

ANTI-DISCRIMINATION COMMISSIONER
OF THE NORTHERN TERRITORY

No. 1 of 1999

IN THE MATTER OF

JOE ROMELO

V

DARWIN PORT AUTHORITY, DICK ADEY & DANNY GREIG

HEARING

BEFORE:	COMMISSIONER DAWN LAWRIE
COUNSEL ASSISTING:	MR PAT MCINTYRE
REGISTRAR:	MS SHARON WOON
COMPLAINANT:	MR JOE ROMELO
FIRST RESPONDENT:	DARWIN PORT AUTHORITY represented by MR ARTHUR BOLAND
SECOND RESPONDENT:	MR DICK ADEY
THIRD RESPONDENT:	MR DANNY GREIG
BASIS OF COMPLAINT:	SECTIONS 19(1)(a) AND 19(1)(k) - DISCRIMINATION ON THE GROUNDS OF RACE AND TRADE UNION ACTIVITY SECTION 23 – PROHIBITED CONDUCT OF VICTIMISATION IN THE AREA OF WORK
DATE:	21 JULY 1999

INTRODUCTION

On 14 October 1997 a delegate of the Anti-Discrimination Commissioner accepted a complaint from Mr Joe Romelo against the Darwin Port Authority (first respondent), Mr Dick Adey (second respondent) and Mr Danny Greig (third respondent) in the area of work on the grounds of race and trade union activity.

Mr Romelo made a further complaint of victimisation against the first and second respondents. On 25 November 1997 the first and second respondents were advised that a delegate of the Commissioner had accepted the complaint of victimisation.

As the matters had not been settled within six months, the complainant requested they be listed for Hearing pursuant to *section 84* of the NT *Anti-Discrimination Act 1992*, and the matter was referred to the Commissioner on 30 June 1998.

The Commissioner convened a preliminary Hearing on 20 July 1998 for the purposes of giving directions relating to the Hearing of the matter, which was set down for Tuesday 15 September 1998.

Certain matters including the decision of the Commissioner to Hear the complaints pursuant to *section 84* of the Act were appealed to the Supreme Court by the respondents, and following the dismissal of the appeals the Hearing commenced 23 March 1999.

Evidence was put before the Commissioner 23, 24, 25, 30, 31 March, and 1, 30 April 1999 with final submissions being put to the Commissioner 7 June 1999.

THE COMPLAINTS

Mr Romelo is an employee of the Darwin Port Authority, and alleged that in the area of work he had been discriminated against by the Darwin Port Authority and his supervisors Mr Dick Adey and Mr Danny Greig on the grounds of his race and trade union activity contrary to *sections 19(1)(a) and 19(1)(k)* of the *NT Anti-Discrimination Act 1992*, and that after he lodged a complaint with the Anti-Discrimination Commissioner he was victimised by the Darwin Port Authority and Mr Adey, because of having lodged the complaint, contrary to *section 23* of the Act.

The Darwin Port Authority, Mr Adey and Mr Greig denied they had individually or collectively discriminated against Mr Romelo and the Darwin Port Authority and Mr Adey denied Mr Romelo's further allegation of victimisation.

These separate matters were considered at the one Hearing, and for the sake of convenience I shall address the whole of the evidence in arriving at my separate findings.

THE LEGISLATION

The NT *Anti-Discrimination Act 1992* came into operation 1 August 1993, and makes discrimination based on race or trade union activity in the area of work unlawful, unless a specific exemption applies.

“Discrimination” is defined in the following terms:

“SECTION 20 - DISCRIMINATION

- (1) For the purposes of this Act, discrimination includes –
 - (a) any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity; and
 - (b) harassment on the basis of an attribute,

in an area of activity referred to in Part 4.
- (2) Without limiting the generality of subsection (1), discrimination takes place if a person treats or proposes to treat another person who has or had, or is believed to have or had –
 - (a) an attribute;
 - (b) a characteristic imputed to appertain to an attribute; or
 - (c) a characteristic imputed to appertain generally to persons with an attribute,

less favourably than a person who has not, or is believed not to have, such an attribute.

- (3) For discrimination to take place, it is not necessary that –
- (a) the attribute is the sole or dominant ground for the less favourable treatment; or
 - (b) the person who discriminates regards the treatment as less favourable.
- (4) The motive of a person alleged to have discriminated against another person is, for the purposes of this Act, irrelevant.”

“Victimisation” is prohibited conduct and is outlined in the Act as follows:

“SECTION 23 - PROHIBITION OF VICTIMISATION

- (1) A person shall not victimise another person because the other person –
- (a) has made, or intends to make, a complaint;
 - (b) has given, or intends to give, evidence or information in connection with proceedings under this Act;
 - (c) has alleged, or intends to allege, that a person has committed an act which would amount to a contravention of this Act; or
 - (d) has done anything in relation to a person under or by reference to this Act.
- (2) Victimisation takes place if a person subjects or threatens to subject another person or an associate of the other person to any detriment.

- (3) Subsection (1)(c) does not apply to or in relation to an allegation that is false and not made in good faith.”

Section 91 of the Act is also relevant:

“SECTION 91 - BURDEN AND STANDARD OF PROOF

- (1) Subject to this section, it is for the complainant to prove, on the balance of probabilities, that the prohibited conduct alleged in the complaint is substantiated.
- (2) Where a respondent wishes to rely on an exemption, it is for the respondent to raise and prove, on the balance of probabilities, that the exemption applies.”

THE EVIDENCE

A report pursuant to *S.77* of the *NT Anti-Discrimination Act 1992* referring the complaints for Hearing was tendered and accepted in evidence.

The contents of that report, together with the evidence presented during the hearing have been taken into account in arriving at my decision in this matter.

The complainant, Mr Joe Romero, is a man of Aboriginal descent, who has been working for the Darwin Port Authority for twenty-four years, and for the last five years has been a member of the Waterside Workers Union – prior to that he was a member of the Waterside Workers Federation. Mr Romero has been a union member for the whole of the time he has been employed by the Darwin Port Authority.

At the time of the Hearing Mr Romero had been on sick leave for fourteen months.

Mr Romero alleged that his inability to work was directly attributable to the discrimination on the basis of his race and trade union activity he had been subjected to by Mr Dick Adey and to a lesser extent Mr Danny Greig, and to victimisation by Mr Adey.

Mr Romero submitted that the Darwin Port Authority is vicariously liable for the discriminatory conduct of Mr Adey and Mr Greig.

Mr Dick Adey is Maintenance Manager for the Darwin Port Authority and Mr Danny Greig is Maintenance Foreman.

Mr Romero outlined the background and history of his complaints, and stated that the first incident of discord with Mr Adey occurred when Mr Adey was the Manager of the Wharf Precinct, before joining the Darwin Port Authority as Maintenance Manager.

This occurred on Stokes Hill Wharf, when Mr Romero was working as dogman on a forklift positioning a gangway for a passenger liner – a Mr Kenny Ewitt was the crane driver.

In Mr Romero's words, Mr Adey came "screaming down the wharf abusing me". Mr Romero felt insulted that Mr Adey should approach him as Mr Romero had been "putting gangways on ships for years" while he considered Mr Adey to be inexperienced and "out of line".

Some weeks following this altercation Mr Romero heard a rumour that Mr Adey was coming across to the Darwin Port Authority as Maintenance Manager – effectively to be Mr Romero's "boss".

A union meeting was held and Mr Romero went to Darwin Port Authority Operations Manager Captain Bruce Wilson and Deputy Chief Executive Officer of the Darwin Port Authority Mr John Butler – asking if the rumour was true. Mr Romero asserted that the customary practice of first internally advertising such a vacancy had not been followed in this case, and that as union delegate he challenged the way in which the position had been filled.

