



**NORTHERN TERRITORY
ANTI-DISCRIMINATION COMMISSION**

LOCATION: DARWIN

**TRIBUNAL: SALLY SIEVERS
COMMISSIONER**

DATE OF HEARING: 16 March – 26 March 2015

HEARING NO: H02014005-01

COMPLAINANT: MRS LINDA SMYTH

RESPONDENTS:

First Respondent: NORTHERN TERRITORY TREASURY

Second Respondent: MR DOUG KERR

COUNSEL:

COMPLAINANT: SELF REPRESENTED

RESPONDENTS: MR CRAIG SMYTH

**DATE OF DECISION: Written Decision published on
1 February 2016**

REASONS FOR DECISION

1. INTRODUCTION

The Complaint

- 1.1. Mrs Smyth lodged a complaint with the Anti-Discrimination Commission (ADC) on 5 August 2011; the complaint form was dated 27 July 2011.
- 1.2. The complaint alleged prohibited conduct by Mr Kerr (Second Respondent), a fellow employee at the Northern Territory Superannuation Office (NTSO), a part of Northern Territory Treasury (First Respondent), and management of NTSO between June 2003 and September 2006.
- 1.3. The hearing commenced, before me, on 16 March 2015.
- 1.4. The hearing proceeded over 10 days, heard evidence from 22 witnesses and 79 exhibits were tendered. The witness list is Attachment A.
- 1.5. Three allegations were referred to hearing, these were:
 - Sexual harassment against the Northern Territory Treasury (vicarious liability) and Mr Doug Kerr (direct liability) contrary to Section 22 of the *Anti-Discrimination Act* (the Act).
 - Discrimination on the basis of sex against the Northern Territory Treasury (vicarious liability) and Mr Doug Kerr (direct liability) contrary to Section 31(2) (d) of the Act.
 - Victimisation of Mrs Smyth against the Northern Territory Treasury (vicarious liability) and Mr Doug Kerr (direct liability) contrary to Section 23 of the Act.

2. THE MAIN LEGAL ISSUES

- 2.1. The matter proceeded at hearing on the basis that the conduct of Mr Kerr towards Mrs Smyth constituted sexual harassment in the area of work. However, it is clear from decided cases that conduct that may constitute sexual harassment in the area of work may also substantiate an allegation of sex discrimination in the area of work so both allegations remain to be considered.
- 2.2. The Act under which the conduct was considered is the *Anti-Discrimination Act* in place at the time of the conduct in 2005/2006.

Sexual Harassment

- 2.3. Section 22 of the Act sets out what is required to be proven to establish Sexual Harassment.
- 2.4. In order to fully understand the issues in contention in this matter the section is set out in full below.

“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; or
 - (b) makes an unwelcome demand or request (whether directly or by implication) for sexual favours from the other person; or
 - (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; and

- (b) any impairment that the other person has; and
- (c) the relationship between the other person and the person engaging in the conduct; and
- (d) any other circumstance of the other person.”

- 2.5. It should be noted that whilst section 22(2)(a) to (d) are all alternative types of conduct, they must be found to exist in conjunction with section 22(2)(e) or (f). The issues in contention in this matter are whether the conduct alleged fits within various subsections of section 22(2). Particularly was the conduct “unwelcome”, of a sexual nature and then the most significant area of contention; the existence of the required connection between the conduct alleged and the area of work.
- 2.6. The case law in the area is clear that the issue of whether the conduct alleged under section 22(a) to (d), should be considered as “unwelcome” is a subjective test.¹ That is, you look to the reaction whether expressed or otherwise of the person who was the subject of the conduct.²
- 2.7. The cases also state whether the conduct is unwelcome is as much from the victim not having solicited or invited the conduct as it will be from any positive indication by the victim that the conduct was not welcome.³ Furthermore, conduct that is “unwelcome” simply means conduct that is disagreeable to the person to whom it is directed.
- 2.8. In regard to the issue of whether conduct is of a sexual nature, the case law requires that the conduct is placed in context, and the event or sequence are not viewed in isolation to make this assessment.
- 2.9. The second area to consider is whether a reasonable person would have anticipated the *possibility* that the reaction to the conduct would involve offence, humiliation or intimidation.
- 2.10. This is an objective test and requires an evaluation of the behaviours against the reasonable person test placed in the circumstances (s22(3)) of the Complainant. It is not determinative that Mr Kerr says he had no intention to offend, humiliate or intimidate Mrs Smyth.
- 2.11. The wording of section 22 is similar to those of provisions in other jurisdictions. The use of the word “possibility” is crucial in making a decision

¹ Kraus v Menzie [2012] FCA 3 at 22.

² Erin v Verga (no3) [2013] 1311.

³ Australian anti-discrimination law – 2nd Edition Rice et al page 584

as this indicates the low threshold against which the conduct has to be viewed in context. Further section 22(3) lists a number of matters to consider in assessing this, including the relationship between the people that are considered in this objective assessment. This list however is not exhaustive.

- 2.12. It should also be noted that the Act also has an additional aspect in section 22(2)(f) where the person is or believes on reasonable grounds that they will be subject to some detriment which is an alternative to section 22(2)(e).

Nexus to Work

- 2.13. In regard to the nexus that is required to work in section 22, section 22 does not set out with the same specificity as section 105, the requirement of a nexus. Section 105 requires “an act in connection with his or her work that is unlawful under this Act”. However the same words cannot be placed in section 22, which only requires “A person shall not, in an area of activity referred to in Part 4, sexually harass another person”.
- 2.14. Clearly, the area of activity in this case is work, so there has to be a link or nexus to work in the conduct of Mr Kerr alleged to substantiate the sexual harassment or sex discrimination. In the equivalent legislation in Tasmania and Queensland they do not require that sexual harassment is linked to a public area such as work. This is not the case in the Northern Territory, a link has to be proven to work to substantiate sexual harassment in this matter.
- 2.15. There have been a number of decided cases interpreting “in connection with work” in regard to employer’s vicarious liability for worker’s conduct, as it is a phrase used under in the sexual harassment provisions of the *Sex Discrimination Act 1984 (Cth)*. It has also been considered in legal journals which have coined the phrase “off duty” sexual harassment.
- 2.16. The decided cases include *South Pacific Resort Hotels Pty Ltd v Trainor [2005] 144 FCR*, *Leslie v Graham* and *Lee v Smith [2007] FMCA 59*. The approach of the Court in *South Pacific Resort Hotels Pty Ltd v Trainor* was applied in *Lee v Smith*.

“The Court went on to say in conclusion on the vicarious liability issue

‘The expression “in connection with” in its context in section 106(1) of the *Sex Discrimination Act 1984 (Cth)* is a broad one of practical application and, as in *Leslie v Graham [2002] FCA 32* the facts here point readily to the

conclusion that Mr Anderson's conduct in the staff accommodation was "in connection with" his employment ...'⁴

2.17. The decided cases listed above, have included findings that sexual harassment occurred in an apartment provided by the workplace, while two people attended a conference. Also sexual harassment in accommodation provided on site by the workplace and the last matter involved the sexual assault of a woman after attending drinks at the house of a work colleague. It was relevant that there was a history of sexual harassment in the workplace prior to the sexual assault, these included:

- Calendars of topless women and computer images containing pornography visible to the Complainant as she moved about the workplace.
- The First Respondent typed on a computer being shared by him and the Complainant the words "Austin is a champion in the sack". When questioned by the Complainant why he had written that, the First Respondent allegedly replied that if the Complainant ever wanted to go out with him she should call him.
- During a conversation between the Complainant and the First Respondent he allegedly said to the Complainant that he would like to have sex with her. It is further alleged that after the Complainant rejected the First Respondent he said to the Complainant "you will be sorry" in a threatening tone etc.

2.18. In proving sexual harassment the test is not as clearly defined as that found in vicarious liability section 105 however, the use of the phrase "in an area of activity" in section 22(1) means that there has to be the nexus between the conduct of Mr Kerr towards Mrs Smyth and their work or workplace.

Discrimination on the basis of sex

2.19. Section 20 of the Act sets out what is required to be proved to establish Discrimination under the Act. Most relevant in this matter is section 20(1)(b), which refers to "harassment on the basis of an attribute" in an area of activity.

2.20. The word harassment is not defined in the Act, whereas sexual harassment is at section 22 of the Act. There is no Northern Territory case law to provide guidance on what is meant by harassment under the Act.

⁴ Lee v Smith & Ors [2007] FMCA 59 (page 156)

2.21. The law in Australia, on the use of the word harassment in the Commonwealth *Disability Discrimination Act 1992*, the word harassment is used but again not defined. As the term “harassment” is not defined in the *Disability Discrimination Act 1992*, the notion was given its Macquarie Dictionary meaning in the decision of *McCormack v Commonwealth* [2007] FMCA 1245.

‘The Macquarie Dictionary (3rd ed) contains a definition of “harass” which is:

“1. to trouble by repeated attacks, incursions, etc., as in war hostilities; harry; raid.

to disturb persistently; torment, as with troubles, cares, etc.”

2.22. Subsequent cases use other dictionary definitions to assist in interpreting harassment including that a one off incidence is sufficient. However, after much analysis the cases and definitions offer broad guidance but state that individual cases turn on their own facts.

2.23. If the alleged conduct fits within the definition of harassment the next step, as stated earlier, is to establish harassment on the basis of an attribute which in this case is a link between the harassment and Mrs Smyth’s sex.

Vicarious Liability

2.24. Section 105 sets out provisions in relation to vicarious liability. It is not as broad as common law vicarious liability but a very specifically defined statutory provision.

2.25. In order to avoid responsibility for the conduct of Mr Kerr, if it is found to be prohibited conduct, the NT Treasury needs to establish on the balance probabilities the matters set out in section 105.

2.26. The live issue and broad interpretation of the connection to work has been discussed above.

2.27. Also relevant is the use of the phrase “all reasonable steps” in section 105(2) which imposes a higher threshold than just reasonable steps. Further section 105(3) is not an exhaustive list of what matters are able to be considered.

2.28. The case law in this area has evolved over time as the research and cases have disclosed sexual harassment is still prevalent and incidents are not declining. The legislation is beneficial and at section 3(c) sets out the objective “to eliminate sexual harassment”.

Victimisation

- 2.29. What is considered victimisation in everyday use is wider and more generalised than victimisation as set out under the Act and defined for the purpose of protecting people's rights to make anti-discrimination complaints. Section 23 sets out very specific criteria and circumstances.
- 2.30. There are two parts to victimisation under the Act. One is the trigger and the second part is the detriment because of something that the Complainant has done, or intends to do under anti-discrimination legislation.
- 2.31. Engaging in prohibited conduct or conduct fitting into one of the subsections in section 23 is referred to as the 'trigger' for victimisation. There is a need to look carefully at each subsection to ensure alleged conduct falls within one of the subsections.
- 2.32. In this case the victimisation allegation, if factually established, is most likely to be considered under section 23(1) (a) which states "has made, or intends to make a complaint." A complaint is defined in section 4 as "a complaint made under Part 6". Part 6 sets out the process of lodging a complaint with the NT Anti-Discrimination Commission (ADC).
- 2.33. If the trigger event is established, there is a need to then establish a nexus to the next limb that is detriment because of the complaint of prohibited conduct or contravention of the Act. The person who is alleged to have done the victimising must have known of the complaint, which is the trigger.
- 2.34. The phrase detriment is not defined in the Act. However, it has been considered in cases "being placed under a disadvantage with consequent 'loss damage or injury'." Legislation refers to any detriment however, previous decisions have established that detriment must be material, it must be a matter of substance and not trivial. Detriment is determined objectively.

Tendency evidence

- 2.35. It is not unusual in cases similar to this one for the incidents that make up the allegation not to be witnessed but to occur with just the Complainant and Respondent present. It is also not unusual for a Complainant to lead evidence or seek to lead evidence from other witnesses who have had similar experiences of the conduct by the Respondent particularly if, as in this case, the conduct is largely denied.
- 2.36. This issue has been considered recently by the Federal court in the matter of *Robinson v Goodman [2013] FCA 893*. This is a case where the issue was

considered as a preliminary matter, and unlike this matter the *Evidence Act 1995* (Cth) applied. There were two key considerations, one was the relevance of the evidence to be lead and the second is weighing the probative value of the evidence.

2.37. In the discussion in the above case it was said that the critical question is whether evidence is relevant to a fact in issue, because it shows that a person has or had a tendency to act in a particular way. The first step is relevance and the second step is the balancing of the probative value of the tendency evidence and the potential prejudice to the Respondent.

3. ONUS AND BURDEN OF PROOF

3.1. Before considering the evidence and findings that are to be made, I will set out what has to be established, the parameters or boundaries provided by the Act as it sets out how the evidence is to be measured and understood in light of these requirements.

3.2. The Act places the onus of proof that is the requirement to prove the allegations, on Mrs Smyth as the Complainant. This is set out in section 91, replicated in full below.

“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.”

3.3. However, if the conduct alleged against Mr Kerr substantiates prohibited conduct, e.g. sexual harassment, sex discrimination or victimisation, then when considering the issue of whether NT Treasury are vicariously liable (section 105) for the conduct, the onus shifts to NT Treasury to provide evidence that the requirements which are set out in section 105(2) and (3) have been established.

The Standard of Proof

3.4. As set out in section 91 the standard of proof is the civil standard and there have been a number of cases in other jurisdictions on what in practice this means in the anti-discrimination jurisdiction and in particular where the

allegations are of sexual harassment. In *Ewin v Vergara (no 3) [2013] FCA 1311*, paragraphs 93 – 95, it is stated that:

“In considering the matters referred to in s 140(2), Branson J noted that moral opprobrium may, but will not necessarily attach, to discriminatory conduct (at [133]); anti-discrimination legislation is to be regarded as beneficial and remedial legislation (at [134]); that the absence of intent as a requisite element of the conduct proscribed diminishes the opprobrium attached to and the gravity of a finding of contravention (at [135]); and that not all contraventions are equally grave, the gravity of a contravention will vary depending upon the seriousness of the allegations made (at [137]).

Each of the observations made by Branson J in relation to the RD Act are apposite in their application to the SD Act. As Branson J said at [139], to adopt as a starting point a position that discrimination is a serious matter not lightly to be inferred, will have a tendency to lead a trier of facts into error. Her Honour continued:

“The correct approach to the standard of proof in a civil proceeding in a federal court is that for which s 140 of the Evidence Act provides. It is an approach which recognises, adopting the language of the High Court in *Neat Holdings 67 ALJR 170*; 110 ALR 449, that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved — and, I would add, the circumstances in which it is sought to be proved.”

The passage referred to by Branson J from *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 should be set out in full. At 170-171 Mason CJ, Brennan, Deane and Gaudron JJ said:

“The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary “where so serious a matter as fraud is to be found”. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not

lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.”⁵

- 3.5. In practical sense as the Commissioner I am required to decide what was more likely to have happened; not in a broad sense, but looking at each of the allegations, is it more likely or not that the allegation is made out?

4. THE ASSESSMENT OF THE EVIDENCE

- 4.1. Before I set out the evidence and the factual findings I have made, it is also necessary to set out the manner in which I have weighted different forms of evidence, including the approach I have taken to assess the reliability of the evidence given by Mr Kerr and Mrs Smyth.
- 4.2. The following paragraphs set out general comments and how in coming to the decision I have assessed evidence. The approach taken in the hearing was to accept the tender of the bulk of evidence as long as it was relevant to the issues being determined. However, it is important to set out how evidence is to be used and what weight is given to evidence, as not all evidence tendered is of equal weight.
- 4.3. Assessing the credit of various witnesses is not as simple as accepting all that one witness says and rejecting all the evidence of another witness. It requires an assessment of each area of disputed facts and the quality of evidence and issues that may impact on the accuracy of each witness in the evidence they gave about the particular issue.
- 4.4. The best evidence is clearly what a person sees, hears or experiences with their own senses for example; they were one of the participants in a conversation or see an incident with their own eyes or in this case a document that was created at the time of the incident as a business record. In this case, records created during other assessments of the work place.
- 4.5. It is also important to note that the content of a question in either examination in chief or cross-examination, which is then denied, is not evidence that the events or incidents occurred. The answer to the question is the evidence. As I said repeatedly during the hearing, making a suggestion to a witness and having them agree with it, carries far less weight than if the witness gave evidence of events in their own words.

⁵ Ewin v Vergara (no 3) [2013] FCA 1311, paragraphs 93 – 95.

- 4.6. It should also be noted witnesses repeating, in their statement or in evidence, events that other people have told them about and that they have not seen themselves, carry far less weight than the evidence of people who saw and heard things themselves first hand.
- 4.7. Furthermore, material provided in submissions for the first time and not raised in the hearing is not evidence and cannot be used in arriving at my decision, for example; an explanation for the creation of file note by Mr Fernandez being that it was created by someone else, or new documents attached to submissions, for example extracts from Annual Reports.
- 4.8. Mrs Smyth relies heavily in her submissions on the recorded conversations she obtained either during telephone calls or in her meetings with people however, in most cases these carry very little weight as people tended to agree with statements put to them. Unless similar evidence was given in the hearing, then very little weight can be placed on this material.
- 4.9. Greater weight can be placed on the evidence of people who participated in the taped phone calls or conversations and then gave evidence and were available for cross-examination.
- 4.10. The evidence of recordings or witnesses' statements tendered in the hearing but who were not available to give evidence at the hearing will generally be given less weight.
- 4.11. The weight given to recorded material is also reduced when the person being questioned had been drinking.
- 4.12. In making a decision, I am not bound by the rules of evidence however, it is common sense that evidence is less reliable, less likely to be accurate, the further you get from the original source, like the game of whispers played by children. There is a real risk of accepting evidence of what someone said to someone else about something that they saw or heard.
- 4.13. In this case, all witnesses' evidence, unless from a document created at the time, either as a record of a meeting held in the NTSO, or for a purpose unrelated to the issues in this case, is affected by the passing of a considerable amount of time. This case, required people to give evidence about events that occurred between 2003 and 2006, in March 2015.
- 4.14. It is also clear that the majority of witnesses have something vested in the outcome. Senior NTSO management and their work colleagues who gave evidence, all appear to have chosen sides and for some the inconvenience of

being asked to be involved was evident in the manner in which they gave their evidence.

- 4.15. In making a decision, particularly in a sexual harassment case, Courts and Tribunals are often left to choose between competing and conflicting versions of events, which is the case here, where vastly differing accounts of the sequence of events were given.
- 4.16. As set out above this matter has the added difficulty that events occurred ten or so years prior to when witnesses gave their evidence. This amplifies the readily recognised occurrence of witnesses' preconceptions influencing their perception of an event and the later recount of that event will involve reconstruction of a memory which may be influenced by the process of rationalisation, or may be influenced by the tendency to unconsciously reconstruct on the basis of subsequent events. Other factors that make memory less reliable include emotions, drug and alcohol consumption at the time of the alleged events, and animosities between witnesses etc.
- 4.17. I have taken a cautious approach to the evidence, particularly from Mr Kerr and Mrs Smyth, the two protagonists.
- 4.18. Inevitably, my assessment is influenced by my general impression of both Mr Kerr and Mrs Smyth as they gave their evidence. I acknowledge the limitations of the assessment of demeanour however, there are a number of documents and other witnesses' accounts to compare and contrast the manner and content of their evidence to.
- 4.19. I say at the outset, in weighing up evidence given by both Mr Kerr and Mrs Smyth, it is clear that some evidence was unreliable and had to be rejected. I will make some initial comments on generally why I found each witness unreliable and what cause I attribute that unreliability to at the outset, so the reader can better understand my reasoning. I will deal with the specific reasons that effect particular events as I consider them.

Observations about Mr Kerr's evidence

- 4.20. My general impression is that Mr Kerr had little memory of the specific events alleged in the matter due, potentially to the passing of time and potentially his level of alcohol use over this time period and the personal issues he was experiencing at the time. As set out below he was still prepared, particularly during cross-examination even though given multiple warnings to make comments unrelated to the questions asked and often to provide information to portray Mrs Smyth or her partners in a negative light.

- 4.21. Mr Kerr was unimpressive during evidence in chief as he appeared to be stating his case rather than giving evidence. During cross-examination, his approach to Mrs Smyth was arrogant and condescending. Mr Kerr's answers in cross-examination were often non-responsive and evasive. He repeatedly, deliberately added information (unsupported by other evidence in the case) such as Mrs Smyth was often drunk; she had multiple partners, one of whom was violent, questioning Mrs Smyth credibility and drawing attention away from answering the question.
- 4.22. Mr Kerr also in cross-examination was not prepared to concede minor details which would have been reasonable to concede when questioned for example; he did not concede the possibility that he provided a reference to Mrs Smyth in January 2005, until the document was produced to prove the event occurred.
- 4.23. In the first half hour of cross-examination I repeatedly asked him just to answer the question put to him, and not to offer additional information. He also became argumentative and obstructive as the cross-examination continued.
- 4.24. Mr Kerr was also effusive as to why things were not possible (even though he had no direct memory) and about his own expertise in the office. He made dramatic gestures and often became pedantic.
- 4.25. Evidence was provided throughout the case that Mr Kerr was suffering from the effects of excessive drinking in the relevant period. He lacked awareness and did not acknowledge the impact of his behaviour in a work setting for example; He stated that Ms Watters spoke to him 6 months after the incident between them and so he believed his earlier conduct was not problematic and that they had both moved on (this incident is fully explored below in the Complainant's case).
- 4.26. In regard to the scope and extent of his relationship with Mrs Smyth, he minimised any potentially negative aspects to his conduct; firstly whether incidents occurred at all, disputing the circumstance in which they occurred, also trivialising the impact of the conduct on Mrs Smyth.
- 4.27. While I do not generally regard Mr Kerr as a credible witness, not all of his evidence is rejected. The approach I have taken is to carefully scrutinize his evidence and largely reject it unless a "cogent foundation" exists such as corroborative evidence, which makes his account more likely. His evidence is not accepted if it conflicts directly with other credible accounts.

Observations about Mrs Smyth's evidence

- 4.28. At the time of the events, between 2003 and 2006, Mrs Smyth was a hard working individual, giving her all to make a new career for herself. While she was a capable self-advocate in areas without emotional overlay, she appears to be more vulnerable when dealing with the behaviour of a work colleague upon whom she relied, due to previous life experiences.
- 4.29. It is clear at the time of the hearing that she still had conflicting emotions about how she felt about Mr Kerr's conduct. She felt indebted to him due to the professional support he provided. Mrs Smyth also displays animosity towards NTSO management in particular Mrs Clayden, for what she believed was allowed to happen to her.
- 4.30. It is clear from the material that Mrs Smyth gathered and prepared for the hearing that the matter has been a focus of her life which is not uncommon in cases similar to this.
- 4.31. The reliability of Mrs Smyth's evidence, in particular what she believed motivated NTSO management, the events attributed to NTSO management and the motivation attributed to some of Mr Kerr's conduct, is affected by a lack of objectivity and displays a propensity to assume the worst of NTSO management.
- 4.32. In areas where the extent of her relationship with Mr Kerr is questioned, Mrs Smyth minimises the scope of contact between them, as she is sensitive that this in some way diminishes the seriousness of the conduct she alleges against him.
- 4.33. I do not find Mrs Smyth to be deliberately dishonest as the essential features of her case and evidence have remained consistent. However, I am cautious in accepting Mrs Smyth's evidence on topics such as the sequence of events after NTSO were made aware of Mrs Kerr's inappropriate conduct, NTSO management's role in events and the extent and full scope of her relationship with Mr Kerr. In these matters I consider her reliability to be vulnerable. I only accept her evidence where it is corroborated and consistent with material created earlier.
- 4.34. Another area where I have exercised great caution in regard to Mrs Smyth's evidence is in relation to how she claims the NTSO management responded to the allegations of inappropriate behaviour by Mr Kerr. It is clear that Mrs Smyth remains very disappointed and angry about what she perceives as an inadequate response from them. This, I believe, has had an effect on how she has interpreted or reconstructed events that occurred during this time period.

She remains particularly bitter and angry with Mrs Clayden. Mrs Smyth's strong feelings see her overstate her case, embellish aspects and attribute motivations to NTSO management's actions which are not sustainable. It is in the area of NTSO's actions and motivations that she attributed to them that I consider her reliability to be particularly vulnerable. This includes the allegation that NTSO management have fabricated evidence and colluded in the presentation of their evidence on the sequence of events. I treat these allegations and evidence with a great deal of caution.

- 4.35. While it is a live issue in Mrs Smyth's case, in regard to the authenticity of various documents, once this issue is resolved, documents created in the work place at the time in question, which shed light on events, are attributed greater weight as corroborative evidence for various incidents. For example, the file note created by Mr Fernandez which documents events involving staff of the NTSO between 4 January 2005 and 18 February 2005.⁶

Impact of time

- 4.36. The passing of ten years between the events in question and evidence given on them had an impact on the evidence provided by all witnesses. While most witnesses did their best to provide a truthful account, caution is required in making findings about events that are not supported by documents created at the time that these events unfolded.

Taped conversations

- 4.37. In preparing for the case, Mrs Smyth recorded a number of people she had conversations with, either in person or by telephone. The list of recorded conversations is detailed in Attachment B.
- 4.38. Mrs Smyth made two visits in person to Mr Kerr, on 17 and 27 February 2011. She was intoxicated on the second visit and swore at Mr Kerr. In the latter part of her visit Mrs Smyth was aggressive towards Mr Kerr.
- 4.39. Both conversations were recorded without Mr Kerr's knowledge or consent. This does not reflect well on Mrs Smyth but no submissions were received regarding the illegality of the recording or that they could not be used as evidence in the case. After all the time spent on the recordings most were of very little evidential value. Evidence given under oath at the hearing and documents created during the business of the NTSO at the time of the alleged incidents, is to be given the greatest weighting in coming to my decision in this matter.

⁶ Exhibit R87, Annexure A

- 4.40. A number of the recorded conversations feature people agreeing with leading questions due to this it is difficult to get a sense of what the person's actual memory of events was or views were. This type of evidence carries very little weight and is of limited assistance in proving the case that Mrs Smyth is alleging. It will be outlined where material from interviews has been relied on and it will usually only be used if it is supported by direct oral evidence or documents created at the time, such as; evidence from Ms Scholz in regard to events concerning Ms Watters.

5. BACKGROUND

- 5.1. The Complainant, Mrs Linda Smyth and the Second Respondent, Mr Doug Kerr were both employees of the Northern Territory Public Service, working in the Northern Territory Superannuation Office (NTSO), during the relevant period August 2003 until September 2006.
- 5.2. In 2003 and 2004, the NTSO, which was part of NT Treasury (First Respondent), was located in Palm Court on Cavenagh Street. The NTSO then moved to Enterprise House on the Esplanade in November 2004.
- 5.3. Mrs Smyth commenced employment as a Finance Officer in Training (FOIT) in January 2003, and on 5 August 2003 commenced a rotation in the Finance unit in NTSO. At this time, Mr Kerr had been working for NT Treasury, specifically the NTSO, since March/April 1987 and at the end of 2003 was in the Policy area of NTSO.
- 5.4. Mrs Kathleen Clayden commenced as Commissioner for Superannuation in January 2003 after many years in other Public Service roles.
- 5.5. The NTSO was a small office with approximately 24 staff. Other key staff in NTSO, during the relevant time, were Mr Keith Fernandez, who was the Assistant Director of Superannuation Policy, Mr Gerard Taylor, the Operations Manager with responsibility for Member Services, Benefits and Systems area and Ms Wendy McKay, the Finance and Investments Manager.
- 5.6. From August 2003 to September 2006, the time period of the allegations, Mrs Smyth had two partners. Mrs Smyth was in a relationship with Mr Mike Rawiri until the middle of 2005 and with Mr Cy Bush following this.
- 5.7. Mrs Smyth, after her time in the FOIT program, commenced work in the NTSO as an Administrative Officer (AO) 3 and worked her way up to an AO5 position. She acted on higher duties on numerous occasions.

- 5.8. Around April 2003, Mr Kerr moved from the Finance area to the Senior Policy/Research section. Even after this move he was still actively involved in smaller superannuation schemes.
- 5.9. Mr Kerr trained many staff in the finance area, including Ms Kerrina Watters (nee Dove), Ms Emmy Milan and Mrs Smyth. The training arrangement, whether asked for by managers or the individuals was informal.
- 5.10. Mrs Smyth's case is that Mr Kerr was a friendly work colleague however, from the middle of 2004, circumstances changed as she had increased work responsibility and more to do with Mr Kerr. It was alleged that he had always been "touchy feely", however at various times throughout her employment at the NTSO the "degree and the frequency" of the touching "escalated". It made Mrs Smyth feel uncomfortable and the behaviour was unwelcome.
- 5.11. It is Mrs Smyth's case that the dynamic of her relationship with Mr Kerr changed after she received a late night call from him in mid to late 2004, and believing that he was very depressed or suicidal, drove to his home in Palmerston. She offered assistance to him throughout this time as she felt that he had no-one else to turn to.
- 5.12. It is clear, from Mr Fernandez's evidence, that Mr Kerr (who he supervised) was having some personal issues at the time in question (2003 – 2005) and was drinking heavily. This affected his work performance and resulted in high absenteeism. Mr Kerr concedes that he was struggling at this time.
- 5.13. Mrs Smyth's case is that, following her offer of assistance to Mr Kerr, the number of phone calls and text messages from him increased dramatically and became "too much". He became intrusive and the frequency of the communication started to impact negatively on her and her personal life.
- 5.14. Mrs Smyth alleges that on 8 January 2005 Mr Kerr broke into her home and she found him naked, drunk and asleep in her son's bed. After this incident, Mrs Smyth ceased communication with Mr Kerr. A card from Mr Kerr to Mrs Smyth indicates that early in 2005 Mr Kerr was struggling with personal issues.⁷ In addition to the card there are two letters, written in early March 2005, between Mr Kerr and Mrs Smyth. In the first letter Mr Kerr asks Mrs Smyth why she isn't communicating with him. Mrs Smyth outlines her reasons for this in her letter of response.⁸ Mrs Smyth denies disclosing the information to a work colleague at this time.

