

**ANTI-DISCRIMINATION COMMISSION
NORTHERN TERRITORY**

COMPLAINANT: MRS ELFRIDA KALICH

RESPONDENT: MR FRANC ES

NUMBER: 1998/2

TRIBUNAL: MS DAWN LAWRIE
HEARING COMMISSIONER

COUNSEL ASSISTING: MR DAVID ALDERMAN

GROUNDS OF COMPLAINT: DISCRIMINATION ON THE GROUNDS OF
SEX (*SECTION 19(1)(b)*) AND SEXUAL
HARASSMENT (*SECTION 22*) OF THE NT
ANTI-DISCRIMINATION ACT.

DATE OF DECISION: 24 JUNE 1998

INTRODUCTION

On 14 May 1996 a delegate of the Anti-Discrimination Commissioner accepted a complaint from Mrs Elfrida Kalich against Mr Franc Es, the operator of a business known as Stainless Steel Industries, alleging discrimination in the area of work on the grounds of sex and sexual harassment contrary to *Section 19(1)(b)* and *Section 22* of the NT *Anti-Discrimination Act 1992*.

Following investigation and an unsuccessful attempt to conciliate the matter, the delegate referred the complaint to the NT Anti-Discrimination Commissioner for Hearing pursuant to *Section 83* of the Act.

A copy of the referral report was sent to the parties.

The Hearing of the matter was delayed due to litigation in another place concerning a procedural issue.

BACKGROUND

In April 1995 the Complainant Mrs Elfrida Kalich was employed by the Respondent, Mr Franc Es as a casual book-keeper. Mrs Kalich's position was subsequently changed to permanent part-time work, with a minimum of 15 hours per week.

Mr Es is the owner/operator of a business known as Stainless Steel Industries.

While Mr Es employed two young men on a temporary basis on "work experience", the business of steel fabrication was undertaken by Mr Es, with Mrs Kalich the only other permanent employee.

The business is located in Hardy Road, Berrimah, an industrial area just south of Darwin.

Mr Es resided on the premises until early March 1996 when he leased a flat in Bagshaw Terrace, Palmerston.

While residing at the workshop it was Mr Es's custom to invite friends and business colleagues to barbeques on site, including Mrs Kalich and her husband John Kragelius. Wine and beer would be available at these barbeques.

It was also Mr Es's custom to offer wine at the workplace, during working hours to any visitors and to his employee Mrs Kalich. On a Friday he would usually order pizzas or Chinese meals, for staff and business associates. Mr Kragelius attended some of these barbeques.

Mr Es held business luncheons at the Palmerston Tavern and the Novotel Atrium (Darwin) to which employees were invited. A Christmas function to which both Mrs Kalich and Mr Kragelius were invited was held at the Casino "Boardroom".

Mr Es invited both Mrs Kalich and Mr Kragelius to his flat for a special Easter dinner, however only Mrs Kalich attended.

Mrs Kalich alleged that Mr Es would press her to drink wine during working hours, that as a result she became "tipsy" and would need to rest before driving home; that he requested she use her "woman's ways" to entice a business person to meet with Mr Es; that on hearing Mrs Kalich's husband was to work in Tennant Creek Mr Es looked "happy", referred to her as a "lawn" or "hay" widow and invited her to his home for chicken drumsticks and wine.

Mrs Kalich further alleged that Mr Es made unwelcome remarks of a sexual nature; touched her breasts, bit her on the thigh and placed his arms around her waist from behind, and that this conduct amounts to sex discrimination and sexual harassment, contrary to *Sections 19(1)(b) and 22* of the *NT Anti-Discrimination Act*.

Mrs Kalich alleged that because she resisted his advances, Mr Es downgraded her position to "casual" part-time, and that because of the stress she suffered she resigned in May 1996.

Mr Es agreed that on occasion he would offer Mrs Kalich wine after working hours, that he would pay her compliments, and that he invited both Mrs Kalich and Mr Kragelius to various functions, including the special Easter meal at his flat.

Mr Es denied having pressured Mrs Kalich to drink wine, or subjecting her to unwelcome advances including biting her thigh.

Mr Es stated that placing Mrs Kalich on a casual employment basis was due solely to the financial affairs of the company, and was not as a result of a rebuff to the alleged sexual harassment. In his defence to the points of claim, Mr Es also stated Mrs Kalich would occasionally visit him at his home without a specific invitation.

THE LEGISLATION

The NT *Anti-Discrimination Act 1992* came into operation 1 August 1993, and makes discrimination based on sex 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."

