

# POOLE v DARWIN SPEEDWAY RIDERS & DRIVERS ASSOCIATION

## REASONS FOR DECISION

### Introduction

Darwin Speedway Riders & Drivers Association ("DSRDA") is a motor sports club and holds motorbike and motorcar races at Hidden Valley Speedway near Darwin.

Mr Ray Poole was a voluntary in-field official at the DSRDA for about 11 years prior to 1996. Ms Lisa Spooner had also been a voluntary in-field official for the previous three or four years. She and Mr Poole were, in the context of the DSRDA, colleagues and friends. In late 1995 DSRDA decided to change its procedure for selecting in-field officials and in early 1996 invited written applications for all in-field official positions. "In-field" simply means that they were positions at or near the field or race track. At various times the positions were also referred to as corner marshalls or in-field marshalls. Mr Poole and Ms Spooner applied for but were not offered positions as in-field officials for the 1996 season.

Mr Poole complains that DSRDA unlawfully discriminated against him in not offering a position. He claims that he was not offered a position because of his association with Ms Spooner.

Ms Spooner made a separate complaint of sex discrimination arising out of the same events. The complaint was heard separately and dismissed by Acting Commissioner Bradshaw. A complaint of victimization by Ms Spooner was upheld by the Acting Commissioner.

DSRDA advised the Registrar of the Commission that it did not wish to be heard in these proceedings and was not heard. However, three witnesses from the club were served with subpoenas to give evidence. They were Mr Geoffrey Blake, the president of the club in 1994, 1995 and early 1996, Mr Peter McIver, vice president in 1995 and early 1996, and Mr Paddy Ryan, clerk of course for motor cars from early 1996.

### Jurisdiction

The Anti-Discrimination Commission may deal with a complaint made in relation to discrimination in any area of activity referred to in Part 4 of the *Anti-Discrimination Act* ("the Act"). See s20. "Clubs" are an area of activity to which the Act applies. See s28.

### A Club

A "club" is defined in the Act to mean "an incorporated or unincorporated association of not less than 30 members that –

- (a) is established for social, literary, cultural, political, sporting, athletic, recreational or community service purposes or any other similar lawful purpose;

- (b) provides and maintains its facilities, wholly or partly, from funds of the association; and
- (c) sells or supplies liquor for consumption on its premises."

Uncontradicted evidence was given before Acting Commissioner Bradshaw that DSRDA:

1. Was an incorporated association
2. Had 30 or more members
3. Was established for sporting purposes
4. Provided and maintained its facilities, at least partly, from its own funds
5. Sold liquor for consumption on its premises at the relevant time.

I find, relying on s90(d) of the Act, that DSRDA is a club within the meaning of the Act.

### **Discrimination**

Discrimination is defined in s20 of the Act.

"(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."

Mr Poole relies upon section 19(1)(r) of the Act which provides as follows:

- "(1) Subject to subsection (2), a person shall not discriminate against another person on the ground of any of the following attributes:
- (a) ... ;
  - (b) sex;.
  - ....
  - (r) association with a person who has, or is believed to have, an attribute referred to in this section."

According to the *Interpretation Act* "person" includes a body corporate. As an incorporated association DSDRA is a body corporate.

The application of section 19(1)(r) of the Act in the present case is unclear. Assuming Mr Poole can prove:

- that he was less favourably treated by DSRDA; and
- that this was because of his association with Ms. Spooner;

the question remains whether he needs to prove anything more.

A plain reading of section 19(1)(r) suggests two possible interpretations.

The most literal interpretation is that Mr Poole need only prove that Ms. Spooner is a woman - that is, that she has the attribute of "sex" referred to in section 19(1)(b).

Alternatively, it may be that Mr Poole has to demonstrate that he was discriminated against because Ms. Spooner is a woman.

Because of the ambiguity it is necessary to determine which interpretation is more likely to have been intended by Parliament.

The first interpretation leads to absurdity. Under that interpretation the fact that Ms. Spooner is a woman is irrelevant - Mr Poole could equally complain of discrimination on the basis of association with a man who, of course, would also have the attribute of "sex".