Mr Romero's evidence was supported by his witnesses, and I accept their evidence that within the maintenance section there was a level of concern and animosity generated by the way in which Mr Adey was appointed which was neither addressed nor alleviated by senior management.

It was Mr Romero's evidence that the maintenance gang met with Captain Wilson and challenged Mr Adey's appointment, at which meeting Captain Wilson apologised for the lack of adequate communication with the Maintenance Section about the appointment. Mr Romero alleged that there was considerable argument during the meeting, and that because of his strong representations on behalf of other union members, and his refusal to accept that Mr Adey's appointment was in accordance with what had been normal practice, he was subsequently singled out for unfair and discriminatory treatment.

In Mr Romero's words:

“..... if you oppose anything you're pushed to one side. You're the bad boy of the company.”

Mr Romelo then went on to outline a series of incidents which he believed demeaned him, causing him stress, anxiety and eventually leading to his inability to perform his duties due to illness.

These incidents included Mr Adey spray-painting the limbs of trees to be lopped; Mr Romelo being given a note listing his gardening duties and the time to be taken to perform them; Mr Adey “passing little yellow notes” to the Supervisor Lee Metner regarding Mr Romelo; being told by Mr Adey how to use a fire hose; being “directed” to clean drains and being “spied on” by Mr Adey while performing routine tasks; having Mr Adey take photographs of Mr Romelo’s work areas; being kept under close supervision on light duties painting whalers at Fort Hill Wharf after being certified fit to resume normal duties.

Mr Romelo was particularly distressed at the spray-painting incident, as he had won a “Keep Australia Beautiful” award for his maintenance of the Darwin Port Authority precinct. He also resented the note, or job description of his gardening duties, as he had years of experience in that area.

Mr Romelo stated that there was a “big drama” over his use of a Darwin Port Authority ute, with talk of him being seen “all over town” with the ute – however Mr Romelo had never been spoken to directly by management over this issue, but was instead constantly harassed by Mr Adey, who wanted Mr Romelo to use a quad bike to travel from the maintenance shed at Fort Hill Wharf to the Mooring Basin instead of the ute.

The maintenance staff had a roster which ensured a rotation of duties, including rubbish removal, cleaning and maintaining the grounds and toilets of the Mooring Basin some 2 km from the main Port area.

Ms Erica Seipel, the lock operator, was the supervisor.

During one of his routine lock rosters, Mr Romelo was involved in a traffic accident which resulted in three months sick leave and on his return to work Mr Romelo was, on medical advice, to be assigned light duties.

The light duties consisted of painting an area of Fort Hill Wharf. After a couple of weeks on that task Mr Romelo obtained a medical clearance and requested he be returned to normal duties. However he was informed by his immediate supervisor Danny Greig that he would continue to paint Fort Hill Wharf.

It is worthwhile quoting Mr Romelo's direct evidence, as it indicates his perception of what was happening to him:

¹Mr Romelo: "So I've come back with a certificate and I've handed it to Danny Greig, I think it was, or Lee Metner and I said, right, Lee said, go back and report to Danny Greig, he was a foreman at the time. I said, Danny, I'm back now, I want to go back to my normal duties and I'm fit to go back to work, to go back to my normal duties, and I was down the basin that time. He said, no way, mate, all you're going to do is, you're going to go back over the Fort Hill Wharf and you're going to paint the wharf, you know, because you've been a naughty boy you're going to paint the whole lot till we think you've painted the whole Fort Hill Wharf. Well, by that time – and they made it out to be a priority job, right? They made out this had to be painted. So, right, as soon as I was taken off not an ounce of paint has been on it, not an ounce of paint has been painted. But this job was a priority job. I think I spoke to Arthur Boland on occasions with this, I rung him. I said, Arthur, what's the problem, what's going on here? This job here now all of a sudden no-one's doing it. How come when I was there it was a priority job, you know, you had to do it, you've got to do it, you know, all this caper? So this is when all the – they said, of course, I'm a naughty boy, you know what I mean, I would do this, I don't do – you know, and all this caper."

Mr McIntyre: "Who said those sorts of things to you?"

Mr Romelo: "These guys. Danny Greig was one of them."

¹ Transcript of Evidence - 23 March 1999

Mr McIntyre: “What sort of things did he – what did he actually say?”

Mr Romelo: “He said because you rock the boat you are a naughty boy. I think it was in this statement I’ve give, if you have a look through it, that I’m a naughty boy and if, you know, like, if I’m going to be a naughty boy I’m going to get, you know, put over the thing for it, over the bench for it.”

About this time the roster – or pool – came up again, and Mr Romelo put in for the cleaning detail at Fort Hill. The duties included mopping the stairs of the amenities/office block on the wharf.

Mr Romelo’s supervisor, Mr Metner, received another yellow note from Mr Adey directing that Mr Romelo scrub these stairs, rather than mop them. Mr Romelo sought the assistance of Mr Brian Manning, the union organiser and the yellow note was binned and the directive to scrub was withdrawn.

Mr Romelo alleged that Mr Adey took photographs of the work he had performed, causing further distress.

Mr Romelo and some of his colleagues then met with Arthur Boland and outlined their grievances against Mr Adey. At that time Mr Boland was Assistant Secretary (Corporate Services) for the NT Department of Transport and Works.

The Chief Executive Officer of Transport and Works, Mr Paul Tyrrell, was also Chief Executive Officer of the Darwin Port Authority.

Mr Romelo believed that Mr Boland would be able to settle things down, however there was no improvement, despite several approaches to Mr Boland.

Mr Romelo then approached the Hon Mick Palmer MLA, who was acting Minister for Transport and Works outlining his concerns. In particular, Mr Romelo was unhappy about Mr Adey’s decision to take the work utility and

allocate a quad bike to the maintenance gang for travel between Fort Hill and the Mooring Basin. Mr Romero believed this action was specifically aimed at him, to denigrate him.

There was a union meeting called, and the decision was taken that members would refuse to use the quad, on the grounds that it was unsafe.

Mr Romero alleged that in a further effort to humiliate him, Mr Adey then ordered the fabrication of a trolley which could be used to carry cleaning gear around the Mooring Basin. When Mr Romero went into the workshop, persons unknown had hung a sign "Joey's trolley" on the offending piece of equipment, which caused further distress and embarrassment.

It was at this stage that Mr Romero had approached the Acting Minister for Transport and Works, (Hon Mick Palmer MLA) who, according to Mr Romero's evidence, spoke to the Chief Executive Officer, Mr Paul Tyrrell, on Mr Romero's behalf.

It was Mr Romero's belief that the Minister requested that he (Mr Romero) was to be left alone, however the harassment is alleged to have continued, as a result of which he had become severely stressed and had been unable to work for some fourteen months. Mr Romero related the harassment back to

his original altercation with Mr Adey, voicing his objections and in particular his role as a union delegate in raising the manner of Mr Adey's appointment with Darwin Port Authority management.

Mr Romero runs a small security company and he believed his race was a factor in action taken against him because of his failure to seek approval for outside employment – in essence Mr Romero believed that there was a culture of opposition to a person of Aboriginal and Torres Strait Islander descent running a successful business.

Events following an oil spill were also put forward as evidence of Mr Romero being unfairly singled out and harassed by Mr Adey.

It was alleged Mr Adey went looking for Mr Romero to assist in cleaning up the spill but failed to find him as Mr Romero was clearing rubbish from the extreme end of the Mooring Basin at the time.

He was reported by Mr Adey for being "off the job" but was subsequently cleared of the charge.

Mr Romero stated the third respondent, Mr Greig, was used by Mr Adey as a conduit to convey instructions to Mr Romero which were part of the pattern of harassment, that Mr Greig made racially derogatory statements and that the continual demeaning conduct and harassment was because of Mr Romero's actions in putting forward the views of union members to management.