⁷ Exhibit C6

⁸ Exhibits C8 & C9

- 5.15. It is the NT Treasury's case that management was made aware of allegations of inappropriate conduct by Mr Kerr to Mrs Smyth in February 2005. The conduct described is different to that alleged by Mrs Smyth. NT Treasury also alleged that management were provided with the two letters and arranged for a mediation to occur between Mr Kerr and Mrs Smyth in early March 2005. There is a real difference between NT Treasury, Mr Kerr and Mrs Smyth's description of the sequence of events in terms of when management was made aware of the allegations of inappropriate behaviour against Mr Kerr and when mediation occurred.
- 5.16. Mrs Smyth alleged two further incidents occurred at her home in April and May 2005. In the first incident in April, Mr Kerr was found naked in a chair on Mrs Smyth's back veranda and in May 2005, Mrs Smyth alleged that he did not leave her home with work colleagues when they had left.
- 5.17. It is Mrs Smyth's case that the harassment did not occur continuously throughout 2005 and 2006 and that there was no harassment in the second half of 2005.
- 5.18. Mrs Smyth case alleges further unwelcome touching in March /April 2006.
- 5.19. Mrs Smyth's case alleges that throughout 2005 and 2006 a number of emails with sexual connotations were sent by Mr Kerr either solely to Mrs Smyth or to Mrs Smyth and others in the office.
- 5.20. In early 2006, Mr Kerr purchased a house two streets from Mrs Smyth's home. Mrs Smyth did not raise the issue with her employers at that time but management at the NTSO say when they became aware of this they raised this with Mrs Smyth in February 2006.
- 5.21. The next incident Mrs Smyth alleges in her case is said to occur on 19 August 2006, when she and her partner at the time, Mr Cy Bush, arrived at Mrs Smyth's home and found Mr Kerr naked on her back veranda. Mr Kerr returned the next day to verbally abuse Mrs Smyth.
- 5.22. It was following this incident that Mrs Smyth alleged that she first informed management at the NTSO of her issues with Mr Kerr. Mrs Smyth alleges that she had a meeting with Mrs Clayden and her direct supervisor, Ms McKay. During this meeting, Mrs Smyth alleges that Mrs Clayden was very unemotional and cold and told her that the only option available to Mrs Smyth was to make a formal complaint against Mr Kerr and take him to court but that if he committed suicide as a result then Mrs Smyth would be to blame. NT Treasury denied both the timing and the content of this conversation.

- 5.23. Mrs Smyth took recreation leave shortly after the alleged incident in her home on 19 August 2006 and during this leave she resigned from the NTSO. Mrs Smyth alleges that she felt forced to resign as she couldn't bring Mr Kerr to court due to his mental instability but that it was clear to her that his harassment wouldn't stop if she continued to work in the NTSO.
- 5.24. Other events which Mrs Smyth claims support her case are the incidents between Mr Kerr and other female staff in the NTSO, particularly Ms Kerrina Watters (nee Dove) and Ms Emmy Milan. Ms Watters gave evidence of receiving an excessive number of emails and phone calls from Mr Kerr with a sexual undertone and Mr Kerr concedes aspects of this conduct.
- 5.25. Mr Kerr's response regarding certain incidents is that he has no memory of these and he would not have behaved in this manner. Mr Kerr's case is that he and Mrs Smyth were friends with a much closer involvement in each other lives than disclosed by Mrs Smyth and the phone calls, texts and even work emails were part of that friendship.
- 5.26. Mr Kerr alleged the work place contact was also part of the friendship and the incidents at her home were not as she recounted but explicable in the scope of their relationship which involved drinking heavily and hanging out together playing pool, swimming in Mrs Smyth's pool and sleeping over at her home. Mr Kerr claims that he was also welcome to swing by Mrs Smyth's home even if she wasn't there. It is Mr Kerr's case that even after Mrs Smyth resigned they maintained a relationship.
- 5.27. NT Treasury's sequence of events differs markedly from Mrs Smyth's and also contains the overarching explanation that if inappropriate behaviour occurred it did not occur in the workplace, but in the two employees' private lives away from the workplace, and so they were unable to take action.
- 5.28. Furthermore, NT Treasury's response (via NTSO) is that they did all they could to make staff aware of their rights if discrimination or harassment occurred; the office provided staff with Anti-Discrimination Training and had a Harassment in the Workplace Policy. The NTSO management also maintained that they did all they could, when Mrs Smyth disclosed the events with Mr Kerr to them; the time line of which differs considerably to Mrs Smyth's.
- 5.29. NT Treasury's case is that the disclosure and subsequent mediation occurred in February/March 2005 and not August 2006 as alleged by Mrs Smyth. The NTSO asserts that management did everything they could for Mrs Smyth and offered advice on how to manage her situation. However, as Mrs Smyth was not prepared to make a formal complaint the NTSO management were

restricted in what they could do and were also restricted as most of the conduct alleged against Mr Kerr occurred outside of work.

5.30. NT Treasury's case is that in 2005, NTSO management did all they could to encourage Mrs Smyth to make a formal complaint. They also moved his desk, monitored contact between Mr Kerr and Mrs Smyth and sent them to mediation. Furthermore, in early 2006 when concerns were raised that Mr Kerr had purchased a home close to Mrs Smyth's house, they again raised the issue with Mrs Smyth and offered assistance. NTSO management believed that Mrs Smyth's decision to resign was to pursue outside business interests.

5.31. Mrs Smyth lodged a complaint with the Anti-Discrimination Commission (ADC) on 5 August 2011; the complaint form was signed 27 July 2011. The complaint form was lodged with a cover letter from Top End Women's Legal Service dated 5 August 2011.

6. COMPLAINANT'S CASE

6.1. The Complainant's case alleged a sequence of events throughout late 2003 until late 2006 that Mrs Smyth says support her sexual harassment or sex discrimination complaint and victimisation complaint.

6.2. Mrs Smyth's case alleges broadly four types of behaviour of which there are multiple occurrences:

1. Mr Kerr's unwelcome touching in the work place that made her feel uncomfortable. It is alleged this occurred over two periods first from June 2004 to January 2005 and then again when Mrs Smyth was on higher duties in March/April 2006.

2. Excessive, intrusive, demanding text and phone calls, in particular after her visit to Mr Kerr's Palmerston residence in August/September 2004.

3. Emails in the work place that contained sexualised content:

- 3a. Email dated 22 December 2005⁹

- 3b. Emails dated 17 March 2006¹⁰

- 3c. Email dated 23 March 2006¹¹

⁹ Exhibit C23

¹⁰ Exhibit C24 (x2 emails)

3d. Email dated 1 June 2006¹²

3e. Email dated 23 August 2006¹³ (The impression Mrs Smyth had of this email was that the sexual harassment would continue as this was sent by Mr Kerr immediately after the mediation allegedly occurred).

4. Behaviour at her home:

4a. On 8 January 2005, Mrs Smyth alleges that Mr Kerr broke into her home and she found him naked in her son's bed. Mrs Smyth believed that he had masturbated and was drunk. When he exited her son's room and approached her, she was sitting at her dining room table and he placed her hand on his penis, on the outside of his shorts.

4b. Mr Kerr was found naked on Mrs Smyth's back veranda by Mr Rawiri in April 2005.

4c. Mr Kerr was intoxicated and remained at her home after Mr Bryars and his partner left in May 2005.

4d. On 19 August 2006 Mr Kerr was naked on her back veranda and also returned to her home the following day and abused her.

6.3. Mrs Smyth also alleged earlier incidents involving other women to support her allegations, including Mr Kerr's conduct towards Ms Watters which involved sending an excessive amount of emails, phone calls and texts to her, some containing sexualised content. His behaviour towards Ms Milan, who commented to a work colleague that she was uncomfortable with Mr Kerr touching her, is also put forward by Mrs Smyth in support of her case.

6.4. Mrs Smyth alleges that the allegations in regard to Mr Kerr's behaviour towards other female staff substantiate her allegation that NTSO management knew of Mr Kerr's behaviour towards other female staff and still put Mrs Smyth in harm's way.

6.5. Mrs Smyth alleged that five documents tendered in the case by the First Respondent were fabricated to support a version of events that differs significantly to hers.

¹¹ Exhibit C33

¹² Exhibit C17 (attached to original complaint)

¹³ Exhibit C11

- 6.6. A key area of dispute between the parties is when the allegation of inappropriate conduct was first raised with NTSO management and when the mediation and other events actually occurred.
- 6.7. Mrs Smyth's case also relied on evidence, disclosed both in her case and in the Respondent's case, of Mr Kerr's general conduct between 2003 and 2006. Mr Kerr's conduct at this time was recorded in work notes written by Mr Fernandez, the details of which are supported by numerous other witnesses. The alleged conduct involved Mr Kerr drinking heavily, substantial absenteeism, and the impact of this behaviour on the quality of his work performance. It should be noted that from the outset that Mrs Smyth does not allege that the harassment was constant throughout her time at the NTSO which is from August 2003 to September 2006.

Mrs Smyth's Case against NT Treasury

- 6.8. Mrs Smyth's case against NT Treasury is that management of the NTSO, in particular Mrs Clayden, and to a lesser extent Mr Fernandez and Mr Taylor, did not do enough to protect her. Firstly by placing her with a man who had previous allegations against him of harassing female colleagues, secondly by not following the Harassment in the Workplace policy once they received the March 2005 letters, and lastly when told in August 2006 of the alleged behaviour.
- 6.9. Furthermore, Mrs Smyth alleges that Mrs Clayden's reaction and comments during and after the August 2006 meeting lead her to believe that she was on her own and that she was unsupported in dealing with the behaviour. Mrs Smyth's case is that because of this reaction she was forced to resign and that this conduct constitutes victimisation once Mrs Smyth had complained.

Undisputed Employment History and Background of NTSO

- 6.10. I find that Mrs Smyth's employment commenced with NT Treasury on 31 January 2003 as a trainee in the Finance Officer in Training (FOIT) program. There is clear evidence, throughout the case, that Mrs Smyth was impressive during her interview with NT Treasury and that she was well regarded as a mature aged graduate. Mrs Smyth's rotation in the Finance area of NTSO commenced on 5 August 2003. She was a valued employee.
- 6.11. Mrs Smyth applied for and won the AO4 position and commenced as a permanent employee in this role on 22 March 2004 (with a three month probationary period). Mrs Smyth states that she was trained by Ms Watters for a week before Ms Watters moved to Systems Administration. Ms Milan, the

Senior Finance Officer at that time, then assumed responsibility for training Mrs Smyth.

- 6.12. When Mrs Smyth commenced her employment with the NTSO there were two other employees in the Finance section, Ms Milan at an AO5 level and Ms McKay, the Finance and Investments Manager.
- 6.13. Mr Kerr worked in the Policy section with one other trainee and reported to Mr Fernandez. Importantly, Mrs Smyth did not know Mr Kerr before she commenced in the NTSO office.
- 6.14. Mrs Smyth's case is that she only saw Mr Kerr during office hours up until she visited his home in Palmerston.
- 6.15. It is clear that Mr Kerr was friendly and helpful in the work place, offering advice etc., as he had 20 years' experience with the NTSO. During his time at the NTSO, Mr Kerr had trained many new staff, including Ms Watters, Ms Milan and Mrs Smyth.
- 6.16. Mr Kerr spent a lot of time training Mrs Smyth and appointed himself her "unofficial mentor".¹⁴
- 6.17. After three months' probation, Mrs Smyth was made permanent. In May 2004, Ms Milan wanted to take leave, which would include being absent over the end of financial year period. This leave was approved by Commissioner Clayden.

Issues of a lack of training, filling two positions and developing a reliance on Mr Kerr

- 6.18. Mrs Smyth alleges that there was a lack of training provided by Ms Milan. From June 2004, when Ms Milan left the finance section, it is Mrs Smyth's case that she had to take on the AO5 role. Mrs Smyth's allegation and relevance to this is that it resulted in a greater reliance on Mr Kerr, as it was both her and Ms McKay's first experience of the end of financial year processes. This reliance on Mr Kerr led to a closer working relationship with Mr Kerr.
- 6.19. Mrs Smyth also alleges that she did both the AO4 and AO5 roles (an area disputed by NTSO).

¹⁴ Exhibit C17, Attachment "Referee Report – Doug Kerr 31 March 2006"

- 6.20. It is Mrs Smyth's evidence that she was extremely stressed going through her first end of financial year in the AO5 role. It is also her evidence that she was very reliant at this time on Mr Kerr; who trained her and helped her with tasks. According to Mrs Smyth, Mrs Clayden said she could rely on Mr Kerr. Mr Kerr had worked in Finance and only left that section shortly before Mrs Smyth commenced there. Mr Kerr's assistance to Mrs Smyth at this time is supported by Ms McKay.
- 6.21. It is Mrs Smyth's view (with mixed feelings) that she would not have made it through the end of financial year work period in 2004 without Mr Kerr's assistance.
- 6.22. Ms McKay supports Mrs Smyth's statement that Ms Milan refused to train Mrs Smyth in both her statement and evidence.¹⁵ When Mrs Smyth won the Senior Finance Officer position it was a difficult time for her. Ms McKay also supported Mrs Smyth's claims that she was working lots of overtime. In addition to that Mrs Clayden had said that Mr Kerr was to be used as a resource by the Finance team during this period. Mr Kerr's assistance to Mrs Smyth at this time is supported by Ms McKay.
- 6.23. An area where there appears to be little dispute, is that Mr Kerr would, due to his knowledge of the Super schemes and the finance area, assist Mrs Smyth if requested. How this was to transpire either with defined areas agreed via his supervisor Mr Fernandez, or more informally is an area of minor dispute.
- 6.24. It is clear that Mr Kerr was to assist Mrs Smyth in June/July 2004 as this was her first experience of the end of financial year process. Mrs Smyth attributes this assistance to conversations with and assurances from Mrs Clayden.
- 6.25. Mrs Clayden in her evidence did not agree with Mrs Smyth's assertion that she had difficulty obtaining training from Ms Milan. Mrs Clayden does agree that at various times it was just Mrs Smyth and Ms McKay in the finance area; however there is evidence of various other people in the AO4 role at different times between 2003 and 2006. This is very general evidence and not specific to the time period June to September 2004.
- 6.26. Mrs Clayden's evidence is that Mrs Smyth was not reliant on Mr Kerr for training and support as although there were training issues with Ms Milan, Ms McKay, as the manager, should have been just as skilled and as capable of training Mrs Smyth.

¹⁵ Exhibit C36

- 6.27. Mrs Clayden, in cross-examination broadly supported the arrangement that Mr Kerr could at times assist Mrs Smyth but added that this would have been in consultation with Mr Fernandez, as Mr Kerr's supervisor. Mrs Clayden also conceded that they had difficulty filling the AO4 position.
- 6.28. In cross-examination, Mr Fernandez also stated that Mr Kerr had been there a long time and knew the finance processes. He would have provided assistance because of his knowledge of the way certain schemes worked.
- 6.29. Under cross-examination, Mr Kerr did not agree that he was allocated as a resource at specific times to the finance section. He states that his assistance would have been requested for work on smaller schemes. Mr Kerr does however agree that he would have been seen as a resource because of his knowledge. He does not agree that he would have been allocated as support to the finance team by Mrs Clayden.
- 6.30. I find that the period June to September 2004 was a stressful time for the Finance team as Ms McKay and Mrs Smyth were going through their first end of financial year. Mrs Smyth and her direct supervisor did not feel adequately trained or resourced and worked additional hours to achieve the requirements of the job. While Mr Kerr did not have official status as supervisor he assisted Mrs Smyth during this period; a matter that even in 2015 Mrs Smyth was grateful for. This was an important foundation of the ongoing working relationship between Mr Kerr and Mrs Smyth and set up an ongoing dynamic of their relationship.

Ongoing Workplace support provided by Mr Kerr to Mrs Smyth

- 6.31. In November 2004, the NTSO moved from Palm Court to Enterprise House. During this time, it is alleged that Mr Kerr gave Mrs Smyth his business card with his mobile number for her to call him about work matters. It is Mrs Smyth's case that one reason for giving Mrs Smyth his mobile number was due to their different work hours; Mrs Smyth came in later and worked later and Mr Kerr came in early and left early. Mrs Smyth's case is that she could call Mr Kerr on his mobile during her workday if he had already left.
- 6.32. Mr Kerr denied that he handed over a business card with his mobile number on it under these circumstances. His evidence is that he gave Mrs Smyth his business card one weekend that Mrs Smyth's partner at the time, Mr Mike Rawiri, was away. He gave it to her on the premise that if she had a problem she could call him.

- 6.33. Mr Kerr agreed under cross-examination that he arrived at work between 6.30am and 7am and went home between 4.30pm and 5pm. He did not agree with Mrs Smyth's assertion that he left the office at 3pm.
- 6.34. Mr Fernandez, in cross-examination agreed that Mr Kerr was an early starter and would regularly be in the office before him at 7am however, he could not say when Mr Kerr left the office.
- 6.35. I find that it is clear that Mr Kerr started work early and also that he gave his business card to Mrs Smyth. Regarding the circumstance of provision of the business card, I find the version of events given by Mrs Smyth more likely.
- 6.36. The real issue of significance is that having the card increased the contact between them and extended the relationship beyond work hours.

Mrs Smyth's Higher Duties Appointment

- 6.37. It is Mrs Smyth's case that she was more reliant on Mr Kerr and her contact with Mr Kerr increased each time she was on Higher Duties Appointment (HDA).
- 6.38. In Ms McKay's evidence, she states that there were three instances when Mrs Smyth worked on HDA as she was away. This occurred in October 2004, September 2005 and March/April 2006. Ms McKay agrees with Mrs Smyth that she would have been reliant on Mr Kerr during her time on HDA and the job would have necessitated her working closely with him. The Personnel Information Payment System (PIPS) records for Mrs Smyth, supports Ms McKay's and Mrs Smyth's evidence on this point, as does the statement of Mrs Clayden.¹⁶ The relevance of these dates is that they are the link to alleged events in the sequence, such as the touching, excessive phone calls and texts.
- 6.39. The periods that Mrs Smyth was on HDA are not in doubt; there is some dispute over staffing levels at these times and how many hours Mrs Smyth worked. The more relevant issue is Mrs Smyth's increased reliance on Mr Kerr during these period and that some of the alleged incidents occurred during these periods of HDA.

Touching

- 6.40. Mrs Smyth states that Mr Kerr was "generally friendly and helpful towards me at the start."

¹⁶ Exhibit R55, Annexure 7

“He was touchy, feely”. “When he came up he’d touch you. My back - the way I sat... not unusual for him to walk up and touch me, like, come up behind me and touch me, perhaps, shoulders, the head, the hand, which sort of escalated over time with the degree and the frequency.”

- 6.41. From 17 June 2004, Mrs Smyth alleged that Mr Kerr spent more time at her desk training her and the “...touchy, feely” behaviour continued and escalated. He would rub her and leave his hands on her while showing her things; the evidence is that this occurred during this time, as Mrs Smyth was more reliant on Mr Kerr. This evidence is consistent with that contained in Mrs Smyth’s original complaint form in answer to question 8; “He became touchy/feely, always wanting ‘a hug’.” “It seemed harmless at first”.
- 6.42. Mrs Smyth would not ask Mr Kerr to stop this behaviour (he would leave his hands there), as she wanted a permanent position in the NTSO. “I was trying to get along. I was trying to get a permanent position. I wasn’t going to make waves, and so I took it as just being friendly.” Initially, Mrs Smyth took this behaviour as friendly but over time it increased and it became unwelcome.
- 6.43. Mrs Smyth’s evidence is that Ms McKay witnessed this behaviour. Mrs Smyth claims that Ms McKay would come out of her office and ask Mr Kerr what he was doing and he would move away from Mrs Smyth. It is Mrs Smyth’s evidence that Ms McKay did this because she could see the touching. “He’d come up behind you and - and touch you on the shoulders, and then he’d move his hands to rub you. Rub shoulders down past elbows to forearms”.
- 6.44. It is Ms McKay’s evidence that Mrs Smyth would move away from Mr Kerr when he was touching her. Ms McKay could see that she was uncomfortable and at times she would instruct Mr Kerr to move away from Mrs Smyth. Ms McKay would approach Mr Kerr and ask him what he was doing; “he would generally say that he was helping me” and she would usually respond with, “Well, do you need help right now?” “I would generally say no and...she’d ask him to move away”.
- 6.45. Ms McKay supports this assertion. Ms McKay could see Mrs Smyth’s workstation in both work locations at Palm Court and Enterprise House. She could see Mr Kerr place his hands on Mrs Smyth’s shoulders at Enterprise House, “...he often touched you, in particular. He would put his hands on your shoulders, and touch the top part of your arms and rub. It made me feel uncomfortable.”

- 6.46. Ms McKay's statement and evidence support Mrs Smyth's claim regarding Mr Kerr touching and hovering around Mrs Smyth's desk.¹⁷ She describes that Mr Kerr would "touch her in a suggestive and inappropriate way" and was "over-friendly". Ms McKay described how Mr Kerr would touch Mrs Smyth's top arm and rub up and down, Ms McKay was uncomfortable with this. She had a clear view of her staff at Palm Court.
- 6.47. In the cross-examination of Ms McKay counsel for the Respondents, suggested time frames around this conduct; it is alleged to have occurred in Palm Court from October/November 2003 to the end of 2004. It is Ms McKay's evidence that the "excessive" touching happened a couple of times a month and she would ask Mr Kerr to move away from Mrs Smyth, but there were other times when Ms McKay didn't deem the touching unacceptable and so didn't request that he move away. The behaviour continued when the NTSO moved to Enterprise House.
- 6.48. In her witness statement and evidence-in-chief, Mrs Clayden recalled seeing Ms McKay order Mr Kerr away from Mrs Smyth's workstation.¹⁸
- 6.49. Further support for Mr Kerr's touching of Mrs Smyth being an issue in 2004-early 2005 is that it is specifically referred to in the letter Mrs Smyth wrote to Mr Kerr on 4 March 2005, she asks that he "respect the following boundaries" including:
1.
 2. Do not touch me."¹⁹
- 6.50. Mrs Smyth's letter supports her allegations that Mr Kerr was touching her and it was unwelcome contact.
- 6.51. In his witness statement, Mr Kerr refers to allegations of inappropriate physical contact but he does not address the type of contact described by Mrs Smyth and Ms McKay in the paragraphs above. He comments on kissing and hugging and deals with the issue of hovering around her desk but claims that this was specifically for work and part of the usual work place interaction.²⁰ Mr Kerr denies his conduct was intended to make Mrs Smyth feel uncomfortable or otherwise be construed as being of a sexual nature.

¹⁷ Exhibit C 36

¹⁸ Exhibit R55, Paragraph 50

¹⁹ Exhibit C9

²⁰ Exhibit R51, Pages 32 - 36

- 6.52. Mr Kerr's evidence does not deal with the specific allegations. He describes himself, as others do as a "touchy-feely person". He talks about training people and touching their arm or shoulder. Specifically referring to Mrs Smyth he states; "I can't recall anything in particular". He had no indication she was uncomfortable and refers to knowing by body language if this was the case with other people.
- 6.53. In cross-examination, Mr Kerr concedes that in the middle to late June 2004 period when he was assisting Mrs Smyth that he would come up behind her and place both his hands on her shoulders. "I possibly did that. Yeah, I possibly have done that with any number of staff". Mr Kerr denied that he moved his hands further or that he would leave them on Mrs Smyth's shoulders. Apart from this concession in cross-examination, Mr Kerr denies each aspect of the touching that was put to him.
- 6.54. It is part of both Mr Kerr and NT Treasury's case that the touching could not have occurred because it was an open plan office. It is clear that from the diagrams tendered and other evidence that Palm Court was not open plan. Further when they moved to Enterprise House, the evidence, while variable is that the person with the clearest view of the team and Mrs Smyth was Ms McKay and her evidence is that she did see touching.
- 6.55. I find that from June 2004 onwards until January 2005, Mr Kerr was touching Mrs Smyth in the manner described above and, as seen by Ms McKay and corroborated in part by Mrs Clayden's evidence that she saw Ms McKay ask Mr Kerr to move away from Mrs Smyth's desk.

The incident at Palmerston and Mr Kerr's personal issues at the end of 2004 and into 2005

- 6.56. Around August/September 2004 or at least after June 2004 and before the NTSO move to Enterprise House in November 2004, Mrs Smyth received a phone call from Mr Kerr. Mr Kerr was struggling with his father's death at the time. It was also an incident mentioned in Mrs Smyth's original complaint.
- 6.57. In cross-examination Mrs Smyth recounts the details of this phone call,
- "Yes. I – in that phone call I asked him where he was. He gave me an address in Palmerston and I went to that address."
- 6.58. It is Mrs Smyth's evidence that she obtained Mr Kerr's home address in Palmerston and drove with her child straight out to his home. Mrs Smyth states that she responded in this manner as her husband had committed

suicide in 1999. It was the first time Mrs Smyth alleged that she saw Mr Kerr out of work.

6.59. When she arrived at his home,

“– he was a real mess. He was really – well, I believed it, okay. I believe he was extremely depressed. He was very drunk. He was crying. He was really emotional and I just stayed there with him for some time and talked to him because – and I talked to him about my background with the experience of the suicide, my background with the experience ... and he seemed to have calmed down by the end of it”.

6.60. Mrs Smyth’s evidence is that she stayed for about two hours. Mrs Smyth’s impression of Mr Kerr at this time was that he was all alone, had no family, partner or children and was feeling down so she said that he could talk to her if he needed help and that he could call her or text her.

6.61. Similar material appears in a file note written by Mr Fernandez which is included in his statement.²¹ Mr Fernandez says the file note is based on a discussion with Ms McKay, dated 7 February 2005, in which she conveyed this information to him.

“LS went to DK’s house on an occasion because he had rung her late one evening saying he was depressed and needed her help. She took her son with her and when she arrived at DK’s place he was drunk and passed out. When she woke him up he began to grope her. LS told him to stop it and left the house with her son”.²²

6.62. While this record of the incident is not precisely the same as Mrs Smyth’s it supports her evidence that she travelled to his home after a telephone call where he seemed to need help.

6.63. A matter of general concern in regard to this incident is when Mrs Clayden recounts it in her statement she is prepared to give Mr Kerr latitude and wonders whether Mrs Smyth had “mistaken a clumsy and drunken hug from Mr Kerr as an intention to grope her.”²³

6.64. It is also clear from evidence created by Mr Fernandez at the time for work purposes, that during 2003 to 2005, Mr Kerr was struggling personally. He was frequently absent from work which affected the performance of the work

²¹ Exhibit R87, Annexure A

²² Exhibit R87, Annexure A

²³ Exhibit R55, Paragraph 30

unit.²⁴ The file note also records events from 4 January 2005 to 18 February 2005, the focus being Mr Kerr's conduct. This is also explored in Mr Fernandez's evidence-in-chief and in cross-examination. It will be discussed more fully below under the First Respondent's case.

- 6.65. The occurrence of this visit is supported by Mrs Clayden's evidence in cross-examination.
- 6.66. In his statement and evidence, Mr Kerr says he has no memory of this phone call and subsequent visit by Mrs Smyth to his home.²⁵ In his evidence he instead alleges another instance when Mrs Smyth visited his home in Palmerston and they called in at the bottle shop on the way there. This was unsolicited evidence, with the objective of painting Mrs Smyth in a negative light.
- 6.67. I find that this incident involving a phone call and then Mrs Smyth's attendance at Mr Kerr's home and the offer of future and on-going assistance by Mrs Smyth occurred and that the significance of it can only be ascertained in light of later evidence of the sequence of events after this time.
- 6.68. Both Mr Kerr and Mrs Smyth mention the issue of suicide at this time with Mr Kerr denying that he was suicidal. A large amount of material documented at the time does not use the phrase suicidal but repeatedly refers to Mr Kerr "struggling".
- 6.69. Mrs Smyth alleged that it was during this occasion at Mr Kerr's home in Palmerston that she told him that her husband had taken his own life. Mr Kerr denied this.

After the Palmerston visit

- 6.70. It is Mrs Smyth's evidence that Mr Kerr took up her offer of assistance and began to call and text her. Mrs Smyth claims that she endeavoured to get Mr Kerr to attend "GROW" support groups. The calls and texts, Mrs Smyth alleges, then became very frequent, including then changing to wanting to know where she was, what she was doing and also details such as those set out on page 15 of the original complaint.

"The texts included a lot of emotional stuff like he was my true friend, would do anything for me and would stand by me no matter what. Others included content of a sexual nature." (No detail regarding the specifics of the texts of a sexual nature was ever provided).

²⁴ Exhibit R87, Annexure A

²⁵ Exhibit R51, Paragraphs 24 - 25

6.71. In her evidence, Mrs Smyth spoke of how, at first, when Mr Kerr would call and text her, she would talk to him quite a bit as he was feeling down. This was at the same time that she was busy at work and needed his help. However, Mrs Smyth alleged that the calls and texts got too much.

“It got too much. He – there were – I think particularly, you know, if he’d been drinking, maybe that had something to do with it. He would ring and ring and ring and ring and ring and text and text and it was just getting too much.”