Further, the Act includes in its objects:

"[the elimination of]...discrimination against persons on the ground of race, sex, sexuality, age, marital status, pregnancy, parenthood, breastfeeding, impairment, trade union or employer association, religious belief or activity, political opinion, affiliation or activity, irrelevant medical record or irrelevant criminal record in the area of work, accommodation or education or in the provision of goods, services and facilities, in the activities of clubs or in insurance and superannation..."

The second interpretation is more consistent with such an object. It recognizes that the victims of sexist, racist or other discriminatory attitudes may include persons other than those against whom such attitudes are held.

If the above interpretation is correct<sup>1</sup>, as I believe it is, Mr Poole needs to prove that it is more probable than not (see s91 of the Act)

- (i) that he was less favourably treated by DSRDA than a person without the attribute of association with a woman; and
- (ii) that this was:
  - (a) because of his association with Ms. Spooner; and
  - (b) because of the fact that Ms. Spooner is a woman.

### **The Facts**

My factual findings are largely an adoption of the very helpful submission made by counsel assisting, Mr Bruxner.

Over a period of many years prior to early 1996 Mr Poole and Ms Spooner acted as corner marshals at race meetings conducted by the club; in the case of Mr Poole for about 11 years and in the case of Ms Spooner for 3 or 4 years. Mr Poole, in particular, had extensive experience as a corner marshal and had trained many track officials over this period. The main role of the corner marshals prior to 1996 was to assist motorbike riders who had fallen off and to assist in restarting cars that had stopped eg because they had "spun out". From 1996 the role seems to have much the same except that the title was changed by DSRDA to that of in-field marshal and the officials location was changed from corners to the middle area of the field. Mr Poole and Ms Spooner were close associates in the context of the clubs activities, and shared one end of the race track when discharging their duties as corner marshals. Mr Poole gave evidence that he would have spent more time with [Ms Spooner], associated with the speedway and working there, than anybody else".

In-field/corner marshals were not paid a wage. The only rewards they received were free entry to the speedway, some free soft drinks and the payment of their track insurance by the club. The main reward for the dedicated officials was that of personal satisfaction and the enjoyment of performing the role.

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<sup>1</sup> Section 19(1)® of the Act is ambiguous and somewhat clumsy. Having regard to the Commissioner's function under section 13(1)(p) of the Act counsel assisting, Mr Brauxner, submitted that the above ambiguity could be resolved by deleting section 19(1)® and re-drafting the introductory words as follows:

*(1)Subject to subsection (2) a person shall not discriminate against any other person or any associate of that other person n the ground that the other person has any of the following attributes...."*

Mr Poole and Ms Spooner were members of an informal group of race officials ie the group of people who worked at the race meetings to conduct the races. The officials group, which had no formal standing or power, was formed as the result of a practice instituted by the club and particularly on the initiative of its president at the time, Mr Geoffrey Blake. The practice was aimed at ensuring that race officials were given an opportunity to put points of view or raise issues with the clubs committee. For this purpose the officials met regularly. Ms Spooner was either appointed informal secretary of the group, or fell into that role. A spokesperson - the identity of whom changed from time to time - for the officials' group would attend at the committee meetings, held every few weeks during the racing season March - October and raise with the committee any concerns the group may have had about issues they saw as affecting them in the performance of their role. Roughly 90 percent of the issues were safety related and the remainder were administrative and mostly related to the groups dissatisfaction with certain of the committees actions or decisions.

The introduction of the officials' group, and the presence of its representatives at committee meetings, was not welcomed by all on the committee. Many on the committee, and most notably the vice-president Peter McIver resented what they saw as a time-wasting and disruptive intrusion by persons who had not been elected by the club membership to have any say in the running of the clubs affairs. By late 1995, a considerable amount of friction had developed between the officials group and the committee. Mr McIver in particular appears to have been openly hostile and dismissive towards Ms Spooner, who was present at every committee meeting in 1995, either in the capacity of spokesperson or as secretary to the officials' group. Ms Spooner took notes at these meetings. She also published an officials newsletter which reported generally on club activities including the committee meetings.