"Sexual harassment" is prohibited conduct and is outlined in the Act as follows:

"SECTION 22 - PROHIBITION OF SEXUAL HARASSMENT"

- (1) A person shall not, in an area of activity referred to in Part 4, sexually harass another person.
- (2) Sexual harassment takes place if a person -
- (a) subjects another person to an unwelcome act of physical intimacy;
 - (b) makes an unwelcome demand or request (whether directly or by implication) for sexual favours from the other person;
 - (c) makes an unwelcome remark with sexual connotations; or
 - (d) engages in any other unwelcome conduct of a sexual nature, and
 - (e) that person does so -

-
-
- (i) with the intention of offending, humiliating or intimidating the other person; or
 - (ii) in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct; or
- (f) that other person is, or reasonably believes that he or she is likely to be, subjected to some detriment if he or she objects to the act, demand, request, remark or conduct.
- (3) For the purposes of subsection (2)(e)(ii), circumstances that are relevant in determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct include -
- (a) the sex, age or race of the other person;
 - (b) any impairment that the other person has;
 - (c) the relationship between the other person and the person engaging in the conduct; and
 - (d) any other circumstance of the other person."

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

Mrs Kalich gave detailed evidence relating to the alleged offences, and called two witnesses, Glenda Beljon and John Kragelius.

It is undisputed that Mrs Kalich commenced work as a part-time bookkeeper with Stainless Steel Industries 26 April 1995, working 10-15 hours per week; that in July 1995 her position changed to permanent part-time, and that she resigned 10 May 1996.

The circumstances of Mrs Kalich's resignation are, however, in dispute.

Mrs Kalich stated she became aware of the job through a neighbour who had previously held the position but had resigned. Mrs Kalich stated the neighbour was "having a relationship" with Mr Es at that time, and didn't want to continue working with Mr Es while having a relationship.

After commencing employment with Mr Es, Mrs Kalich was learning to use a computer package "Mind Your Own Business" (MYOB) and was assisted by a friend and table-tennis companion, Glenda Beljon.

On 23 August 1995 Mrs Kalich went to Indonesia for a month and on her return she alleged Mr Es told her his relationship with the neighbour was finished. Mrs Kalich's evidence was that Mr Es then started asking her to lunch, at least once a month - to the Palmerston Tavern or (most of the time) the Atrium in Darwin. If there were people in the workshop on Fridays, Mr Es would order in pizzas or chicken.

Mrs Kalich went on to outline how Mr Es would offer her glasses of wine - once when her friend Glenda was present and with increasing frequency from December 1995. Mrs Kalich stated she was due to finish work around 3:00pm and Mr Es would offer the wine from 2:30 onwards.

When asked how much she drank, Mrs Kalich replied:

"Well, that's Mr Es trick. When I - I told him at the beginning, when he offered me, I said, 'I don't drink', and he said 'Oh, you will like this 'cause this is the sweet', so I tried to drink. Yeah, it was sweet, and it was Lambrusco, the wine brand."

Mrs Kalich referred to "compliments" paid to her by Mr Es:

"Oh, you look nice. Your breasts are nice. You should not - you should not wear bra, he said and you should wear shorter skirt or shorter short and talking like my face it looked nice. You don't look old."

Mrs Kalich alleged that on several occasions Mr Es tried to kiss her fingers. She stated that she didn't say or do anything at the time, but on the following mornings at work she told him she was not interested in a relationship - that her husband was angry because she was late home and was worried about her driving while "tipsy".

Mrs Kalich gave evidence that once, after both had been drinking wine, Mr Es placed his hands on her breasts and she said: "No, this is too much." This was alleged to have happened in January 1996. At the time, they were sitting in the relatively small office, which had a curtain over the window which looked out onto the workshop floor. Mrs Kalich asked for the curtain to be moved in February as she "didn't feel comfortable."

In answer to a question from Counsel Assisting Mrs Kalich alleged that the following events occurred in February 1996:

"... actually he - he grabbed my waist when I was standing in the workshop and I straight away said 'I don't like this', and I reminded him many times that - I said 'I'm not interested and I'm married', and he always say, 'oh yeah', or 'I see', he said 'that's why you couldn't do anything, because you are married', and sometimes in February when I was working with the computer, he bit me."

Mrs Kalich corrected this statement, saying she was bitten on the leg by Mr Es in July 1995 - in February she was grabbed around the waist. Mrs Kalich told her friend Mrs Beljon of these events.

Mrs Kalich outlined a series of events relating to an invitation from Mr Es to visit his home on Good Friday, April 5 1996. On Thursday 4th April Mr Es asked Mrs Kalich to come to lunch on the Friday as he was going to make a special pancake from Slovenia.