6.72. Mrs Smyth also gave evidence that if she did not answer his call he would leave a voice message and be angry that she had not answered. It shifted away from conversations about his feelings to Mr Kerr wanting to know where she was, “...wanting to know my personal situation...and I was growing uncomfortable with that.” Mrs Smyth gave evidence of receiving 5 or 10 calls in a row.

6.73. The number of phone calls and text messages escalated quickly. Mr Kerr would call or text late at night or at odd hours. This continued even after Mrs Smyth’s partner, Mr Rawiri, told him to stop. Mrs Smyth says in evidence-in-chief this occurred between June and November 2004 however, in cross-examination concedes between June and October 2004.

6.74. The increasing number of phone calls and voice mails and the controlling behaviour, such as wanting to know where she was are also detailed in the initial complaint. Her evidence on this is as follows,

“MS SMYTH: Okay. If I didn’t answer the phone, he would just continually, sort of, keep ringing, and he’d leave voice messages because I hadn’t picked up. He even seemed to be angry that I didn’t answer the phone. I stopped returning all his calls. I just – it was just getting too – too demanding and a bit more wanting to know where I was, what I was doing, sort of, a bit of a shift away from talking about his feeling down or depressed or needing to talk to someone because he was feeling – that he was struggling to more wanting to know my personal situation. Where I was; what I was doing and I was growing uncomfortable with that. So I cut back on answering his calls, responding to his texts, yeah, because I – yeah. You know, you might get, I don’t know, five or 10 calls in a row. I had my own family to look after and...”

6.75. Mr Fernandez’s file note of events between January 2005 and February 2005 records him being told by Ms McKay that “DK has left multiple text messages on LS mobile and as such she will now not answer any calls from him”.²⁶

²⁶ Exhibit R67, Annexure A

- 6.76. Mr Rawiri also gave evidence regarding the volume of calls and text messages from Mr Kerr, “Well, his name on the phone and phone calls all the time, Linda would say that’s Doug. That’s Doug.” Mr Rawiri similarly notes this in his statement.²⁷ Mr Rawiri was concerned in regard to the number of phone calls and text messages, regarding his intentions towards Mrs Smyth.
- 6.77. The evidence of Ms Watters is also relevant here as tendency evidence to support that the conduct Mrs Smyth alleged is more likely than not to have occurred. The similarities are in relation to Mr Kerr’s assisting each woman at work, the frequency of his efforts to contact Ms Watters, the change in nature of the conduct over time and not stopping the conduct when asked.
- 6.78. In Mr Kerr’s statement he does not concede that the texts and phone calls to Mrs Smyth were excessive; but rather were a normal part of their discourse when organising social events such as going for a walk.²⁸
- 6.79. Mr Kerr in cross-examination does not agree that the number of calls was excessive but he does agree that they exchanged lots of phone calls and texts.
- 6.80. As stated previously, Mr Kerr does not agree that he was suicidal or depressed at this time. He would instead say that he was struggling. He doesn’t concede that he called Mrs Smyth to talk to her about these issues but instead recounts that he would have called her for a specific reason.
- 6.81. I find that Mrs Smyth’s evidence of calls and texts, supported by evidence from Mr Rawiri and the file notes created at the time, occurred after the Palmerston visit in August/September 2004 until January 2005. The calls were initially seeking help with personal issues. The calls then started to intrude on Mrs Smyth’s family life and as stated in her letter in March 2005 they also had an impact on her work.²⁹ They support the allegation of harassment; the question is whether there is a connection to work and if this was dealt with in the March 2005 mediation.
- 6.82. I find that the progression of phone calls and texts occurred as Mrs Smyth described. This evidence is supported by events recounted by Ms Watters and the conclusions and inferences set out below surrounding these events.
- 6.83. It is clear that this behaviour was harassment and it was on the basis of sex, however the real question is whether there is a the nexus to the workplace, as the relationship between Mr Kerr and Mrs Smyth changed with Mrs Smyth’s

²⁷ Exhibit C34, Paragraph 4

²⁸ Exhibit R51, Paragraph 88

²⁹ Exhibit C9

offer of help Mr Kerr made at his home in August/September 2004. The offer was taken up by Mr Kerr when he commenced calling to discuss his “struggles”. The findings on this matter will be discussed below under the heading phone calls and texts from paragraph 9.64 onwards.

Mr Kerr commences visiting Mrs Smyth’s home after the Palmerston incident

- 6.84. Mrs Smyth’s case is that in late 2004 Mr Kerr commenced visiting her home. Sometimes her partner was there when he visited and sometimes not. Mr Kerr would come around and they would sit on her back veranda and play pool. Mrs Smyth states in cross-examination that Mr Kerr visited her home three to four times between August and October 2004.
- 6.85. Apart from saying that their first out of office contact was the visit to Mr Kerr’s Palmerston home in late 2004, Mrs Smyth does not give direct evidence of his visits to her home except to confirm that they did occur after this time.
- 6.86. Mrs Smyth was cross-examined on a number of specific incidents where it is alleged that Mr Kerr and Mrs Smyth had contact outside the office prior to her visit to his home in 2004. She states in cross-examination that Mr Kerr came to her home on a few occasions when he was feeling down. Mrs Smyth puts this at 3 or 4 times. She limited these visits from August to October 2004 when the phone calls became too much and her partner, Mr Rawiri, told Mr Kerr to back off.
- 6.87. Mr Rawiri met Mr Kerr in the second half of 2004 at Mrs Smyth’s workplace. Mr Rawiri met him another four to six times at Mrs Smyth’s home. He claims that he did not see Mr Kerr swim in Mrs Smyth’s pool. Mr Rawiri clarified that he only saw Mr Kerr at Mrs Smyth’s home three times between August and October 2004. He confirms that Mr Kerr would have been at Mrs Smyth’s home at other times when he wasn’t there. However, between 2003 and 2005, in total he saw Mr Kerr at Mrs Smyth’s home 4 to 6 times.
- 6.88. Mr Kerr does not agree that he came to Mrs Smyth’s home and discussed his issues but rather he came to her “...house on many, many occasions” and played pool and swam in her pool. (It is a point of contention for Mrs Smyth that they never swam in her pool). Only one other witness indirectly mentions swimming in support of Mr Kerr’s case; Mr Taylor recalls in evidence receiving an invitation from Mrs Smyth to her home which included the comment “bring your bathers”. However he gave no direct evidence of Mr Kerr swimming at Mrs Smyth’s home.
- 6.89. Other specific alleged visits to Mrs Smyth’s home by Mr Kerr are set out in the Second Respondent’s case below.

Nightcliff Bowling Alley

- 6.90. It is Mrs Smyth's case and evidence, given by both Mrs Smyth and Mr Rawiri that in late October to early November 2004 there was an incident at the Nightcliff Bowling Alley/Play Shack. Mrs Smyth's partner at the time, Mr Rawiri, was aware that Mr Kerr called very frequently and was driving her nuts. The phone was in the middle of the table where they were seated at the bowling alley and Mr Rawiri saw that it was Mr Kerr calling and "he answered my phone and told him pretty directly, stop calling me..." Mrs Smyth's complaint is more detailed and states that Mr Rawiri answered the phone and told Mr Kerr to "fuck off".
- 6.91. Mr Rawiri's evidence is that he "picked up the phone and answered it and told him in no uncertain terms to stop calling you, texting you and voice messaging you".
- 6.92. In cross-examination, Mr Rawiri's evidence is that when he answered Mrs Smyth's phone at the bowling alley he told Mr Kerr to "fuck off". He told him to "fuck off" once before this incident when he turned up at Mrs Smyth's home. This was before the incident at the bowling alley. Both these incidents are also detailed in Mr Rawiri's witness statement.³⁰
- 6.93. Mr Kerr, in cross-examination, does not recall Mr Rawiri answering the phone to one of his calls to Mrs Smyth but recounts an alternative phone call when Mr Rawiri called him on Mrs Smyth's phone and physically threatened him. This is denied by Mr Rawiri. Mrs Smyth asked Mr Rawiri when he gave evidence if he ever physically threatened Mr Kerr, to which Mr Rawiri replied "No". It is one of a number of allegations Mr Kerr makes when giving unsolicited evidence with the aim of damaging the credit of Mr Rawiri, who came across in the witness box as very earnest and even with the passing of time giving his evidence to the best of his recollection. This unsolicited material reflects more adversely on Mr Kerr than those whose reputation he was aiming to damage.
- 6.94. I find this incident occurred as conveyed by Mr Rawiri and Mrs Smyth and is another example of an unwelcome phone call. It is also an example of others being aware of the phone calls and the impact on Mrs Smyth and that not only had Mrs Smyth asked for it to stop but also Mr Rawiri.

³⁰ Exhibit C34, Paragraphs 5 - 6

Why Mrs Smyth did not raise the matter with her employer in late 2004

- 6.95. In his evidence, Mr Rawiri claims that he encouraged Mrs Smyth to complain about the phone calls and text messages to management at work, prior to the incident at her home in January 2005. The large number of calls, voicemails and texts are also set out in his statement as a matter of concern.³¹ Mr Rawiri states in cross-examination that Mrs Smyth refused to raise these concerns with her work as she claimed that she was concerned about losing her job.
- 6.96. In cross-examination, Mr Rawiri speaks further about Mrs Smyth's belief that she would lose her job and states that at the time he was unaware of the processes involved in terminating the employment of a permanent public servant. What is relevant is not the formalities of how difficult or otherwise it is to sack a public servant, which was explored with Mr Rawiri but his evidence of what Mrs Smyth consistently expressed to him.
- 6.97. This evidence is consistent with that of Mrs Smyth in cross-examination. Mrs Smyth states that she "...felt that if I complained that – I – I felt that if I complained I would lose my employment. That's how I felt about it, because he had been there – they had all – he was very good friends with Mrs Clayden and Mr Fernandez, and he had been there for many, many years".

January 2005 – incident at Mrs Smyth's home

- 6.98. It is alleged, as part of Mrs Smyth's case, that there was an incident on 8 January 2005 at Mrs Smyth's home in Nakara involving Mr Kerr. It features in later emails between work colleagues such as that dated 3 March 2006 sent by Mrs Clayden to Mr Fernandez.³²
- 6.99. In evidence, Mrs Smyth described the events of 8 January 2005. Her son Jack was returning from a holiday in Melbourne on the day of the incident, which is why the date is so precisely remembered. Mrs Smyth had placed fresh sheets on his bed and made the house ready for his return. Mrs Smyth and Mr Rawiri collected Jack from the airport, bought takeaway in town and then returned home. Mrs Smyth tendered Mr Andrew McKenzie's untested affidavit as evidence of Jack's trip to Melbourne.³³ Jack returning from Melbourne is not contentious.
- 6.100. Mrs Smyth describes what happened when they returned home.

³¹ Exhibit C34, Paragraph 4

³² Exhibit R55, Annexure 17

³³ Exhibit C3

“We went immediately around the back veranda and put the food out on the table and it was evening, so I thought I’d go inside the house – and my house was always locked, gates and house, and I went inside the house to turn the air-conditioning units on in the bedrooms because, you know, it wasn’t far off from everyone going to bed. And when I came to my son’s bedroom, Doug Kerr was in there and he had no clothes on and looking straight from the door in, he had his feet closest to me lying on the bed and he had body fluids all around him. It stunk in there. He’d taken my new kitchen appliance...He’s got my new kitchen appliance, which was an egg poacher, actually, with four circles in it, and he’d taken that from the kitchen into my son’s bedroom and was using that as an ashtray on the floor beside him. I just went into shock. I – I just – I didn’t know what to do. I went out to my partner and I just asked him to – for him to pack up the food and take my son back to his place, and that I couldn’t talk to him then about it. It was very weird but I just begged him, please go”.

6.101. Further details provided in evidence include that; Mr Kerr was naked and he was lying on her son’s bed with his feet facing the door. He was either passed out or asleep. The room stank; there was no fan or air-conditioning on. There were “empties” around him.

6.102. It is Mrs Smyth’s evidence that she requested that her partner, Mr Rawiri leave with her son. After they left she cried and thought that her job was over. She picked up the phone to call the police but Mr Kerr walked down the hallway, now dressed in a pair of shorts and she hung up the phone.

“I hung up the phone. Yeah, he’s just come up behind me I suppose the way he’d come up to me at work, come up behind me out of the hallway there and just touched – come up behind me, just touching me and I – I really didn’t know what to do. I had hung up the phone. I – I hadn’t actually spoken on the phone and he – he sort of grabbed my hand and put it on his –put it on his penis. I got up, pushed him away. He’s tried to hug me. He always – I need a hug, I need a hug, that’s how he – he always was. I need a hug and I pushed him away from me and I said we’d no longer speak. I could not – I could not communicate with him anymore and so – yeah, so he left and I went to my partner’s apartment which was the Sands at the Rapid Creek”.

6.103. Mrs Smyth clarified that her concern was not just that her child might have walked in and seen it first but that Mr Kerr’s behaviour had once again escalated.

“That his behaviour had once again escalated to a dangerous – now dangerous sort of – a dangerous point, not just like a – a threat to my safety, threat to my son’s safety.”

6.104. The cross-examination of Mrs Smyth on the incident took a number of courses. Firstly, obtaining the details of the timing of her movements and established the limited time Mr Kerr had to attend her home. In all, they were out for around two and a half (2.5) hours. When they returned, the house was still locked. The question was posed how could Mr Kerr have possibly known when they were going to be out and done the things alleged in this time frame. However, Mrs Smyth's evidence remained consistent under cross examination regarding the times frames and sequence of events.

6.105. The second area explored was the details of what Mrs Smyth saw and the light in her son's bedroom at the time. The details remained the same however, Mrs Smyth's ability to see so clearly was questioned when it was dark outside (around 7.30pm) and the light wasn't switched on.

6.106. She was taken through the specifics of what she saw when she found Mr Kerr in her son's bed. She says there were bodily fluids and sweat on the bed sheets. It was hot in the bedroom as there was no fan or air-conditioning turned on. It looked like Mr Kerr had masturbated in her child's bed. It also looked like Mr Kerr had used her new egg poacher as an ashtray as there were cigarette butts in it and also "empties" in the room. Mrs Smyth states that she could see everything in the room because of the light coming in through the windows from the outside veranda.

6.107. Another approach was to put an alternative proposition to Mrs Smyth of what she saw. The Respondent's cross-examination took Mrs Smyth to the version of this incident in her complaint lodged with the ADC. There is far less detail in the original complaint than in evidence, there is no mention of Mr Rawiri, no mention of the call to Mr McKenzie, there is no mention of Mr Kerr putting Mrs Smyth's hand on his penis and trying to hug her, no mention of masturbation or bodily fluids. Mrs Smyth's explanation is detailed below:

"MS SMYTH: Well, I felt pretty – pretty uncomfortable saying that level of disgusting things, and I still find it uncomfortable now.

MR SMYTH: You're not the only one.

MS SMYTH: I can't explain it, but, no, it's not there. It's not something I felt comfortable saying anyway. It's – it's pretty disgusting stuff."

6.108. Further explanation:

"MS SMYTH: I just didn't give that level of detail."

MR SMYTH: Can I suggest to you, Ms Smyth, that your account has become more detailed – your account in relation to what has happened on 8 January 2005 has become more detailed since 2011.

MS SMYTH: I've just revealed more about what actually happened.

MR SMYTH: Yes.

MS SMYTH: The truth is the truth, and that's stayed the same. I've just revealed more about it.

MR SMYTH: Just revealed more. It would've been important to you, wouldn't it, at the time of putting in this complaint, being it's some 33 pages long, to be as detailed as possible at the time, wouldn't it? That would've been important to you, to put as much detail as possible in this complaint?

MS SMYTH: I found it very difficult to write the actual complaint. At that time, and for some time, I was struggling with my own depression and anxiety and I wrote it myself. I did take a long time to do that because I found it a very difficult thing to do. I will be reading this, because I don't know if it's mentioned elsewhere in the document, considering it's such a large document. I don't know if that's the only section on 8 January."

6.109. In regard to the ADC process it is not unusual for Complainants initial complaint forms to lack detail, the detail is usually requested later in the process and it is made clear to parties what areas need to be covered.

6.110. Counsel for the Respondents put to Mrs Smyth that she reconstructed the event or was being untruthful. Mrs Smyth denied this.

6.111. Counsel for the Respondents put an alternative version of events to Mrs Smyth in cross-examination:

"MR SMYTH: All right. Can I suggest to you that this is what in fact happened? Doug Kerr came around to your house on this evening not knowing that you had gone to the airport, not knowing anything about your son's holiday or anything like that. He came around to your house for the purposes of having a swim in your pool. He had a swim in your pool. He may have been drunk at the time. He let himself into your house with a spare key that you kept in an obvious place around the house, under a pot plant or a door mat or something. He may have been drunk at the time. He had a few beers, he had a few smokes, and, to sleep off his, whatever it is, alcohol-induced state, he went and had a lie down in your son's bed where you had allowed him to sleep before."

6.112. Then the specifics from this were explored, such as how did he get in without a key and it is alleged that Mr Kerr had slept in her son's bed before. In cross-examination Mrs Smyth denied that Mr Kerr ever slept in her son's room prior to 8 January 2005. It is suggested but denied that perhaps Mr Kerr stayed in her son's room prior to this incident when her partner was not there or was out of town. It is Mrs Smyth's evidence that this did not happen.

- 6.113. Counsel for the Respondents also questioned Mrs Smyth as to how Mr Kerr got in to her home. There was no sign of forced entry and Mrs Smyth speculates that Mr Kerr obtained her keys at work and made a copy of them.
- 6.114. In cross-examination, Mrs Smyth describes the specifics of what happened after she found Mr Kerr in her son's bed. She says that Mr Kerr approached her while she was sitting at the kitchen table. He came up behind her and put his hands on her shoulders, and grabbed Mrs Smyth's hand and placed it on his penis. He then tried to hug her and she pushed him away. Then Mrs Smyth said, "Get out. We can't – no –no more speaking". A suggestion is made in cross-examination that this was not an appropriate response. Mrs Smyth can't recall the exact words she used. Mrs Smyth thought that Mr Kerr was suffering mental health problems at the time as why else would he do something like that.
- 6.115. In cross-examination, it is also explored if Mr Kerr was drunk that night. Mrs Smyth assumed he was drunk and had passed out in her son's room but when he walked out of the room he didn't appear to be "...blind, rotten drunk...".
- 6.116. In cross-examination, there were more details given than in evidence-in-chief. The issue is does the cross-examination make me question Mrs Smyth's version of events as apart from Mr Rawiri being asked to leave and told what had happened straight after the incident, the only people present were Mr Kerr and Mrs Smyth. There is some support for a part of her account in the file notes and emails of work colleagues.
- 6.117. Mrs Smyth does concede that Mr Rawiri did not see Mr Kerr in the room. Mrs Smyth says that she did not tell him that Mr Kerr was there at the time because she was concerned as to how he would react. Mrs Smyth did not want Mr Rawiri to assault Mr Kerr.
- 6.118. Evidence of the events and what Mrs Smyth says she saw is documented in Mr Rawiri's material and also in the original complaint, pages 15 - 16. Mr Rawiri's evidence and statements support Mrs Smyth's version of events.³⁴ Mr Rawiri said that he grabbed Mrs Smyth's son, Jack, and left her home. Mr Rawiri is only aware of what Mrs Smyth told him later; including Mr Kerr being nude in Jack's room and that he had masturbated. Mr Rawiri believes that Mrs Smyth did not tell him at the time because he had a high-profile job and he could get into trouble if he had caused harm to Mr Kerr.

³⁴ Exhibit C34 & C35

- 6.119. Mr Rawiri was asked about how security conscious Mrs Smyth was. He describes this in detail but summarize it as “over the top” and “overboard”. In regard to leaving a key around her house, he was not aware of a set being left outside.
- 6.120. The statement of Ms Christine Nestor (untested) also provides details of the incident on 8 January 2005. Ms Nestor recounts that on 7 October 2005, Mrs Smyth and Ms Nestor were in the Wharf area, in Darwin, when Mr Kerr approached them. Mrs Smyth made them leave the area quickly when Mr Kerr approached. Mrs Smyth then told Ms Nestor of the incident on 8 January 2005 when Mr Kerr broke into her home. Ms Nestor’s statement includes elements such as Mr Kerr not wearing clothes; that he was drunk and passed out on Jack’s bed and that Mrs Smyth didn’t complain to management as she was scared that she would lose her job.³⁵
- 6.121. This information is also in the statement (untested) of Mr Andrew McKenzie, Jack’s uncle, who Jack had been staying with.³⁶ Mrs Smyth and Mr McKenzie both allege that she called him after Jack’s return home and told him about Mr Kerr being naked and passed out on Jack’s bed. Mrs Smyth also told Mr McKenzie that Mr Kerr had broken into her home.
- 6.122. Mrs Smyth also alleged in her affidavit that she emailed Ms Watters as she was upset and didn’t know who to talk to.³⁷ Ms Watters confirmed in evidence that she had received an email from Mrs Smyth detailing the incident with Mr Kerr. Ms Watter’s statement recounts that she received this email while in Nhulunbuy.³⁸
- 6.123. Ms Watters remembers that Mrs Smyth had issues or was being harassed by Mr Kerr because Mrs Smyth had sent emails about it in which she also asked Ms Watters if she had had issues with Mr Kerr. One email contained information regarding the incident with Mr Kerr on 8 January 2005. Mrs Smyth suggests to Ms Watters that Mr Kerr’s attention moved from Ms Watters directly to Mrs Smyth. Ms Watters does not agree with this statement. “...the time you said Doug had turned up at your house in your kid’s bed or something, but I didn’t notice it transfer directly.”
- 6.124. Mrs Clayden’s email to Mr Fernandez on 3 March 2006 includes details such as Mr Kerr being in her son’s bed, naked and drunk and that he had stubbed

³⁵ Exhibit C32

³⁶ Exhibit C3

³⁷ Exhibit C25, Page 8

³⁸ Exhibit C25, Paragraph 90

out cigarettes in a kitchen appliance. It is also noted that this was the night that her son returned home from an interstate trip.³⁹

6.125. In cross-examination, Mr Fernandez denies that he or management were aware of this incident at the time. Mr Fernandez's evidence is that at the time he wrote the file notes, in January/February 2005, he was not aware of the alleged break in to Mrs Smyth's home by Mr Kerr. In cross-examination, Mr Fernandez confirms that the week before and the week after 8 January 2005, Mr Kerr was struggling. Details of this incident or anything like it are not contained in Mr Fernandez's file note of the events at this time.⁴⁰ The absence of notes is consistent with both parties' cases. Mrs Smyth that she did not tell any-one in 2005 and NT Treasury that they were not advised of this incident in 2005.

6.126. Mrs Smyth's evidence is that after the event of 8 January 2005 she took three days sick leave (from 10/01/05 – 12/01/05).⁴¹ This was at a time in work when the interface needed to be completed.

6.127. Mr Kerr responds to the allegation concerning 8 January 2005 in his statement and states "I have no memory whatsoever of this incident".⁴² In giving evidence regarding the incident on 8 January 2005, Mr Kerr says that it does not stick in his memory and he has no recall of this event as described by Mrs Smyth. In cross-examination, he is much more dogmatic stating "...I have-have declared that that did not occur".

6.128. Mr Kerr makes the point that prior to 8 January 2005 he had slept in Mrs Smyth's son's bed before. There is no other evidence to support this. He also states that he knew where the spare key to Mrs Smyth's house was kept. In his statement he says that Mrs Smyth told him where her spare key was but he does not recall using it to enter her home when she was not there.⁴³ In his evidence Mr Kerr said that he knew where her spare key was.

6.129. In cross-examination, Mrs Smyth denies that she ever left a key out.

6.130. In regard to the incident at Mrs Smyth's home on 8 January 2005, I find that Mrs Smyth did find Mr Kerr in her son's bed, naked and drunk and the room in the condition she describes. It is consistent with the struggle Mr Kerr was going through at the time that he may have no recall of the incident due to the level of alcohol he was consuming and his state of mind. It was also during

³⁹ Exhibit C19

⁴⁰ Exhibit R67, Annexure A

⁴¹ Exhibit C4

⁴² Exhibit R51, Paragraphs 37 - 43

⁴³ Exhibit R51, Paragraph 99

this time period that Mrs Smyth was of the impression that Mr Kerr wanted a relationship with her. Support for her account is provided by Mr Rawiri who agrees that Mrs Smyth asked him to leave and told him about the incident soon after.

6.131. There are also key features of this incident described in an email sent by Commissioner Clayden on 3 March 2006 including unusual but consistently repeated use of the egg poacher referred to as a kitchen appliance as an ashtray. I do not accept that Mr Kerr stole a key from Mrs Smyth's desk at work to obtain entry and the issue of how he entered her home is difficult to resolve.

6.132. However, this factual finding does not mean that the allegation of sexual harassment in the area of work (prohibited conduct) has been proven, as will be discussed below, a number of other matters have a bearing on this, such as the connection to the workplace.

Mr Rawiri's call to NTSO

6.133. Mr Rawiri thought the incident at Mrs Smyth's home on 8 January 2005 should have been dealt with in the work environment. He urged Mrs Smyth to raise it with her managers, as he had previously asked her to do when she was receiving excessive phone calls and texts from Mr Kerr. Mr Rawiri's evidence and statement allege that within a week of the 8 January 2005 incident he made a phone call to Ms McKay. Mr Rawiri wanted Mr Kerr to be told to stay away from Mrs Smyth by his workplace superiors.⁴⁴

6.134. Ms McKay's evidence and statement of this phone call is that Mr Rawiri was irate and he wanted Mrs Smyth's superiors to stop Mr Kerr harassing her.⁴⁵ Ms McKay's evidence is that she spoke to Mrs Clayden about this and Mrs Clayden said she would handle it. In cross-examination, Ms McKay does not recall the precise date of the phone call but recalls the conversation. She does not agree that a more extensive conversation occurred with Mrs Smyth in 2005. Ms McKay told Mrs Clayden about the phone call but alleges that nothing was done at the time. Mr Fernandez recalls Ms McKay raising the matter that "...Linda's boyfriend wants to come in and sort it out with Doug..."

6.135. In both his statement and evidence Mr Taylor recalls receiving a phone call from Mr Rawiri around the time of the mediation in March 2005.⁴⁶ Mr Taylor alleges that Mr Rawiri told him that he wanted to come in "to sort things out

⁴⁴ Exhibit C34, Page 40

⁴⁵ Exhibit C36, Page 22

⁴⁶ Exhibit R61, Paragraph 81 – 83

with Mr Kerr". Mr Taylor told Mr Rawiri not to come in to the office as he was worried about what might happen if there was an altercation.

6.136. I find that it is clear that Mr Rawiri rang the NTSO office on at least one occasion irate at Mr Kerr's conduct. This is further support that Mr Kerr's behaviour was intruding on Mrs Smyth's life in early 2005.

Mrs Smyth's approach to Mr Kerr after 8 January 2005 incident

6.137. In Mrs Smyth's evidence she states that her approach to Mr Kerr, following the incident on 8 January 2005, was to become like a brick wall and not communicate with Mr Kerr. At this point the NTSO was in Enterprise House.

6.138. Mrs Smyth's evidence is that she pretended that Mr Kerr was not there and just got on with her work. Mrs Smyth states that at work she did not communicate with him at this time and tried to avoid walking past his desk etc. If the Policy division needed to speak to or deal with the Finance division then the correct channel of communication was via her manager.

6.139. Mrs Clayden says in evidence that she noticed that Mr Kerr and Mrs Smyth "...weren't as friendly, that was for sure. I think they - I think that Mrs Smyth was trying to limit her interaction to work-related things..."

6.140. Other support for Mrs Smyth's case that she had stopped communicating with Mr Kerr and that things were strained between them is found in the card Mr Kerr handed to her, dated January 2005.⁴⁷ There was no dispute that the card was from Mr Kerr.

6.141. Mrs Smyth's evidence is that the text in the card makes it clear that Mr Kerr had been struggling badly for a while and that he had relied on Mrs Smyth for support. In support of this the card refers to services such as GROW.

6.142. In the card, Mr Kerr states "Hopefully you will determine what you want & where you want to be" and signed the card saying "luyatabits".⁴⁸ An arrow pointing to the confused figure in the card states "Me over Xmas & New Year (Not Good!!)". Mrs Smyth saw the card as an attempt to apologise for his conduct however; it did not change her approach of not wanting any involvement or communication with him.

6.143. The card is not dealt with in Mr Kerr's statement or evidence in chief however, he was asked about it in cross-examination by Mrs Smyth. Mr Kerr's

⁴⁷ Exhibit C6

⁴⁸ Exhibit C6

explanation for the card was that due to an air crash he had been involved in on Boxing Day in 1986 he found that time of year very difficult; he was also selling his unit at the time and had lots going on.

6.144. I am very sceptical of the air crash explanation from Mr Kerr as it is a significant explanation for his conduct, raised for the first time in cross-examination, with no other supporting material lead to substantiate the truth or otherwise of this explanation.

6.145. In cross-examination, Mrs Smyth also put to Mr Kerr that the reason he mentioned GROW in the card is because she had advised him to seek help from this organisation. The card also mentions using Mrs Smyth as his personal "GROW" time, indicating that she was helping him with his issues at this time. Whilst Mr Kerr agrees this material is mentioned in the card he says they spoke of many things.

6.146. The card supports Mrs Smyth's case of Mr Kerr struggling over this period and card indicates Mrs Smyth's support for Mr Kerr at this time and his appreciation of it. The card indicates a relationship of support and assistance with personal issues.

