⁵⁷
- [331] On 29 May 2020 Mr Walsh refuted the allegations that there was any problem with safety, saying that there had been no complaint from any other tenants, that Mr Gitau had himself moved the offending items and that the lights were working normally.
- [332] The failure to act on the emails of 19 and 22 May 2020 and the obstruction by the trailer on 2 June 2020 so that Mr Gitau could not remove his car are relied on by the tenants as less favourable treatment in the direct discrimination claim and were originally relied on as detriment for the purpose of the victimisation claim.
- [333] It seems that Mr Gitau also sent Mr Walsh some photographs of the alleged obstructions.¹⁵⁸ These did not come out well in the bundle and better copies were handed up during the hearing on behalf of Mr Gitau and marked exhibit 1 and 2. Although Mr Walsh said in cross examination that after the birth of the baby none of the alleged obstructions were in the yard, the trailer, metal sheet and pallet can also be seen, although less clearly, on videos 1 and 2 taken in the incident of 25 May 2020 and so I do not think he is right about this.¹⁵⁹
- [334] Looking at this evidence, I agree with Mr Gitau that there would be a safety hazard in the yard if there were no lights. The trailer could easily have been positioned further away from the stairs. And it is right that the photograph shows there is an iron sheet so close to the front of the car port, that as seemed to have happened, required Mr Gitau to reverse into the car port rather than drive in forward. Viewed in the context of other attempts to disturb the tenants, it is my finding that this was done as part of the respondents' campaign against the tenants.

25 May 2020 nigga and bush nigga comments

- [335] It is common ground that on 25 May 2020 Ms Boles made comments to Mr Gitau after he asked her about the monkey comment. This can be seen and heard on video 1 and is recited in Ms Boles' evidence:¹⁶⁰

what you nigga, you nigga, you bush nigga

- [336] She said in cross examination that this was more of a 'statement' than a conversation. She probably means by this, that she did not respond to anything said by Mr Gitau, which is probably one way to view this.
- [337] She said in cross examination that when she said 'nigga', she was really saying 'bush nigga' which was not a racial insult. However, it can clearly be heard on the video that she called him a nigga or nigger and then bush nigga or bush nigger.
- [338] Ms Boles denied that she used the words 'nigger' or 'nigga' as an insult or to ridicule or humiliate Mr Gitau. She denied that 'bush nigga' is a racial insult. Instead she said that a 'bush nigga' to her is:

¹⁵⁷ Tab 26 page 418.

¹⁵⁸ For example, tab 26 page 420.

¹⁵⁹ Mr Gitau said in cross examination that the trailer was not obstructing on that occasion.

¹⁶⁰ Affidavit 30 March 2022 tab 29 page 25.

the sleaziest kind of person with no character, they have no moral context, they will do anything, they'll throw a stone and hide the hand, they always want something for nothing

[339] In the amended contentions, the use of these words by Ms Boles is relied on by both tenants as direct race discrimination, an act of racial vilification, and as a detriment for the purposes of the victimisation complaint. In final written submissions neither tenant relies on the words as detriment in the victimisation complaint. I have dealt with these allegations earlier in these reasons under 'racial vilification', 'The direct discrimination complaints – Ms Boles' and victimisation complaints.

[340] I cannot see that the use of these words were part of the campaign against the tenants conducted by the company and Mr Walsh because they were not said by the lessor or on the lessor's behalf.

25 May 2020 attack by Mr Walsh

[341] Video 2 shows Mr Walsh running towards Mr Gitau shouting obscenities and attacking him with a golf club in his hands. In this incident Mr Gitau received an injury to his hand. I reject the suggestion by Mr Walsh that he was acting in self defence at any time during this incident. Undoubtedly as can be seen from the video he was the aggressor.

[342] In the amended contentions, this attack is relied on by both tenants as an act of racial vilification and as detriment for the purpose of the victimisation complaint. It is not relied on as an act of direct race discrimination. In final written submissions the attack is not relied on by either tenant as racial vilification or victimisation.

2 June 2020 blocking Mr Gitau's carport with a trailer

[343] It is alleged that on 2 June 2020 Mr Walsh deliberately put his trailer in a position to block the car port which was being used by the tenants. This was added to the QHRC complaint when it was amended the day after, on 3 June 2020 and it was included in Mr Gitau's evidence.¹⁶¹

[344] The affidavit also referred to another time when Mr Walsh obstructed the tenants. That was on about 10 June 2020 when Mr Walsh parked his car in the driveway allegedly causing a lot of difficulty to the tenants because they had to move out items such as a refrigerator, couch and bed and 'caused a lot of stress'. During his cross examination¹⁶² Mr Gitau described this he said that Mr Walsh had blocked the entrance to the property with his car and refused to move the car when asked.