The fragile relationship between the officials' group and the committee reached breaking point in November 1995. In the previous month, Ms Spooner had made a written complaint to the committee against a Mr Lyndon Schlein. Mr Schlein was a senior male member of the club. For example he was the course announcer in 1995-1996. The complaint arose from an incident that occurred on the track when Mr Schlein either, on one view, assaulted Ms Spooner or, on another view, pushed her to a place of safety. The incident was witnessed by Mr Poole, and, according to him, clearly involved an assault upon Ms Spooner.

The committee handled the complaint by delegating responsibility to the then president of the club, Mr Blake. (It is possible that this may have happened before Ms Spooner formally made a written complaint). Mr Blake spoke to Mr Schlein and arranged for Mr Schlein to apologise to the committee. The committee then forwarded a written version of the apology to Ms Spooner. The apology was couched in general terms and contained no particular acknowledgment of the validity of the complaint.

On 14 November 1995 the race officials met to discuss the committees written response to Ms Spooners complaint against Mr Schlein. The outcome of the meeting was that on 15 November 1995 they wrote to the committee claiming that the committee had shown favouritism in dealing with the complaint in a less formal way than that which is set out in the clubs rules. The letter was written by Ms Spooner and signed (although the

exhibited copy does not include the signatures) by more than a dozen officials, including Mr Poole. The letter expressed the view that the rules required the alleged perpetrator to appear before the committee to explain his or her actions. The letter contained no allegation that the Mr Schlein had been favored because Ms Spooner was a woman.

On 18 November 1995 there was a meeting of the committee. In accordance with the DSDRA's usual practice this meeting was also attended by a large number of people who were not committee members. At this meeting the officials letter was discussed. In the course of the discussions Ms Spooner was singled out for personal criticism by Mr McIver and by other club members. Mr McIver was vice-president of the club, a member of the committee and influential in the decision making processes of the club. Mr McIver, in particular, expressed the view that Ms Spooner was a troublemaker; a view he repeated in evidence before this Commission. The minutes of the meeting record that a suggestion was made to Ms Spooner that she no longer act as an official. Although other members of the officials group, including Mr Poole, were present and supported Ms Spooner it is clear that she bore the brunt of the criticism.

Sometime after this meeting Mr McIver visited Ms Spooner privately and spoke frankly about his reasons for criticising Ms Spooner at the meeting. On this occasion Mr McIver asked Ms Spooner to resign as a corner marshal. Mr McIvers admitted motivation at this time was to get rid of the troublemakers in the officials ranks. At about this time, quite possibly at the same meeting, Mr McIver admits having said to Ms Spooner that he wasnt going to be told by a woman how to run his club.

Throughout 1994 and 1995 the committee, Mr McIver and particularly Mr Blake, implemented a series of significant changes in the club and its operations. This was a response to a downturn in the DSDRA's fortunes during the early 1990s and a perceived need to streamline and professionalise it. When Mr Blake assumed the presidency he had wide ranging plans for the DSDRA. His agenda covered most areas of its activities, including the role and organisation of officials. In his view, there was the need for improved communication between the officials and the club hierarchy. Part of his response was the introduction of the practice referred to above by which officials were given a voice at committee meetings. He was also of the view that the clerk of course, Ian Jordan, who had responsibility for overseeing the officials while car and motorbike races were underway was overworked and otherwise unsuitable for the position.