6.147. It is Mrs Smyth's case that she hardly spoke to Mr Kerr in the early part of 2005. In cross-examination, Mr Kerr does not concede that this is the case and gives examples of contact between them; however some of these examples are clearly from 2006. Mrs Smyth suggests in cross-examination that the letters from March 2005 suggest otherwise. This is an area where I find Mr Kerr was not being truthful and was being obstructive.

6.148. Mrs Smyth's case, via her direct evidence, the card and the letters exchanged in March 2005, is that after 8 January 2005, she tried to have minimal contact with Mr Kerr. This is what led to the exchange of letters (mentioned below) and the lack of contact is a major feature of these letters.⁴⁹

Exchange of Letters March 2005

6.149. It is uncontested evidence that on 3 March 2005, Mr Kerr handed Mrs Smyth a letter.⁵⁰ It is undated and unsigned. It is clear from this letter that the situation Mrs Smyth describes that of there being no communication between her and Mr Kerr, apart from work-related contact, was in place. Mrs Smyth's evidence is that no communication included any eye contact. Mr Kerr, from the words in the letter, was clearly frustrated by this lack of communication

⁴⁹ Exhibit C8 & C9

⁵⁰ Exhibit C8

and referred to their current form of communication as a “business transaction”.

6.150. From the text in the letter, Mr Kerr does not articulate what has led to the lack of communication. In the letter he states, “Your silence towards me has been deafening and will fester unless quickly addressed.”⁵¹ Mrs Smyth felt that the letter threatened repercussions for her in the work place, particularly due to the use of the word “fester”. She was angry that he threatened that this would affect her in the work place, if she wasn’t nicer to him. Mrs Smyth also interpreted the use of the phrase “My “investing” in someone once again appears to have turned on me as meaning that he expected more than a professional relationship as a return on his investment.

6.151. In evidence, Mrs Smyth states that “...the things he said in there seemed to imply that in his mind, there was a relationship or that he wanted one and it wasn’t going to happen, and I had felt that for some time with the content of those calls and that he was angling that way.”

6.152. In Mr Kerr’s evidence, he explains what “my investing in” meant in the letter. He claims that he would train people but they would leave shortly after. In evidence Mr Kerr explains that he meant “let’s talk” when he used the word “fester”. In cross-examination Mr Kerr does not agree that this was meant to be threatening.

6.153. Mr Kerr concedes that the letter indicates a breakdown in communication. This is clearly different from other evidence he gave during the hearing. Mr Kerr goes on to state that there had been a breakdown in communication in March 2005 because he recalls that is when he and Mrs Smyth went to conciliation.

6.154. Mrs Smyth’s response to Mr Kerr’s letter, dated and signed 4 March 2005, was handed personally to Mr Kerr.⁵² In the letter, Mrs Smyth acknowledges his work place assistance. She also sums up the position as now alleged in the presentation of her case.

“The situation has changed significantly in the last few months. Your behaviour and demands have caused me considerable stress to the point that I feel uncomfortable in the office. As I have figured out and you have expressed in your letter, you appear to think that a return on your ‘investment’

⁵¹ Exhibit C8

⁵² Exhibit C9

is due. Your return seems to include being involved in my life (inside and outside of the office) leading to a relationship. This is not possible”.⁵³

6.155. Mrs Smyth then requested three things in the letter:

1. “Do not contact me outside of the office
2. Do not visit my home
3. Do not touch me”

6.156. Mrs Smyth further states that if Mr Kerr does not respect her boundaries she will have no choice but to take formal action against him for harassment.

6.157. In cross examination, Mr Kerr concedes that Mrs Smyth’s letter refers to the previous few months, which would include the alleged 8 January 2005 incident. Mrs Smyth’s letter states “your behaviour and demands have caused me considerable stress to the point that I feel uncomfortable in the office”.

6.158. Mr Kerr states that he did not understand the content of Mrs Smyth’s letter of response, dated 4 March 2005. He postulates that when she mentioned his “behaviour and demands” had caused her “considerable stress” that she was referring to a conversation they had about her selling her house to him. In Mr Kerr’s evidence and statement he refers to an offer he made to Mrs Smyth to purchase her house in Nakara and she and her son could live with him, rent free, until she purchased a new house.⁵⁴ Mrs Smyth recalls this also, however her version differs slightly in that she does not agree that the reason he made this offer was because she was looking to buy another property

6.159. A related area that is discussed below in this decision, is that both the letter and Mr Kerr’s evidence of what occurred at the mediation are the same; that Mrs Smyth’s perception at the time was that he wanted a relationship with her. It is clear from the demands in the letter that matters now raised in Mrs Smyth’s complaint were of concern to her in March 2005 i.e. the contact outside office hours, visiting her home and touching her. Mr Kerr concedes in cross-examination that the issues in the letter and what subsequently occurred in conciliation was one and the same, that it was Mrs Smyth’s perception that Mr Kerr wanted a relationship with her.

⁵³ Exhibit C9

⁵⁴ Exhibit R51, Paragraph 49 – 50

6.160. Mr Kerr claims that they worked things out at the mediation and got over their issues fairly quickly. Mr Kerr says they spent lots of time together after the mediation. This is not Mrs Smyth's case.

6.161. It is Mrs Smyth's case that she was grateful for Mr Kerr's assistance in the work place but that he expected a full sexual relationship in return for his help. In Mrs Clayden's email dated 7 March 2005, she notes that, allegedly after mediation "Doug advised that he had "screwed up" and didn't realise the effect he was having on Linda."⁵⁵

6.162. The letters largely speak for themselves and support the allegations made by Mrs Smyth up until this time that the phone calls, texts and visits moved from helping him in his struggle to what she perceived as his expectation of a sexual relationship. Mrs Smyth also interpreted the letter as threatening consequences in the work place if their issues were not resolved. The language leaves this interpretation open however, it was denied by Mr Kerr.

Who handed letters to Mrs Clayden?

6.163. Mrs Smyth alleges that Mr Kerr handed the two letters to Mrs Clayden however, neither Mr Kerr nor Mrs Clayden agrees with this when Mrs Smyth asks it of them in cross-examination. It is also suggested to Mr Kerr in cross-examination that the proof that he had given the letters to Mrs Clayden was the fact that he had used the word "fester" in his letter and Mrs Clayden had used that word in her email about the issue to Mr Fernandez dated 7 March 2005.⁵⁶

6.164. The Respondent's case as disclosed in cross-examination appears to be that Mrs Smyth handed the letters to Mrs Clayden or Ms McKay, which is denied by Mrs Smyth.

"MR SMYTH: And can I suggest to you that once – on or about that Friday that you gave copies of these letters, that is Doug Kerr's letter and this letter that you wrote, to your manager, Wendy McKay?

MS SMYTH: That is completely false and - - -

MR SMYTH: All right.

MS SMYTH: - - - that is a completely new allegation.

MR SMYTH: All right. Just say yes or no - - -

MS SMYTH: Sorry. Okay.

MR SMYTH: - - - to the question. Thank you. All right. And can I suggest to you that you gave copies of these letters to Kathleen Clayden?

⁵⁵ Exhibit C18

⁵⁶ Exhibit C18

MS SMYTH: Not at all.”

- 6.165. There is not sufficient evidence or any evidence to support Mrs Smyth’s case that it was Mr Kerr who handed the letters to Mrs Clayden. However, it is clear that the material was received by NTSO management and placed on the “Personnel – Counselling – Superannuation Office – Employee Management Issues” (File no. SUP 2009/36).⁵⁷
- 6.166. It is also part of Mrs Smyth’s case that her letter in response was an informal complaint and that the Harassment in the Workplace Policy should have been followed. However, this does not fit with Mrs Smyth’s case that she did not tell anyone about her problems with Mr Kerr’s behaviour until August 2006.
- 6.167. Mrs Smyth pursued this line in her cross-examination of Mr Fernandez, Commissioner Clayden and Mr Taylor. She continually suggests that they failed to follow the Harassment in the Workplace Policy. Whilst Mr Fernandez agrees in retrospect NTSO management possibly should have. All three Managers state they did not do this as they understood the conduct occurred outside of the workplace.
- 6.168. Mrs Smyth follows a similar line of questioning with NT Treasury Manager of Human Resources (HR), Ms Sarah Temple. In cross-examination, Ms Temple is also asked about the two letters exchanged by Mrs Smyth and Mr Kerr in March 2005.⁵⁸ Mrs Smyth puts to Ms Temple that based on the Harassment in the Workplace Policy, her letter, written in response to Mr Kerr’s, constitutes an informal complaint. Ms Temple does not agree that this is the case; rather the letter is what was used to resolve the issue.
- 6.169. In cross-examination, Ms Temple also sets out what she would have done upon receipt of these letters. She says that she would need to get more details about the issue and that she would also seek further advice as to how to proceed. Ms Temple says that if a manger didn’t come to HR for advice, but sought it elsewhere, then that too is acceptable. Ms Temple says that there would be a real need to understand the details of the matter.

April 2005 incident at Mrs Smyth’s home

- 6.170. Mr Rawiri gave evidence of and detailed in his statement⁵⁹ another incident involving Mr Kerr, in April 2005. Mr Rawiri alleges that he called into Mrs Smyth’s house and found Mr Kerr asleep, naked and drunk in the outside

⁵⁷ Exhibit R62

⁵⁸ Exhibit C8 & C9

⁵⁹ Exhibit C34

entertainment area. In cross-examination, Mr Rawiri states that he thought Mr Kerr was “mad – a dickhead and mad at that time.”

6.171. Mrs Smyth was not at home at that time. Mrs Smyth returned home after Mr Rawiri called her and they locked up the house and went inside.

6.172. In an email drafted by Mrs Clayden to Mr Fernandez titled “Potential HR issue”, dated 3 March 2006, Mrs Clayden notes “The other incidents LS described included one where DK apparently turned up naked in her front yard in the middle of the night. LS told me that since those incidents she did not allow DK at her home...”⁶⁰

6.173. In Mr Kerr’s statement and evidence he said that he has no direct recollection of the April 2005 incident.⁶¹ However, he recalls a time that he fell asleep on one of the chairs outside Mrs Smyth’s house and alleges that Mr Rawiri took his shorts (favourite old cricket club pair) and that he and Mrs Smyth joked about it later. He thinks that it would be “...unlikely that I would sit there to directly expose myself”.

6.174. I find that this incident occurred and relevantly it occurred after the exchange of letters asking for these types of visits to stop and also as will later be alleged on the Respondents case, after the March 2005 mediation.

Incident involving Mr Bryars and Mr Kerr at Mrs Smyth’s home in May 2005

6.175. Mrs Smyth’s case is that Mr Bryars borrowed her ute to move some of his belongings to Mr Kerr’s home as he was house-sitting for him while Mr Kerr was on leave. Mrs Smyth alleges that this incident took place in May 2005 as this is when Mr Kerr took leave from work.

6.176. Mrs Smyth alleges that she received a text from Mr Bryars in which he apologised for Mr Kerr turning up at her house. Mr Rawiri states that in the text (which he read) Mr Bryars had tried to dissuade Mr Kerr from going to Mrs Smyth’s home. Mr Rawiri claims that he read the text message from Mr Bryars regarding the incident at her home. This incident is also detailed in Mr Rawiri’s witness statement.⁶² Mr Rawiri speaks of the event relating to Mr Bryars and his partner (now wife), Anita, borrowing Mrs Smyth’s ute to move house and the text refers to not being able to get Mr Kerr to leave Mrs Smyth’s home.

6.177. Mr Kerr turned up with Mr Bryars and his partner after they had moved and were returning Mrs Smyth’s ute. Mrs Smyth had left her home and asked that

⁶⁰ Exhibit C19

⁶¹ Exhibit R51, Paragraphs 61 - 63

⁶² Exhibit C34, Paragraphs 18- 23

Mr Bryars make sure Mr Kerr left with him. Mr Kerr did not leave (as set out in the text message) when Mr Bryars did and remained at Mrs Smyth's home so that when she arrived home later Mr Kerr was sitting on her back veranda naked. Mr Rawiri says Mrs Smyth pulled in and saw this and then left.

6.178. In the email drafted by Mrs Clayden to Mr Fernandez titled "Potential HR issue", dated 3 March 2006, Mrs Clayden noted the following:

"One incident concerned the day she loaned her utility to DK so that he could help MB and AP move their belongings from Stuart Park to DK's place which they were going to house-sit while he was away. They all ended up at LS's house and were having some drinks and a swim. LS had to run some chores but said they should stay but asked MB to ensure that DK left with them when they went. MB and AP left but DK stayed (MB sent a text message to LS but she didn't check her phone). When LS returned home she found DK naked and drunk in her son's room. (Her son was returning from a trip down south that evening) He had drunk her boyfriend's beer, stubbed cigarettes out in a new kitchen appliance she had bought and generally been pretty horrible. She ended up calling a friend who owned a taxi to take DK home. I understand that MB told you about this incident (and others)."⁶³

6.179. Some of the details in this file note are similar to Mrs Smyth's recollection of the incident involving Mr Bryars and as some details are very similar to the 8 January 2005 incident.

6.180. Mrs Clayden's documents have Mr Kerr's leave listed from 6 May 2005 to 25 May 2005, however she did not think that this was when the Bryars' incident occurred. She thought it occurred at the end of Mr Bryars' time in the NTSO which was in December 2005.

6.181. In his witness statement, Mr Kerr refers to Mr Bryars staying at his home before he and his partner left Darwin. He also refers to being at Mrs Smyth's home with Mr Bryars and his partner but he does not agree that he refused to leave her property or that he was found naked by Mrs Smyth. He cannot recall an incident of this type.⁶⁴

6.182. However in cross-examination, Mr Kerr states that he does not believe that Mr Bryars and his partner house sat for him in May 2005. He also does not agree that they borrowed Mrs Smyth's car, that he was drunk in the back of the car or that he came to her home.

⁶³ Exhibit C19

⁶⁴ Exhibit R51, Paragraph 74 - 77

- 6.183. Mr Kerr was on leave in May 2005 and during cross-examination of Mr Fernandez, Mrs Smyth suggests that it is at this time that the incident with Mr Bryars happened. She puts further details of the incident to Mr Fernandez but again he had no recollection of it.
- 6.184. In cross-examination Mr Bryars recounted the time he and his partner visited Mrs Smyth's home; "...yeah, look, I – I don't have a recollection of the – the full reason why the ute was involved or whether we borrowed it or what actually happened, but I remember being at your house on that – on that occasion which – the date I don't recall either being so long ago. And, you know, what I observed there was when we arrived, Mr Kerr was already there, a friend of yours, Mark I think his name is, the football guy, and your son were there. So we, as per my statement as you probably read, we had a chitchat, a bit of – a bit of lunch, a few drinks and then we left."
- 6.185. The reference to the Rugby guy places the incident before June 2005 which is when Mr Rawiri and Mrs Smyth's relationship ended.
- 6.186. It is clear that an incident did occur involving Mr Kerr around the time of a move by Mr Bryars and his partner, and it involved Mr Kerr staying at Mrs Smyth's home after the others had left and again being found naked.
- 6.187. However, what remains less clear is when this occurred. Mrs Smyth links the incident to the time Mr Kerr was on leave in May 2005. Mr Rawiri was involved both by his own account and also from Mr Bryars' recall so it was before June 2005. Other alternative dates are suggested by Mrs Clayden, Mr Kerr and Mr Bryars, but no one can say definitively when this might have happened. In light of the matters set out below it is less likely to have occurred later in 2005. However, it appears to have occurred after the exchange of letters in March 2005 in which clear boundaries were articulated.

The rest of 2005

- 6.188. It is uncontested that in 2005 Mr Kerr was absent from the workplace due to work commitments which required him to travel to present seminars and also due to ill health, including shoulder surgery and diverticulitis. Mr Kerr confirms he was on recreation leave between 9 and 25 May 2005 and in late May 2005 he was hospitalised and had 5 to 6 weeks off work. He did not see Mrs Smyth for two months.
- 6.189. Mrs Smyth says that she remained polite to Mr Kerr throughout her time in the NTSO.

6.190. Mrs Smyth was in a relationship with Mr Cy Bush from the middle of 2005.⁶⁵

6.191. It is Mrs Smyth's evidence that when Mr Kerr came back from major surgery he seemed mellow. There were times they had to work together when she was on HDA as her manager was away.

HDA at the end of 2005

6.192. Mrs Smyth was on higher duties from 8 September 2005 to 14 October 2005, approximately six weeks. She alleges that at this time she was doing all three finance jobs. Mrs Clayden does not agree with this as she thought that Mr Andrew Wiedler was filling the AO4 position at the time.

6.193. Mrs Clayden states in cross-examination that if Mr Kerr was giving assistance to Mrs Smyth this would have only been with the pre-approval of Ms McKay and Mr Fernandez. This was Mrs Smyth's first time as manager.

6.194. Mrs Smyth gave evidence of an incident that occurred during the HDA period in September 2005 where Mr Kerr picked up her son from school or childcare. This will be discussed below in Mr Kerr's case as it does not go towards establishing the allegations against Mr Kerr.

Email in 2005

6.195. On 22 December 2005, an email was sent by Mr Kerr to Mrs Smyth dealing with alcohol.⁶⁶ Mrs Smyth's evidence is that she took it as Mr Kerr apologising for the late night calls and believed that he was implying that his behaviour was a result of his alcoholism. Mrs Smyth also believes that the email contained sexual connotations.

6.196. The text of the email speaks for itself however; the relevant aspect in Mrs Smyth's case is the use of alcohol to excuse the late night, unwelcome phone calls. The last page refers to "Things that are downright impossible to say when drunk" and include the sentence, "Thanks, but I don't want to have sex".⁶⁷

6.197. This on its own would not amount to conduct that would substantiate one of the subsections of section 22 Sexual harassment. However it forms part of the overall picture of the manner in which Mr Kerr related to Mrs Smyth and should also be viewed in the context of the history of Mr Kerr's conduct, including the letters exchanged in March 2005.

⁶⁵ Exhibit C58

⁶⁶ Exhibit C23

⁶⁷ Exhibit C23

6.198. It should also be noted that this email and the others listed below were sent after March 2005 which is when Mr Fernandez took Mr Kerr through and had him sign the Harassment in the Workplace policy.⁶⁸

6.199. Mr Fernandez recalls in evidence bringing Mr Kerr into his office to have him read and sign the Harassment in the Workplace policy, shortly after Mr Kerr and Mrs Smyth had attended mediation. Mr Kerr also details this event in his witness statement and his account corresponds with Mr Fernandez'.⁶⁹

2006

6.200. During Mrs Smyth's evidence she concedes appropriately that what she describes as the harassment by Mr Kerr was not constant; it was up and down. Mrs Smyth claims that Mr Kerr began harassing her again sometime around April 2006. Mrs Smyth grew concerned because of conversations relating to Mr Kerr buying her house and his offer that Mrs Smyth and her son could live in it with him rent free.

6.201. It is clear on the evidence that in early 2006 Mr Kerr bought a house two streets away from Mrs Smyth's home in Nakara. Mr Kerr cannot recall the exact date but states that it was the end of the wet season or monsoon.

6.202. From that time onwards it is Mrs Smyth's case that she noticed Mr Kerr driving by her house or sitting outside it. According to Mrs Smyth there was no need for Mr Kerr to drive past her house as it wasn't on his way home.

"...even though my street was not – it was out of the way, you didn't have to go through – go past my street to get to his home."

6.203. On one occasion Mrs Smyth made eye contact with Mr Kerr and he drove off. This incident and sequence is also detailed in the original complaint at page 15.

6.204. Mr Kerr denies driving past Mrs Smyth's house during and following April 2006, apart from when they were still seeing each other socially.

6.205. Mrs Smyth alleges that from approximately April 2006 Mr Kerr again took an interest in her and started exhibiting strange behaviour. This coincides with Mrs Smyth being on HDA as Ms McKay was on leave during March and April 2006.

⁶⁸ Exhibit R67, Annexure C

⁶⁹ Exhibit R51, Paragraph 59 - 60

6.206. Mrs Smyth's case is supported by the evidence of Ms McKay who agrees that Mrs Clayden had said that Mrs Smyth should rely on Mr Kerr while Ms McKay was on leave.

6.207. During cross-examination Ms McKay is taken to an email, dated 7 March 2006 sent by Mr Fernandez. In the email Mr Fernandez asks that any requests for Mr Kerr's assistance must go through him in the first instance. Ms McKay does not agree that the content of the email is different to her evidence that Mrs Clayden had allocated Mr Kerr to assist in the finance section.

Workplace touching in 2006

6.208. Mrs Smyth, in cross-examination, refers to this period of HDA;

“And then we had six weeks where he was allocated to work with me and help me through to do the three jobs in finance for six weeks, and during that time he did fall back to the touchy feely during that six week period when my direct line manager was away and it was just the two of us in finance”.

6.209. In cross-examination Mr Kerr denies that while Mrs Smyth was on HDA from 20 March 2006 to 13 April 2006, he took advantage of the situation and began touching her and rubbing his hands up and down her arms. Mr Kerr says this could not have happened because they were in an open plan office.

6.210. There is not enough detail of what occurred over this period to make a finding in regard to the alleged work place touching.

Emails sent by Mr Kerr in 2006

6.211. Mrs Smyth tendered into evidence two emails she received from Mr Kerr on 17 March 2006.⁷⁰ The first, sent at 9.17am is titled “Interesting signs in Restroom, and has Mrs Smyth as a recipient. It contains sexualised content and derogatory comments about women.

6.212. The second email was sent at 3.20pm from Mr Kerr to Mrs Smyth and also one other recipient; titled “Work truths”. This content, while not appropriate for the workplace, does not contain material of a sexual nature.

6.213. A further email dated 23 March 2006 is titled ‘How to speak about women and be politically correct’.⁷¹ It was also sent to Mr Fernandez and Mr Taylor who were part of the NTSO Management at the time. It is Mrs Smyth's case that

⁷⁰ Exhibit C24

⁷¹ Exhibit C26, Attachment C & Exhibit C33

NTSO management did nothing about these sexualised emails being sent via Northern Territory Government (NTG) email. The material in the email of the 23 March 2006 is of a sexual nature and not appropriate for the work place. The gender stereotypes contained in this material would impact on respectful work place interactions. It is Mr Kerr's evidence that the email went to a number of people including a young, female trainee which elevates the inappropriateness of the conduct. This is a very poor example to staff starting their career on what is acceptable in the work place.

6.214. In cross-examination Mrs Clayden states that at this time she was unaware of any issues relating to workplace emails between Mr Kerr and Mrs Smyth and consequently no restrictions were placed on Mr Kerr's email use. Mrs Clayden also says that she would not have tolerated people sending sexually explicit emails in the workplace.

6.215. Mr Fernandez is cross-examined on this and it is clear that he received the email as part of a chain email. He doesn't recall anyone coming to speak to him about it. He agrees that the email was a breach of the public service code of conduct. Mr Fernandez thinks that he would have spoken to Mr Kerr about the email but he has no actual memory of it. Mr Kerr's email was sent the same month as the email from Mrs Clayden regarding the harassment issues.

6.216. In his statement Mr Kerr admits sending the email dated 23 August 2006 to Mrs Smyth and concedes that the jokes were risqué and crude in nature and that it was not appropriate to send to work colleagues. Mr Kerr goes on to say that there was no malice or ill intent towards Mrs Smyth in sending her this email and that other staff in the NTSO sent emails of a similar nature to each other at this time.

6.217. The Respondents' submissions state that the emails are ok because Mrs Smyth did not tell Mr Kerr she was offended. This is not the test, as set out above. Findings in regard to the emails are set out below from paragraph 9.90 onwards.

6.218. In another email from Mr Kerr, sent on 1 June 2006, titled "Aussie Love Stories" both Mr Fernandez and Mr Taylor were also recipients. Whilst the content is not of a sexual nature the content is not appropriate for sharing via a work email.

6.219. In cross-examination Ms Temple who was Treasury's Human Resources (HR) Manager throughout parts of the period covered by Mrs Smyth's allegations agrees that if management was aware of emails of a sexual nature being sent that they would tell the person to stop. As far as Ms Temple is aware there was and is no software available in the public service that can monitor

people's use of email; there is just the advice to staff on the computer's log in screen of best practice when using work email or computers. Ms Temple also gives evidence that she does not agree with the comment that it was common place in the superannuation office to send emails of a sexual nature.

6.220. In regard to the emails which contained varying content, it is clear that some were of a sexual nature and inappropriate. The content must be viewed in light of the exchange of letters in March 2005 that set boundaries for Mr Kerr's contact with Mrs Smyth their communication and interaction. It is clear the material dated 17 and 23 March 2006 fits within the terms of section 22(2) (d) i.e. "engages in any other unwelcome conduct of a sexual nature". The question then remains as to the application of section 22(2) (e) (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". Findings in regard to the emails are set out below at from paragraph 9.90 onwards.

Mrs Smyth's allegation that the NTSO wanted her to resign

6.221. Mrs Smyth alleges that NTSO management wanted her out of the workplace but they needed her to train someone else in her role before this occurred. Mrs Smyth's case as put to Mrs Clayden is that NTSO management sent an email regarding an expression of interest for training in the finance section, in July 2006. However, no email was produced during the hearing.

6.222. Also, at this time in Mrs Smyth's version of events, she had not conveyed her concerns regarding Mr Kerr to NTSO management. Mrs Clayden does not recall the email and denies that having Mrs Smyth train staff in finance tasks was anything more than succession planning, which was part of the overall training program within the NTSO.

6.223. Mrs Smyth claims that Ms Laughton made a request for finance training in response to the NTSO management's expression of interest and in August 2006 she was being trained by Mrs Smyth. It is Mrs Smyth's case that it was at this time that she made her complaint to NTSO management about Mr Kerr's behaviour.

6.224. Mrs Clayden and Mr Taylor do not concede that they were planning or preparing for Mrs Smyth's departure. They claim that the sole aim of the training was to ensure the NTSO had a multi-skilled team. When Mrs Smyth resigned, Ms Laughton was receiving finance training from her and so she backfilled the position after Mrs Smyth left.

6.225. This allegation does not fit with the timing of the sequence of events that Mrs Smyth alleges and there is no evidence of a link between the training of Ms Laughton and the alleged NTSO management desire for Mrs Smyth to no longer work at NTSO other than Mrs Smyth's allegation. While it is clear that Ms Laughton was being trained by Mrs Smyth, there is no evidence of a link to Mrs Smyth being forced out of the NTSO as alleged.

Who Mrs Smyth told

6.226. Mrs Smyth's evidence and case is that she only confided in one person in the work place about Mr Kerr's behaviour, Ms Sharon Laughton, and that apart from Ms Laughton, she kept the issue to herself.

6.227. Ms Laughton can't recall the exact time frame that she worked with Mrs Smyth but in cross-examination it was clarified that she moved into the Finance section in August 2006. She had been working in the NTSO since 2001. However, it is clear that apart from Mrs Smyth generally being upset about Mr Kerr and conveying this to Ms Laughton when she worked in System Administration; Ms Laughton was no more specific than this.

Incidents at Mrs Smyth's home – 19 & 20 August 2006

6.228. On 19 August 2006, Mrs Smyth's, evidence is she came home and found that Mr Kerr had broken into her back yard (her house was locked) and was sitting naked in a chair on her veranda. Mrs Smyth had returned home with Mr Bush having finished work on two jumping castle jobs. Mrs Smyth's evidence is Mr Kerr appeared to be asleep or passed out in the chair. This incident and sequence is also documented in the original complaint, page 17.

6.229. Mrs Smyth claims that she and Mr Bush did not know what to do. Mrs Smyth was concerned about her work, "Again I wanted to keep my job". Mrs Smyth couldn't believe the harassment was happening again. Mr Bush who had not met Mr Kerr before this evening was angry and wanted to throw him out. Mrs Smyth and Mr Bush had a disagreement but decided to go inside and lock up the house and hope that Mr Kerr would leave during the night.

6.230. Mr Bush's evidence is that he had not met Mr Kerr until 19 August 2006.⁷² Prior to this incident the only work colleague who visited Mrs Smyth's home since they commenced their relationship in the middle of 2005, was Ms Sharon Laughton.

⁷² Exhibit C58

6.231. Mr Bush's statement places the incident involving Mr Kerr, at Mrs Smyth's home on 19 August 2006 as it coincided with the jumping castle jobs. He also gave evidence of this incident. He claims that he and Mrs Smyth arrived at her home at about 10.30pm. Mr Kerr was naked on a lounge chair on the back veranda Mr Bush states that he and Mrs Smyth argued about how best to handle the situation. Mr Bush alleges that Mrs Smyth was very upset and asked him to do nothing as she was afraid she would lose her job if she complained to her employer. They locked the house and went to bed and Mr Kerr was gone in the morning⁷³.

6.232. Mrs Smyth cross-examined Mr Kerr about the incident at her home on 19 August 2006. Mr Kerr denies that this incident happened in August 2006 and if something similar had happened it would have been a long time prior to this and it would not have been his intention to fall asleep naked.

6.233. It should be noted that Mrs Smyth was not cross-examined on this incident.

6.234. The Respondents' submissions concede that the incident or one similar occurred. This is in contrast to the allegations on 20 August 2006.

Next day 20 August 2006

6.235. Mrs Smyth's evidence is that Mr Kerr returned to her home the next day on 20 August 2006. It is alleged that Mr Kerr walked into her house while Mrs Smyth was cooking breakfast in the kitchen and Mr Bush was watching TV on the veranda. Mrs Smyth alleges that Mr Kerr was angry and verbally abused her but appeared to be sober. He was angry because she was in a relationship with Mr Bush and he wanted to be in a relationship with her. Mrs Smyth states that Mr Kerr was enraged, yelling, and saying nasty things such as "You should be going out with me" and "You're a slut". The incident was over quickly.