"Because I refuse all the invitation before, he said 'please come'. 'All right then' I said, and I said to him, 'pancake only', and he said 'oh yes. What else can I do?' he said "you are married. I can't do anything'. So I went there for a pancake and he cook the pancake already and he pour cognac on top of the pancake and I couldn't eat the whole lot because it - there was cognac there so I didn't really like, and he serve with wine again, and I - as usual, he refilled my glass with wine again and again. I drank."

After the lunch Mrs Kalich went and sat on the doorstep facing the backyard - it is alleged Mr Es then bent his knees and tried to kiss Mrs Kalich - who struggled, asked him to stop - and said: "This is sexual harassment."

Mr Es stopped immediately, and Mrs Kalich went home.

On her return to work on Tuesday 9 April Mrs Kalich noticed Mr Es looked unhappy, called her Mrs Kalich instead of Elfrida, and said: "You should be more active to promote the business."

On or about 15 April Mr Es asked if Mrs Kalich's husband, Mr Kragelius could come and service the office cars. Mrs Kalich said no - as her husband had obtained work in Tennant Creek and was leaving Darwin 18 April.

On 18 April Mrs Kalich alleged Mr Es teased her about being a "lawn widow" (*sic*) and asked her home for a dinner of chicken drumsticks. Mrs Kalich refused the invitation, and stated that on the following day, 19 April 1996, Mr Es's attitude towards her changed - he called her Mrs Kalich instead of Elfrida and was less friendly.

On that day Mr Es asked Mrs Kalich to ring "Michael" to come to the workshop on the Saturday or Sunday for some photographic work. Michael was known to be busy, and Mrs Kalich stated she clearly remembered Mr Es saying: "Use your ability as a woman to drag him to come to the workshop"

Mrs Kalich found this remark offensive and humiliating and retorted: "Women and men are equal" to which Mr Es is alleged to have responded: "Equal? Why don't you want to make love with me?"

Mrs Kalich says she was surprised and upset at that remark and said: "I have been telling you that I am not interested in you as a man at all."

It was alleged that Mr Es walked from the office, returning a short time later to advise that a person called Jane would be coming to work as a receptionist the following week if Mrs Kalich was unable to work. Mrs Kalich stated she recorded these incidents in the office diary in Indonesian.

An appointment was made for lunch with Michael at the Atrium for 26 April, but at the last minute Michael rang and cancelled.

Mr Es and Mrs Kalich went to the lunch and Mr Es ordered whisky for himself and Mrs Kalich. Mrs Kalich does not like whisky, but drank a little of it.

When Mr Es and Mrs Kalich returned to the workshop, about 2:00pm, Mrs Kalich said she was going home - Mr Es said "at 2:00pm" but made no other remark.

Mrs Kalich felt she had not worked her full time that day, and without being asked went to work the following day (Saturday) to help Mr Es in the workshop.

Mr Es was away on a job until approximately 2:00pm and on his return told Mrs Kalich she was to be at his place for lunch at 4:00pm - saying: "Don't say anything - thank you."

After going home Mrs Kalich went, as asked, to Mr Es's flat in Palmerston for the meal Mr Es had prepared. Potatoes, meat and wine.

After the meal, refilling Mrs Kalich's drink, Mr Es went and had a shower - on his return he asked if Mrs Kalich would like to have a shower, saying she could lock the door.

Mrs Kalich declined the offer and said she was going home.

Mrs Kalich then alleged Mr Es said: "Don't insult me - you are rude - I don't want to fuck you." Mrs Kalich stated she replied: "Don't use that word to me" and went home.

On 29 April Mrs Kalich went to work, and Mr Es said: "Your face looks like a cucumber. Can you make it longer?" Mr Es went outside, then suddenly returned, half opening the office door - saying: "Boo Boo."

Mrs Kalich stated she felt humiliated and was upset. She took the next day off work, but went to a breakfast seminar on Friday 2 May representing the company. Following the breakfast she arrived at the workshop around 9:30 - Mr Es was not there as he had an appointment with his bank.