In late 1995 Mr Blake pushed for the appointment of Mr Paddy Ryan as the clerk of course for car races in the 1996 racing season. Mr Blake believed that Mr Ryan would do a better job than Mr Jordan. The 1995 committee supported the appointment of Mr Ryan and he was approached by Mr Blake regarding his willingness to take on the position. Mr Blakes recollection of his discussions with Mr Ryan at this time is that the only major proposed change to the officials arrangements for 1996 was in relation to the procedure for their selection. For the first time, written applications for officials positions would be sought. This appears to have been Mr Ryans idea. Mr Blake recalls that there may also have been general discussion about the number of persons working on the in-field and the desirability from a safety point of view of reducing those numbers. However, there was no specific discussion at the time as to how this might be achieved. Mr Blake stressed in evidence that he was content for Mr Ryan to have

considerable say (subject to the committees approval) in the manner in which the officials system operated in 1996. Indeed, this was consistent with his plan at the time of taking over the presidency, namely:

“... that basically there would be someone in charge of the officials; that they would be a conduit for concerns; they would also be responsible for training; theyd basically be running the show in the officials department.... “

Mr Ryan has a similar recollection - although he recalls saying to Mr Blake that he was only prepared to take on the position if he was able to select [his] own crew that [he] would be very comfortable with.. Shortly after Mr Ryans conversation with Mr Blake, Mr Ryan recalls that he informally discussed with various members of the executive of the committee, including Mr Blake, Mr McIver and Mr Goldini, who became president in 1996, his intentions regarding the officials' system for 1996. The "executive" consisted of the president, Mr Blake, the vice-president, Mr McIver, and the secretary and treasurer. It is not clear whether it was formally constituted or simply an informal group constituted for convenience. The upshot of those conversations was that Mr Ryan was to have a reasonably wide discretion in the selection and organisation of the officials:

“I was told to go and pick a crew that I could work with, who I felt comfortable with, who were competent in my opinion and that had to be approved by the executive committee.”

One of the initiatives Mr Ryan discussed with the executive (although it is unclear exactly when) appears to have been the abolition of the corner marshals positions, because he wanted to cut back on the people in the centre. Mr Blake recalls that this possibility was discussed and that Mr McIver was certainly in favour of such a change. These discussions were apparently informal i.e. outside committee meetings.

On or about 7 February 1996 Mr Ryan on behalf of DSDRA sought written applications for the in-field officials positions.

In February 1996 Ms Spooner and Mr Poole each applied for advertised positions.

Once applications closed, Mr Ryan made recommendations to the clubs committee as to the applicants to be selected. He indicated to the committee that there were more applicants for the positions than there were vacancies.

Whether there was in fact any relevant reduction in the number of in-field officials' positions remains unclear. Despite being the author of the 1996 system, Mr Ryan was surprisingly vague as to the precise numbers involved and the respects in which the new system differed from the old. In any case, his evidence was not that Mr Poole and Ms Spooner had been overlooked because their old positions no longer existed. Neither Mr Pooles nor Ms Spooners application was recommended by Mr Ryan. A similar fate occurred for 2 other in-field officials who had worked at the speedway during 1995. No evidence was directed precisely to why these officials were not re-appointed but it

appears likely they were seen as associated with Ms Spooner and to be "troublemakers".

There was no evidence before this Commission to suggest that Mr Poole was anything other than an extremely dedicated, experienced, and competent track official, and worthy of the complimentary references tendered. Lisa Spooner clearly lacked Mr Pooles experience, but there was no convincing evidence before this Commission, nor before Mr Bradshaw, that she was incompetent.

### **The Non-Reappointment of Mr Poole and Ms Spooner**

It is critical to analyse the evidence of Messrs Blake, McIver and Ryan in order to determine the reason or reasons why DSDRA chose not to offer officials positions to Mr Poole and Ms Spooner in 1996.

#### **Mr Ryan**

Mr Ryan was the person who received and recommended the rejection of the applications of Mr Poole and Ms Spooner. His evidence is the logical starting point.

Early in his evidence Mr Ryan said that the reason he did not appoint Ms Spooner was because he could not work with her. Mr Ryan made no secret of his opinion of Ms Spooner. He variously described her as disruptive, a troublemaker, erratic and prone to doing silly things. He regarded her as very headstrong and very hard to control and referred to her panic mode. These characteristics, according to Mr Ryan, were apparent both in Ms Spooners performance of her duties as an official and in the context of her involvement in the officials' group. He clearly resented Ms Spooners apparent influence amongst the officials and her presence at the committee meetings:

“....she was the organ grinder and you people (Mr Poole and the other officials) were the monkeys that she played the tune to and everybody did what she wanted and that's the way she wanted it.... She had everybody under her spell. When she ground the organ, the music came out and everybody did their tricks.”