In summary in his evidence in chief Mr Romero outlined a series of allegations of intimidation, harassment and victimisation culminating in his being unable to continue working at the Darwin Port Authority due to ill health.

Mr Boland (for the Darwin Port Authority) pursued the issue of just who was the union delegate, and the means by which the Darwin Port Authority was formally notified. While this matter remained unresolved, it was not disputed that at times Mr Romero acted as a spokesperson for his fellow employees.

With Mr Romelo under cross examination from Mr Boland, there was considerable time devoted to the consideration of just when the undisputed discord between Mr Romelo and Mr Adey commenced; Mr Adey's transfer from the Department of Transport and Works to the Darwin Port Authority; and the management and operation of Mr Romelo's security company, JR Security. These issues were raised throughout the Hearing of the various allegations of discriminatory conduct.

With the assistance of Mr Boland, a number of documents relating to the appointment of Mr Adey to the position of Maintenance Manager at the Darwin Port Authority were produced, including references to the *Public Sector Employment and Management Act*.

However, the matters before me were pursuant to the NT *Anti-Discrimination Act*, not the *Public Sector Employment and Management Act*, and as it is not disputed that Mr Adey's appointment caused resentment among some Darwin Port Authority employees, and that Mr Romelo took the matter up on their behalf with management, whether or not the correct public sector procedures were followed is largely irrelevant. The only relevant factor in this issue is whether Mr Romelo's approaches to management as a union delegate or spokesperson, resulted in his suffering unlawful discrimination and any detriment.

Mr Boland also addressed the issue of Mr Romelo's non-compliance with the requirement under the *Public Sector Employment and Management Act* to seek permission to engage in outside employment, and the following exchange illustrates the point each party sought to make:

²Mr Boland: "I concede that after that you did submit an application to engage in outside employment."

Mr Romelo: "Thank you, Mr Boland."

² Transcript of Evidence – 23 March 1999

Mr Boland: “My purpose, Mr Romelo, is to put to you that you are not somebody who adheres to the rules. You are not somebody who does as they’re told. You are somebody who does as they please and that is why you have to be supervised, because you just won’t do it otherwise.”

Mr Romelo: “What, for 23 years you’re telling me, Arthur, that I haven’t done that?”

Mr Boland: “I’m talking about a period – and I think I’m within the subject period – I’m talking about a period from mid 1997 to early 1998 when you say you were subject to victimisation. What I’m putting to you is that you are not subject to victimisation, not on the basis of your colour or your trade union activity, you were subject to scrutiny because you wouldn’t play the game, because you wouldn’t obey the rules.”

Mr Romelo: “That’s your opinion.”

During the proceedings I received evidence, which I accept, on changes to established waterfront practices instituted by senior management to improve the efficiency of the Port, including references to “multi-skilling” of the workforce.

As part of that process was a performance development program (PDP) was run by the Darwin Port Authority for its employees.

A memo from Mr Dick Adey was sent to Joe Romelo, Tony Walsh and Kevin O’Donoghue informing them of their PDP interviews however they refused to attend with Mr Adey whom they considered to be the “new boy” at the Darwin Port Authority and they were subsequently interviewed by Captain Bruce Wilson.

Mr Boland, on behalf of Darwin Port Authority, was consistent in portraying the considerable changes instituted by Mr Adey, including directions given to Mr Romelo regarding his duties, as changes instituted as part of the overall reforms taking place.

The complainant, Mr Romelo, was just as consistent in his evidence that he was being subjected to discriminatory conduct and harassment by Mr Adey because of his union activities and race, and for having lodged a complaint with the Anti-Discrimination Commission.

What was evident from the proceedings was the unrelenting and increasing hostility between Mr Adey, the new Maintenance Manager, and Mr Romelo, the long-term worker. Further, it is clear that this hostility was made known to Minister Palmer MLA, the Port Authority Chief Executive Officer Paul Tyrrell, Captain Wilson, Captain Butler, Arthur Boland and most, if not all of the workforce at the Darwin Port Authority.

One of the recurrent issues raised by all parties was the purchase of a quad bike on the recommendation of Mr Adey for use by maintenance staff, in place of a ute which had been used for that purpose and which, it was alleged, Mr Adey had wanted for his (official) use.

Following representations from Mr Romelo, Mr Boland ordered an occupational health and safety assessment on the proposed use of the quad.

It is undisputed that the quad has remained in a shed at the Darwin Port Authority and has not been used for the purpose for which it was purchased.

The second respondent, Mr Adey, outlined his work experience before joining the Darwin Port Authority, including time spent with the Roads Division, Department of Transport and Works. This work included bush work, and Mr Adey referred to the method of taping, or marking trees and vegetation in the survey of road reserves. It is accepted that this is a procedure with which Mr Adey is familiar. Mr Adey stated he used this procedure in deciding which trees at the wharf precinct were to be lopped by Mr Romelo as part of the normal maintenance duties.

Mr Adey stated the tree(s) had not been lopped, and when he enquired as to why, he was told his instruction to Mr Romelo should have been addressed through the acting foreman, Mr O'Donoghue – as the correct “chain of command”. Mr Adey referred to

the hostility of the three maintenance people, describing Mr O'Donoghue as "uncooperative", "abrasive" and "obnoxious". He described another of the maintenance crew, Mr Walsh, as "lazy".

Mr Adey also described Mr Walsh as "provocative", and a person who has failed to accept the concept of multi-skilling.

Mr Adey made a lengthy submission, but much of the material Mr Adey put to me in evidence was either irrelevant or hypothetical – such as what Mr Adey may or may not have done in certain circumstances in his previous experience with Roads Division.

In relation to the original placing of the gangway incident, Mr Adey spoke at some length about the noise and confusion which can occur when a ship comes alongside the wharf, and stated that if he had wanted to engage Mr Romero's attention he would have had to shout and wave at him.

However, as Mr Adey also stated he could not recall this incident, his evidence as to what might have happened was unconvincing.

In addressing the complaints made by Mr Romero, Mr Adey stated the issue of the lopping of the trees had caused him considerable concern, as the job had first been delayed and secondly poorly done with whole branches being cut off by a chain saw, creating a traffic hazard. Mr Adey denied having given Mr Romero a note detailing his gardening duties and the time to be taken to perform them.

Mr Adey denied having behaved in a discriminatory manner towards Mr Romero either on the grounds of race or trade union activity, or victimising him. Mr Adey dismissed suggestions by witnesses that he had been in the habit of driving past the "Grey Collar" Club with his "eyes right" to check on Mr Romero, pointing out that there was a T-junction and traffic in the area, and in addressing the issue of the scrubbing of the steps to the office/amenities area Mr Adey went into some detail regarding the need for the area to be clean on any particular day.

Mr Adey alleged that Mr Romelo was lazy and had a poor work ethic. He mentioned Mr Romelo's use of a mobile phone, surmising it was for sending or receiving private calls, and vaguely remembering a visitor in a blue ute speaking with Mr Romelo during work hours.

In response to questions by Counsel Assisting, Mr McIntyre, Mr Adey gave further extensive evidence of his difficulty in dealing with Mr Romelo, including referring Mr Romelo for counselling, and his efforts to change the work practices in place at Darwin Port Authority since his recruitment as Maintenance Manager.

The issue of the quad bike and the trolley was raised, and it was Mr Adey's evidence that the trolley was to be used to cart cleaning materials around Stokes Hill/Fort Hill Wharf, and the Mooring Basin.

The quad bike was to be used to travel from Fort Hill to the Mooring Basin, a distance estimated by Mr Adey to be approximately 1 kilometre, on a public road with relevant speed signposts.