On his return to the office Mr Es handed Mrs Kalich a letter, which was tendered in evidence, and is quoted in full:

"STAINLESS STEEL INDUSTRIES
UNIT 2/5 HARDY ROAD BERRIMAH N.T. 0820
P.O. BOX 38379 WINNELLIE N.T. 0821
TELEPHONE: (089) 32 3550 FACSIMILIE: (089) 32 1385

Alfrida KALICH
17 DUNBAR ST., GRAY, PALMERSTON

MRS. KALICH

With this letter I inform you about an important decision I made, as a proprietor - manager of STAINLESS STEEL INDUSTRIES. It was not easy to decide, that at this present financial situation I need to close the permanent position of book keeper - receptionist. For the most effective solution, this place will be replaced with a temporary position, based on casual employment, for 15 hrs. per week, spread in two days (Thursday and Friday)

This decision starts with 10. of May 1996. (*sic*)

Regards

FRANC ES
Manager"

Mrs Kalich and Mr Es were seated opposite each other in the office.

Mrs Kalich stated she said to Mr Es: "This is not because of financial problems, this is because I refuse you ..."

Mrs Kalich said Mr Es was "furious" and said: "Don't mention it, this is between employer and employee" and then left.

Mrs Kalich worked her normal hours that day, but then attended her doctor and received a certificate saying she was unfit for work and faxed it through to Mr Es. She resigned her position and did not return to work.

Mrs Kalich subsequently made a complaint of discrimination and sexual harassment to the Anti-Discrimination Commissioner.

Mrs Kalich's evidence was that she was changed from a permanent employee to that of a temporary employee because she had refused Mr Es's unwelcome sexual advances.

Mr Es vehemently denied the allegation, and insisted that his financial circumstances dictated the change in Mrs Kalich's employment status. Both parties spoke at some length on this point.

Mrs Kalich called two witnesses - Mrs Glenda Beljon and Mr John Kragelius.

Mrs Beljon, a book-keeper, has known Mrs Kalich since 1994/95 - they had met through table-tennis which they both play two or three times a week. They travelled interstate together, sharing a room at motels in Perth, Melbourne, Adelaide and Alice Springs. These trips occurred between 1994-1996.

Mr Es had installed a computer at his business premises, and in August 1995 Mrs Beljon went to Stainless Steel Industries to help Mrs Kalich use and understand the financial software package marketed as "Mind Your Own Business" (MYOB).

Arriving at approximately 2:00pm, Mrs Beljon stayed at the premises assisting Mrs Kalich until approximately 5:00pm.

During the afternoon, Mr Es offered both Mrs Kalich and Mrs Beljon glasses of wine, which Mrs Beljon said "we didn't really want".

In her evidence, Mrs Beljon stated that after her visit to the work site, Mrs Kalich began to talk to her about her (Mrs Kalich's) concerns - that Mrs Kalich was feeling very uncomfortable, that Mr Es's conversations and actions had sexual connotations, and that the office environment, with a curtain over the window made Mrs Kalich uncomfortable.

Mrs Beljon recalled Mrs Kalich as telling her that Mr Es had bitten Mrs Kalich on the thigh, and that Mr Es was inviting Mrs Kalich to have meals with him and to visit him at home which, in Mrs Beljon's words "she really didn't want to do".

Mrs Beljon was told by Mrs Kalich of the letter advising Mrs Kalich of the change in her employment status from permanent part-time to casual, and it was Mrs Beljon's evidence that Mrs Kalich was certain this change was because of Mrs Kalich's refusal to have a relationship with Mr Es.

At this time Mrs Beljon was about to leave her employment as a part-time bookkeeper with a local firm trading as Northern Territory Property Services. Mrs Beljon recommended her friend Mrs Kalich to a Mrs Muir of Northern Territory Property Services, and Mrs Kalich rang Mrs Muir and an appointment was made for an interview.

However, when Mrs Kalich rang to confirm the appointment, she was advised by Mrs Muir that the job was to be advertised.

Subsequently Mrs Beljon asked Mrs Muir if her friend, Elfrida Kalich, had got the job. Mrs Beljon then stated, Mrs Muir advised her that Mrs Muir had contacted Mr Es of Stainless Steel Industries for a reference, but he had said words to the effect that Mrs Kalich was inefficient, or incompetent. Mrs Muir also indicated she was aware Mrs Kalich had taken out a complaint of sex discrimination against Mr Es.

Mr Kragelius gave evidence for Mrs Kalich.

Mr Kragelius couldn't recall when he and Mrs Kalich were married, but believed it to be around 1983.

Mrs Kalich started work at Stainless Steel Industries in 1995, and from that time Mr Kragelius had several contacts with Mr Es, including performing some work on Mr Es's car, and attending several social functions hosted by Mr Es, at the workshop, at Mr Es's home, and at the Casino.

Until he left to work in Tennant Creek Mr Kragelius would have drinks with Mr Es at the workshop a "couple of times a week". Mr Kragelius stated he did some work for Mr Es the day before leaving for Tennant Creek, where he worked for approximately seven months.