[345] In the amended contentions, only the incident of 2 June 2020 was relied on in the complaint, as direct discrimination and (by Mr Gitau) as detriment for the purpose of the victimisation complaint. In final written submissions the incident of 2 June 2020 is not pressed as detriment for the purposes of the victimisation complaint.

[346] Mr Walsh denies the incident on 10 June 2020¹⁶³ but has no written evidence about the 2 June 2020 incident. Mr Walsh's point of view about this, which came out clearly in his cross examination of Mr Gitau, was that the tenants had no right to use the car port anyway.

¹⁶¹ Affidavit tab 20 page 243.

¹⁶² At the beginning of day 2.

¹⁶³ Tab 9 page 36 paragraph 86.

[347] I find that Mr Walsh did intentionally obstruct the car port with his trailer on 2 June 2020 and that this was part of the campaign against the tenants.

Schedule 5 – what the respondents say about racial terms

[348] This needs to be examined because Ms Boles admits calling Mr Gitau a ‘bush nigga’, and possibly a ‘nigga’ or ‘nigger’, and this is relied on as an act of direct race discrimination, racial vilification and as the case was originally set out in the contentions, as a detriment for the purpose of the victimisation complaint.

[349] In cross examination and in her written evidence,¹⁶⁴ Ms Boles sought to say there was a difference between the words ‘nigga’ and ‘nigger’ and between ‘nigga’ and ‘bush nigga’, the word ‘nigger’ being an insult and the word ‘nigga’ not being an insult. She says that it is acceptable and not racist in certain circumstances, to call someone a nigga or a bush nigga.

[350] Dictionary evidence has been filed by the respondents seeking to support the suggestion that there is a difference between the word ‘nigger’ which is offensive to African Americans and the word ‘nigga’ in Black English which is used by African Americans when referring to each other and which is not offensive.¹⁶⁵ But there seems to be some confusion, because another dictionary entry provided by the respondents says that the word ‘nigger’ is commonly used in ‘black English vernacular’ and is only otherwise abusive.¹⁶⁶ And in her earliest contentions Ms Boles describes her understanding of the word ‘nigger’ and does not refer to ‘nigga’ at all, and therefore makes no distinction between the two words.¹⁶⁷

[351] As pointed out to Ms Boles in cross examination the obvious problem with suggesting that there is a difference between ‘nigger’ and ‘nigga’ when the words are spoken is that it is difficult to tell which spelling is being used. I think this must be even more difficult when the word is used as an expletive as here.

[352] Mr Gitau said in evidence he could not tell the difference and he did not know whether the two words were in fact the same.

[353] Overall, my view is that the examination of the differences between the word ‘nigger’, ‘nigga’ and ‘bush nigga’ are no assistance at all to decide whether the use of the words were unfavourable or less favourable or to the detriment of Mr Gitau when he heard them. That is because in discrimination law, although an unjustified sense of grievance cannot be a detriment,¹⁶⁸ whether particular treatment is unfavourable or less favourable or to the detriment of a person, is considered objectively in the context of previous interactions between the complainant and the alleged perpetrator, and in the particular circumstances of the complainant.

¹⁶⁴ Tab 34 page 53.

¹⁶⁵ Annex 1 to Applicant’s Response to Respondent’s Response to Contentions filed in ADL024-21 filed on 15 June 2022 tab 34 page 57.

¹⁶⁶ Appendix G to affidavit Ms Boles 24 March 2023.

¹⁶⁷ Response to contentions filed on 10 November 2020 tab 11 page 43 paragraphs 1h and 17.

¹⁶⁸ *St Helens Metropolitan Borough Council v Derbyshire* [2007] UKHL 16, [27], (House of Lords) Lord Hope of Craighead, and *Sivananthan v Commissioner of Police, New South Wales Service* [2001] NSWADT 40, 41.

- [354] As Mr Gitau said in evidence, to him the words were very offensive and racist, and as a person born in Kenya and who came to Australia in 2007,¹⁶⁹ it was reasonable for him to regard the words in that way.

Schedule 6 - Ms Boles' stated views about African men

- [355] Ms Boles describes herself as an American Negro from Alabama.¹⁷⁰ It is a stark fact that in this case Ms Boles has gone out of her way to file material to explain her mistrust and dislike of African men, and she repeated this when giving evidence. Part of the reason for her mistrust comes from her experience of a previous marriage to a Nigerian man.¹⁷¹
- [356] Ms Boles' evidence discloses that she regarded the tenants as exhibiting the same type of poor behaviour and attitudes as she had perceived from Africans when she was in the USA.
- [357] I pick out some relevant paraphrased passages from the evidence and contentions:

After we first met the Applicants when they applied to live at (the unit) and before they stated they wanted a lease, I expressed my reservations about them to my spouse David Walsh ... He understood my concerns ... he said to me that being from Kenya was no reason to discriminate against the Applicants.¹⁷²

I know from my knowledge of African men that they are misogynistic. On average they do not place any importance on monogamy and it is not unusual for Africans to have multiple wives if they can afford it. They believe they are entitled to have sex with other women if their girlfriend partner or wife is pregnant¹⁷³