Although Mr Ryan was firm in his views about Ms Spooner, he was unable when pressed to give any convincing examples of behaviour on her part which could justify such views. There was, however, no evidence that his views were the result of sexist attitudes on his part - he simply loathed Ms Spooner, something which was clear to other club members, notably Mr McIver and Mr Blake and, in the circumstances, his decision not to offer her a position was unsurprising.

Mr Ryan does not appear to have had the same intense dislike for Mr Poole. When asked by Mr Poole why he did not offer Mr Poole a position, Mr Ryan responded:

“Because you would ignore some directives at different times which wasnt suitable for me and I just didnt feel comfortable working with you.”

Mr Ryan was unable to give examples of any such conduct by Mr Poole.

Mr Ryan denied that Mr Pooles association with Ms Spooner was the reason he decided not to recommend Mr Poole for a position for 1996. Despite that denial, and in light of Mr Ryans failure to offer any convincing explanation of his decision , it is difficult to avoid the conclusion that he must at least have been influenced by the fact that Mr Poole was a close associate of Ms Spooner. I find that this is the likely explanation for Mr Ryan's decision not to recommend Mr Poole for a position.

### **Mr Blake**

Apart from his involvement in the appointment of Mr Ryan as clerk of course for cars , Mr Blake appears to have had little direct input into the decision not to offer Mr Poole or Ms Spooner positions for the 1996 season. By the time the committee endorsed Mr Ryans recommendations in mid February 1996, Mr Blakes ability to maintain an active involvement in the affairs of the DSDRA was increasingly affected by the demands of his own business interests. He agreed that the selection process was something he was prepared to leave to the committee and Mr Ryan. He recalls being advised by the committee or Mr Ryan that the number of applicants exceeded the available positions, something which he understood had been contributed to by a reduction in the number of in-field officials positions. His understanding was that the corner marshals positions had been abolished and that this had played a part in the non-reappointment of Mr Poole and Ms Spooner. As observed above it is unclear whether there was in fact any reduction in the number of officials' positions.

### **Mr McIver**

Mr McIver clearly shared Mr Ryans view that Ms Spooner was a troublemaker. Similarly, he regarded her as manipulative:

“Lisa was using different officials for different positions to get at where she was trying to go. As in like causing drama.”

Mr McIver resented Ms Spooners presence at committee meetings. He felt that she was behind a trend which led to there being a page full of trivial complaints by officials at every committee meeting. He agreed that Ms Spooner could be described as a drama queen.

Like Mr Ryan, Mr McIver was unable to support his assessment of Ms Spooner with convincing examples.

The evidence suggests that Mr McIver was openly critical of Ms Spooner at committee meetings, and, in particular, appears to have led the attack upon Ms Spooner at the committee meeting convened in response to the officials complaint stemming from the Lyndon Schlein incident.

Whereas Mr Ryans attitude to and treatment of Ms Spooner appears to have been simply a product of a severe clash of personalities the situation with Mr McIver is more complicated. There is no suggestion that he actively disliked Ms Spooner. In fact, there

appear to have been occasions where Mr McIver relied upon and valued Ms Spooners organisational abilities and other occasions where he acted out of a sense of concern for Ms Spooner. This was coupled, however, with an apparently firm belief that Ms Spooner was pursuing a hidden and possibly destructive agenda:

“... I was in the association trying to hold it up and keep it - keep it happening, where Im getting a person that is - I didnt know whether she was trying to help the place or destroy the place or what she was trying to do, but every time I turned around there is this particular person causing grief all the time.”