Mr Kragelius stated that on occasions Mrs Kalich would come home from work "upset", and that there were occasions when Mrs Kalich would come home having apparently had more than her fair share of alcohol, which concerned Mr Kragelius as she had driven home.

It was Mr Kragelius's evidence that at the time his marriage was under some strain.

With regard to the alleged biting of the thigh, Mr Kragelius stated he had been told of the incident by his wife, but under examination Mr Kragelius contradicted his evidence as to when he was told of the alleged biting incident, at the time it was said to have occurred or later, and finally stated he couldn't remember if he was told before he went to Tennant Creek, while he was in Tennant Creek or on his return from Tennant Creek.

Mr Kragelius was vague and unable to remember with any clarity the more formal social occasions he had attended which were hosted by Mr Es.

His evidence was unclear as to when he became aware of the various allegations against Mr Es, but stated he didn't mention his concerns to Mr Es at any time as he considered it was Mrs Kalich's business and she could handle it.

Mr Kragelius was unable to remember if he was told of the suggestion that Mrs Kalich use her "female abilities" to get the photographer to attend the workshop before he went to Tennant Creek, while he was in Tennant Creek or on his return.

Mr Es gave evidence on his own behalf.

At the time of employing Mrs Kalich, Mr Es had two young men on "work experience" in the workshop, Ian Luke and Eddy Clark, and two men on the workshop floor, Steven Graham who was intending to leave Darwin in November 1995 and Bob Spanner who was employed on a contract basis.

Across the road there was a cabinet maker joinery workshop run by a Mr Ivan Blackhall, who used to come to Stainless Steel Industries on a fairly regular basis for a cup of coffee, lunch, and at times a glass of wine. Mr Es stated that Mrs Kalich was invited to participate, that the atmosphere was friendly and at times "one glass of wine" turned into two glasses, and that they all went home happy.

Mr Es gave evidence regarding the barbeques he arranged at the workshop at which employees and their families were invited to attend, and the lunches at the Palmerston Tavern and the Atrium which Mrs Kalich, as an employee was invited to attend. There was also a Christmas lunch at the "Boardroom" (Darwin Casino) attended by his accountant Mrs Gustafson and her husband, Mr Kragelius and Mrs Kalich.

Mr Es referred to a lunch he hosted at the Atrium attended by Mrs Kalich and Mr Michael McRostie, the photographer contracted to produce advertising/promotional material for the company, and referred to as Michael in Mrs Kalich's evidence.

Mr Es was clear in his evidence that any compliments paid to Mrs Kalich were general compliments, said to cheer her up, and that Mr Kragelius was included in his invitations for dinner at his flat. Mr Es said he asked Mr Kragelius why Mr Kragelius had not attended the Easter dinner at Mr Es's flat, and that Mr Kragelius had replied: "We had a silent week, we didn't speak".

It was after this dinner that Mr Es was alleged to have told Mrs Kalich she needed to become "more active to promote the business". In evidence, Mr Es said that while it was not Mrs Kalich's role to "promote" the business, she was encouraged to represent the business at various seminars and business breakfasts.

Mr Es also referred to an incident when he needed to get some stationary from the office cupboard and had to pass Mrs Kalich - in his words - "I grabbed her with my hands along her waist to pass". Mr Es said it was not a sexual approach, it was "just to pass".

Mr Es referred to the offers of drinks at the workplace, which were offered to work acquaintances, visitors, staff, and Mrs Kalich's husband Mr Kragelius. While Mr Es stated that, in retrospect, that may have been unwise, he was adamant that there was no ulterior motive in offering wine to Mrs Kalich.

Mr Es denied the allegations of sexual harassment - he denied having grabbed Mrs Kalich's breasts, and denied having said "Don't insult me - you are rude - I don't want to fuck you" at his home.

Mr Es spoke of his wish to encourage Mrs Kalich to gain experience in general office management, and his encouragement for her to use the computer software packages - he stated he was happy with her work, and understood her difficulty with language as he is a migrant and spoke very little english before 1987.

January to April 1996 was a quiet period for Stainless Steel Industries. The volume of work had decreased and several of Mr Es's cheques to suppliers were dishonoured. He was called in for an interview with his bank manager, and according to his evidence Mr Es decided to cut down on his costs, one effect being to temporarily change the permanent position of book-keeper to a casual temporary position until the business improved. Mr Es described his business as facing a "financial crisis".

The change in status of the book-keepers position to casual temporary would allow for 15-20 hours per week, and Mr Es viewed this as a financially prudent temporary arrangement.