6.236. In her cross-examination, Mrs Smyth provided more details including that Mr Kerr said that Mrs Smyth should have been in a relationship with him, that she did not believe he was drunk and that he was only there for a short period of time. Mr Bush remained on the veranda for the entirety of the confrontation.

6.237. Mr Bush in his statement spoke of hearing Mr Kerr in a rage and yelling which generally supported Mrs Smyth's version of events.⁷⁴ However evidence produced at the hearing was less useful as Mr Bush worked as a concreter in the morning on the day he gave evidence and had been up since 2.30am in

⁷³ Exhibit C58, Paragraph 11-14

⁷⁴ Exhibit C58, Paragraph 17

the morning. Mr Bush stated in his own words that he heard "...a man's voice yelling rude ... words" and then "...[jumping] in his car and [taking] off"

6.238. Mrs Smyth claims that Mr Kerr timed his visit to her home with her birthday which is 19 August. (Mrs Smyth's case is that Mr Kerr knew it was her birthday because he had helped her complete and signed for her a form which had her son's birth certificate attached). Mr Kerr does not agree with any of these allegations. Apart from Mrs Smyth's claims there was no other evidence called to support the allegation that certain events, such as this one, occurred on specific days as they were significant to Mrs Smyth.

6.239. Mrs Smyth says that she was shaken by the incident and decided that she was going to complain to her employer however she alleges that she was still worried that she might lose her job a common concern of Complainants in sexual harassment matters.

6.240. Mr Kerr's statement⁷⁵ and evidence claim that he has no recollection of such events and that it would be unlikely to have occurred as he claims he does not use such derogatory language towards women. Mr Kerr does not believe this happened. In cross-examination Mr Kerr adds that at this time Mrs Smyth was preparing to resign and he knows this as they had many conversations about it.

6.241. Mr Kerr denies returning the next day (after an alleged incident) to verbally abuse Mrs Smyth. He claims he has no recollection of this event.

6.242. I find that the events of 19 August 2006 occurred as stated in evidence from Mrs Smyth and Mr Bush. I am less certain of scope of events on 20 August 2006. However it is clear that there was an angry confrontation.

6.243. Mr Bush's evidence was that during his relationship with Mrs Smyth there were phone calls and text messages from Mr Kerr and even with this incident there was reluctance from Mrs Smyth to complain to her work as she was concerned it would impact on her job.

6.244. Following the incidents of 19 and 20 August 2006 Mr Bush encouraged Mrs Smyth to complain about Mr Kerr's conduct to her employer so that they could "say something to him."

⁷⁵ Exhibit R51

Mrs Smyth raised Mr Kerr's behaviour at work

6.245. Mrs Smyth alleges that she raised the incidents regarding Mr Kerr, in her work place on 21 August 2006. Mrs Smyth claims that the events of 19 and 20 August 2006 were the catalyst for her complaint to Mrs Clayden on 21 August 2006. It is the Respondent's case that Mrs Smyth did not talk to Mrs Clayden on 21 August 2006 about Mr Kerr or on any other date in the manner attributed to this conversation.

6.246. Mrs Smyth claims that she could not continue to tolerate Mr Kerr's harassment so on Monday morning 21 August 2006, she spoke to her manager, Ms McKay, and told her what had happened. She discussed the incidents that happened over the weekend and the events from January 2005 that Mr Kerr had broken into her home and been found in her child's bedroom. Mrs Smyth claims that Ms McKay only knew of Mr Kerr touching her in the work place and knew nothing of the other events. Mrs Smyth's evidence states that Ms McKay was shocked.

6.247. Mrs Smyth alleges that she conveyed to Ms McKay her fear that there would be repercussions in the work place if she complained, as she believed that Mr Kerr had made this threat to her previously. Mrs Smyth states that it took a lot for her to complain to Ms McKay and that "... I didn't want to lodge a big complaint about it because I wanted to keep my job".

6.248. Ms McKay's statement and evidence support Mrs Smyth's version of events.⁷⁶ Ms McKay states in evidence that Mrs Smyth came to her office on Monday 21 August 2006, and spoke about Mr Kerr breaking into her home and also past incidents involving Mr Kerr. Ms McKay emphasized that this was the first time that Mrs Smyth had complained to her. Ms McKay also states that Mrs Smyth was concerned about losing her job if she complained. Ms McKay in evidence states that she went to Mrs Clayden to inform her of the issues between Mr Kerr and Mrs Smyth and the Commissioner told her that they would meet after the monthly NTSO's management meeting.

6.249. Mrs Smyth in evidence claims that she was called into a meeting in Mrs Clayden's office. Mrs Clayden denies this occurred. In cross-examination Mrs Clayden, as set out below, states that meetings occurred in February 2005 and February 2006.

6.250. In evidence, Mrs Smyth details her account of the meeting with Mrs Clayden on 21 August 2006:

⁷⁶ Exhibit C36, Paragraph 35 and 36

“...so I was there and Kathleen Clayden, the Commissioner, basically dominated the meeting, ran the meeting, and she said several things. She said that she knew it was happening pretty much the whole time. That really shocked me because I didn’t think anybody knew anything. She said that he’d done it before to other staff. I had a memory of her saying even five or six, or maybe perhaps I was number five or six, but five or six was the number – times.

She said that she knew he’d purchased a home two streets away from me. She did not say the address. She said he purchased a house two streets away from me. She said she become very worried at that point, that he – he did that, and she basically said she couldn’t stop him. She couldn’t stop him. The only way that he could be stopped from doing this was I had to take him to court, go through formal channels on my own, that – in – in some kind of court process. I had to do that to – to try and stop it and – and that was the only way, and if I did that, he would likely try and kill himself, and I would be to blame for that. She was very specific on that, that I would be to blame if he killed himself. I – I just couldn’t believe the things she was saying.

It was – it was shocking. It was – to me, it was evil. It was shocking. It was – it was the – what was coming out of her mouth was – was traumatising. I – I just – I was in tears. I – I didn’t – you know, I mean, up until that point, until I complained that day, I didn’t think anyone knew anything, and then I’m told all this information from the head of the office. And I also thought that – at the time that she specifically said that because – because of my previous struggle with grief and depression for – for several 5 years when my husband killed himself, and that was something I could never, ever go through again, and I – I – it’s something I can’t explain to people unless they’ve been through it. It’s just something I could not go through ever again; couldn’t even risk it.”

6.251. Mrs Smyth alleges that Mrs Clayden conducted the meeting in a very unemotional way. Mrs Smyth states that the meeting lasted for 30 minutes or so. (This incident and sequence is detailed in the original complaint, pages 17- 18). Mrs Smyth’s evidence is that following the meeting with Mrs Clayden she was in a mess and went home early.

6.252. Ms McKay’s statement⁷⁷ and evidence support Mrs Smyth’s view of Mrs Clayden’s demeanour during the meeting Ms McKay’s statement also mentions Mrs Clayden’s comment that, “ if [Mrs Smyth] was to go ahead with the complaint then she should be prepared for [Mr] Kerr to attempt suicide and

⁷⁷ Exhibit C36, Paragraph 40

that [Mrs Smyth] would be responsible for it".⁷⁸ Both Ms McKay and Mrs Smyth claim that they were shocked and in tears.

6.253. In evidence Ms McKay states that she had the impression that Mrs Clayden knew about the harassment of Mrs Smyth and other female employees by Mr Kerr. Ms McKay claims that this was the first time Mrs Smyth spoke to her about her issues with Mr Kerr.

6.254. Mr Bush alleges in his statement⁷⁹ that on Monday 21 August 2006, Mrs Smyth returned home from work extremely upset. Mr Bush's version of the conversation Mrs Smyth had with Mrs Clayden mirrors that of Mrs Smyth's evidence, including the Commissioner telling Mrs Smyth that the harassment would only stop if she took Mr Kerr to Court and that he may try to kill himself as a result of the complaint. Mr Bush also makes reference to other female staff who had, according to Mrs Clayden, been harassed by Mr Kerr.

6.255. Mr Bush states the reference to suicide was particularly significant in light of Mrs Smyth's husband's suicide some years earlier. In Mr Bush's statement, he then speaks of Mrs Smyth feeling like she had no option but to resign⁸⁰. In Mr Bush's evidence he mentions the meeting between Mrs Smyth and NTSO management, held the day after she lodged the complaint and also that a mediation had been booked.⁸¹ Mr Bush's impression was that Mrs Smyth was very upset with Mr Kerr's harassment, management's response to it and felt that management did nothing to help her.

6.256. Mr Bush's evidence is made up largely of things he was told by Mrs Smyth.

6.257. In Ms Laughton's evidence, she refers to Mrs Smyth and Ms McKay's demeanour following the meeting with Mrs Clayden. She describes them both as being upset and also "a little bit angry". Ms Laughton also claims in evidence that Mrs Smyth "was always quite upset about that – what – what was going on with [Mr Kerr] whenever she would talk to me about it."

6.258. The Respondent's case is that no meeting took place between Ms McKay, Mrs Smyth and Commissioner Clayden in which the Commissioner was cold and calculated and had them both in tears.

6.259. In her statement⁸² and in evidence, Mrs Clayden denies that the meeting with Mrs Smyth and Ms McKay occurred in August 2006. Mrs Clayden also denies

⁷⁸ Exhibit C36, Paragraph 41

⁷⁹ Exhibit C58, Paragraph 19

⁸⁰ Exhibit C58, Paragraph 20

⁸¹ Exhibit C58, Paragraph 21

⁸² Exhibit R55

a number of key aspects of this conversation such as; stating that Mr Kerr might commit suicide if a complaint was made against him, being aware of Mr Kerr sexually harassing other female colleagues, or having any conversations with Ms Milan about harassment. Mrs Clayden has some recollection of an issue regarding Mr Kerr texting Ms Watters but not of it being of a sexual nature⁸³. This is discussed in detail below.

6.260. Mrs Clayden says that she did not tell Mrs Smyth that she would be responsible for Mr Kerr's suicide if she reported him. Mrs Clayden is very firm in her evidence that she had spoken to Mrs Smyth in February 2005 and then again in February 2006 and not in August 2006 as alleged by Mrs Smyth. Mrs Clayden also states in cross-examination that she never told Mr Kerr to stop harassing Mrs Smyth. She also denies that mediation occurred in August 2006.

6.261. The findings in regard to whether it has been proven that this meeting occurred and its contents as alleged by Mrs Smyth are set out below from paragraph 9.21 onwards.

Mrs Smyth's work place meetings

6.262. In evidence Mrs Smyth claims that she returned to work the day after making her complaint and was called into a meeting with Mrs Clayden, Mr Fernandez and Ms McKay. This meeting was run by Mr Fernandez who spoke about Mr Kerr struggling with depression, and that he had received calls and texts from him after work. He was aware that drinking was a big part of Mr Kerr's issues.

6.263. Mrs Smyth alleges that Mr Fernandez was going to book the Employee Assistance Service (EAS) for Mr Kerr and Mrs Smyth to attend in order to discuss their work place issues. Mrs Smyth's evidence is that she was shocked at the characterisation of the incidents as a workplace dispute or a workplace issue. This is not how she would characterise it. She says that she was in shock.

Mediation in 2006

6.264. Consistent with Mrs Smyth's case, Ms McKay states that an EAS mediation between Mrs Smyth and Mr Kerr was organised by Keith Fernandez and that the mediation was in 2006 and not in 2005. Mrs Smyth's case is that mediation between her and Mr Kerr was organized by NTSO management after she had told Mrs Clayden about the August 2006 incident at her home.

⁸³ Exhibit R55, Paragraphs 143-147

6.265. The Respondents dispute this evidence and claim as will be set out below, that it occurred in 2005.

6.266. Mr Rawiri's evidence and statement⁸⁴ allege that during his relationship with Mrs Smyth, although he encouraged her to speak with her superiors regarding Mr Kerr's behaviour, Mrs Smyth would not as she was fearful that she would lose her job. In his statement Mr Rawiri also says that no work place counselling or mediation sessions occurred between Mrs Smyth and Mr Kerr while he was in a relationship with Mrs Smyth.⁸⁵

6.267. Furthermore Mr Rawiri says that he would have been grateful if this did occur as Mr Kerr's behaviour was putting stress on their relationship. Mr Rawiri's statement supports Mrs Smyth's version of events including the mediation occurring in 2006 and that once Mrs Smyth lodged a complaint with her employer she felt she had no option but to resign.

Mediation

6.268. It is Mrs Smyth's case and evidence that the next day she and Mr Kerr attended the counselling session that had been booked by Mr Fernandez. Mrs Smyth discusses what occurred in evidence and relays that there was no chance to speak independently to the counsellor.

6.269. Mrs Smyth alleges Mr Kerr did most of the talking during the session; "...It was the three of us in that room for the whole time of the counselling session, so there was no chance to independently speak. I was still very shocked by everything that had gone on, and I was pretty quiet. Mr Kerr sort of did most of the talking and he just said that it was more just a workplace dispute, that I had missed – I felt he wanted a relationship with me which was causing me a lot of grief and problems inside and outside of my workplace and – and it was just all a silly misunderstanding sort of thing, and – and that was about it."

6.270. Mr Bush's statement⁸⁶ supports Mrs Smyth's version of events. In his statement he recalls Mrs Smyth returning home from work on 23 August 2006 and telling him about the mediation she had attended that day with Mr Kerr.

6.271. In Ms McKay's statement⁸⁷ she states that Mrs Smyth attended a mediation session organised by Mr Fernandez, on 23 August 2006 but that she was not advised of the outcome of the mediation. In evidence Ms McKay states that

⁸⁴ Exhibit C34

⁸⁵ Exhibit C34, Paragraph 26

⁸⁶ Exhibit C58, Paragraph 22

⁸⁷ Exhibit C36, Paragraph 53

Mrs Smyth told her that she had attended mediation but had no direct experience of this.

“MS SMYTH: Yes. So do you recall me going to this EAS meeting with Mr Kerr the following day?

MS MCKAY: I think you told me that you went.

MS SMYTH: Did I – did you read any report or outcome about that?

MS MCKAY: No.”

6.272. In evidence Ms Laughton alleges she has no recollection of the mediation occurring between Mr Kerr and Mrs Smyth.

6.273. Mr Rawiri details his knowledge of the mediation in his statement⁸⁸ that Mrs Smyth alleges happened in August 2006. Although he and Mrs Smyth were not in a relationship at this time, they remained friends and Mrs Smyth called Mr Rawiri and explained the events that had occurred leading up to her resignation from the NTSO, including that she had attended mediation with Mr Kerr.

6.274. The findings in regard to the sequence of events, are set out from paragraph 9.21 onwards.

6.275. Mrs Smyth alleges that upon their return to the work place (on 23 August 2006) Mr Kerr sent an email titled “Male Comebacks to female comebacks to male chat up lines” at 3.18pm.⁸⁹ The content is of a sexual nature and is inappropriate for the workplace and will be considered below.

6.276. On receipt of Mr Kerr’s email on 23 August 2006, Mrs Smyth believed that the only way to stop his behaviour towards her was to go through a formal Court process. She thought he was angry at her and that her job was over. The mediation session had not sorted anything out. Mrs Smyth says that she was a mess and took sick leave, as she couldn’t face coming back to work. A medical certificate was tendered for 23 and 24 August 2006.⁹⁰

Mediation and who conducted it

6.277. Who conducted the mediation was a significant issue for Mrs Smyth in the preparation for and during the hearing however in determining the case and matters necessary to prove Mrs Smyth’s allegations it is less decisive than when the mediation occurred.

⁸⁸ Exhibit C34, Paragraph 30

⁸⁹ Exhibit C11

⁹⁰ Exhibit C12, Medical Certificates 24 & 25 August 2006

6.278. Mrs Smyth's original complaint makes no reference to EAS, however Mrs Smyth claims in evidence that the mediation was with EAS. There was no documented evidence tendered to support this allegation, though it is clear that efforts had been made to request documents via Freedom of Information (FOI) and a request that the ADC summons material from EAS.

6.279. It is clear from all parties concerned that there was only a single mediation that took place. Mrs Smyth claims that this happened in 2006, and the Respondent's allege it occurred in 2005.

6.280. Mrs Smyth claims that EAS provided the mediation and there is an assumption in the various conversations and phone calls that Mrs Smyth recorded that this was the case. This is also the underlying assumption in the early responses from the Respondents to the ADC. Ms McKay also refers to the mediation being with EAS.

6.281. The Respondent's case at the hearing was that the mediation was provided by the Community Justice Centre (CJC) which was part of the Department of Justice (DOJ) at the time. In cross-examination Mr Fernandez agrees that in the telephone call with Mrs Smyth in 2012 he referred to EASA however; he was unsure at the hearing exactly who the provider was. Further evidence on this issue is discussed in the First Respondent's case set out below.

6.282. The evidence disclosed that during 2005/2006 CJC were not a provider of EAS services to Treasury.

Mrs Smyth brought forward her leave

6.283. Mrs Smyth's evidence was that she brought forward her planned leave, following the mediation as she was not coping, "I really felt like I was going to resign because I couldn't stop him".

6.284. Mrs Smyth changed her leave from 4 October 2006 to 6 September 2006. A series of emails⁹¹ dated 20 August 2006, show the change in leave dates from October to September 2006. Mrs Smyth's email gives no explanation of why, however Ms McKay's says it was due to the original October dates "...clashed with both Lyn and Doug's leave dates".

6.285. It is clear Mrs Smyth did move her leave forward however there is only Mrs Smyth's evidence to support that this was due to the incidents set out above.

⁹¹ Exhibit C13

Resignation

- 6.286. Mrs Smyth's case and evidence states that when she had two weeks of leave left before she had to return to work and as two weeks' notice of resignation was required, she faxed in her resignation to NTSO on 15 September 2006.⁹² Mrs Smyth states in her evidence "...I just felt I had no other choice and that was what I did". Mrs Smyth's case is that she was forced to resign, and that the training she provided to Ms Laughton was organised in preparation for her forced departure.
- 6.287. Mrs Smyth case and evidence alleges that if she stayed in her position with the NTSO, the only way to end Mr Kerr's harassment would be to take him to court and she was concerned that if she did this then he might commit suicide and this would be as a result of her actions. The thought of this was unbearable to her. She also felt that if she stayed on then she was putting her safety and that of her son's in jeopardy and so she felt at the time that the best option was to resign.
- 6.288. Mrs Smyth has no diary entries or file notes which document the events of August 2006. She says in cross-examination that she cannot locate her diary from 2006.
- 6.289. Mr Bush in his evidence, states that Mrs Smyth resigned "...because she didn't want the pressure from him anymore". Mr Bush was present when Mrs Smyth wrote her resignation letter and he alleges that she was very upset and angry when writing it.
- 6.290. The Respondent's case provides an alternative explanation for Mrs Smyth's resignation and does not concede that it was in any way related to Mr Kerr's behaviour or the actions of NTSO management in retribution for her complaints about Mr Kerr's behaviour.
- 6.291. The circumstances of Mrs Smyth's resignation were dealt with in First Respondent's case; however Mrs Smyth's evidence, supported by Mr Bush, is that she resigned because of Mr Kerr's conduct and management response to it. If established this may form part of Mrs Smyth's victimisation case.
- 6.292. Mrs Smyth confirms in cross-examination that she did not think she had any option but to resign, because she believed that if she formally complained about Mr Kerr, he would commit suicide.

⁹² Exhibit C14

- 6.293. In cross-examination, other options other than resigning are put to Mrs Smyth such as seeking assistance from the Office of the Commissioner for Public Employment or requesting a transfer to another department/area in Treasury. Mrs Smyth says that she didn't consider any of these at the time.
- 6.294. In cross-examination the Respondent's position that Mrs Smyth resigned because she had enough of working at Treasury, in that she didn't like the hierarchical structure that comes with working in that kind of environment and she wanted to pursue her other business interests, such as the jumping castles, coke van and property/unit management was put to Mrs Smyth but Mrs Smyth denied that this was the reason for her resignation.
- 6.295. Further in cross examination, Mrs Smyth is questioned about the circumstances surrounding her resignation from the NTSO. Mr Kerr's version of events is put to Mrs Smyth. That Mrs Smyth called him after she had faxed through her resignation and asked him to get it off the fax machine and put it on Ms McKay's chair. He also claims that he dropped off her personal belongings at her home and after she resigned Mr Kerr visited her a couple of times and they sat on her veranda and talked. Mrs Smyth denies that any of these things occurred.

Farewell

- 6.296. It is Mrs Smyth's case and she gave evidence that she attended the office at Enterprise House for a farewell get together following her resignation. She was handed a farewell card which was signed by NTSO staff and also other Treasury staff. In the middle of the card close to the printed greeting are the words "Linda Good bye, Good luck, Hope you get a good fuck" and it was signed "Buju"⁹³.
- 6.297. Mrs Smyth's alleges that other comments on the card reference the middle comment by the repeated use of the words rhyming with "good luck". Mrs Smyth doesn't view the card as funny or a joke in light of her stated reason for her resignation.
- 6.298. Mrs Smyth's case at the commencement of proceedings was that Mr Kerr wrote this comment and it was a continuation of his sexual harassment of her. The evidence is that it was written by Mrs Marie Tonks who gave evidence and details of this in her statement⁹⁴ that she wrote the comment in the centre of the card.

⁹³ Exhibit C16

⁹⁴ Exhibit R53

- 6.299. In cross-examination the point is made to Mr Kerr that his signature is not on the card yet he claims that at that time they were good friends. Mr Kerr also denies that he wrote or asked someone else to write the central message on the card.
- 6.300. In cross-examination Mr Kerr clarifies that he was not at work the day of Mrs Smyth's farewell as he "either had pallets of pavers placed at my house, or my carport commenced to go up, or I had a bobcat in there because I was doing things to my house at that period of time." Mr Kerr's name is on the front of the card in some-one else's writing, along with each of the characters on the card being named after other NTSO staff, including Mrs Clayden. This would suggest that whoever wrote the names was also unaware of any issues between Mr Kerr and Mrs Smyth at the time of her resignation.
- 6.301. In cross examination, Mrs Clayden says that she signed the card first and never saw the comment in the centre of the card.
- 6.302. Mrs Smyth in evidence claims that there was no morning tea or even a gift provided at her farewell. She was handed the card and left soon after. Her recollection is that Mr Kerr stayed outside during the get together.
- 6.303. In the two photographs, tendered by Mrs Smyth, of her farewell, there is no evidence of food or a gift. Mrs Clayden has no specific memory of Mrs Smyth's farewell gathering and so cannot comment if there was food or a gift provided. Mrs Clayden and Mrs Smyth are also photographed together at the farewell.⁹⁵
- 6.304. I find that Mr Kerr did not write the words in the card however it is troubling that another work colleague felt that it was permissible in the work environment to write such a comment. This does not reflect well on the person who wrote the comment or the work environment, as well as the fact that no-one took issue with the comment which is in a prominent position in the card. However the more relevant question is how does this assist Mrs Smyth's case in proving the allegations she has made against Mr Kerr and the NTSO, and apart from being background information evidencing a culture where this could occur without challenge in 2006, it has little further value in proving the allegations under the Act.

Hostility from Mr Kerr after Mrs Smyth's resignation

- 6.305. Mrs Smyth alleges that following her resignation from the NTSO Mr Kerr sent her very hostile text and voice messages. Her view is that he took her

⁹⁵ Exhibit C17

resignation as a personal separation. Furthermore Mr Bush's statement⁹⁶ also refers to threatening and abusive messages Mrs Smyth received from Mr Kerr, after she had resigned. Mr Bush encouraged Mrs Smyth to take these messages to the police, however she refused as she was still of the view that Mr Kerr may take his own life if he felt threatened.

6.306. As set out in his case Mr Kerr states that he collected Mrs Smyth's resignation letter from the fax machine and placed it on Ms McKay's chair. He also brought Mrs Smyth's possessions from the office to her home and remained on good terms with her, even bringing his niece to visit Mrs Smyth in October 2006. These matters are expanded on in the Second Respondents case set out below.

Mrs Smyth's view of Mr Kerr's position and influence with management

6.307. Mrs Smyth's case is that Mr Kerr, as a long term employee of NTSO had a position of power and influence in the office which was not linked to his level but the time he had been at NTSO, he possessed skills that few other employees had and long term relationships with key NTSO management.

6.308. Ms Laughton states in evidence that Mr Kerr had a lot of influence in the office, in terms of moving money around and also over Mr Taylor, Mr Fernandez and Mrs Clayden, the NTSO management team at the time. Ms Laughton believes that Mr Kerr had influence over decisions that were made in the office.

6.309. Ms Laughton compares the management team and Mr Kerr to a "boys club" however she mentions that Ms McKay was not a part of this circle. She says that Mr Kerr and Mr Taylor, Mr Fernandez and Mrs Clayden were close within the workplace.

6.310. In cross-examination, Ms Laughton is referred to the transcript of her telephone conversation with Mrs Smyth on 20 February 2011. Ms Laughton confirms that she felt she was held back from getting a management position by Mr Kerr and the management group because she was an Aboriginal.

6.311. All three members of the NTSO management team Mr Fernandez, Mr Taylor and Commissioner Clayden deny that this was the case.

⁹⁶ Exhibit C58, Paragraph 28

Lodgement of Mrs Smyth's complaint

6.312. In cross-examination, Mrs Smyth gives an account of how she came to lodge the complaint against Mr Kerr and the NT Treasury with the ADC. She initially sought the assistance of Top End Women's Legal Services (TEWLS) in Darwin, who advised her to lodge her complaint with the ADC, which she agreed to do. Mrs Smyth had no face to face meetings with any of the lawyers in TEWLS as by this time (middle of 2011) she had relocated to Queensland. Mrs Smyth states that she found it very difficult to put the complaint together as she was on medication at the time for depression and anxiety and found it difficult to relive the experiences outlined in her complaint.

Mrs Smyth alleges Mr Kerr harassed other women in NTSO

6.313. Mrs Smyth's case commenced with the allegation that five or six other women had been harassed by Mr Kerr whilst he was working at the NTSO. It became clear there was only evidence to support incidents involving two women; Ms Milan in 2002 and Ms Watters (nee Dove) 2002 and into early 2003.

6.314. Mrs Smyth's case appears to be that the allegations that other women were harassed by Doug Kerr over the years he was at NTSO, has a number of uses. Firstly, she should have been warned and secondly NTSO should have done more, to stop the behaviour. Mrs Smyth's view is that NTSO had made the decision that they needed him more than they needed her.

6.315. In considering this material I have viewed the value of it as what's referred to as tendency evidence (as discussed above). The first step is to consider the available evidence and its credibility, then to decide on its relevance, and probative value against potential prejudice to Mr Kerr.

6.316. The value then of the evidence is that it is more likely than not that similar conduct alleged against Mr Kerr in this matter occurred. That Mr Kerr had behaved in a similar way before which would make it more likely that he behave in the way alleged in the complaint.

6.317. Mr Kerr, in his statement⁹⁷ and evidence, denies the allegation that he sexually harassed five or six other women at NTSO. The evidence set out below supports that there were incidents involving Ms Milan and Ms Watters. A large amount of evidence was called however it can be distilled as follows.

⁹⁷ Exhibit R51

Ms Emmy Milan

6.318. Ms Milan, during her evidence, denied repeatedly and strenuously that anything of a sexual nature occurred. However documents created at the time, by Keith Fernandez, suggest that Ms Milan did have an issue with Mr Kerr touching her shoulders when he spoke to her prior to 19 June 2002. This is recorded in a file note of a conversation created by Mr Fernandez when he was looking into resolving personal differences between staff in June 2002.⁹⁸

6.319. It stated “Also discussed was Emmy’s comment to Rhonda about Emmy not liking Doug touching her when he was talking to her”.⁹⁹

6.320. The background to this comment is found in a taped conversation with Ms Rhonda Scholz¹⁰⁰, Ms Scholz claims that Ms Milan spoke to her about her issue with Mr Kerr putting his arm around her. Ms Scholz raised the issue with the Commissioner at the time Ros Sumner, who advised her to speak to HR, which she then did. HR advised Ms Scholz to speak to Mr Kerr about his behaviour and once the matter was raised with him the behaviour ceased. Ms Scholz also said that Ms Milan was reluctant to say anything about Mr Kerr’s behaviour as she didn’t want to be seen to be complaining.

6.321. Mr Fernandez’s file note also records that the touching was no longer an issue, as it had been addressed. In the file note it states “... that it had always been an issue for her but as she and Doug had been friends for sometime [sic] did not know how to address the matter, but since Doug had been made aware, it was no longer an issue for her”. The investigation appears to have been about the relationship break down between Ms Milan and Mr Kerr.

6.322. Mr Fernandez dealt with Ms Milan’s issues with Mr Kerr in his statement¹⁰¹ and in evidence Mr Fernandez acknowledges that there was an issue with Mr Kerr touching Ms Milan and that he spoke to Ms Milan about this as part of a conversation about broader staff issues. Mr Fernandez spoke to Mr Kerr about this issue but as Ms Scholz had already brought up the issue with him, at this stage he believed it was resolved. Ms Milan did not want the issue with Mr Kerr to be dealt with in any other way.

6.323. In Mr Kerr’s statement¹⁰² and in evidence, he denies there was an issue with Ms Milan. Mr Kerr believes Ms Milan became very introverted at work.