Mr Adey was cross-examined by both Mr Romelo and Mr Boland, and in response to Mr Boland, Mr Adey indicated that if the quad bike was used to travel between Fort Hill Wharf and the Mooring Basin the distance at which the speed limit would be 60 kph would be between 500-600 metres – other speed limits being 20 kph or 40 kph.

Mr Adey clarified that the trolley was not being used at the time of the Hearing, nor was the quad bike.

The third respondent, Danny Greig is a Maintenance Foreman with the Darwin Port Authority and has known Mr Romelo for approximately 25 years. Mr Greig denied having discriminated against Mr Romelo on the grounds of trade union activity and/or race. (Mr Greig is not a party to Mr Romelo's complaint of victimisation).

Mr Greig's evidence was brief and to the point, and he impressed me as an honest and credible witness.

The complainant, Mr Romelo, called the following witnesses:

Tony Walsh

Kevin O'Donoghue (by telephone)

Minister Mick Palmer MLA (by telephone)

Erica Seipel

Joe Clarke

Lou Saracini

Marros "Smokey" Archibald

Neville Shields

Ken Hewitt

The respondents, Darwin Port Authority, Mr Adey and Mr Greig called the following witnesses:

Joe Ordogh

Captain Bruce Wilson

John Butler (by telephone)

Ron Harbick

Cheryl Day.

All of the witnesses attested to the hostility between Mr Romelo and Mr Adey, but put differing views as to why such hostility existed, whether the conduct of Mr Adey towards Mr Romelo was one of persecution and harassment, or whether it was a legitimate managerial response to poor work performance and practice.

It is clear from the evidence that the management of the Darwin Port Authority was under pressure to implement reforms which would bring greater efficiency to the Port, particularly as their performance was under review in considering who, or what organisation, would be given control of the new Port at East Arm.

While the day to day management of the Port rested with senior officers at the Darwin Port Authority, the Chief Executive Officer (CEO) was Paul Tyrrell, the CEO of the Department of Transport and Works, who was physically remote from the Port. Similarly the effective development and implementation of equal employment opportunity (EEO), recruitment and training programs was coordinated by an officer attached to Department of Transport and Works, not the Darwin Port Authority. Mr Arthur Boland who was approached several times by Mr Romelo, is the Assistant Secretary (Corporate Services) Transport and Works, and is also physically remote from the Port. Simple questions as to who was responsible for

ordering/authorising vehicles for the Port Authority elicited somewhat convoluted responses from witnesses, and it is in this context that I consider the evidence of the witnesses, whose perceptions of events differed in so many respects.

One such example is the witnesses evidence relating to the “washing down” procedures following the bulk loading of iron ore. Mr Romelo was ordered to participate in this task, which is a “dirty job”. He and Joe Clarke did so, and Mr Clarke stated that both Mr Adey and Captain Wilson were present which Mr Clarke considered unusual – while Captain Wilson and Mr Adey’s evidence was that they were there to ensure this particular procedure was carried out promptly and efficiently because of some environmental concerns which had been raised in the media. Mr Romelo’s witnesses were more skeptical, one describing the presence of Mr Adey and Captain Wilson as a “set-up”, and evidence of the harassment of Mr Romelo.

On this issue I found Captain Wilson to be defensive and somewhat unconvincing, and I believe his presence during the wash down procedure to be indicative of the unusual and close attention being shown to Mr Romelo by Mr Adey and senior management.

I have carefully considered the evidence of the witnesses called by the respondents, and while I believe they gave an honest account of events as they saw them, including the difficulties of introducing reforms to long standing practices, I do not consider much of the evidence to be particularly helpful in addressing the issue of whether the treatment of Mr Romelo by Mr Adey (and to a lesser extent Mr Greig) was unlawful as alleged by Mr Romelo.

Mr Ordogh is a leading hand motor mechanic employed at the Darwin Port Authority for the last 29 years. Mr Ordogh said in his opinion Mr Romelo performed poorly “as a team” and would leave his workplace without telling

his workmates or superiors where he was going. Mr Ordogh has spent most of his 29 years service in the garage, and under questioning from Counsel Assisting stated that Mr Romelo had never worked in the garage, and they only worked together occasionally on bulk loading duties. Mr Ordogh agreed Mr Romelo would act as spokesperson for union members from time to time.

In his evidence the Operations Manager Captain Wilson referred to the challenge to improve the work practices in place at the Port, which he described as rorts and laziness. Captain Wilson referred to Mr Adey as a very enthusiastic man, with whom he could work to change the work practices. Captain Wilson referred to a small core of three who were lazy and did not like authority, and named them as Joe Romelo, Tony Walsh and Kevin O'Donoghue. Captain Wilson went on to describe Mr Romelo as "not very intelligent" and "against authority". Captain Wilson referred to the disciplinary action he had taken against other Darwin Port Authority workers, whom he stated had come on line, but he had not had the same success with Mr Romelo, whom he considered resistant to change. Captain Wilson was scathing in his comments regarding previous middle managers at the Darwin Port Authority, including a previous Harbour Master, stating he had to sort out middle management and senior management before he could get down to maintenance staff.

Captain Wilson had been impressed by Mr Adey and put in the request for Mr Adey to transfer from his position at the precinct to the Darwin Port Authority – with the brief to assist him change work practices.

Captain Wilson referred to the friction between Mr Romelo and Mr Adey, and said he told Mr Adey to keep as far away as possible from Mr Romelo.

While Captain Wilson had given Mr O'Donoghue a written warning regarding his employment, he was not aware of any such warning having been given to Mr Romelo, nor of any counselling regarding his job performance.

Mr John Butler, now retired, had been deputy Chief Executive Officer of the Darwin Port Authority – as Port Manager.

Mr Butler's evidence also went to the need for increased productivity and changed work practices, and the resistance of some workers, including Mr Romelo, Mr O'Donoghue and Mr Walsh.

Mr Butler had been responsible for the overseeing of the harassment policy in place at the Darwin Port Authority, but did not become directly involved in Mr Romelo's allegations of harassment against Mr Adey as he considered Mr Romelo had taken the issue out of his hands by going to Mr Boland.

I accept Captain Wilson's clear unequivocal evidence that on taking up his appointment Mr Adey had been briefed on the need to reform the work practices, and it is clear from the evidence that Mr Adey felt the attention he was showing to Joe Romelo was an essential part of that process. On the evidence of Captain Wilson, Mr Adey had been briefed on a "small core of people" who had trouble changing their ways. Captain Wilson said that he didn't think he mentioned specific names, but I also find that statement unconvincing.

Minister the Hon Mick Palmer was called as a witness by Mr Romelo. Mr Palmer confirmed he had been approached by Joe Clarke who raised the use of the quad bike as a safety issue, and the Minister also remembered a similar conversation with Mr Romelo. He advised that his procedure would have been to pass those concerns on to the relevant Minister.

Throughout proceedings, Mr Romelo had been variously referred to as "lazy", "uncooperative" and "provocative" by Mr Adey and Darwin Port Authority management and I have taken the evidence of Mrs Erica Seipel into account in considering and assessing these remarks.

Mrs Seipel operates the lock at the Mooring Basin, and was Mr Romelo's supervisor when he was assigned cleaning duties at the basin.

Mrs Seipel stated, *inter alia*:

“I think if this is about work performance I had no problems at all with his working. He was very quick, he got his work done. I was quite cranky at first when I thought I was getting Joe because you do hear stories and I actually complained that he was being sent down to me but I had to go back and eat my words because when he did come down he worked really well. I had no problems at all. As for the racial bit, I have never come across any racism in the Port, unless someone can refresh my mind but I don’t believe there has been any racism.”

and in response to a question from Mr Romelo who referred to the “dramas” he had had with Mr Adey, Mrs Seipel stated:

“I think there was a problem with Joe. Dick did seem pretty keen to find out where he was all the time and probably where I thought it may have been a little bit unfair, there were other blokes also who weren’t always on the job that were being left alone and maybe – I think in a way and with no respect (*sic*) to Dick because he’s a hard worker, he just was little bit obsessed with Joe. I just”

Mrs Seipel also stated that having been in supervisory roles herself:

“I can understand how hard it is for Dick as well as Joe’s problems, you know. I feel that – pretty soft with both of them I guess.”