There was conflicting evidence as to whether Mr McRostie attended the luncheon or lunches at which Mr Es and Mrs Kalich were present, and I shall refer to that matter later.

Mr Es called several witnesses -

- Mr Bryant;
- Mr Blackhall; and
- Mr Clark.

Mr McRostie also attended as a witness.

Mr Bryant is an upholsterer, and operated his business from a shed across a driveway from Stainless Steel Industries.

Mr Bryant's evidence was that he would visit Stainless Steel Industries and share a drink, either a cup of coffee during the day or a cold beer or wine after work. He remembered a person called "Freda" being employed at Stainless Steel Industries, but had never noticed any impropriety between Mr Es and Mrs Kalich.

Mr McRostie is the photographer who had been engaged by Mr Es to prepare some promotional material from Stainless Steel Industries.

Mr McRostie stated he had attended a few business lunches with Mr Es at the Atrium Hotel, always with other people he described as business associates of Mr Es present.

Mr McRostie remembered one lunch where Mr Es and a person he described as a "secretary" present, but was unable to recall the date and could not identify Mrs Kalich as the person present.

Despite extensive questioning and after examining his diary Mr McRostie could not recall taking photographs of Mrs Kalich, or having lunch with Mrs Kalich present.

Mr Clark was called as a witness by Mr Es. While at secondary college, Mr Clark had done some "work experience" at Stainless Steel Industries - there were also some other men employed at that time, and Mrs Kalich.

In his evidence Mr Clark remembered lunches on a Friday being held at the office, with wine being offered to others although he did not drink, being under-age.

Both parties agreed that Mr Es is a friend of Mr Clark's family, and had sponsored Mr Clark on a trip to Tamworth.

Mr Es occasionally took Mr Clark's family to lunch of a weekend, and had twice employed Mr Clark on work experience.

Mr Clark outlined his recollection of the layout of the office area and Mrs Kalich's "work station", facing the air conditioner with the window and a computer to her right.

Mr Blackhall gave evidence by telephone from the USA.

Mr Blackhall had conducted a joinery business in a rented workshop in Berrimah, across the road from Stainless Steel Industries.

Mr Blackhall's evidence was that he would get together with Mr Es after they had knocked off work and have a few drinks. At times they had pizzas, or other food, and it was a general relaxation period at which "Elfrida" (Mrs Kalich) was present more often than not. Other friends of Mr Es's were also present from time to time.

Mr Blackhall described the relationship between Mr Es and Mrs Kalich as a reasonably friendly employer/employee situation. Mr Blackhall did not sense any romantic tie between Mr Es and Mrs Kalich.

SUBMISSIONS

Both parties made submissions essentially repeating their earlier evidence - the complainant Mrs Kalich referring to the offering of drinks, the meals at Mr Es's unit and in particular the alleged events at the dinner on the night of Good Friday and the late lunch on Saturday 27 April 1996.

Mrs Kalich mentioned the diary notes she had made of specific incidents as they occurred 18 and 19 April, the writing being in Indonesian.

These pages have been removed from the office diary and neither party was able to explain how the pages came to be missing.

Mrs Kalich also referred to her visit to the doctor following receipt of the letter from Mr Es, of her visit to the police at Palmerston and her referral to the Anti-Discrimination Commissioner by the police.

In her submission Mrs Kalich referred to the timing of the writing of the letter changing her employment status, which Mr Es, contrary to his earlier evidence now agreed was written the night before his appointment with the bank manager.

Mrs Kalich submitted that this indicated her change in employment status was because of her rejection of Mr Es's advances, rather than as a result of the meeting between Mr Es and his bank manager.

The respondent Mr Es denied any impropriety stating that Mr Kragelius had been included in the invitations to dinner, that Mrs Kalich had always had the opportunity to refuse wine when offered it, that compliments paid to Mrs Kalich were simply courteous and part of his culture, that he had not physically harassed or assaulted her, and that his remark regarding her being a "hay widow" or "lawn widow" was meant as a joke.

It was Mr Es's submission that Mrs Kalich knew and accepted his need to reduce her hours because of his financial difficulties, and that although he had allowed a friendliness to develop in the workplace, he had not sexually harassed Mrs Kalich.

Counsel Assisting referred to the conflicting evidence of the parties and the various themes - one that everything Mrs Kalich had alleged was true; that some or nearly all of what she had said was true but that things that had happened were now being portrayed in a different light; that some of the things were true but others had been manufactured to assist her case; and the theme that none of her allegations were true and her whole case had been fabricated.