⁹⁸ Exhibit R67, Annexure F

⁹⁹ Exhibit R67, Annexure F

¹⁰⁰ Exhibit C78, Pages 3 and 4

¹⁰¹ Exhibit R67, Paragraph 62-76

¹⁰² Exhibit R51, Paragraphs 127 & 128

- 6.324. In cross-examination Mr Kerr is taken to Annexure F of Mr Fernandez' statement¹⁰³ which is a series of file notes that document conversations Mr Fernandez had with employees in June 2002, due to a level of disharmony in the Finance unit. The conversation with Mr Kerr is dated 20 June 2002. For almost a page of the file note, Mr Kerr recounts his issues with Ms Milan's work practices and only the last paragraph deals with "...Emmy's comment to Rhonda about Emmy not liking Doug touching her when he was talking to her."¹⁰⁴
- 6.325. Mr Kerr's perception is that the issue with Ms Milan had been resolved and that he had raised it with his other female staff to ensure that it was not an issue for them also. In cross-examination, Mr Kerr says that due to its place in the document he does not think that it was a huge issue. He has no independent recollection of the issue with Ms Milan. He has no recollection of who the complaint was made to or how it was handled. Mr Kerr volunteered unsolicited information to criticise Ms Milan's work capability.
- 6.326. In cross-examination, Mr Kerr is taken to the file note pertaining to Ms Scholz's conversation with Mr Fernandez¹⁰⁵ dated 19 June 2002. It is clear from this file note that there were performance issues in the work unit and that Ms Milan was not communicating with Mr Kerr. The work related problems between Mr Kerr and Ms Milan are linked with the timing of when Ms Milan raised the point that she did not like him touching her. In this document, it is also noted that Mr Kerr threatened "to rethink his employment situation" if something wasn't done¹⁰⁶.
- 6.327. In cross examination Mr Kerr agrees with the interpretation of Ms Scholz's document that the working relationship declined after Ms Milan raised the issue of touching. He repeatedly says that this was "not a big issue".
- 6.328. The finding on all the available evidence is that there was an issue in 2002 and part of this was Mr Kerr touching Ms Milan in a manner that she was uncomfortable with; placing his arm around her shoulder. It was dealt with largely by Ms Scholz, becoming aware of it and raising it with Mr Kerr. Ms Milan's reluctance in evidence and even at the time, to complain, is not determinative. This is a consistent feature when this type of conduct occurs in the work place often people demonstrate a reluctance to complain.
- 6.329. The relevance of this evidence in the matter is that it is one further strand in the evidence that will determine the likelihood that the allegations of Mr Kerr

¹⁰³ Exhibit R67

¹⁰⁴ Exhibit R67, Annexure F

¹⁰⁵ Exhibit R67, Annexure F

¹⁰⁶ Exhibit R67, Annexure F

touching Mrs Smyth in the manner she described in the workplace occurred. It is also relevant to address the lack of awareness or disregard by Mr Kerr of the impact and inappropriateness of his behaviour in the work place, and potentially that when the issue is reluctantly raised by staff, working relationships decline.

Ms Watters

6.330. Ms Kerrina Watters previously known as Ms Dove and Ms Newhouse gave evidence. She will be referred to as Ms Watters in these findings.

6.331. Ms Watters' evidence is that she worked as an AO3 for Mr Kerr and that in the beginning they worked well together and became friends, although they did not meet up outside of the office. After about a year something changed in their relationship and Ms Watters refers to Mr Kerr developing an "infatuation" with her. Mr Kerr started constantly sending Ms Watters' emails and texts messages at all hours of the day, and it got to the point that Ms Watters felt like she was being harassed.

"...it got to a point where I, sort of, felt like I was being harassed. I was being constantly getting emails every time of the day or even text messages."

6.332. In her recorded conversation¹⁰⁷ with Mrs Smyth, Ms Watters' refers to receiving long emails each day from Mr Kerr and at one point up to 30 text messages in an hour. Ms Watters asked him to stop this behaviour, but he did not listen.

6.333. Ms Watters confided in Ms Debbie Charles about the texts and emails from Mr Kerr, some being sent in the middle of the night. Ms Charles thought that this was inappropriate and suggested that Ms Watters raise the issue with Mrs Clayden. It is clarified in cross-examination that the meeting with Mrs Clayden occurred in about March 2003. Ms Watters confirms that, together with Ms Charles, she raised her issue with Mr Kerr with Mrs Clayden.

6.334. The Commissioner told Ms Watters to leave it with her and Ms Watters felt that Mrs Clayden was supportive and had listened to her concerns. Ms Watters is not sure what the Commissioner did to stop the harassment but Ms Watters was relocated within the office in approximately a month or so following the complaint. A structure was put in place so that she did not have to work directly with Mr Kerr. Ms Watters also states in cross-examination that while she did not think that Mr Kerr was depressed or suicidal, she did think that something was going on with him that he was possibly suffering from a

¹⁰⁷ Exhibit 40, Pages 40-43

mental illness. Ms Watters claims that she was comfortable communicating with Mr Kerr again about six months after her complaint.

6.335. Ms Watters clarifies in cross-examination that she felt like Mr Kerr was stalking her electronically, not physically. She would receive texts and emails from Mr Kerr, asking her questions such as "...where are you? Why haven't you called me? Get back to me. I need to speak to you now..."

6.336. In cross-examination, Ms Watters agrees that there was a sexual undertone to the communication from Mr Kerr however, she found the intensity of the texts and emails more concerning. Ms Watters describes an unusual situation where Mr Kerr would put a stick in her draw when he had gone for a walk. Ms Watters did not have a problem with Mr Kerr touching her but he did buy her gifts, such as flowers, a purse and an Australian cricket shirt.

6.337. Ms Watters' evidence is that the harassment continued up to Easter 2003 when Ms Watters started going out with her now husband. Even after Mr Kerr was aware that Ms Watters was seeing someone else she did receive a couple of texts from him. Ms Watters' gave evidence that Mr Kerr was told that the contact was unwelcome but he continued with the harassment despite knowing this.

6.338. Mrs Smyth links Ms Watters' not getting two jobs in NT Treasury to her complaint about Mr Kerr. Ms Watters when asked does not agree this was the case and both Ms Watters and Mrs Clayden stated that the Commissioner helped Ms Watters to obtain a ministerial position in Treasury.

6.339. Ms Debbie Charles' statement¹⁰⁸ and evidence, deal with her knowledge of what happened to Ms Watters while she was working in the NTSO. Ms Charles and Ms Watters became friends while working at the NTSO and have remained friends since. Paragraphs 13 to 15 of Ms Charles' statement¹⁰⁹ refer to conduct around March 2003, when Ms Watters told Ms Charles that she was feeling harassed by Mr Kerr, due to the excessive text messages and emails he was sending her, some of which referred to Mr Kerr wanting to enter into a sexual relationship with her. He also sent her flowers on either Ms Watters' birthday or Valentine's Day. Ms Charles refers to Ms Watters telling Mr Kerr to stop harassing her.¹¹⁰

6.340. Ms Charles had a meeting with Mrs Clayden and Ms Watters. Ms Watters told Mrs Clayden that she received many text messages, outside work hours and emails, during work hours, from Mr Kerr. The content of some of the text

¹⁰⁸ Exhibit R70

¹⁰⁹ Exhibit R70

¹¹⁰ Exhibit R70, Paragraph 22

messages was inappropriate. Ms Watters was quite embarrassed and did not want to make a formal complaint. It was agreed during this meeting that Ms Watters would move and work next to Ms Charles¹¹¹. In cross-examination, Ms Charles refers to the “Doug situation”. In cross-examination, Ms Charles also states “I thought Kerrina was being harassed” and the solution was for Ms Watters to sit next to Ms Charles in the systems area. Ms Charles also says that “she did have that distance from – from Doug which is what she needed.” Ms Charles felt supported by Mrs Clayden at this time.

6.341. In her statement¹¹² Mrs Clayden has some recollection of an issue regarding Mr Kerr texting Ms Watters. Mrs Clayden recalls Ms Watters asking Mr Taylor to tell Mr Kerr to stop texting her. Mrs Clayden alleges that she prepared a short statement regarding the matter for Ms Watters to sign but she declined to do so. This document was not tendered in the hearing.

6.342. In cross-examination Mrs Clayden was very firm that Ms Watters’ complaint was not of a sexual nature contrary to all of material from other witnesses. Mrs Clayden was unaware of a text sent by Mr Kerr to Ms Watters saying he wanted to sleep with her. The matter of Ms Watters and Ms Charles coming to Mrs Clayden’s office to complain about Mr Kerr’s behaviour is not in her statement.

6.343. However in cross-examination Mrs Clayden says she and Mr Taylor spoke to Ms Watters in “The Cav” about other issues in her personal life and also the issue with Mr Kerr. Ms Watters did not want to make a formal complaint as Mr Kerr was her friend and she did not want to get him into trouble. She just wanted the communication to stop and so she asked Mr Taylor if he would stop Mr Kerr from texting her. Mrs Clayden drafted a short statement regarding this matter however Ms Watters declined to sign it. As far as Mrs Clayden was aware nothing else arose between Mr Kerr and Ms Watters after this.

6.344. In his statement¹¹³, Mr Taylor describes his recollection of the issue between Mr Kerr and Ms Watters. Ms Charles brought the issue of the inappropriate texts to the attention of Mr Taylor. Mr Taylor then recalls being asked by Mrs Clayden to instruct Mr Kerr to stop sending text messages to Ms Watters, which, Mr Taylor says, he agreed to do. Mr Taylor thinks this was the end of the issue. He was not aware of any other incidents.

¹¹¹ Exhibit R70, Paragraph 20, Annexure F

¹¹² Exhibit R55, Paragraphs 143-147

¹¹³ Exhibit R61, Paragraphs 84-90

6.345. In Mr Kerr's statement¹¹⁴ and evidence he claims that he had provided assistance to Ms Watters as she worked in the finance area. She was also a smoker, and they would take smoke breaks together where they would speak to each other about a number of things. Mr Kerr also states that Ms Watters motivated him to get fit. He says that they spent time on the phone outside of office hours. He was aware that Ms Watters had very little confidence at the time. Mr Kerr says that he "probably got too close to Ms Dove..." Mr Kerr says that they exchanged a number of emails and texts and that he sent her an inappropriate text that he immediately regretted sending and for which he apologised the next day. Mr Kerr concedes that he sent Ms Watters an inappropriate text saying that he wanted to sleep with her. Mr Kerr states that there was never any malice intended in the texts he sent to Ms Watters.

6.346. In cross-examination it proved very difficult to establish the dates that Mr Kerr began calling, texting and emailing Ms Watters outside of office hours. He claims that he cannot recall, if it was before or after Mr Fernandez' investigation in June 2002.

6.347. It is clear in cross-examination that there was an exchange of phone calls out of office hours; that he put a stick in her drawer after a walk, sent her flowers to the office, and also gave her Australian cricket shirt worth \$100. Mr Kerr sent her long emails in work hours (at one point he was sending one every morning). He agrees that these were personal "good morning" type emails. He did not send these emails to anyone else. He also agrees that Ms Watters' asked him to stop ringing and texting her. Mr Kerr says that she asked him to stop after he sent the inappropriate text to her one weekend. Mr Kerr says that it was something they worked through and were able to move on from.

6.348. The argumentative manner in which Mr Kerr gave his evidence in cross-examination generally is demonstrated by this exchange. There are a series of questions where he does not agree with the statement that he asked Ms Watters for sex.

"MR KERR: I sent her an inappropriate text saying I would like to sleep with her. So I did not recall asking her for sex."

6.349. Mr Kerr discussed the issue with Ms Charles. Mr Kerr suggests that the issues between him and Ms Watters had been resolved as he ran into her years later and there did not appear to be any hard feelings from her towards him.

6.350. Mr Kerr never conceded that the number of emails and texts was excessive or could be perceived as harassing. Also during his evidence he appeared totally

¹¹⁴ Exhibit R51

unaware of the inappropriateness of his behaviour toward a work colleague and one who he supervised, apart from the one text. Mr Kerr minimised the seriousness by saying she spoke to him a number of years later.

- 6.351. I accept the evidence of Ms Watters supported by Ms Charles and largely conceded by Mr Kerr that Ms Watters, at a vulnerable point in her life, received repeated texts and emails from Mr Kerr, including a request to sleep with him. It is clear, that both at the time and during the giving of his evidence, Mr Kerr lacked awareness of the impact of his conduct. It is evident that Mr Kerr was not prepared to stop the inappropriate conduct even after being requested to by Ms Watters and knowing that she had commenced a new relationship.
- 6.352. The tendency evidence is of conduct involving two women and not five or six women as alleged by Mrs Smyth. The allegation that Mr Kerr harassed five or six women was refuted by calling the named women to give evidence.
- 6.353. The finding is that both incidents set out above occurred. The evidence of both incidents is cogent and supported by documents and other witnesses around at the relevant time.
- 6.354. The evidence of Ms Watters and Ms Milan is relevant to prove Mrs Smyth's allegations, as even though the conduct is not identical and not corroborative in the strictest sense, it shows a pattern; Mr Kerr in the role of supervisor and providing assistance, a colleague developing a dependence on him and a good working relationship established which extended to out of office hours contact which then becomes more frequent and intrusive. This includes Mr Kerr not responding to requests to stop. This assists in finding that the conduct in regard to excessive phone calls and texts is more likely than not to have occurred as alleged by Mrs Smyth.
- 6.355. In regard to touching and making an employee who he supervised uncomfortable, Mr Kerr's interactions with Ms Milan present a similar case. Ms Milan complained of Mr Kerr touching her when they were working together and how this behaviour was unwelcome and contributed to deterioration in their working relationship.
- 6.356. Both prior incidents are clearly relevant and in the present circumstance I find the probative value outweighs the potential prejudice to the Respondent. The prejudice is ameliorated by the fact that both incidents were raised with Mr Kerr at the time they occurred and these proceedings are not the first time he was made aware of the allegations. Documents and witnesses support the incidents and the approach taken.

6.357. The evidence also suggests that there was little awareness in NTSO management of the power dynamic which is a common feature of sexual harassment in the work place; women are embarrassed by the conduct and do not want to make a fuss, they just want the conduct to stop.

6.358. Mrs Smyth's further allegations that the women were "shafted" rather than management dealing with Mr Kerr appropriately is not supported by the findings on this evidence. The evidence of the circumstances involving Ms Milan and Ms Watters do not support this allegation. Ms Milan chose to move to complete her studies and her leave was approved by Mrs Clayden. Ms Watters was experiencing a difficult time in her life and did not secure a number of positions that she applied for in the NTSO. Mrs Clayden ensured that Ms Watters had another opportunity which eventually resulted in her securing a job in Nhulunbuy and moving there with her current husband.

6.359. Further I do not accept that this material can be used in the way suggested in Mrs Smyth's submissions i.e. that NTSO management knew of Mr Kerr's behaviour towards other female staff and still put Mrs Smyth in harm's way. The touching of Ms Milan by Mr Kerr predates Mrs Clayden's time as Commissioner and Ms Watters' allegations whilst they assist in the likelihood of the events Mrs Smyth says occurred did occur do not on their own substantiate this allegation

Mrs Smyth's allegation that the content of various documents were fabricated

6.360. Mrs Smyth alleges that numerous documents tendered in the matter have been created to enhance the Respondent's case.

6.361. These documents are listed below in chronological order

1. File note created by Mr Fernandez which details Mr Kerr's behaviour between 2003 and 2005 and specifically describes the events of January and February 2005. It notes his behaviour in work and towards Mrs Smyth¹¹⁵
2. Email from Mrs Clayden to Mr Fernandez and Mr Taylor, dated 7 March 2005.¹¹⁶
3. Harassment in the Work Place Policy, dated and signed, on the last page, by Mrs Smyth on 11 March 2005.¹¹⁷
4. Email from Commissioner Clayden to Mr Fernandez, dated 3 March 2006.¹¹⁸

¹¹⁵ Exhibit R67, Annexure A

¹¹⁶ Exhibit C18

¹¹⁷ Exhibit C22

¹¹⁸ Exhibit R67, Annexure E

5. File Note created by Mr Fernandez regarding his conversation with Ms Gail Humble. The file note is undated but the conversation occurred on 28 February 2006.¹¹⁹
- 6.362. Mrs Smyth's submissions and evidence on each document above is set out below.
- 6.363. In regard to the first document Mr Fernandez's file note, documenting events from January and February 2005 Mrs Smyth alleges in her cross-examination that this was actually only created in 2014 to support the First Respondent's changing version of events. Mr Taylor denies this allegation as do the other NTSO staff.
- 6.364. Further in Mrs Smyth's submissions it is alleged it was created to support the changing versions of stories alleged by the Respondents (Part 2: Attachment 5: Fabricated file note re Doug Kerr Feb 05). There was no evidence lead in Mrs Smyth's case to support this allegation.
- 6.365. However the email is very supportive of a number of allegations made by Mrs Smyth in her case and does not reflect well on the management of Mr Kerr's binge drinking and absenteeism by NTSO. This file note also records an entry on 17 February 2005 "KC called GT and I into a meeting to advise *that DK had been up to his old tricks with LS*". What was meant by this was not explored in the hearing. It is difficult to conclude that it refers to other events involving Mrs Smyth as from Mr Fernandez's statement this is the first involvement of Mrs Clayden. Mrs Clayden's evidence is that she was not back from leave until the end of January 2005. It is difficult to speculate on what "his old tricks" are, it could possibly relate to inappropriate conduct with other women however there was no evidence lead to confirm or reject this.
- 6.366. However the file note also contains material inconsistent with the sequence of events alleged by Mrs Smyth.
- 6.367. This file note and its creation are further discussed in the First Respondent's case.
- 6.368. The second document the email dated 7 March 2005¹²⁰ sent by Mrs Clayden to Mr Fernandez and Mr Taylor, which was found in Mr Fernandez's personal records) and also in the file "Personnel – Counselling-superannuation Office – Employee Management Issues" (File no.SUP 2009/36) at document 36.

¹¹⁹ Exhibit R67, Annexure D

¹²⁰ Exhibit C18

- 6.369. Mrs Smyth allegation is that it was created in 2005 as dated. However, Mrs Smyth's explanation (not in evidence in chief but within her affidavit¹²¹) is that the email was created the next business day, after the exchange of letters between Mrs Smyth and Mr Kerr in March 2005 and its contents are false. Mrs Smyth's case is there was no meeting or mediation that occurred.
- 6.370. Mrs Smyth in evidence claims she was concerned with the content of the email and she alleges that it is false. Mrs Smyth claims that all parts or events mentioned did not happen. This is consistent with Mrs Smyth's case that she did not discuss Mr Kerr's conduct or participate in mediation until 2006. However it does not take into account or explain the March 2005 letters and how they came to be provided to NTSO management.
- 6.371. Mrs Smyth's submissions also make a great deal of there being four versions of the email noting that only three versions were supposedly tendered at exhibit C 18. However only two were provided one from Mr Taylor's account – with Information Act release across it, and one from Kathleen Clayden's account.
- 6.372. However on the face of these documents, one has been printed by the sender, the content of the message is the same, and the other has been printed from one of the recipient's accounts. There is no support in the different versions for the allegation that it was fabricated by Mrs Smyth.
- 6.373. The Respondents' submissions at paragraph 83 alleged that Mrs Smyth's case is that this email was created as a cover should the Complainant ever complain.
- 6.374. This email and its creation are further discussed in the First Respondent's case.
- 6.375. The third document is the 'Harassment in the Workplace Policy' dated 11 March 2005¹²² with Mrs Smyth's signature on the back page. Mrs Smyth alleges that when she signed the last page of the Harassment in the Workplace Policy that she was handed just a single page to sign by Mr Taylor and it was not attached to the Harassment in the Workplace Policy.
- 6.376. The NT Treasury claims that Mrs Smyth was given the full document and signed it in Mrs Clayden's office, on 11 March 2005, once Mr Taylor had explained it to her. Mrs Smyth states that she was asked by Mr Taylor to sign the single page as there had been an administrative error and she hadn't

¹²¹ Exhibit C26, Pages 12 & 13

¹²² Exhibit C22

signed the attendance list for the Basic Discrimination Harassment and Training that she had attended in February 2005.

6.377. Mr Taylor's and Mrs Clayden's evidence is set out in the First Respondent's case below.

6.378. The issue with this document is not that it was fabricated but the manner in which the signature was allegedly obtained.

6.379. The fourth document alleged by Mrs Smyth to be fabricated, is the email dated 3 March 2006 that was sent by Mrs Clayden to Mr Fernandez¹²³. Mrs Smyth claims that the content of the email is false and the meeting between Mrs Clayden and Mrs Smyth did not occur. In Mrs Smyth's affidavit¹²⁴ she claims that the email was not located during the FOI searches from documents in the possession of the NT Treasury, but rather was located in the personal records of a former NTSO employee. This is a matter conceded by Mr Fernandez, who retained the record after he left NTSO.

6.380. Mrs Smyth's reason for alleging the document was fabricated was because her case is that the meeting with Mrs Clayden did not occur and neither did the conversation between the Mrs Clayden and Ms McKay or the detailed events set out in the email.

6.381. In cross-examination Mrs Clayden says that the two emails were stored on her personal drive. In evidence in chief, Mrs Clayden explains that she copied her email folders to her personal drive when the office moved from Enterprise House to the Treasury building because during a previous office move some of her emails had been lost.

6.382. Mrs Smyth alleges that some content in the email is inaccurate such as referring to her partner/boyfriend at the time as "Mike". Mrs Smyth says that she and Mr Rawiri had separated well over a year prior to the date of this email. Mrs Smyth also says in cross-examination that she never spoke to Mrs Clayden about Mr Kerr buying a house near her.

6.383. Mrs Smyth's case is that the document is fabricated as she does not agree with the content.

6.384. Mrs Smyth alleges that because this file note does not contain any information about the meeting between Mr Fernandez and Ms Humble, as set out in the

¹²³ Exhibit C19

¹²⁴ Exhibit C26, Pages 15 & 16

file note referred to below, that email was not created at that time or that the meeting with Ms Humble did not occur.

- 6.385. The Respondents submissions state the information contained in the email can only have been told to NTSO by Mr Kerr.
- 6.386. The circumstance of the meeting from NTSO perspective and creation of the email are discussed further in the First Respondent's case set out below.
- 6.387. In cross-examination, Mr Taylor states that the letters shared between Mr Kerr and Mrs Smyth, the email dated 3 March 2006 sent by Mrs Clayden and the two file notes created by Mr Fernandez, one detailing his conversation with Ms Humble and the other outlining incidents involving Mr Kerr, turned up for the first time in response to the order to produce documents related to the case from the ADC. Mr Taylor denies that the two file notes were recently created in 2014.
- 6.388. The final document alleged to be fabricated is a file note that details Mr Fernandez's conversation with Ms Humble; the file note is not dated but refers to a conversation on 28 February 2006.
- 6.389. Mrs Smyth alleges that the file note, written by Mr Fernandez, regarding his meeting with Ms Humble,¹²⁵ was created by the Respondents before submitting their witness statements, and was not written in 2006 as claimed.
- 6.390. Further that the events it refers to in 2005 did not happen. Also if this meeting had occurred and this advice obtained it would have been mentioned in Mrs Clayden's file note dated 3 March 2006.
- 6.391. Mrs Clayden gave evidence that she was given a copy of the file note dated 28 February 2005, by Mr Fernandez when preparing for this case. In cross-examination Mrs Clayden denies that the file note was fabricated for the case.
- 6.392. Mr Taylor gave evidence of locating two files¹²⁶ one titled 'Personnel - Counselling - Superannuation Office - Employee Management Issues' and the other 'Personnel - Counselling - Personnel - Employee Assistance Services (EAS) - Review' which were kept in the Commissioner's office under lock and key. These files did not come up in earlier TRIM searches conducted during FOI requests because the content of the files was not recorded on TRIM, just the name of the files, which do not pertain in any way to this case.

¹²⁵ Exhibit R67, Annexure D

¹²⁶ Exhibits R62 and R63

- 6.393. The files include these four documents and numerous other documents some tendered in the case such as: memorandums between Ms McKay & Commissioner Clayden, letters exchanged by Mr Kerr and Mrs Smyth,¹²⁷ and EAS reports. Exhibit R62, File no. SUP 2009/36: "Personnel – Counselling - Superannuation Office - Employee Management Issues".
- 6.394. The creation of the file note and the discussion between Mr Fernandez and Ms Humble are referred to below in the First Respondent's case.
- 6.395. The findings to be made in regard to each document will be made after the material in First Respondent's case about each document is discussed. However the allegations made by Mrs Smyth that the documents were fabricated remains just that, an allegation, as no evidence was called by her to substantiate the allegations and as will be discussed below whilst some of the allegations were put to NTSO management. they were denied. As with other allegations the onus is on Mrs Smyth to prove these, there is no obligation on the Respondents to verify via IT audits etc. (if this is even possible) the veracity of documents. It should also be noted that just asking a question is not evidence that the contents are true; it is the answer to the question which is the evidence.

Mrs Smyth's general allegation against NTSO senior management that they colluded to create evidence

- 6.396. It is understandable that suspicion may arise from the way documents were produced by the Respondents in this matter. The relevant documents were not disclosed during the FOI process but only during the discovery process for the ADC hearing of this case. For those frequently involved in litigation, it is not uncommon that all efforts to locate relevant documents are not made until the discovery phase. It is for others to comment on the lack of disclosure during the FOI process and the propriety of storing personnel materials and files in the homes of public servants.
- 6.397. There is understandable suspicion and theories seeking to explain this. However I am not able to rely on this suspicion and it does not meet the standard of proof required to establish a factual basis on which to make the finding that one or more of these documents were fabricated or that the former NTSO management team have colluded.
- 6.398. These are very serious allegations but no evidence was presented apart from the allegations being made by Mrs Smyth and her not believing the explanation of two files, whose content was not kept on TRIM being located

¹²⁷ Exhibits C8 and C9

when required by the Respondents. Also four different witnesses gave evidence on oath of when file notes and emails were created. Appropriate concessions were also made by witnesses such as Mrs Clayden regarding the email dates stating that she may have some of the details wrong. I reject outright the suggestion that Mrs Clayden, Mr Fernandez and Mr Taylor in anyway colluded between themselves or with their legal representatives in the documents provided, statements prepared or evidence given in this matter.

Difference between original response to the complaint in 2013 and end response and evidence

6.399. Mrs Smyth alleges in her case that various witnesses' versions of events changed because the ground of victimisation was added to the case. In particular she claims that witnesses' evidence and the Respondents case changed from the original response.

6.400. Mr Taylor makes the point during cross-examination by Mrs Smyth (this is after various versions of the initial response and comparisons made to his witness statement were put to him) "...you make a report or make a decision on what you know at that time. As time moves forward, you may discover other evidence or other information that is relevant and then that will, of course, change the original."

6.401. Mr Taylor denies that his version of events changed because the ground of victimisation was added to the case.

6.402. In cross-examination, Mrs Smyth took Mrs Clayden through the differences in her account of the events. Mrs Clayden explains that her first version is similar to Mrs Smyth's account as she relied on this account to respond to the complaint. Once further information became available, Mrs Clayden says that her memory of that time became clearer and she was able to revise her account.

6.403. This line of cross-examination had very little impact on the credibility of the evidence given by the three witnesses who were part of NTSO management at the relevant time. The variation is largely explained by the fact that witnesses initially provided material from memory which occurred between eight and ten years before and then corrected their account, when documents which were created at the time of the events became available to refresh their memory. It is these documents which were created at the time that are to be given the greatest weight.

7. FIRST RESPONDENT'S (NT TREASURY) CASE

Mr Kerr's employment and problems between 2003 and 2005

- 7.1. There was clear evidence during the hearing from both Mrs Clayden and Mr Fernandez that from 2003 to 2006, Mr Kerr was drinking heavily. Mr Kerr experienced numerous personal issues during this time and these had an impact on the workplace due to his absenteeism.
- 7.2. In Mr Fernandez's statement, contemporaneous file note¹²⁸ and evidence, he states that he had concerns for Mr Kerr's wellbeing. The concerns about Mr Kerr's conduct are noted over the period January to February 2005. In cross-examination, Mr Fernandez says he has no recollection of specific complaints about Mr Kerr's drinking "...but Doug was known to have a bit of a drinking problem".
- 7.3. Mr Kerr's absenteeism was also an issue when he was working in the policy team. In cross-examination, Mr Fernandez says that "It was affecting the performance of the work unit in terms of the things that we needed him to do, yes". Mr Fernandez agrees that Mr Kerr was struggling at the beginning of January 2005.
- 7.4. Mrs Clayden became aware of certain drinking incidents in January 2005 during a conversation with Mrs Smyth in February 2006. In this conversation they discussed their mutual concern with the possibility of Mr Kerr drinking himself to death¹²⁹. Mrs Clayden spoke of Mr Kerr's problem with drinking, stating she believed that she could only take action if his drinking impacted on his work, which on occasion it came close. Mrs Clayden refers to both Mr Kerr binge drinking and having a drinking problem.
- 7.5. Mr Bryar's in his statement¹³⁰ held concerns for the way Mr Kerr consumed alcohol and was of the view Mr Fernandez his supervisor was a bit concerned about Mr Kerr's alcohol consumption at the time.
- 7.6. Mr Kerr concedes in cross-examination that Mr Byrars had raised concerns with him about his drinking. Mr Kerr admits that he was binge drinking from time to time. He does not concede that he had a conversation with Mr Fernandez about his drinking and the effect it had on his work. In further cross-examination of Mr Kerr, issues with drinking and its impact in the workplace he concludes with "I was never formally counselled". He claims that he received no direct assistance.