He gave evidence that he knew that Ms Spooner was behind most if not all of the officialscomplaints, e.g. that she was the author of various letters which had been submitted to the committee by the officials' group. The evidence from other witnesses, notably Mr Jordan who described as BS the suggestion that Ms Spooner was a manipulative troublemaker, suggests that Mr McIvers suspicions regarding Ms Spooner were misplaced.

Several aspects of Mr McIvers testimony suggest that his assessment and treatment of Ms Spooner may have been a product of deep-seated sexist attitudes on his part. These attitudes were demonstrated in his answers to a variety of questions relating to his perception of the role of women in the speedway environment. He was clearly of the few that speedway is a male domain in which women could participate, provided they did things the male way. Further, he appears to have ascribed what he saw as particularly female character traits and/or skills to Ms Spooner e.g. the writing of articulate letters, being manipulative, and nagging. He agreed that he considered that Ms Spooner was doing a mans job as a corner official".

Mr McIver gave evidence that he was generally intolerant of disagreement - he was receptive to people who had good ideas, provided they were good ideas from his perspective. This was particularly in the context of his activities as vice-president of DSDRA, where he took the view, perhaps justifiably, that the time and effort he had invested entitled him to have particular influence over the direction the club took. Were it not for the sexist attitudes he otherwise displayed, it might have been possible to understand his attitude to Ms Spooner solely in terms of his vision for the club and his role in that vision. Ms Spooner was clearly an opinionated person and agreed that she was inclined to offer an opinion even if it had not been sought. It is also clear that, particularly in 1995, she had become a fixture at committee meetings and was an active if not the dominant member of the officials' group. It is quite conceivable that a person in Mr McIvers position could have found such a person irritating and could even have formed the view that she was a troublemaker.

It is impossible, however, to put aside the strong suspicion that Mr McIvers sexist attitudes contributed to his view that Ms Spooner was a troublemaker and to his admitted desire to remove her from in-field officials' duties. On the balance of probabilities, I am satisfied that these attitudes did contribute to Mr McIver's views and his later actions.

Mr McIvers evidence was that Mr Poole came to be seen as a troublemaker because of his association with Ms Spooner.

### **The Actions of the Committee**

Although Messrs Blake, Ryan and McIver were major players in the course of events leading to the non-reappointment of Mr Poole and Ms Spooner to in-field officials' positions, it is critical to note the role played by the executive which, as noted, consisted of the president, vice-president, secretary and treasurer of the club.

Late in 1995 the executive approved the appointment of Mr Ryan to the position of clerk of course for cars. That appointment appears to have been the initiative of Mr Blake. However, Mr McIver indicated in evidence that he was highly supportive of the appointment. He had for some time been urging changes to the officials system - specifically to get rid of all the troublemakers in the Association. He noted that there had been discussions by the executive regarding such changes. He agreed that by the time of the meeting on 21 November 1995, at which the Lyndon Schlein incident was discussed, there was something on the drawing board to get rid of the troublemakers. This was implicit in his comments at that meeting. See p2 of the minutes of the meeting. Although Mr McIver rejected the suggestion that Mr Ryan was selected in the expectation that he would not offer positions to Mr Poole or Ms Spooner - and clearly it was the case that Mr Ryan was given a wide discretion - he agreed that the appointment was made in the knowledge that Mr Ryan was aware of the drama that was happening the year before (This was a reference to events earlier in 1995 rather than 1994). Mr McIver also acknowledged that Mr Ryan had said to him on many occasions words to the effect I've had it with that Lisa Spooner and that the only person who actually complained to the executive about Ms Spooner was Mr Ryan ...which he did on several occasions.. In the circumstances, and having regard to Mr McIvers admitted desire to get rid of "troublemakers", especially Ms Spooner, it is clear that Mr McIvers support for the appointment of Mr Ryan must have been influenced (perhaps strongly influenced) by Mr McIvers confidence that Mr Ryan would not offer an officials position to Ms Spooner or Mr Poole and the other "troublemakers" associated with them in the officials' group.