Mrs Seipel said she knew of Mr Romelo’s union activities as a delegate, that he had long been a delegate, and that as a delegate:

“He’d listen to complaints from the workers and go to management, make sure that the workplace is safe and basically that’s it.”

Mrs Seipel was herself a delegate for administrative staff, and referred to Captain Bruce Wilson as “very good” and “very understanding”.

In explaining what she meant by Mr Adey being “obsessed” with Mr Romelo, Mrs Seipel said:

“Well, I think somewhere along the line there had been an argument and I think Dick sort of just didn’t like Joe and sort of – I don’t know. I just felt that Joe was being ridden and I won’t say that it may not have been warranted but I will say that there are other people who should have been treated the same.”

Mrs Seipel knew of the controversy over the proposed use of the quad to travel to the Mooring Basin, and expressed her concern that with cars speeding in the area such a proposal was dangerous.

In answer to a question from Mr Boland (Darwin Port Authority) Mrs Seipel repeated her statement about her initial misgivings on having Mr Romelo assigned to her area – and said that she had been misled and went on to describe Mr Romelo as very good, a fast worker, and that she had not had any problems with him.

In answer to direct questions from Mr Boland, Mrs Seipel stated she had not seen either Mr Greig or Mr Adey take action against Mr Romelo on the basis of his race or trade union activity.

I have quoted Mrs Seipel’s evidence at some length as I found her to be a straightforward, honest and reliable witness, without discernable bias, a person who had supervised the complainant Mr Romelo, and who was also aware of the difficulties facing managers and supervisors during a time of change.

I found Mr Romero's other witnesses to be honest, direct and forthcoming and for the most part, extremely critical of Mr Adey. However, I consider their obvious personal antipathy and resentment towards Mr Adey was largely irrelevant to the proceedings and my decision in these proceedings. It's only relevance is whether Mr Adey's personal opinion of Mr Romero led to unlawful discrimination and harassment of Mr Romero. I have taken account of the witnesses testimony as to Mr Romero's good work as a gardener and cleaner, and his activities in taking up issues with management on behalf of his fellow workers. I also noted their evidence as to comments made by Mr Greig and Mr Adey regarding "coloured blokes".

Several of these witnesses were clear in their recollection of Mr Romero being given a note detailing his gardening duties and their time frame – which was denied by Mr Adey. This was perceived as unnecessary, insulting and demeaning to Mr Romero, who was regarded by his peers as a good worker, who had won a gardening award for the Darwin Port Authority. On the evidence before me, and having observed the demeanor of all parties, I prefer the evidence of Mr Romero and his witnesses to that of Mr Adey.

I have placed particular reliance on the evidence of Joe Clarke, a labourer at the Darwin Port Authority. Mr Clarke was clear in his recollection of a detailed note outlining his gardening duties being given to Mr Romero, and was equally clear in the events surrounding the cleaning of the drain at which Captain Wilson was present – the first time Mr Clarke had ever known Captain Wilson to be "on the job" on the wharf.

It was Mr Clarke's evidence that Mr Adey "humbugged" only Joe (Mr Romero) – that Mr Adey was "gunning" for Mr Romero, that he was obsessed by Mr Romero and hounded Mr Romero. Mr Clarke also said that during a smoko break at the "Grey Collar Club" Mr Greig said "we've got a guy that's going to shaft Joe Romero and his name's Dick Adey".

Mr Clarke was unshaken in his evidence that in driving past the Grey Collar Club, Mr Adey would always look to see if Mr Romero was there (the "eyes right"), if Mr Romero was known to be in the vicinity.

Mr Clarke was a most impressive witness. I found him honest, forthright and sincere, and where there is a conflict I prefer his evidence to that of Mr Adey.

Similarly, Mr Saracini referred to a campaign to “out Joe, to break him, to belittle and demean him”.

I have taken into account witnesses’ responses to Mr Boland’s questions as to whether they had directly observed Mr Romelo being discriminated against and have weighed up those responses in light of the bulk of their evidence.

Given the large amount of evidence presented on the issue of the proposed use of a quad bike, the cleaning of certain areas including the Mooring Basin, tree-logging, the painting of the wharf by Mr Romelo while on light duties and the position of the Grey Collar Club, a site inspection was arranged and took place 31 March 1999. All parties, the Registrar Ms Sharon Woon, Counsel Assisting Mr Patrick McIntyre, and my Personal Assistant Mrs Karyn Jessop were present.

The site inspection was useful in clarifying the scope and range of duties undertaken by Mr Romelo, the traffic around the Grey Collar Club, the area of the “whaler” on Fort Hill Wharf painted by Mr Romelo, the distance from the Mooring Basin to Fort Hill and the traffic likely to be encountered on that journey.

Odometer readings indicate the distance from the rubbish bin area at the boat ramp to the southern extremity of the Mooring Basin to be

1.1 kilometres, and it is a further 2 kilometres to the maintenance shed. This is proportionately considerably further than the distance quoted by Mr Adey.

There is considerable traffic in the area, including trucks, tankers and large commercial vehicles.

I find Mr Romelo's strenuous objections to the use of a quad bike to travel in this area to be entirely reasonable, and there is considerable doubt in my mind as to the reliability of Mr Adey's evidence on this issue.

The trolley referred to in evidence was also produced as an exhibit. It did little to add to the credibility of the respondents representations as to its efficiency.

Throughout the Hearing I received evidence as to Mr Romelo's involvement with a private security company. This Hearing relates to Mr Romelo's employment with the Darwin Port Authority, and any detriment he may have suffered because of discrimination while so employed. His outside employment is largely irrelevant to the issues at hand. It's only relevance is whether this outside employment impacted on his ability to perform his duties at the Darwin Port Authority. While Captain Wilson and Mr Adey were critical of Mr Romelo's outside employment activities, they did not put in place any of the counselling and disciplinary procedures available to them under the *Public Sector Employment & Management Act*.

SUBMISSIONS

Mr Romelo produced a report from Dr Ian Jackson, a psychiatrist, prepared at the request of Cridlands Lawyers acting for the Darwin Port Authority in a Work Health Claim.

The respondents objected to the document being received, and after carefully considering their objections and the submission of Counsel Assisting I received the document in evidence and have considered it in my decision as to what detriment, if any, Mr Romelo suffered as a result of any prohibited conduct on the part of the respondents.

In his final submission Mr Romelo outlined the detriment he claimed to have suffered as a result of the alleged discrimination, and sought orders including compensation for medical expenses, legal fees, loss of salary, and hurt, humiliation and distress. Mr Romelo further sought an order requiring the respondents not to repeat or continue the prohibited conduct, a written apology from the respondents and an order requiring the first respondent to move the complainant (Mr Romelo) to a position where he would not fall under the supervision of the second respondent, Mr Adey. Mr Romelo tendered accounts of medical and legal costs in support of his claim.

Mr Boland put final submissions on behalf of the three respondents. Mr Boland submitted that the issues placed before me were industrial issues which should not have attracted the jurisdiction of the NT *Anti-Discrimination Act*, that matters outside the complainants points of claim should not be considered, and Mr Boland then referred in some detail to the evidence, which he submitted did not support Mr Romelo's allegations. Mr Boland referred to the second respondent, Mr Adey, as a man of "fair dealing" who on coming to work for the Darwin Port Authority had not been given a brief to "get" Joe Romelo, but had had to deal with an individual Mr Boland described as recalcitrant – that is, non-complying, obstinate and resistant to change.