¹²⁸ Exhibit R67, Paragraphs 4 – 9 and Annexure A

¹²⁹ Exhibit C19

¹³⁰ Exhibit R43, Paragraphs 21 & 22

- 7.7. Mr Kerr, in his statement,¹³¹ and in cross-examination, concedes that during the time in question he was dealing with some personal issues, including his father's death (August 2003) and was consuming an excessive amount of alcohol to cope with his issues.
- 7.8. In Ms Isard's evidence and statement, she comments regarding Mr Kerr but does not refer to his absenteeism or drinking however in cross-examination she acknowledges that he was "...known to be a drinker..."
- 7.9. In Ms Scholz's conversations with Mrs Smyth that were recorded she refers to Mr Kerr's drinking and smelling of alcohol during work hours, or going off at lunch and coming back smelling of alcohol. Further evidence of the same type with a little more detail is also recorded in her later transcript¹³².

February 2005 – Receipt of Information by management

- 7.10. It is NT Treasury's case that a sequence of events began with Mrs Smyth's complaint to Ms McKay about Mr Kerr's conduct on 7 February 2005. NT Treasury allege that Ms McKay brought the complaint to the attention of Mr Fernandez.
- 7.11. Mr Fernandez, in a file note regarding Mr Kerr's behaviour between 2003 and 2005¹³³ described how he was informed by Ms McKay, on 7 February 2005, of four areas of concern regarding Mr Kerr's behaviour towards Mrs Smyth. Only two of the areas listed are a part of Mrs Smyth's current complaint. The first incident noted, occurred at Mrs Smyth's home on a weekend. Mr Kerr was drunk and that he jumped into Mrs Smyth's bed, which he then passed off as a joke.
- 7.12. The second incident noted is very similar to Mrs Smyth's account, of receiving a call late one night from Mr Kerr in which he claimed to be depressed and in need of help. Mrs Smyth went to his home where he allegedly groped her. The third incident involved Mr Kerr sending multiple texts to Mrs Smyth's mobile. Incident four is Mr Kerr continually asking to borrow Mrs Smyth's utility (Ute) or sell her house to him amongst other requests. Mr Fernandez also gave evidence about this file note.
- 7.13. Mr Fernandez's observation in February 2005 (before the complaint) was that up to this stage, Mr Kerr and Mrs Smyth were on friendly terms; they had smoke breaks together and regularly socialised outside work. As set out above Mrs Smyth denies this last statement.

¹³¹ Exhibit R51, Paragraphs 20 - 23

¹³² Exhibit R78, Pages 14-15 (July 2012 Transcript)

¹³³ Exhibit R67, Annexure A

Management Meetings

- 7.14. Mr Fernandez's file note¹³⁴ records a discussion by Management about their duty of care to Mrs Smyth. It mentions Mr Fernandez raising the issue with Mrs Clayden and Mr Taylor. Mr Fernandez states in the file note, that he advised Ms McKay that Mrs Smyth should make a formal complaint, however Ms McKay indicated that Mrs Smyth did not want to do this as Mr Kerr was a "mate". Mrs Smyth did disclose that she intended to speak to him about his behaviour.
- 7.15. Mr Fernandez's states in evidence that he recalls talking to Mrs Clayden, and in keeping with her management ethos, she wanted to deal with the problem straight away, even though the alleged incidents occurred outside of work. Mr Fernandez remembers having a meeting with Mrs Clayden and Mr Taylor to discuss what they could do given the circumstances¹³⁵. (There is no mention of Ms McKay in his statement).
- 7.16. These events are also set out in Mrs Clayden's statement¹³⁶ and in her cross-examination and evidence. Mrs Clayden states that the dates were recreated from recreational leave records from that year.
- 7.17. Mrs Clayden states that she was told by Mr Fernandez of a conversation he had with Ms McKay after Mrs Smyth had spoken to her about her issues with Mr Kerr. There are no details of the incidents in Mrs Clayden's statement. She just mentions that they occurred out of the office and involved alcohol and inappropriate behaviour. She noted her concern at hearing that Mr Kerr was drinking heavily and it was affecting his work.
- 7.18. In her evidence, Mrs Clayden recalls hearing about the allegations against Mr Kerr after she returned from Christmas leave, 31 January 2005. Mrs Clayden was very particular in the giving of her evidence and stated that this was the first time she had heard of anything relating to inappropriate behaviour by Mr Kerr. She also reiterates that the incidents involved alcohol, and that they happened outside of the office at Mrs Smyth's and Mr Kerr's homes.

Conversation between Mrs Clayden & Mrs Smyth (after her conversation with Mr Fernandez)

- 7.19. Mrs Clayden claims in her statement and in evidence that she was surprised by the allegations as she had understood that they had a good working relationship and that they mixed socially. Mrs Clayden states that she spoke

¹³⁴ Exhibit R67, Annexure A

¹³⁵ Exhibit R67, Paragraphs 19 - 24

¹³⁶ Exhibit R55, Paragraphs 25 and 26

to Mrs Smyth soon after her initial conversation with Mr Fernandez in order to offer support and to hear the allegations directly from Mrs Smyth. Mrs Clayden believes that the discussion was held in private and only she and Mrs Smyth were present.¹³⁷

- 7.20. In her statement and evidence, Mrs Clayden states that Mrs Smyth was annoyed that Ms McKay had divulged her personal information. Mrs Smyth was initially reluctant to talk, but did relay the incident where she and her son attended Mr Kerr's home in Palmerston and Mr Kerr was drunk and groped Mrs Smyth. It is evident from Mrs Clayden's statement that at the time she gave Mr Kerr the benefit of doubt in terms of the incident relayed by Mrs Smyth.¹³⁸
- 7.21. Mrs Clayden offered support to Mrs Smyth and advised her to make a formal complaint to the Human Resource Department. If a complaint had been made, Mrs Clayden states that she could have organised for Mr Kerr to undertake counselling, or have moved him to a different location in the Department if required.
- 7.22. Mrs Clayden believes that Mrs Smyth told her that she would handle Mr Kerr herself. Mrs Clayden reiterates Mrs Smyth's determination to handle the situation herself in both her statement and evidence. Mrs Clayden also offered EAS assistance to Mrs Smyth and discussed the advantages of counselling. Mrs Clayden says she was uncomfortable leaving the incident for Mrs Smyth to handle.¹³⁹
- 7.23. Mrs Clayden says in her statement that she did not refer the issue to Mrs Weber (nee Wauchope), then the Assistant Under Treasurer, as she thought that this would have been in breach of Mrs Smyth's confidence. Mrs Weber's evidence was that she would have expected to be advised, even if it was only to offer her support to the supervisors as it was not a burden she expected managers to bear alone.
- 7.24. Mrs Clayden states in evidence, that she raised the issue in a meeting she called with NTSO management about a week to ten days after her initial conversation with Mrs Smyth. Mrs Clayden states she was concerned about Mr Kerr's drinking and the effects that this may have had on his interactions with Mrs Smyth.¹⁴⁰

¹³⁷ Exhibit R55, Paragraph 28

¹³⁸ Exhibit R65, Paragraph 23

¹³⁹ Exhibit R55, Paragraphs 32-35

¹⁴⁰ Exhibit R55, Paragraph 33

- 7.25. In her evidence and statement,¹⁴¹ Mrs Clayden mentions that the incidents between Mr Kerr and Mrs Smyth occurred outside of the work place, these were factored into her approach to the situation. She was also concerned that Mr Kerr could lodge a victimisation complaint against NTSO management if they took action without lodgement of a formal complaint by Mrs Smyth.
- 7.26. Support for the Respondent's case exists in the statement and evidence from Mr Harold Glenwright.¹⁴² Mr Glenwright states that during an NTSO management group meeting in the Enterprise House, Mrs Clayden mentioned that Mrs Smyth had an issue with Mr Kerr sexually harassing her and that it occurred outside the workplace. No more details were given or instruction on what action was to be taken. On page four of his statement, Mr Glenwright claims that it was mentioned during the meeting that Mrs Smyth had not put in a formal complaint and the matter could not be escalated further until Mrs Smyth had put in a formal complaint. He thought the Commissioner was dealing with the harassment allegations herself as she did not allocate any tasks to managers present at the meeting.
- 7.27. Mrs Clayden says in her statement¹⁴³ and in evidence that she discussed the duty of care the management team had to Mrs Smyth and then invited Mrs Smyth to the meeting to attempt to convince her to lodge a formal complaint. At this meeting, the management team agreed that if Mrs Smyth didn't lodge a formal complaint there wasn't a lot that they could do to assist with the incident.
- 7.28. In Mr Taylor's statement¹⁴⁴ and evidence, he refers to a meeting with Mrs Clayden, Mr Fernandez and Ms McKay.
- 7.29. Mr Fernandez's statement¹⁴⁵ and evidence describes a meeting occurring on 17 February 2005. He alleges that the meeting involved Mrs Clayden, Mr Taylor and Ms McKay. Mr Fernandez also states that in this meeting, Ms McKay mentioned that she had received a call from Mrs Smyth's boyfriend, in which he told her that he wanted to come in to the office and 'sort it out' with Mr Kerr.
- 7.30. Mrs Smyth was called into the meeting and Mr Fernandez says that they discussed options with Mrs Smyth and put to her that if she wanted management involved she would need to make a formal complaint.

¹⁴¹ Exhibit R55

¹⁴² Exhibit C15, Page 3

¹⁴³ Exhibit R55, Paragraph 39

¹⁴⁴ Exhibit R61, Paragraphs 22 and 23

¹⁴⁵ Exhibit R67, Paragraph 29 - 31

- 7.31. Mr Fernandez's recalls suggesting to Mrs Smyth that she speak to Mr Kerr about the problem. He also claims management advised that one of them could accompany Mrs Smyth when she spoke to Mr Kerr. Mrs Clayden says in evidence that Mrs Smyth was adamant she didn't want to make a complaint.
- 7.32. Mr Taylor reiterates the evidence of Mrs Clayden and Mr Fernandez when he says that Mrs Smyth did not want to lodge a complaint and that she would deal with the situation herself.¹⁴⁶

Outside advice was sort

- 7.33. After that meeting, Mrs Clayden says that Mr Fernandez sought the advice of EAS and DOJ.
- 7.34. Mr Fernandez recalls Ms McKay advising him that Mrs Smyth had spoken to Mr Kerr; however Mrs Smyth received a text and phone call from him the next morning. He claims that Mr Kerr did not attend work the next day.¹⁴⁷
- 7.35. Mr Fernandez recalls having a number of meetings about the situation with NTSO senior management. In these meetings they discussed the duty of care required for Mrs Smyth and how they could deal with the matter informally, given that Mrs Smyth didn't want to make a formal complaint. He states that the advice he received from EAS and DOJ was that management could not breach Mrs Smyth's confidentiality by making a complaint on her behalf or taking any formal action against Mr Kerr.¹⁴⁸
- 7.36. In Mr Taylor's statement, he alleges that the advice NTSO management received, from EAS, DOJ and the HR department, was to take no formal action until Mrs Smyth lodged an official complaint.¹⁴⁹

Management Actions

- 7.37. Mr Fernandez says he monitored the situation between 8 and 10 February 2005 and spoke to Mr Kerr about his personal issues in the hope that Mr Kerr would open up about the situation with Mrs Smyth, but he did not. On 9 February 2005, Ms McKay advised Mr Fernandez that Mrs Smyth had spoken to Mr Kerr however she wasn't aware of the details of the conversation.

¹⁴⁶ Exhibit R61, Paragraph 26

¹⁴⁷ Exhibit R67, Paragraphs 32 and 33

¹⁴⁸ Exhibit R67, Paragraphs 34 - 36

¹⁴⁹ Exhibit R61, Paragraphs 34 - 36

- 7.38. Mr Fernandez advised Ms McKay to continue to monitor the situation but that they could not confront Mr Kerr unless Mrs Smyth was willing to make a formal complaint.¹⁵⁰
- 7.39. Mr Fernandez says on 10 February 2005, Ms McKay told Mr Fernandez that Mrs Smyth had accompanied Mr Kerr to Bunnings the previous afternoon to help him choose paint for his house. Mr Fernandez documented this information in his file note¹⁵¹ written at the time, as well as in his statement¹⁵² and evidence.

Mr Kerr moved desks

- 7.40. Mr Fernandez and Mr Taylor allege that they moved Mr Kerr to a different desk and monitored the interactions between Mr Kerr and Mrs Smyth. During this period, Mr Fernandez says that he did not observe any inappropriate interactions.¹⁵³ Mr Taylor confirms moving Mr Kerr for the above reasons in his statement¹⁵⁴ and evidence.
- 7.41. Mrs Clayden also addressed Mr Kerr's relocation, in her statement¹⁵⁵ and in evidence. She says that they moved Mr Kerr to a desk that was further away from Mrs Smyth so he could be observed by Mr Fernandez and Mr Taylor in this location.
- 7.42. Further in cross-examination Mr Kerr was moved from the middle policy desk to the end policy desk. In cross-examination, Mrs Clayden confirms that Mr Kerr moved desks around 7 February 2005 and that Management moved Mr Kerr around this time to coincide with Mr Bryars joining the unit. Mrs Smyth's case is this move did not occur.
- 7.43. Under cross-examination, Mr Taylor conceded that he could only see Mr Kerr from his office at Enterprise house if he stood up and looked out on a 45 degree angle. This would affect both his knowledge of their interactions and his ability to monitor Mr Kerr's conduct.
- 7.44. Mr Fernandez says that although there was a concrete pillar obstructing his view in his office he could see Mr Kerr's desk if he looked through the glass partitioning between his and Mr Taylor's office. He said that the partitions at people's desks did not obstruct his view. However, after further questioning regarding the placement of bookshelves and other furniture, Mr Fernandez

¹⁵⁰ Exhibit R67, Paragraphs 25 - 27

¹⁵¹ Exhibit R67, Annexure A

¹⁵² Exhibit R67, Paragraph 28

¹⁵³ Exhibit R67, Paragraphs 35 - 37

¹⁵⁴ Exhibit R61, Paragraph 49

¹⁵⁵ Exhibit R55, Paragraph 46

says that he could only see people's heads if he was sitting down but if he was standing he could see over the furniture.

- 7.45. Mrs Clayden did not have a clear view of the open plan areas from her office. The only memory Mrs Clayden has of interactions between Mr Kerr and Mrs Smyth at this time is when she saw Ms McKay come out of her office and tell Mr Kerr to move away from Mrs Smyth's desk.
- 7.46. In cross-examination, Mr Kerr states that at some point during his time in Enterprise House, he was moved from the workstation P2 to P3, as shown on the floor plan of the office.¹⁵⁶ It is Mrs Smyth's case that Mr Kerr did not move. Mr Kerr, in cross-examination pointed out on the plan of Enterprise House¹⁵⁷ that he moved from sitting at P2 to P3.
- 7.47. Mrs Smyth claims that Mr Kerr sat in the same spot the entire time - as marked on exhibit C5. Ms McKay was seated where F is marked.
- 7.48. There are two issues I make findings on the first is whether Mr Kerr was moved. To make this finding I rely on the evidence from Mr Fernandez, Mr Taylor, Mrs Clayden and Mr Kerr and find Mr Kerr was moved in 2005 in Enterprise House.
- 7.49. The second issue is even though the intent was for Mr Taylor and Mr Fernandez to keep an eye on Mr Kerr. It is clear from their evidence and evidence of Mrs Smyth's and others that both men did not have a clear view from their offices of Mr Kerr unless standing or moving around.

Two letters

- 7.50. In cross-examination of Mrs Smyth, it was suggested that on Friday 4 March 2005, Mrs Smyth gave the letters¹⁵⁸ that she and Mr Kerr had written to each other to Ms McKay. Mrs Smyth denies this. It was then suggested that she had given the letters to Mrs Clayden which Mrs Smyth also denies.
- 7.51. In Mrs Clayden's statements¹⁵⁹ there is no mention of the letters exchanged between Mr Kerr and Mrs Smyth. However, in her evidence Mrs Clayden was shown the two letters which had been placed on a Trim file titled "Employee Management Issue" which was kept locked in her office¹⁶⁰ and found during preparation for this case by Mr Taylor.

¹⁵⁶ Exhibit C5

¹⁵⁷ Exhibit C5

¹⁵⁸ Exhibits C8 and C9

¹⁵⁹ Exhibits R55 and R56

¹⁶⁰ Exhibit R62 and Exhibit R63

- 7.52. Mrs Clayden's evidence was that the finding of these documents had led her to remember or have a "...very very vague" memory that she was handed the two letters by Mrs Smyth and that Mrs Smyth probably had someone with her at the time. In cross-examination, Mrs Clayden concedes that the first time she mentioned the letters was in her evidence the day prior.
- 7.53. Mrs Clayden says in cross-examination that at the time she saw the letters, in March 2005, she knew that Mr Kerr wanted to be involved in Mrs Smyth's life, both inside and outside the office. She believed he wanted a relationship with Mrs Smyth, because she had been advised of the situation in February 2005. Mrs Clayden had the letters in her possession in March 2005.
- 7.54. Mrs Clayden's explanation as to why she did not mention the letters in her first response to the case is that she did not have a copy of them until the TRIM file was located. Mrs Clayden concedes that she had the letters at the time of preparing her witness statement but did not include them in it as her memory of them was not strong enough to include them in her statement.
- 7.55. In cross-examination, Mrs Smyth asked if Mr Kerr had handed the letters to Mrs Clayden however was denied by Mrs Clayden. In her evidence and cross-examination, Mrs Clayden recalled Mrs Smyth handing her the two letters.
- 7.56. Mr Taylor makes no mention of the letters in his statements or evidence in chief. The letters were first raised with him in cross-examination.
- 7.57. In Mr Fernandez's cross-examination it is clear that he did not see the letters in March 2005.
- 7.58. In cross-examination, Mr Kerr denies handing the letters to Mrs Clayden. His response is that he can't see why he would have done that as the letters referred to a private matter.
- 7.59. Later in her evidence and in cross-examination, Mrs Clayden links receiving the letters as the catalyst for how she was able to get Mr Kerr to attend mediation. Due to the content of the letters and the fact that there were two letters, one from either party, Mrs Clayden states that it was then feasible for management to arrange mediation. The Commissioner hoped that mediation would solve the issues between them.

MS CLAYDEN: "...But because there were the two letters we were then able to get them to go to mediation. It was pretty clear that we were going to have to get them to do mediation because there's two people in the office now who are at loggerheads with each other, or one is confused and the other one is saying don't come near me, but their work required that, at least with the

payment of pensions, that they did interact, so there had to be some interaction at work.”

- 7.60. The evidence in the hearing does not enable me to decide how Mrs Clayden received the two letters, as both Mr Kerr and Mrs Smyth deny it was them and the only evidence available is a reconstructed memory from Commissioner Clayden many years later. The important finding however is that Mrs Clayden in 2005 had received the two letters.

Mediation

- 7.61. The Respondents case, as put in cross-examination to Mrs Smyth and in the evidence of NTSO management, is that on Monday 7 March 2005, Mrs Smyth was spoken to by management about going to mediation with Mr Kerr scheduled for that day.
- 7.62. Mrs Clayden’s statement¹⁶¹ and evidence is that the mediation occurred on 7 March 2005. The mediation occurred after discussions with Mr Fernandez and Mr Taylor in which Mrs Clayden believes she suggested using EAS to do the mediation but it was eventually organized through DOJ. In her evidence, she states that Mr Kerr and Mrs Smyth were directed to attend the mediation.
- 7.63. As set out above, Mrs Clayden links being able to get Mr Kerr to attend mediation to her receipt of the two letters.
- 7.64. Mr Taylor says he discussed options with Mrs Clayden and Mr Fernandez and they decided to request the parties to attend mediation. Mr Taylor admits in his statement that there is no record of the mediation apart from an email sent by Mrs Clayden after the mediation dated 7 March 2005.¹⁶² Mr. Taylor relies on this email¹⁶³ for the date and outcome of the mediation.
- 7.65. The email dated 7 March 2005¹⁶⁴ sets out that Mr Kerr and Mrs Smyth had attended a mediation session at 2pm that day. The email includes a summary of what happened in the mediation as well as identifying Mr Kerr’s acknowledgement in the following terms. “Doug advised that he had “screwed up” and didn’t realize the effect he was having on Linda”.
- 7.66. Mr Fernandez couldn’t recall how management were able to get Mr Kerr to attend mediation. Mr Fernandez’s only evidence of the mediation is from Commissioner Clayden’s email¹⁶⁵ and the Harassment in the Workplace

¹⁶¹ Exhibit R55 Paragraph 56

¹⁶² Exhibit R61, Paragraphs 34 - 36

¹⁶³ Exhibit C18

¹⁶⁴ Exhibit R61, Annexure A and Exhibit C18

¹⁶⁵ Exhibit R61, Annexure A

Policy that he had Mr Kerr sign after the mediation. In Mr Fernandez's cross-examination it is clear that he did not see the letters between Mr Kerr and Mrs Smyth in March 2005.

- 7.67. In cross-examination Mr Fernandez agrees that a meeting occurred between Ms McKay, Mrs Clayden, Mrs Smyth and him and in the meeting, it was agreed to organize a mediation session. Mr Fernandez couldn't recall if he was the one who actually organised the meeting.
- 7.68. Mr Kerr's statement¹⁶⁶ and evidence support the NTSO's case that the mediation occurred prior to August 2006. Mr Kerr is certain that it did not happen in August 2006 as he claims they had a good relationship in the months before Mrs Smyth's resignation. In evidence Mr Kerr agrees that the mediation occurred in March 2005.
- 7.69. In evidence Mr Kerr makes other points such as Mr Fernandez was the person who organised the mediation session and that the session was held on the ground floor of the building where the Northern Land Council is currently located. This was the location of Department of Justice in 2005.
- 7.70. Mr Kerr states they discussed Mrs Smyth's feeling that Mr Kerr had attempted to start a relationship with her and how this caused problems in her life outside work. Mrs Smyth recognized in mediation how supportive Mr Kerr was of her in the office. Mr Kerr indicated that he had no desire to enter into a sexual relationship with her and said he would continue to support her in the office.
- 7.71. According to Mr Kerr, their issues were characterized by the mediator as a communication breakdown.¹⁶⁷ Mr Kerr gave little detail in either evidence or his statement of Mrs Smyth's reaction to what he said in mediation. Mr Kerr thinks that following mediation they "just got on with it..."
- 7.72. In evidence, Mr Kerr's states that after the mediation session he and Mrs Smyth had a drink at "The Cav" and that he had coffee and Mrs Smyth had a couple of bourbon and cokes.
- 7.73. Mr Kerr also states that he and Mrs Smyth debriefed Mrs Clayden back at Enterprise House following the mediation and informed her of the outcome. He remembered that he was required to sign the Department's Harassment in the Workplace policy after the mediation.¹⁶⁸

¹⁶⁶ Exhibit R51

¹⁶⁷ Exhibit R51, Paragraph 56

¹⁶⁸ Exhibit R51, Paragraphs 59 and 60

- 7.74. There is evidence to support Mr Kerr's version of events which is the email sent by Mrs Clayden on 7 March 2005¹⁶⁹ and also Mrs Clayden's statement¹⁷⁰ and evidence.
- 7.75. Mrs Smyth, when asked, denied that the mediation occurred in 2005. She also denied attending a mediation session and going to the pub after with Mr Kerr. Mrs Smyth denied having a meeting with Mr Kerr and Mrs Clayden on 7 March 2005 where they briefed the Commissioner on the outcome of the mediation.
- 7.76. Ms McKay's view is that if events such as these had occurred in 2005, then the issues between Mr Kerr and Mrs Smyth would not have escalated and would have been resolved. However whilst this is logical it is not what occurred in the Watters sequence of events.
- 7.77. The findings in regard to the sequence and when the mediation occurred are set out below.

What was dealt with during mediation?

- 7.78. There was very little evidence given of what the mediation dealt with. There was some brief material in the email dated 7 March 2005¹⁷¹ outlining that Mr Kerr had acknowledged that "he had "screwed up" and his evidence claiming Mrs Smyth misunderstood him wanting a sexual relationship.
- 7.79. The Respondents in their submission (page 17) submit the purpose of the mediation was to deal with "workplace misunderstanding" rather than full exploration of the incidents".
- 7.80. There is no evidence that the incident on 8 January 2005 was discussed at the 7 March 2005 mediation or other specific issues such as touching in the work place, or texts and phone calls etc that are alleged in the complaint being heard.
- 7.81. The finding can only be that the mediation in 2005 had a very limited scope as referred to in the file note date 7 March 2005 and the evidence of Mr Kerr,

¹⁶⁹ Exhibit C18

¹⁷⁰ Exhibit R55

¹⁷¹ Exhibit C18

Who conducted the mediation and where was it held?

- 7.82. A large amount of time during the hearing and pre hearing disclosure was spent on the issue of who conducted the mediation. Mrs Smyth believes the mediation occurred in 2006 and was conducted by EASA. Mrs Smyth's case is that DOJ was not an Employee Assistance Programme (EAP) provider for Treasury in 2005 to 2006. The evidence tendered at the hearing of who conducted the mediation does not assist in determining the crucial question in the case of when the mediation took place.
- 7.83. In cross-examination, Mrs Smyth questioned Mrs Clayden as to why they used the Community Justice Centre (CJC) which was a division of Department of Justice (DOJ) for the mediation, when it was not an EAP provider, unlike EAS. Mrs Clayden's response was that they were trying to organize something through EAS but someone suggested that it could be done through DOJ.
- 7.84. In cross-examination, Mr Taylor says that he is unsure if EAS or another organization provided mediation services. Further Mr Taylor said he understood that no records of the mediation session were created.¹⁷²
- 7.85. Mr Fernandez believed that the mediation occurred because of the conversation after and the email about it.
- 7.86. In Mrs Clayden's evidence in chief, her statement¹⁷³ and also in cross-examination, she maintains that mediation occurred through DOJ and not through EAS.
- 7.87. It is confirmed during Ms Temple's (from Treasury's Human Resources) cross-examination that EAS was definitely an Employee Assistance Programme (EAP) provider between 2003 and 2006. At some point prior to 2006 to 2007, Darwin Consultant Psychologists (DCP) was also added as a provider.¹⁷⁴ EAS or EASA as it is now known was the primary provider during the time period in question.
- 7.88. Ms Temple was also aware of the Community Justice Centre but it was not a formal party to the Treasury's program. Ms Temple agrees that management would give the employees the choice of using EAS or DCP until 2006 to 2007. In Ms Temple's experience, if staff did use the counselling service, the HR

¹⁷² Exhibit R61, Paragraphs 36 and 37

¹⁷³ Exhibit R55, Paragraphs 36 and 37

¹⁷⁴ Exhibit C75

department would receive notification confirming that employees (no names) had attended counselling and an invoice.

- 7.89. In making my decision on the significant issues in this matter who conducted the mediation does not assist in proving any of the allegations in the matter, and none of the parties involved are able to produce records created at the time. The evidence given is largely reconstructed memories.

Outcome of the mediation

- 7.90. Mrs Clayden gave evidence of her meeting with Mr Kerr and Mrs Smyth after the mediation. She sent an email to Mr Fernandez and Mr Taylor after this meeting.¹⁷⁵
- 7.91. Mrs Clayden recalls that she was advised by Mr Kerr and Mrs Smyth that they had worked through their issues. Mrs Clayden's email¹⁷⁶ outlined that Mr Kerr and Mrs Smyth had agreed to have no interaction outside the office. The email also contains an admission from Mr Kerr that "...he had "screwed up" and didn't realise the effect he was having on Linda."
- 7.92. Mr Kerr believed that following mediation they "just got on with it..." After the mediation, Mr Kerr claims that they went for a drink at "The Cav". He says that he had a coffee and Mrs. Smyth had a couple of bourbon and cokes.
- 7.93. In evidence Mr Kerr stated that he and Mrs Smyth also debriefed Mrs Clayden, at Enterprise house after the mediation session and informed her of the outcome. In his statement, Mr Kerr said that he was required to sign the Department's Harassment in the Workplace Policy after the mediation.¹⁷⁷
- 7.94. As set out above Mrs Smyth does not agree that these events occurred in March 2005 but rather in August 2006.