Mr Alderman outlined the tests applying to *Section 22* of the Act, and referred to the evidence, or perceived lack of it, relating to those tests.

Mr Alderman cited several leading decisions on sexual harassment which I found useful.

FINDING

Mrs Kalich's complaint is one of discrimination on the grounds of sex and sexual harassment, pursuant to *Sections 19(1)(b)* and *22* of the NT *Anti-Discrimination Act*.

The respondent, Mr Frank Es, denies that any such discriminatory or prohibited conduct occurred and both parties gave evidence and called witnesses to support their evidence.

This matter has been extremely difficult to determine with directly conflicting evidence being put to me, with both parties exhibiting overt hostility towards each other, and with undisputed evidence as to work place practices which, in my view, significantly blurred the normally accepted divisions between a person's work, social and private life.

It is not in dispute that it was common practice for the employer, Frank Es, to offer wine and food to his employees and acquaintances during working hours, to take employees to lunch, and to invite his employee, Mrs Kalich, and husband, Mr Kragelius to his home for food and wine.

Some of these invitations were accepted by Mrs Kalich who attended without her husband at a time when Mrs Kalich and Mr Kragelius were experiencing difficulties in their relationship.

The matters raised by Mrs Kalich were serious - allegations of breast grabbing, thigh biting, unwelcome attempts to kiss her, attempts (apparently successful) to intoxicate her and invitations to visit her employer's home at night, after squash or table tennis, culminating in a change of her employment status and subsequent resignation due to her refusal of the alleged sexual advances.

Mrs Kalich called her husband, Mr Kragelius, as a witness. His evidence can most charitably be described as extra-ordinary. Mr Kragelius was evasive, contradicting himself on important issues of fact, and when asked to clarify these contradictions suffered a severe memory lapse.

I find it difficult to believe that Mr Kragelius was unable to remember when Mrs Kalich first told him of the alleged incidents of sexual harassment - at the time they were said to have occurred, some time later, when he was in Tennant Creek or on his return from Tennant Creek.

I give no weight to the evidence of this witness.

Mrs Kalich's second witness, Glenda Beljon impressed me as a straightforward, honest witness and I accept her evidence relating to conversations with the complainant, during which Mrs Kalich evinced concern and distress at Mr Es's conduct.

Mrs Beljon recalled asking Mrs Kalich: "Well, why do you stay there?" and Mrs Kalich's response was: "Well, because it's fairly hard to get other work and it's near where I work and the hours suit me and I really haven't got another job and I need the money."

Mrs Beljon remembered being shown a bruise on Mrs Kalich's thigh which was allegedly the result of the bite by Mr Es, but other than her brief time at the workshop during which time she was offered wine by Mr Es, Mrs Beljon could not give direct evidence as to the allegations, she simply recounted what she had been told by Mrs Kalich.

That being said, I accept her evidence as to Mrs Kalich's distress while recounting the alleged instances of harassment.

Similarly, I accept the evidence of Mr Es's witnesses, Mr Bryant, Mr Clark and Mr Blackhall, all of whom referred to Mr Es's habit of providing food and alcohol to staff and acquaintances, and at times of taking staff and their families for lunch at various hotels.

Their frank and honest evidence confirmed the unusual mixing of business and pleasure which was Mr Es's normal business practice. Other than the offers of alcohol, none of these witnesses was able to offer any evidence on the specific allegations made by Mrs Kalich.

Mrs Kalich and Mr Es had given directly conflicting evidence as to whether Mr McRostie, the photographer, attended a luncheon at the Novotel Atrium, and despite persistent questioning and eventual reference to his diary, Mr McRostie was unable to recall with any clarity when and with whom he lunched.

Mr McRostie was evasive, and I regard his evidence as unreliable and attach no weight to it.

Was Mrs Kalich subjected to sexual harassment by Mr Es?

In this unusual matter it is worthwhile to re-examine the definition of both discrimination and sexual harassment.

"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.

SECTION 22 - PROHIBITION OF SEXUAL HARASSMENT

-
-
- (1) A person shall not, in an area of activity referred to in Part 4, sexually harass another person.
 - (2) Sexual harassment takes place if a person -
 - (a) subjects another person to an unwelcome act of physical intimacy;
 - (b) makes an unwelcome demand or request (whether directly or by implication) for sexual favours from the other person;
 - (c) makes an unwelcome remark with sexual connotations; or
 - (d) engages in any other unwelcome conduct of a sexual nature,and -
 - (e) that person does so -
 - (i) with the intention of offending, humiliating or intimidating the other person; or
 - (ii) in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct; or
 - (f) that other person is, or reasonably believes that he or she is likely to be, subjected to some detriment if he or she objects to the act, demand, request, remark or conduct.
 - (3) For the purposes of subsection (2)(e)(ii), circumstances that are relevant in determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct include -

-
-
- (a) the sex, age or race of the other person;
 - (b) any impairment that the other person has;
 - (c) the relationship between the other person and the person engaging in the conduct; and
 - (d) any other circumstance of the other person."