Mr Boland submitted that there was no evidence before me to support Mr Romelo's claims, and further submitted that, theoretically, to move

Mr Adey would place his employment in the NTPS in jeopardy. Similarly there would be a problem in placing Mr Romero elsewhere.

Mr Boland did not make a final submission on the issue of vicarious liability, but referred to previous submissions by the Darwin Port Authority on this issues.

For the purposes of clarity I shall deal with that issue separately. Given its importance, I am adopting the somewhat unusual procedure of quoting the submissions put to me in full:

“Submissions of the Darwin Port Authority (“The Authority”) on Issue of Vicarious Liability (dated 13.4.99)

1. - The *Anti-Discrimination Act* (NT) prohibits discrimination by “persons” and specified bodies. Liability of an employer for breaches of the Act by an employee is not provided for under the Act.
 - The predominant use of the word “person” through out the Act is indicative of a legislative intent that, unless otherwise specifically provided for, the Act is intended to censure individuals for prohibited conduct.
2. - Messrs Adey and Greig are not employed by the Darwin Port Authority.
 - The Authority is a statutory corporation created pursuant to section 6 of the *Darwin Port Authority Act* (NT) 1983. Pursuant to sections 17 and 5 of that Act, officers of the Authority are

“employees” within the meaning of the *Public Sector Employment and Management Act* working in service of the Authority.

- As Public Sector employees, Messrs Adey and Greig are employed by the Commissioner for Public Employment pursuant to section 12 of the *Public Sector Employment and Management Act*.
- 3. - An employer will never be vicariously liable for conduct of an employee falling outside the scope of that employee’s employment or authority.
 - “Prohibited conduct” (as defined) by a foreman, supervisor or member of management at the Authority must fall outside the scope of that employee’s employment/authority in the absence of evidence establishing that such prohibited conduct was sanctioned by the employer – see *Lloyd v Grace, Smith & Co.* (1912) AC716; *Lackersteen v Jones* 92FLR 45-47.
 - There is no evidence that the Commissioner for Public Employment (or the Authority for that matter) sanctioned prohibited conduct by employees.
 - At all material times Messrs Adey and Greig were:
 - (a) liable to disciplinary action under Part 8 *Public Sector Employment and Management Act* for breaches of discipline including, inter alia, harassment of another employee (section 49g);
 - (b) subject to the Authority’s comprehensively publicised Harassment Policy and grievance procedure promulgated pursuant to Public Sector Employment and Management Act employment instruction number 8 as a document of

“best practice” (see evidence of CEO John Butler 29 March 1999).

4. - Not having been made a respondent to Mr Romelo’s complaints, the Commissioner for Public Employment cannot be held to be vicariously liable for the alleged acts of his employees.”

Submission of Mr Romelo dated 19 October 1998:

“Submissions of Romelo on Issue of Vicarious Liability

The Darwin Port Authority is a “person” within the meaning of that term in the *Anti-Discrimination Act*.

The *Interpretation Act* (NT) section 19 provides:

In any Act –

.....

“person” and “party” include a body corporate and a body politic.

There is no provision to the contrary in the *Anti-Discrimination Act*. Subsection 4(7) presumes this general and usual construction of the word “person” because it extends the meaning to include unincorporated associations. It is submitted that the word “person” clearly includes a body corporate such as the Darwin Port Authority which obtains its corporate status from section 6 of the *Darwin Port Authority Act* (NT).”

“The Respondents cannot escape liability by seeking to confuse the issue of who employs Adey and Greig.

If Messrs Adey and Greig are not employed by the Darwin Port Authority, clearly they act under the direction of the Port Authority and are its agents (if not its servants) in all matters concerning the employment of persons such as Romelo by the Port Authority. Consider the following legislation:-

The Darwin Port Authority Act

Section 17(2) Without limiting the generality of subsection (1), the Port Authority has power to –

...

- (t) appoint officers who are employees, for the purposes of carrying out the powers and functions vested in it under this Act; ...

5. INTERPRETATION

- (1) In this Act, unless the contrary intention appears –

“employee” has the same meaning as it has in the *Public Sector Employment and Management Act*; ...

The PSEM Act

Section 3(1) In this Act, unless the contrary intention appears -

“employee” means a person employed in the Public Sector, other than the Commissioner or a Chief Executive Officer’ ...

“Public Sector” means all the Agencies; ...

“Agency” means a Department or other unit of administration of the Public Service of the Territory established under section 7 or continued in

existence, as an Agency, by the *Public Sector Employment and Management (Transition and Savings) Act* or an organisation specified in Schedule 1; ...

[Note: the Darwin Port Authority is not specified in Schedule 1; it could not have been established under section 7 of the PSEM Act as it was established under its own Act; and it was not continued in existence under the Transition Act because its continued existence is the result of the operation of its own Act. See section 5 of the Transition Act.]

The Transition Act

Section 5 All departments and other units of administration of the Public Service **in existence under the repealed Act** immediately before the commencement of this Act continue in existence as Agencies under their respective names on that commencement as if they were duly established on that commencement under section 7 of the Principal Act.

The effect of this legislation is that persons appointed as officers of the Port Authority under para 17(2)(t) must be persons employed in the Public Sector. Presumably they will remain so after their appointment as officers.

The argument of the Respondents is a barren one, however. Quite clearly the officers of the Authority are subject to the direction of their CEO who is in turn subject to the direction of the Minister. The Port Authority is a body corporate and may be sued. If the Port Authority is arguing that it is technically not the employer of

Messrs Adey and Greig, and therefore is not responsible for their actions, then that argument must fail because of the following provisions of the Port Authority Act. They show that the Port Authority is constituted by the CEO who then carries out the functions of the Port Authority by either personal action or delegation of powers and functions. While there is no requirement that functions be delegated to “employees” as defined under the Act, clearly the general practice would be to delegate to employees or agents.

Port Authority Act

7. CONSTITUTION OF PORT AUTHORITY

- (1) The Port Authority shall be constituted by the Chief Executive Officer.
- (2) The establishment of the Port Authority is not affected by reason only of there being a vacancy in the office of the Chief Executive Officer.

8. CHIEF EXECUTIVE OFFICER

- (1) The Minister shall appoint a person to be the Chief Executive Officer.
- (2) [Omitted]
- (3) Subject to this section, the Chief Executive Officer holds office on such terms and conditions as the Administrator determines.

10. DELEGATION BY CHIEF EXECUTIVE OFFICER

- (1) The Chief Executive Officer may, by instrument in writing, delegate to a person any of his or her powers and functions under this Act, other than this power of delegation.
- (2) A power or function delegated under this section, when exercised or performed by the delegate, shall, for the purposes of this Act, be deemed to have been exercised or performed by the Chief Executive Officer.

15. MINISTERIAL CONTROL

- (1) The Port Authority, in the exercise of its powers and the performance of its functions, is subject to the directions of the Minister.

17. (2) Without limiting the generality of subsection (1), the Port Authority has power to –
- ...
- (e) appoint agents; ...

Thus, there is no need to prove vicarious liability. The Port Authority acts through its officers and agents, and through one mechanism or another, acted through Adey and Greig. If the Darwin Port Authority wishes to allege that particular acts by Adey and Greig fell outside of their delegated authority or directions from the CEO, then it is for it to do so such that those acts can be analysed. It is insufficient for it to say that the Commissioner for Public Employment did not sanction prohibited conduct while ignoring its own primary role in directing the actions of its officers.”