There is no suggestion in the evidence that the executive formally considered Mr Ryans proposals as to changed arrangements for the appointment and organisation of officials for 1996. Instead, there appear to have been a number of informal discussions involving Mr Ryan and members of the executive to the effect that Mr Ryan was to get some order back into the place. Mr Blake recalls that Mr Ryan and particularly Mr McIver urged the abolition of the corner marshals positions.

Once Mr Ryan had received and considered the written applications for officials' positions, he made recommendations to the executive, which endorsed all but one of his recommendations. There appears little doubt that Mr Ryans decision relating to Ms Spooner and Mr Poole must at least have been influenced by his dislike of Ms Spooner and the fact of Mr Poole association with her. The same can be said of Mr McIvers endorsement of that decision. Mr Blake gave evidence that he was led to believe by Mr Ryan that there was an over supply of applicants and that the corner marshals positions

no longer existed - something which Mr Ryan and Mr McIver had advocated. It is clear that Mr Blake did not attach much importance to the question of whether particular positions were retained or abolished or particular people were appointed or not. His focus at the time was on the big picture and he was prepared to rely on others to sort out the details. Those others were principally Mr Ryan and Mr McIver. In the circumstances, it would be unrealistic to treat Mr Blakes endorsement of Mr Ryans decision as entirely independent from the factors which influenced Mr Ryan and, critically, Mr McIver.

### **Causation**

Of the persons involved in the decision making process which led to Mr Poole not being offered an officials' position for 1996, the only person who appears on the evidence to have been acting on a prohibited ground in s19 of the Act was Mr McIver. There is ample evidence to support a finding that Mr McIver had a sexist attitude to Ms Spooner and that this was a significant factor in his assessment of her as a troublemaker and in his aim of ensuring that she no longer acted as an in-field official. Further, in Mr McIvers eyes, Mr Poole was guilty by reason of his association with Ms Spooner and his removal was therefore another of Mr McIvers aims.

There is no evidence suggesting that any other person involved in the decision making process was motivated by sexist attitudes. In other words, it cannot be said that a majority of the persons involved in the making of the decision not to offer Mr Poole a position were acting on the ground of his association with Ms Spooner and because she was a woman.

It is impossible to say whether the executive would or would not have made the decisions leading up to the non-appointment of Mr Poole but for Mr McIvers involvement in the decision making process. However, it is clear that Mr McIver was a very influential member of the executive and that his influence at the relevant time was especially high owing to Mr Blakes reduced involvement in club affairs. It would be altogether artificial for him to be regarded as simply a voter. He played a critical role in the course of events leading to Mr Ryans appointment as clerk of course for cars, the abolition of the corner marshals positions and the executives endorsement of Mr Ryans decision not to offer positions to Mr Poole or Ms Spooner. Of all the persons involved in that course of events (Mr Ryan not being a member of the executive) Mr McIver was the dominant force.

Section 20(3) of the Act reads:

"For discrimination to take place, it is not necessary that –

- (a) the attribute is the sole or dominant ground for the less favorable treatment ...".

I take "ground" in this context to mean reason or cause. See *IW v City of Perth* 146 ALR 696 at 743.

Nevertheless a ground or reason should be "a substantial or significant reason for the conduct" or a "substantial or operative factor". See *Bailey v Australian National University* (1995) EOC 92-774 at 75, 552 and cases discussed there.

I am not satisfied that the dominant ground for the failure to offer Mr Poole a position was his association with Ms Spooner and because she was a woman.

However, I am satisfied that these were substantial factors in Mr McIver's motivations and actions and thus operative factors in the chain of events which led to Mr Poole not being offered a position.

### **The "But For" Test**

In *IW v City of Perth* the High Court considered a 13 vote to 12 decision by Perth City Council to refuse to approve the use of premises or a drop in center for HIV infected people. Five of the councillors in the majority were motivated by prohibited discriminatory reasons. The High Court dismissed the appeal on other grounds but three members of the Court; Toohey, Gummow and Kirby JJ, made various obiter statements about the test of causation to be adopted. The question posed was how to identify the relevant ground of decision of the council when different members of the counsel voted for different reasons. Toohey J said the choice was between three tests:

1. The "but for" test, so that in a 13-12 vote it was enough that one member of the majority was motivated by discriminatory reasons; or
2. The relevant ground was the one on which the majority made the decision; or
3. The relevant ground was the one on which the majority of the majority made the decision.