If I accepted at face value all the allegations and statements made by Mrs Kalich then I would find that the conduct complained of met all the relevant tests and a complaint of severe sexual harassment had been substantiated.

Conversely, if I accepted Mr Es's defence and evidence at face value I would be most unlikely to reach such a conclusion, and the complaint would be dismissed.

I believe the truth lies somewhere in between.

Section 91 of the Act provides guidance on the burden and standard of proof required in these matters:

"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."

In deciding whether the complainant, Mrs Kalich, has proved on the balance of probabilities that the prohibited conduct occurred I have taken note of the following judicial guidelines.

Actual Persuasion Needed

In *Briginshaw v Briginshaw* (1938) CLR 336 at 361 Dixon J, said:

"The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.

No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal.

But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved."

Difference Between Civil And Criminal Standard Of Proof

The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge: *Reifek-v-McElroy* (1965) 112 CLR 517 at 521.

Source: The ABC of Evidence at [6070] [6130]
(Butterworths)

On the evidence before me I am unable to find that Mr Es subjected Mrs Kalich to an unwelcome act of physical intimacy.

I have carefully considered all the evidence relating to Mr Es's conduct at the Good Friday lunch and his subsequent conduct in the workplace, his remarks about Mrs Kalich being a "hay widow" or "lawn widow" and the invitation to Mrs Kalich to

shower at Mr Es's flat following the late Saturday lunch, and I find that this conduct was unwelcome, and was of an implicit sexual nature with sexual connotations.

The invitation to lunch at the flat was inextricably linked to Mrs Kalich's employment by Mr Es, indeed on his own evidence this link was clearly established.

I accept the evidence of Mrs Kalich that Mr Es referred to her having a "face like a cucumber" and jumped at her saying "boo boo" and while these remarks are offensive and demeaning, they are not necessarily related to unwelcome conduct of a sexual nature.

However on the evidence before me I find that:

- Mr Es did request that Mrs Kalich "use her feminine ways" to induce Mr McRostie to attend lunch;
- As an employee, Mrs Kalich felt obligated to accept invitations issued by her employer, Mr Es;
- Mr Es did ask Mrs Kalich if she would like to shower while at his flat;
- Mr Es pressed Mrs Kalich to drink wine and kept refilling her glass, and that this caused her considerable discomfort;
- Mr Es made unwelcome remarks as to Mrs Kalich being a "lawn widow" or "hay widow" and immediately extended an invitation to Mrs Kalich to have dinner at Mr Es's flat;

and I find an established pattern of conduct occurred in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.

Further, Mrs Kalich's evidence and demeanour supported her statement to Mrs Beljon that she needed the job, and I find that she reasonably believed she would be subjected to detriment if she objected to her employer's behaviour.

Mr Es's admission that he had written her notice of change of employment status before seeing his bank manager, while earlier stating it was as a direct result of the meeting with the bank manager, reinforces Mrs Kalich's submission of a change in status because of her refusal to accept Mr Es's unwelcome behaviour.

While on the evidence I am unable to come to a finding as to the allegations of thigh biting and the grabbing of breasts, for the reasons outlined above I find Mrs Kalich was subjected to sexual harassment by Mr Es in the area of her work, and that this conduct amounted to a detriment restricting Mrs Kalich's right to equality of opportunity in the workplace because of her sex.

ORDERS

"SECTION 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, Mrs Kalich, did not seek compensation for loss of income, but has sought compensation for hurt, humiliation and distress.

I have carefully considered all the evidence put to me in this matter, and have noted the case law presented by Counsel Assisting.

While sexual harassment should never be trivialised, this is, to put it mildly, an unusual case.

Invitations to drinks at work were offered and accepted, the complainant and her husband accepted the hospitality of the respondent on numerous occasions, and Mrs Kalich impressed me as a strong independent person of considerable resilience.

Taking all these matters into account, I issue the following order;

within 28 days of the issuing of this Order the respondent Mr Franc Es pay the complainant Mrs Elfrida Kalich the sum of \$3,000 for hurt, humiliation and distress.

DAWN LAWRIE
Commissioner

June 1998