Submission by Counsel Assisting, Mr McIntyre dated 27 April 1999:

“2/. Submissions as to ‘Vicarious Liability’ of the First Respondent

2.1 The Respondents’ submission as to the correct construction of the Act is contrary to *S.19 Interpretation Act*.

2.2 In any event to accept the Respondents’ construction would be to deprive Sections 4(7), 5 and 97 of all meaning. Such a construction should be rejected. (**DPA & Ors v Anti-Discrimination Commission**, Unreported, NT Supreme Court, Bailey J, 9th Feb. 1999).

2.3 Whether or not the First Respondent is the employer of the Second and Third Respondent, it remains open on the evidence for the Commissioner to find that they were the servants or agents of the First Respondent which is sufficient to give rise to vicarious liability for their alleged prohibited conduct. (See for example **Morgans v Launchbury & Ors** (1973) A.C. 127 per Lord Wilberforce @ p135:

“...The owner ought to pay, it says, because he has authorised the act or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor’s conduct...”

2.4 By virtue of *S.73* of the Act the Commissioner may join the Commissioner for Public Employment should the Commissioner be satisfied that the said Commissioner for Public Employment is in fact the employer of the Second and Third Respondents.

2.5 The Respondents’ third submission on vicarious liability fails to make the necessary distinction between conduct of an employee, servant or agent;

- 2.5.1 that is authorised expressly or impliedly or so connected with authorised conduct as to be an improper mode of performing it; and
- 2.5.2 conduct outside the scope of the service of the employee servant or agent.
- 2.6 The Crown does not escape vicarious liability in the circumstances of 2.5.1. (See **Commonwealth of Australia v Connell** 1986 5 NSWLR 218; see also the general discussion of Vicarious Liability: Crown Servants, CCH Australian Torts Report 1-940).
- 2.7 **Lackersteen v Jones** 92 FLR 45-47 is an example of 2.5.2. It is not authority for the Respondents' submission that the Third Respondent cannot be vicariously liable for the acts of the Second and Third Respondents.
- 2.7 Neither is it necessary to establish that the Commissioner for Public Employment sanctioned the alleged prohibited conduct.
- 2.8 The matters set out at paragraphs 3(a) & (b) are immaterial to this issue.
- 2.9 It is open for the Commissioner on the evidence to find the First Respondent vicariously liable for the prohibited conduct of the Second and Third Respondents (subject to issues of credibility)."

In his final submission Counsel Assisting further addressed this issue, submitting that:

- the Crown is bound by the Act (*section 5*)
- the first respondent is bound by the Act

- the Act extends further than the usual definition of “person” in the NT *Interpretations Act* by virtue of *section 4 subsection 7*, which extends the Act to unincorporated associations.

I have carefully considered all the evidence put to me on the matter of vicarious liability, including cited cases, and I am of the opinion that if I find the second and third respondents have engaged in prohibited conduct it is open to me to find the first respondent vicariously liable.

Counsel Assisting addressed several sections of the Act, in particular to *section 19* which outlines the grounds of discrimination covered by the Act, including race and trade union activity.

Counsel Assisting drew my attention to *section 20* of the Act, in particular *section 20(1)(b)*:

“For the purposes of the Act discrimination includes harassment on the basis of an attribute.”

Section 20, sub-section (3) says that:

“For discrimination to take place, it is not necessary that the attribute is the sole or dominant ground for the less favourable treatment.”

Sub-Section (4) of that section says that:

“The motive of a person alleged to have discriminated against another is for the purposes of this Act, irrelevant.”

and to *R v Equal Opportunity Board and Another* (1985) VLR at page 317, decision of Nathan J where, on page 323 he says this:

“It is an act of discrimination to deny to an employee a benefit connected with the employment such as accrues to other employees. A benefit of

employment is the entitlement to quiet employment, that is the freedom from physical intrusion, the freedom from being harassed, the freedom from being physically molested or approached in an unwelcome manner.”

Counsel Assisting also referred to *section 31(2)(d)*:

“A person shall not discriminate by treating a worker less favourably in any way in connection with work.”

and *section 91*:

“Subject to this section it is for the complainant to provide on the balance of probabilities that the prohibited conduct alleged in the complaint is substantiated.

Sub-section (2):

Where a respondent wishes to rely on an exemption it is for the respondent to raise and prove on the balance of probabilities that the exemption applies.”

Counsel then addressed points of procedure raised by the respondents, and pointed out the inquisitorial nature of the Hearing, and my powers to include inferences on the basis of the matters put before me in arriving at findings of fact.

Counsel went through the evidence, drawing my attention to inconsistencies, and conflicting evidence from the large number of witnesses called in this matter, such as the direct evidence of Mr Romelo, Mr Walsh, Mr O'Donoghue and Mr Clark as to the existence of the document detailing Mr Romelo's gardening duties and the time to be allotted to each task, and the denial of the existence of such a document by Mr Adey and Mr Boland for the Darwin Port Authority.

Other conflicting evidence was alluded to, with a corresponding need for me to carefully consider the credit of the witnesses and the credibility of their evidence.

Finally, my attention was drawn to the question of quantum of any award for damages, and the decision of the Full Court of the Federal Court (1985) ALR 503, in the matter of *Hall & Ors v Sheiban*.

FINDING

Did the Darwin Port Authority (first respondent), Mr Dick Adey (second respondent) and Mr Danny Greig (third respondent) discriminate against the complainant, Mr Joe Romelo, on the grounds of race and/or trade union activity, contrary to *sections 19(1)(a) and 19(1)(k) of the NT Anti-Discrimination Act*, and did the first and second respondents victimise the complainant contrary to *section 23 of the Act*?

Having carefully considered all the evidence placed before me including the site visit; observed the demeanor of the witnesses; taken account of the submissions put by the parties and Counsel Assisting, I find as follows:

That there is no evidence of discrimination based on race or trade union activity by the third respondent, Mr Danny Greig and those complaints are dismissed.

In considering whether or not the second respondent Mr Adey, discriminated against Mr Romelo on the basis of his race, the issue is not quite so clear cut.

Mr Romelo is of the opinion that Mr Adey resented a person of Aboriginal descent being either a successful businessman or defying authority. His opinion would not in itself indicate that unlawful conduct had occurred, however I must also consider the evidence of Mr Archibald that Mr Adey said “coloured fellows don’t know which branch to cut” and the evidence of Mr Hewitt that Mr Adey said “tell that black bastard to cut the branches I’ve painted”. This was specifically denied by Mr Adey, who in his evidence in chief spoke of his empathy with Aboriginal people and the time he had spent working on Aboriginal communities. Mr Adey did not call independent witnesses to support this view, and I prefer the evidence of Mr Archibald and Mr Hewitt to that of Mr Adey.

The pejorative remark “black bastard” could be dismissed as simply an indication of a racist attitude which is completely out of place in the workplace, but it needs to be considered together with the “coloured fellows don’t know what trees to cut”

comment, and the marking of branches which Mr Romelo found demeaning and humiliating, forming part of his complaint of discrimination on the basis of his race.

Whether or not Mr Adey intended to demean Mr Romelo on the basis of his race is irrelevant. Although Mr Romelo's race was not the only factor in the way in which he was treated, on the evidence before me I find that Mr Adey drew a distinction between "coloured" or Aboriginal workers such as Mr Romelo, and by issuing detailed and unnecessary instructions, treated Mr Romelo less favourably than he would have treated a non-Aboriginal person, and that Mr Romelo was offended and humiliated by this conduct. Further, in all the circumstances, I find a reasonable person would be so offended and humiliated.

It follows, therefore, that I find the second respondent, Mr Adey, discriminated against the complainant Mr Joe Romelo on the basis of race, contrary to *section 19(1)(a)* of the *NT Anti-Discrimination Act*.

Mr Romelo also alleged he was discriminated against on the basis of his trade union activity.