The latter two positions appear to have been argued by the City of Perth.

Toohey J said at 718:

"The 'but for' test, which has featured in some decisions relating to causation in negligence actions, has been rejected as a definitive test of causation".

Nevertheless, he observed that it had a part to play in the matter before the Court. It must be remembered that his Honour was considering a corporate decision and where one vote decided the matter but where only 5 of the 25 votes cast were cast for a prohibited reason.

Gummow J also approved the "but for" test in the circumstances of the case before him. He also (at p732) expressed the opinion that the principles of administrative law relating to corporate bodies ought to be applied. So, where a member of a decision making body is affected by bias a Court will not enter into difficult evidentiary inquiries as to the extent to which that person may have influenced the majority.

Kirby J also approved of "but for" test although he did not suggest this is an exclusive test but rather appropriate in the context of the case before him.

There is nothing in the obiter dicta expressed in *IW v City of Perth* to suggest that the "but for" test ought to be applied in the circumstances of this case. I am satisfied that it is inappropriate to do so.

### **Corporate Liability**

I am satisfied that DSRDA is directly responsible for the actions of the executive and for the actions of Mr McIver so far as he influenced the course of events leading to the decision of Mr Ryan and the executive not to offer a position to Mr Poole. Mr McIver was a senior member of DSDRA and he, in his role as a member of the executive, represented its "mind or will". See *Bogie v University of Western Sydney* (1990) EOC 92-313, *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 and *Ford & Austin's Principles of Corporation Law* 7th Edition, p584.

### **Compensation**

Mr Poole claims monetary compensation under section 88(1)(b) of the Act, that is ... for loss or damage caused by the prohibited conduct. There is, in other words, the need for a causal link between the conduct complained of and the loss allegedly suffered.

Mr Poole gave evidence regarding the effect upon him of his non-appointment as an official in 1996.

He complained that he had lost earnings in connection with his employment as a bobcat operator as a result of being refused access to building sites. He was unable, however, to demonstrate a link between any such losses and the actions of the club.

He gave evidence that his social life has been severely affected as a result of not being reappointed to a position he had filled for many years. Speedway had clearly been his passion and during the racing season he appears to have been involved in speedway related activities as frequently as three or four days per week. He met about half of his friends, and about 80 percent of the people he associated with, through speedway. Since losing his official's position he feels he has been shunned by his former friends and associates. He no longer has any involvement with speedway. Whereas he once had a brilliant and active social life he now appears to have none. His only remaining recreational pursuit is fishing - which he does alone.

Mr Poole also gave evidence that his immediate response to not being offered an official's position was one of humiliation and anger.

Commonsense suggests that the profound impact of this incident upon Mr Pooles life was less a result of his losing the official's position than a consequence of a perception (largely contributed to by his complaint to this Commission) that his actions have been damaging to the club. To the extent that he has been treated as badly as a result of his

complaint he may have the separate remedy of a complaint of victimisation. The availability of such a remedy does not, however, mean that the club should escape liability in respect of at least some of the impact upon Mr Pooles social life. In a club environment such as the DSRDA it is quite foreseeable that a member will be ostracized for taking a stand against unlawful treatment where doing so produces perceived damage to the clubs reputation or finances.

Ms Spooner was awarded compensation of \$7,000.00 for victimization. Although there may be somewhat different issues to be considered in assessing compensation in Mr Poole's case I believe this is also an appropriate amount to award to Mr Poole for offence, embarrassment and humiliation suffered as a result of DSDRA actions.

**Order**

1. That the respondent, Darwin Speedway Riders and Drivers Association Inc., pay to the complainant, Mr Rayond Poole, \$7,000.00 within 30 days.

.....  
**ANTHONY YOUNG**  
Hearing Commissioner

30 April 1998