It is beyond dispute that Kenyan society has objectively high levels of misogynistic attitudes and actual sexual violence¹⁷⁴

I was in regular contact with people of African ethnicity who regarded Negroes as lesser people¹⁷⁵

Some Africans can have, and will express, derogatory and racist views about Negroes¹⁷⁶

I had social interactions with Africans who had moved to the USA. Without exception I found these Africans to be consistently racist and discriminatory towards American Negroes. They regarded us as inferior to them because we weren't 'pure African'¹⁷⁷

I worked in property management in Houston for 25 years and throughout that time I rented properties to African applicants. At best I found them to be barely polite and more usually condescending and dismissive towards myself and other Negro women with whom I worked.¹⁷⁸

¹⁶⁹ Signed but not witnessed affidavit of 8 May 2020 tab 3.

¹⁷⁰ Response to contentions filed on 10 November 2020 tab 11 page 49 paragraphs 30, 34.

¹⁷¹ Affidavit of 14 May 2020 tab 4 and 11 February 2022 tab 24 page 342.

¹⁷² Affidavit of 14 May 2020 tab 4 page 23.

¹⁷³ Affidavit of 30 March 2022 tab 29 page 21 paragraphs 6, 7.

¹⁷⁴ Response to respondent's response to contentions filed in ADL024-21, tab 34 page 44 paragraph 9.

¹⁷⁵ Response to contentions filed on 10 November 2020 Tab 11 page 43 paragraph 1k.

¹⁷⁶ Response to contentions filed on 10 November 2020 tab 11 page 49 paragraph 26.

¹⁷⁷ Affidavit of 14 May 2020 tab 4 page 22.

¹⁷⁸ Affidavit of 14 May 2020 tab 4 page 22.

My belief that the Applicants have a racist attitude towards myself is reinforced by the fact that both the Applicants fail to mention in their affidavits that I was present with David and participated with him in the pre-lease meeting that we had with the Applicants.¹⁷⁹

- [358] When describing her attempts to ask the tenants on 16 March 2020 (Ms Ng'ang'a) and 7 April 2020 (Mr Gitau) whether they had found a new tenant and whether they were going to leave the unit, she said the tenants said it was none of her business and:

I found the behaviour of the Applicants disgusting as well as being deeply upsetting. Their behaviour has been consistent with the racist attitudes and behaviour I have experienced during my life at the hands of the vast majority of all Africans I have ever met in the USA.¹⁸⁰

- [359] In the affidavit of 14 May 2020 Ms Boles said that the tenants acted with 'pernicious racism towards' her.¹⁸¹

- [360] At least by 25 May 2020 and I think most likely well before that, Ms Boles had decided that Mr Gitau was what she would describe as a 'bush nigga'. She explained when giving evidence that as far as she was concerned this meant that he was:

the sleaziest kind of person with no character, they have no moral context, they will do anything, they'll throw a stone and hide the hand, they always want something for nothing

- [361] Later in evidence she said that a bush nigga meant:

It's a person who wants something for nothing, they're a sleazy person, underhanded person, they'll lie in wait, they'll manipulate circumstances to get what they want. I agree it can be insulting if that's what they want to take it to be, but it is not racist. It's not about a race or ethnicity it's not about a colour, it's about a person's character. You can have crackers as bush niggas, you can have swamp niggas, you can have coon-asses – they can all be bush niggas – it's how you act and how you carry yourself. I've seen a few bush niggas here.

- [362] Ms Boles was asked in cross examination about how she had felt around Nigerian men (in the USA) and she said:

isolated – the way they believe is that women should be seen and not heard

- [363] Ms Boles was asked in cross examination why she had referred to the tenants having 'a bunch of African men around' on 28 June 2019.¹⁸² She said:

to tell what type of people was there

- [364] Ms Boles was asked in cross examination about the use of the word 'nigger' (in her upbringing in the USA) and she said:

No, we don't use that. That's an insult. The only time I hear .. or black people or Negros use the word nigger to each other or about each other - the

¹⁷⁹ Affidavit of 14 May 2020 tab 4 page 25.

¹⁸⁰ Affidavit of 14 May 2020 tab 4 page 25.

¹⁸¹ Affidavit of 14 May 2020 tab 4 page 25.

¹⁸² Affidavit of 24 March 2023 paragraph 54.

same reasons the Caucasians will use nigger – they will use it the same way: they don't want to be around them either. It's implying they don't want to be around those type of people – they give them a bad name, a bad reputation. A nigger is the type of person no anybody want to fool with. They don't want to do anything - they're lazy people. And it's a characterisation of a particular group of people which was lazy people, they didn't want to do anything, no moral compass.

- [365] It is notable that in the above passages Ms Boles does not limit her views to African men, although she does not seem to say that she holds anything against African women in general.