Section 4(3) of the Act states:

"For the purposes of this Act, trade union or employer association activity shall be construed to include membership or non membership of a trade union or employer association and a lack or absence of trade union or employer association activity."

and the ordinary meaning of “activity” as defined in the Macquarie dictionary is:

- “1. the state of action; doing.
2. the quality of acting promptly; energy.
3. a specific deed or action; sphere of action: *social activities*.
4. an exercise of energy or force; an active movement or operation.
5. liveliness; agility.”

There was considerable evidence put before me as to precisely when Mr Romelo was a union delegate, and how that information was relayed to management. Under the provisions of the Act as outlined above, it is not necessary to determine whether or not Mr Romelo was the officially accredited union delegate at the time of the alleged discrimination, it is sufficient to find that he was active, as a union member, in promoting the interests of members of his union, and that he suffered a detriment because of that activity.

The overwhelming weight of evidence is that Mr Romelo was indeed active in pursuing union matters; that he approached management on behalf of other union members to protest at Mr Adey’s appointment to the position of Maintenance Manager, and that he was strong and at times vociferous in protecting the rights of the unionised workforce at the Darwin Port Authority, as those rights were perceived by the workforce. This was at a time when management was pursuing changes to established workplace practices to increase efficiency. It is not disputed that on his recruitment, Mr Adey was briefed by management to take an active part in this process.

On the evidence before me, it is clear that the conflict between Mr Adey and Mr Romelo started with the incident at the gangway on Stokes Hill Wharf before Mr Adey even joined the Darwin Port Authority.

I find that the conflict intensified with Mr Romelo's protests to management, on behalf of other union members at the manner of Mr Adey's appointment, and from the evidence I draw the clear inference that because of Mr Romelo's activities on behalf of the maintenance crew, including insisting on the established "chain of command" and his open opposition to the use of the quad bike by the maintenance crew, Mr Romelo was singled out by Mr Adey for special attention.

I do not accept that Mr Adey's close supervision of Mr Romelo was simply to change the work practices and ethics of a "recalcitrant" worker, as expressed by Mr Boland on behalf of the respondents, rather I find that Mr Adey engaged in a pattern of behaviour which intimidated, belittled, demeaned and harassed Mr Romelo and that this behaviour amounted to discriminatory conduct towards Mr Romelo based in part on Mr Romelo's trade union activity, contrary to *section 19(1)(k)* of the Act.

Mr Adey's behaviour towards Mr Romelo was not only unconscionable, it was unlawful.

In assessing whether or not the Darwin Port Authority as first respondent is vicariously liable for Mr Adey's conduct, I have considered whether the Darwin Port Authority took all reasonable steps to ensure discriminatory conduct did not occur.

I find it did not.

The complainant Mr Romelo sought advice and assistance from a number of quarters, including Mr Boland Assistant Secretary (Corporate Services) Department of Transport and Works, and a Minister of the Crown Mr Mick Palmer. The Chief Executive Officer of the Darwin Port Authority Mr Paul Tyrrell was aware of Mr Romelo's concerns, as was the entire Darwin Port Authority hierarchy, but the situation was allowed to deteriorate to a state where Mr Romelo was unable to continue working at the Darwin

Port Authority because of the way he was being singled out and treated. Not only was the Darwin Port Authority derelict in its duty of care to one of its workers, the evidence indicates that the Darwin Port Authority simply regarded Mr Romelo as a troublemaker and an inefficient worker, and actively encouraged and condoned Mr Adey's conduct towards Mr Romelo.

I find the Darwin Port Authority vicariously liable for the unlawfully discriminatory conduct of Mr Adey toward Mr Romelo, on the grounds of both race and trade union activity.

Mr Romelo's further complaint of victimisation against the first and second respondents was also considered. It is a sad reflection on the treatment of Mr Romelo that I find victimisation of him to be part of the normal pattern of conduct towards him, and not as a result of his having made a complaint to the Commission. That complaint is therefore dismissed.

Section 88 of the Act provides as follows:

“88. ORDERS AFTER HEARING

- (1) If, after the hearing of a complaint, the Commissioner finds the prohibited conduct alleged in the complaint is substantiated, the Commissioner may make one or more of the following orders:
 - (a) an order requiring the respondent not to repeat or continue the prohibited conduct;
 - (b) an order requiring the respondent to pay to the complainant or another person, within a specified period, an amount, being an amount not more than that prescribed, that the Commissioner considers appropriate as compensation for loss or damage caused by the prohibited conduct;

- (c) an order requiring the respondent to do specified things to redress loss or damage suffered by the complainant or any other person because of the prohibited conduct;
 - (d) an order declaring void all or part of an agreement made in connection with the prohibited conduct, either from the time the agreement was made or subsequently.
- (2) In this section, the specified things a respondent may be required to do, include, but are not limited to the following:
- (a) employing, reinstating or re-employing a person;
 - (b) promoting a person;
 - (c) moving a person to a specified position within a specified time.
- (3) In this section, "damage", in relation to a person, includes the offence, embarrassment, humiliation, and intimidation suffered by the person.
- (4) If, after the hearing of a complaint, the Commissioner finds the prohibited conduct alleged in the complaint is not substantiated the Commissioner shall make an order dismissing the complaint."

The complainant sought compensation for legal/medical fees, salary entitlement, hurt humiliation and distress, re-instatement of recreation long service and sick leave, and

- an order requiring the respondents not to repeat or continue the prohibited conduct as per *section 88(1)(a)* of the said Act;

- an order in accordance with *section 88(1)(c)* requiring the first respondent move the complainant into a position where he will not fall under the supervision of the second respondent, Mr Dick Adey;
- a written apology from the respondents.
-

and produced documentary evidence as to his detriment.

This evidence included the report from Dr Jackson referred to earlier, in which Dr Jackson diagnosed Mr Romelo as suffering from depression and anxiety, and found a causative link between Mr Romelo's employment at the Darwin Port Authority and this mental injury.

The respondents were offered the opportunity to cross-examine Dr Jackson on his finding, and also to introduce medical evidence as to Mr Romelo's health. The respondents declined to do so, and I accept Dr Jackson's evidence as to Mr Romelo's ill health and its cause.

I am also aware that Mr Romelo has a cause of action before the Work Health Court, but that is irrelevant to the matter before me, which is pursuant to the provisions of the NT *Anti-Discrimination Act* and the effect on Mr Romelo of unlawful discriminatory conduct.

I accept that Mr Romelo has suffered substantially as a result of loss of salary, and has suffered considerable hurt, humiliation and distress.

I intend to make orders requiring both the first and second respondents to pay compensation to Mr Romelo, and in apportioning the payments I have taken into account the failure of the first respondent as the employer to take steps to ensure the complainant, Joe Romelo, was treated fairly by the second respondent, Dick Adey, although the discriminatory conduct of Mr Adey was known to the first respondent.

Accordingly, pursuant to *section 88(1)(b)* of the *NT Anti-Discrimination Act* I issue the following orders:

- that the first respondent, Darwin Port Authority, pay the complainant, Joe Romelo, the sum of \$5,000 for hurt, humiliation and distress, and \$50,000 for loss of income (12/1/98-1/4/99), the payment to be made within 28 days of this order;
- that the second respondent, Dick Adey, pay the complainant, Joe Romelo, the sum of \$5,000 for hurt, humiliation and distress, the payment to be made within 28 days of this order;
- that on the complainant's return to the Darwin Port Authority the first respondent not continue to discriminate against Mr Romelo because of his race or trade union activity, and that the first respondent take all reasonable steps to ensure the second respondent does not engage in any discriminatory conduct towards Mr Romelo.

I recommend the Commissioner for Public Employment examine whether, in all the circumstances, leave should be recredited to Mr Romelo.

DAWN LAWRIE

July 1999