Signing of the NT Treasury's Harassment in the Workplace Policy

- 7.95. Mr Fernandez's evidence is that he did not have a conversation with either Mr Kerr or Mrs Smyth about the mediation, apart from having Mr Kerr read and sign the Harassment in the Workplace policy, around 9 March 2005.¹⁷⁸

¹⁷⁵ Exhibit C18 and Exhibit R67, Annexure B

¹⁷⁶ Exhibit C18

¹⁷⁸ Exhibit R67, Paragraphs 40 and 41

- 7.96. Mrs Clayden states that a part of the mediation process was to have Mr Kerr and Mrs Smyth sign the Department's Harassment in the Workplace policy, as the office had just taken part in Anti-Discrimination training. She has some memory of Mr Taylor bringing Mrs Smyth to her office to do this.¹⁷⁹
- 7.97. In Mr Taylor's statement¹⁸⁰ he refers to having Mrs Smyth sign the Department's Harassment in the Workplace policy. He says that he took Mrs Smyth into Mrs Clayden's office, for privacy, and they sat at a meeting table and discussed the mediation. Mr Taylor states that Mrs Smyth said it went well and that they had arrived at a plan to move forward.
- 7.98. Mr Taylor also said that Mrs Smyth stated that she and Mr Kerr would handle the matter themselves going forward, without any assistance or involvement from the Department. Mr Taylor says he gave the policy to Mrs Smyth and asked her to read it and sign it, to acknowledge that she was aware of the policy and was aware of her rights and obligations under it. Mr Taylor asked if she had any questions and she said she did not. He thinks the entire process took between 15 and 20 minutes. He made a copy of the document and gave the original to Mrs Smyth.
- 7.99. The signed Harassment in the Workplace policy is annexure B to Mr Taylor's statement and dated 11 March 2005.¹⁸¹
- 7.100. During Mr Taylor's cross-examination, Mrs Smyth put to Mr Taylor that he tricked her into signing the harassment policy. Mr Taylor's response to this is that this allegation is incorrect. Mrs Smyth says that Mr Taylor requested she sign the page in question to confirm her attendance at a training course that she had participated in. Mrs Smyth attended ADC training in February 2005.
- 7.101. Mrs Smyth's case is that in March 2005, Mr Taylor brought a single page to her desk and asked her to sign it. She claimed that she was told by Mr Taylor that there had been an administrative oversight and that she needed to sign the form to confirm that she had attended the Anti-Discrimination training in February 2005. She says that the Harassment in the Workplace policy was not attached to the page she signed at the time.
- 7.102. It is Mr Taylor's word against Mrs Smyth's regarding precisely what was discussed in Mrs Clayden's office in relation to signing of Harassment in the Workplace policy. It would be a very serious finding to make that Mr Taylor was involved in the type of deception Mrs Smyth alleges. The evidence of it would need to be more than an allegation. Against such a finding are the

¹⁷⁹ Exhibit R55, Paragraph 61

¹⁸⁰ Exhibit R61, Paragraphs 39 - 48

¹⁸¹ Exhibit R61

following facts, firstly that a document similar to the one signed by Mrs Smyth was signed by Mr Kerr at around same time and Mrs Clayden supports Mr Taylor's recollection of the circumstances surrounding the signing of the documents. I do not make the finding of a deception by Mr Taylor of Mrs Smyth on the balance of probabilities.

Why the Harassment in the Workplace policy was not followed.

7.103. During the hearing Mrs Smyth when conceding that the exchange of letters in March 2005 occurred then moved on to say this exchange raised a complaint that NTSO management should have considered under the Harassment in the Workplace policy.

7.104. The evidence and questioning of the NTSO management is not as specific as whether the material only in the letters should have been considered under the Policy, it dealt with the awareness of matters raised generally in February 2005 as set out above.

7.105. The evidence from the three managers involved, Mrs Clayden, Mr Taylor and Mr Fernandez is that they did not apply the harassment policy to this issue as the incidents, as they understood, took place outside of the work place.

7.106. In cross-examination, Mr Fernandez concedes that in hindsight, upon reviewing Mrs Clayden's email, NTSO management possibly should have followed the Harassment in the Workplace policy.

7.107. Mr Fernandez says he did not apply the harassment policy, not because he was not aware of the allegations but because the policy referred to workplace harassment, and the alleged incidents, as far as he was aware, had taken place outside of the office.

After March 2005

7.108. In Mrs Clayden's statement, she states that she thought the relationship between Mr Kerr and Mrs Smyth was limited to work related interactions following the mediation in 2005. She recalls that there were no further incidents or issues of concern in the following 12 months after the mediation.¹⁸²

7.109. Mr Fernandez's perception was that Mrs Smyth and Mr Kerr had resumed their working relationship and there were no other incidents involving inappropriate conduct. Based on his observations, Mr Fernandez believed that

¹⁸² Exhibit R55, Paragraphs 62 and 63

Mrs Smyth and Mr Kerr appeared to resume their friendship both inside and outside the office.¹⁸³

7.110. In late 2005 Mr Fernandez heard from Mr Bryars that he'd seen Mr Kerr drinking at Mrs Smyth home. Mr Fernandez does not think that Mr Bryars was concerned about this but it just came up in general conversation about what he had done over the weekend.¹⁸⁴ This is contrary to the material presented by Mrs Clayden as set out below which illustrates how difficult it is to recall a sequence of events so many years later in detail.

7.111. Other NTSO staff gave general evidence of their perception of how Mrs Smyth and Mr Kerr related to each other; however these are of limited value, as they do not relate to specific time periods of the various incidents of significance in the matter. For example Ms Isard and Ms Charles gave evidence of positive relationship between Mrs Smyth and Mr Kerr whilst Ms Laughton gave evidence of a negative relationship between the two.

February – March 2006

7.112. It is the Respondent's case that in February 2006, Mrs Clayden was made aware by Mr Fernandez that Mr Kerr had purchased a house in Nakara, which was in the same suburb as Mrs Smyth was living and that he had been seen drinking heavily at her home by Mr Bryars.¹⁸⁵ These incidents were also set out in Mrs Clayden's email, dated 3 March 2006 recording a meeting that took place on 28 February 2006.¹⁸⁶

7.113. On 28 February 2006, Mrs Clayden says in her statement and evidence that she spoke privately with Mrs Smyth for an hour and a half about Mr Kerr purchasing a house in the same suburb.¹⁸⁷ Mrs Clayden's impression from the meeting was that Mrs Smyth did not want her interfering in her life. Annexure 17, of Mrs Clayden's statement, is the email sent to Mr Fernandez on 3 March 2006.¹⁸⁸ about this meeting.

7.114. Mrs Clayden's statement refers to the email as a contemporaneous account of matters that were discussed with Mrs Smyth during that meeting. The email recorded the incident involving Mr Bryars and certain details mirror those detailed in Mrs Smyth's account of what occurred on 8 January 2005.

¹⁸³ Exhibit R67, Paragraphs 43 and 44

¹⁸⁴ Exhibit R67, Paragraphs 45 and 46

¹⁸⁵ Exhibit R55, Paragraphs 64 and 65

¹⁸⁶ Exhibit C19

¹⁸⁷ Exhibit R55. Paragraph 66

¹⁸⁸ Exhibit C19

- 7.115. Mrs Smyth argued that the meeting Mrs Clayden described in her email did not happen and points to the fact that the Commissioner named her boyfriend as being Mike; however she and Mike had ended their relationship almost a year earlier. The Commissioner admits that she drafted the email late in the evening and may have merged a couple of incidents as a result.
- 7.116. Mrs Clayden noted that this was the only time she and Mrs Smyth discussed the issue of suicide and she denied she ever suggested that it would be Mrs Smyth's responsibility if Mr Kerr, committed suicide.¹⁸⁹ Mrs Clayden denied knowing Mrs Smyth's husband had committed suicide and provided a very personal reason why this allegation was very distressing to her.
- 7.117. In her evidence Mrs Clayden was asked to explain the last sentence of the second last paragraph of her email, dated 3 March 2006. "We also discussed the concern we both felt that if DK continued to drink he would end up drinking himself to death and that he may well be suicidal if he felt threatened."¹⁹⁰
- 7.118. Mrs Clayden said that this was the first time she was made aware that Mr Kerr may be suicidal. She knew he had a drinking problem but was not concerned with him being suicidal. The Commissioner withdrew from it being a mutual concern that he might drink himself to death but conceded that they were both concerned about him. Mrs Smyth made the point that there are no documents to support the NTSO's case that these meetings, said to occur in February/March 2005 and February 2006, ever actually happened, however the contested emails refer to these specific events.
- 7.119. An important area of difference in the Respondent's case is a meeting Mrs Clayden had with Mrs Smyth, in February 2006, to check how things were going between Mrs Smyth and Mr Kerr. Mrs Smyth denies in cross-examination that this meeting occurred.
- 7.120. In cross-examination, it was also suggested to Mrs Smyth that she had confused and muddled the events that she said happened in August 2006 with what, in fact happened in March 2005. Mrs Smyth's response was "Absolutely not."
- 7.121. It was also suggested in cross-examination to Mrs Smyth that when she was drafting her complaint in 2011, she was depressed and suffering from anxiety and stress and as a result has confused the events of 2005 with 2006. Mrs Smyth's response to this allegation is that "... those memories are rock solid

¹⁸⁹ Exhibit R55, Paragraph 70

¹⁹⁰ Exhibit C19

in my head because they...just – stood out in my head. They were really significant events in my life.”

7.122. In Mrs Clayden’s statement, she again states that Mrs Smyth did not want help, or to make a complaint when she spoke with her in February 2006. Mrs Clayden believes Mrs Smyth did not tell her about any work related incidents of inappropriate behaviour. Mrs Clayden repeated her view that all incidents occurred outside of the workplace and management had done what they could. Mrs Clayden was unaware of the crude emails, sent after Mr Kerr signed the workplace harassment policy.¹⁹¹

7.123. All of these events are denied by Mrs Smyth as can be seen from the evidence in her case stated above.

7.124. In regard to the meeting that occurring between Mrs Clayden and Mrs Smyth on 28 February 2006, this is supported by other objective evidence, including the incident that sparked it; Mr Kerr buying a house in Nakara in early 2006. The events of the meeting are recorded in an email prepared on Friday 3 March 2006 and refer to an hour and a half conversation on the Tuesday. The matters recorded are consistent with Mrs Smyth’s case and her feeling obligated to Mr Kerr because of his workplace assistance. Mr Kerr’s drinking; being a matter of concern, it sets out something similar to the Mr Bryar’s incident and features the 8 January 2005 incident which was the incident of Mr Kerr being naked in Mrs Smyth’s home. As well as Mrs Smyth’s concern about Mr Kerr being suicidal.

7.125. I find that the meeting occurred and the ongoing issues of concern of Mr Kerr’s behaviour towards Mrs Smyth were discussed. The reasons for this decision are further explored and discussed below

7.126. I do not find that the email dated 3 March 2006, noting the content of the conversation on 28 February 2006 was fabricated. This is an allegation for Mrs Smyth to prove and she has not done so. It remains only an allegation of fabrication and this is based on the fact that the material it contains differs from Mrs Smyth’s case, that a meeting did not occur and that details of events it refers to are not accurate. This is just not enough to prove such a serious allegation. As the onus of proof remains throughout the case with Mrs Smyth, there is no obligation on NTSO to provide technical or IT evidence of the veracity of the document.

7.127. Mr Fernandez, who was made aware of Mr Kerr buying a house in the same suburb as Mrs Smyth and brought it to the attention of Mrs Clayden and Mr

¹⁹¹ Exhibit R55, Paragraphs 73 - 78

Taylor who sought informal advice from Ms Humble who told Mr Fernandez that there was nothing they could do either formally or informally, as this was a private matter. Ms Humble informed Mr Fernandez that there was no law against where Mr Kerr could purchase property.¹⁹²

7.128. The file note documenting Mr Fernandez's conversation with Ms Humble, on 28 February 2006, was discovered on a confidential Department file.¹⁹³ Ms Humble also attached the file note to her statement however, she does not say in her statement that it had been forwarded to her in February 2006 but mentions this in cross-examination.¹⁹⁴

7.129. Ms Humble's statement goes into far more detail regarding the conversation with Mr Fernandez than stated in his file note or his evidence. Ms Humble provided two and a half pages of details¹⁹⁵ and claims that the file note is accurate but she was able to recall further details of the conversation. In contrast to this level of detail Ms Humble is unsure if the conversation with Mr Fernandez happened in person or over the phone but in evidence, she claims that she thinks the conversation most likely happened over the phone.

7.130. It is Ms Humble's observation that NTSO management did take the issue seriously. Ms Humble's advice as detailed in the file note was that management should provide support and advice to the employee but needed to remember they had a duty of care to both parties. Ms Humble cautioned Mr Fernandez against raising the issue with the male employee, either formally or informally, when he was on sick leave.¹⁹⁶

7.131. In evidence, Ms Humble made the point that there is a "...fine line between interfering in people's lives and having a duty of care in the workplace."

7.132. In evidence in chief and in cross-examination, Ms Humble says that the only part of the conversation not recorded in Mr Fernandez's file note was her comments regarding the requirement to investigate the allegations and establish the facts of the situation.

7.133. In response to a question asked in cross-examination which alleged that the file note was recently created, Ms Humble gave evidence that Mr Fernandez had sent it to her in 2006 when he wrote it. In cross-examination, Ms Humble was questioned as to why this information had not been mentioned before, in her statement, and she responded that it was standard practice to validate

¹⁹² Exhibit R67, Annexure D

¹⁹³ Exhibit R67, Annexure D and Exhibit R71, Annexure H

¹⁹⁴ Exhibit R71

¹⁹⁵ Exhibit R71, Paragraph 45 to 58

¹⁹⁶ Exhibit R71, Paragraph 57

what somebody wrote and she also said, "I can tell you that that is not fabricated recently."

7.134. Mr Fernandez received the email from Mrs Clayden, detailing a meeting she had with Mrs Smyth also on 28 February 2006 on 3 March 2006. Mr Fernandez had not been present at the meeting with Mrs Clayden and Mrs Smyth. Mr Fernandez had printed off a hard copy of the email dated 3 March 2006 and took it with him when he left NTSO.

7.135. As a result of the email, Mr Fernandez spoke to Mr Kerr as a friend, to see if he would open up about any personal issues he might have been dealing with. He can't recall Mr Kerr raising any issues that concerned him. Mr Fernandez stated that the consistent legal and HR advice he received was that he should not raise the matter with Mr Kerr when Mrs Smyth was adamant that she did not wish to make a formal complaint.

Reason for Mrs Smyth's resignation

7.136. In her statement, Mrs Clayden links Mrs Smyth's resignation to her outside business interests.¹⁹⁷ The resignation letter states that Mrs Smyth could no longer give her full commitment to the position.¹⁹⁸

7.137. In evidence Mrs Clayden states that she had never been told that the resignation was linked to issues with Mr Kerr. Mrs Clayden's email, notifying staff of Mrs Smyth's resignation, refers to it being for personal reasons¹⁹⁹

7.138. Other NTSO staff also gave evidence on this issue. In her statement, Ms Isard states that she was under the impression that Mrs Smyth resigned from the NTSO to pursue her business interests. Ms Isard recalled Mrs Smyth's jumping castle business and also that she owned property.²⁰⁰ Ms Isard has no recollection of Mrs Smyth resigning due to personal issues.

7.139. Ms Charles was also of the opinion that Mrs Smyth had resigned due to the success of her private businesses.²⁰¹ In her statement, she recalled meeting Mrs Smyth at various events and Mrs Smyth telling her of her successes in her business ventures. On the farewell card to Mrs Smyth, Ms Charles wrote; "Linda, good on you for taking the risk and being successful. Good luck and good wishes, Deb."²⁰²

¹⁹⁷ Exhibit R55, Paragraph 80

¹⁹⁸ Exhibit C14

¹⁹⁹ Exhibit R55, Annexure 18

²⁰⁰ Exhibit R65, Paragraph 15

²⁰¹ Exhibit R70, Paragraph 37

²⁰² Exhibit C16

- 7.140. Mr Taylor gave evidence on the reasons Mrs Smyth resigned from the NTSO. He said in his statement that Mrs Smyth had advised him prior to her resignation that she was considering leaving her job as she did not need the work and wanted to concentrate on her investment properties and other businesses.
- 7.141. Mr Taylor states in evidence that he used to speak to Mrs Smyth about investment properties and that he had recommended trades people to her so she could use them at her investment properties. He alleged that Mrs Smyth discussed with him that she didn't need to work as she had enough investment properties and other businesses and was thinking of resigning.
- 7.142. Mr Taylor also said that at the time of Mrs Smyth's resignation he wasn't aware of any issues between her and Mr Kerr. He was of the opinion that they had resumed their social interactions outside the office.²⁰³
- 7.143. Ms Laughton was asked questions in cross-examination that suggested that her evidence in chief, in which she stated that Mrs Smyth left the NTSO due to harassment and bullying, was inconsistent with what she wrote on the farewell card. "Linda, you lucky bitch. Can you give me a job. Shaz".²⁰⁴ Ms Laughton agrees that it would be unusual to write what she did if someone was leaving due to bullying.
- 7.144. This evidence supports the Respondent's case that Mrs Smyth left the NTSO to pursue business interests.
- 7.145. Mr Kerr added in his evidence that he was not surprised by Mrs Smyth's resignation as he was aware it was coming. He also included that Mrs Smyth wanted to resign because the hours at the NTSO did not suit her, and she wanted to spend more time with her son and the jumping castle business would allow her to do so.
- 7.146. This evidence differs from Mrs Smyth's as set out in her case above. Her case links the incidents at her home on 19 and 20 August 2006, involving Mr Kerr and then NTSO management's response to her reason to resign. The two accounts are starkly different, as set out above.
- 7.147. As set out above most NTSO staff, apart from Ms McKay were not aware of any link between allegations against Mr Kerr and Mrs Smyth's resignation. The material available at the time to NTSO management and staff was that Mrs Smyth's resignation was associated with her expanding business interests.

²⁰³ Exhibit R61, Paragraphs 78 - 80

²⁰⁴ Exhibit C16

8. SECOND RESPONDENT'S (MR KERR) REPOSE

- 8.1. Mr Kerr had a long career in the NTPS primarily the NTSO. He was regarded as an experienced and valued employee in the area of NT Superannuation Schemes. Part of what he did and appeared to enjoy, which was encouraged by NTSO management, was to train other employees and mentor them on superannuation related tasks, particularly members of the finance team, even when he was no longer directly working in that area.
- 8.2. It was clear and agreed by Mr Kerr and those who managed him from 2003 to 2006 that his work was affected by personal matters such as his father's death and alcohol consumption over a number of years. This impacted on his work productivity and lead to absenteeism and health concerns.
- 8.3. The evidence discloses that these issues were not managed well within the office, apart from informal support offered by Mr Fernandez. It was in this period that Mrs Smyth worked in the finance area of NTSO. An area Mr Kerr had vast experience of and where he was encouraged by management to assist Mrs Smyth. This is the background or environment in which the allegations under consideration occurred.
- 8.4. Mr Kerr's evidence is vague in regard to his recollection of the sequence of events from 2003 to 2007, however generally his version supports NT Treasury's response. Particularly in terms of when the issues were first raised; stating that it was 2005 and not August 2006, that there was an exchange of letters in 2005 and attendance at a mediation session in 2005, rather than a year later, as alleged by Mrs Smyth.
- 8.5. Mr Kerr's statement, evidence and in his final submissions, set out a sequence of events that suggests a much more substantial relationship between himself and Mrs Smyth from 2004 to 2006 than portrayed by Mrs Smyth.
- 8.6. It is clear that Mr Kerr's case is that the conduct alleged against him should be viewed in the context that he had a much closer relationship with Mrs Smyth, than she concedes. Mr Kerr's statement²⁰⁵ sets out a table of events, where he details the interactions he had with Mrs Smyth outside the office. Apart from alleging greater contact over time, it appears to also be aimed at establishing that the sequence of events alleged by Mrs Smyth, are incorrect and detract from the credit of Mrs Smyth, Mr Rawiri and Mr Bush by numerous negative allegations including allegations of violence and excessive alcohol use etc.

²⁰⁵ Exhibit R43, Pages 3 - 7

- 8.7. The scope and features of the relationship between Mr Kerr and Mrs Smyth at various points in time from 2003 to 2006 is relevant and required to be considered under section 22(3) of the Act as set out below.
- 8.8. As set out above, the evidence will be viewed through the lense of the impact of time on memory and also that Mr Kerr was drinking heavily over this time. Further unless events and incidents Mr Kerr alleges are supported by other objective evidence whether or not they occurred will be viewed cautiously.

General Relationship evidence

- 8.9. As stated above Mr Kerr first met Mrs Smyth when she was a FOIT in the finance unit of NTSO in August 2003. Mr Kerr concedes that he had an informal role in her training.²⁰⁶
- 8.10. Mr Kerr's evidence is that after initially smoking together at work they struck up a friendship, where they began to spend time together outside of work.
- 8.11. There is general support in the evidence from NTSO staff, including Mr Fernandez, Mrs Clayden and others, that they observed a friendship.
- 8.12. In Mr Fernandez's witness statement, he says that prior to February 2005, he was under the impression that Mr Kerr and Mrs Smyth "were on friendly terms with each other, would go on regular smoke breaks together during the day and that they regularly socialised outside of work".²⁰⁷
- 8.13. In Mrs Clayden's witness statement and evidence-in-chief, she recalled that she was very surprised by Mrs Smyth's allegations against Mr Kerr in February 2005, as up until that point she understood them to be friends who mixed socially.²⁰⁸
- 8.14. In evidence-in-chief and in his witness statement, Mr Taylor describes Mr Kerr and Mrs Smyth's friendship. He was aware that they socialised together outside the office and that they smoked together, almost daily, during office hours.²⁰⁹
- 8.15. As set out above NTSO staff, including Ms Isard, Ms Charles and Mr Bryars, also commented on what they saw as a positive relationship between Mr Kerr and Mrs Smyth where as others such Ms McKay and Ms Laughton refer to negative aspects of their relationship.

²⁰⁶ Exhibit R51, Paragraphs 12 and 13

²⁰⁷ Exhibit R67, Paragraph 20

²⁰⁸ Exhibit R55, Paragraph 26

²⁰⁹ Exhibit R61, Paragraph 24

- 8.16. I find that Mr Kerr and Mrs Smyth were on friendly terms in the early days of her time at NTSO. The more contentious issue is what occurred over time, and what was the occurring at particular points in time between late 2003 and October 2006.
- 8.17. A limitation and one which is understandable after the passing of so much time is that the evidence from NTSO staff rarely referred to time frames and was always very non-specific about the scope of the friendship in and out of the office. It is difficult to ascertain the scope of the friendship at various times. It was clear that it was necessary for Mr Kerr and Mrs Smyth to work together, so they did. Perceptions of a relationship, like anything, differ between people; however there is material created at the time on the matter, which illustrates that, they were not always on good terms as generally alleged. The letters from March 2005 show there was fracturing of the relationship between Mr Kerr and Mrs Smyth and that management were unaware of what had occurred. The lack of knowledge by NTSO management of staff issues is also supported by evidence from the events describe by Ms Watters and events involving Ms Milan.

Smoking

- 8.18. Mr Kerr's broad claim in his statement is that in late 2003 to 2006 "General smoking outside the office when the NTSO was located at Palm Court and (from late 2004) at Enterprise House. It was not unusual for Ms Smyth and me to get together on our own or with other smokers to have a puff and a chat"
- 8.19. Mr Kerr became more specific, alleging that he started smoking with Mrs Smyth outside the Palm Court office a couple of months after she commenced in the Finance unit.²¹⁰ He claims they chatted during these smoke breaks and eventually struck up a friendship. It is Mr Kerr's evidence that they smoked at both locations, Palm Court and Enterprise House. Mr Kerr also states in evidence that they became friends when taking smoke breaks together at Palm Court and moved onto getting coffees at "The Cav" together.
- 8.20. In cross-examination, Mr Kerr restated that they did smoke together at Palm Court, and they also smoked when going to pick up coffees from "The Cav". Further sometimes accompanied by other employees from Department of Corporate and Information Services (DCIS). This is something that Mrs Smyth refutes.
- 8.21. Mr Taylor, also spoke of Mr Kerr's and Mrs Smyth's friendly relationship in the office and smoking together. Mr Taylor only refers to Enterprise House where

²¹⁰ Exhibit R51, Paragraph 14

he recalls Mr Kerr and Mrs Smyth smoking together regularly, every morning and afternoon.

- 8.22. Ms Isard who worked at the NTSO from June 2003 in her statement and in cross-examination, she says that she joined Mr Kerr and Mrs Smyth for smoke breaks.²¹¹
- 8.23. Mrs Smyth stated in evidence that she did not smoke during work hours at Palm Court but she did smoke before work, at lunch and after work. She questioned Mr Kerr and others regarding her smoking when she went to pick up coffees from “The Cav”. It is Mrs Smyth’s evidence that she smoked during work hours at Enterprise House with Mr Kerr and on these smoke breaks they would speak normally as if nothing had happened between them.
- 8.24. Mrs Smyth denied ever asking Mr Kerr to smoke with her whilst working at the Enterprise House. She says that sometimes he was present when she was on a smoke break but she did not specifically ask him to come outside with her. She concedes that it was possible that on occasion she might have asked him to join her for a smoke. In cross-examination, it was put to Mrs Smyth that she and Mr Kerr smoked together regularly and that is how they struck up a friendship. Mrs Smyth denies this.
- 8.25. In evidence, Ms McKay said that she was unaware that Mrs Smyth smoked whilst at Palm Court however, she was aware that Mrs Smyth smoked at Enterprise House but she doesn’t recall seeing Mrs Smyth going for a smoke with Mr Kerr. She was aware that Mrs Smyth smoked at Enterprise House “a couple of times a day”.
- 8.26. It is part of Mr Kerr’s and NTSO’s case that the relationship was more substantial and sustained than conceded by Mrs Smyth. It appears to be a matter where Mrs Smyth is not prepared to make reasonable concession, and it is an area that is supported by evidence from not just Mr Kerr but other NTSO staff as well. That Mr Kerr and Mrs Smyth smoked together initially at Palm Court, and the question is to what extent and scope of it during the time frames alleged. Other staff generalised their recollections and have not given a detailed time frames.
- 8.27. I find that Mrs Smyth’s and Mr Kerr’s smoking at the Palm Court building, and this contributed to the start of a friendship, that commenced when they began worked together from August 2003. The smoke breaks moved onto coffees being purchased from “The Cav” before the relocation to the Enterprise House in November 2004. Other evidence suggests they continued to smoke in a

²¹¹ Exhibit R65, Paragraph 4

similar pattern over the course of the next two years, whilst in Enterprise House apart from the periods late 2004 to his return from illness in late 2005.

- 8.28. This is consistent with Mrs Smyth's case that the inappropriate conduct was not continuous however it also clear at various times including after 8 January 2005 when Mrs Smyth was not communicating with Mr Kerr that they did not smoke together.

Table of Events in Mr Kerr's statement

- 8.29. A table of events is listed in Mr Kerr's statement²¹² from page 3 to 7. The purpose of the table is to support Mr Kerr's contention that their relationship was far more extensive and close, over the period of the allegations, than Mrs Smyth alleged.
- 8.30. Most of the events set out in the table in Mr Kerr's statement provide very little detail.²¹³ Material in the table appears to be aimed at discrediting Mrs Smyth and her version of events. The events listed are of little evidentiary value without detail, supporting evidence or a time frame.
- 8.31. Only some of Mr Kerr's claims, to establish the scope of their relationship, are supported by other evidence. Mrs Smyth denies the majority of these interactions occurred, apart from Mr Kerr meeting her aunt when she was visiting Darwin. Other witnesses such as Mr Rawiri state that specific incidents did not occur. Mr Bush provided some support for a couple of events in 2006.
- 8.32. The matters considered below are the events where there is either supporting evidence for the alleged event or evidence other than Mrs Smyth's which specifically refutes the alleged contact.

First time to Mrs Smyth's home

- 8.33. In Mr Kerr's statement he recounts the first occasion he visited Mrs Smyth's home. He believes that it was early October 2003. In the table it states.²¹⁴ "Ms Smyth invited me to her residence while her boyfriend, Mike Rawiri, was in Sydney for the NRL grand final. This was the first occasion I can recall being invited to Ms Smyth's house".

²¹² Exhibit R51

²¹³ Exhibit R51, Pages 3 - 7

²¹⁴ Exhibit R61, Page 3

- 8.34. Mr Kerr expands on this in his statement alleging that on the Friday night they drank, talked and played pool until the sun came up.²¹⁵ He also gave evidence of this visit and included that they were drinking home brewed bourbon.
- 8.35. Mr Kerr alleges that from that time onwards, they began to spend more time together outside of work, usually when her boyfriend was not around.
- 8.36. Mrs Smyth strenuously denies inviting Mr Kerr to her home on the weekend of the NRL grand final in October 2003.
- 8.37. Mr Rawiri whose work at this time in 2003 was at the NT Institute of Sport as the Head Rugby League coach and is a long time rugby league man has a strong memory of all the NRL grand finals he had attended. He gave evidence that the 2003 was not one of them. He gave clear evidence that he attended the NRL finals in 2000 and 2002.
- 8.38. Further in his statement and evidence, Mr Rawiri says that he met Mr Kerr at Mrs Smyth's home a number of times in late 2004. To his knowledge, Mr Kerr never spent the night at Mrs Smyth's home. He also says that Mr Kerr was not invited to Mrs Smyth's home for social visits or special occasions.²¹⁶
- 8.39. The finding I make in regard to the timing of Mr Kerr's visit to Mrs Smyth's home for the first time is that it was not the weekend of the 2003 NRL grand final. Mr Rawiri's evidence on this matter is convincing and also as the Rugby League is his area of work, he had a very strong, reliable and independent memory of the NRL grand finals he had attended.

General assertions of visits to Mrs Smyth's home from 2004 to 2006

- 8.40. It is Mr Kerr's evidence that he visited Mrs Smyth's residence on a regular/semi regular basis, between 2004 and 2006.²¹⁷ He states "On many occasions, both after work and on weekends, I would attend Ms Smyth's residence. We often drank, played pool and talked about many things". He further alleged these occasions were generally when Ms Smyth's first boyfriend, Mr Rawiri, was not around and that when Ms Smyth took up with her second boyfriend, Cy Bush, these occasions became fewer as it appeared that she would spend time with either one of her boyfriends.
- 8.41. Apart from Mr Kerr's evidence there is very little to support the extent and scope of his visits to Mrs Smyth's home during 2004 to 2006.

²¹⁵ Exhibit R51, Paragraph 15

²¹⁶ Exhibit C33, Paragraph 2 and 3

²¹⁷ Exhibit R51, Page 4

- 8.42. In evidence, Mr Rawiri states that he saw Mr Kerr only four to six times at Mrs Smyth's home between 2003 and mid 2005.
- 8.43. There is one specific incident referred to which is where Mr Kerr attended Mrs Smyth's home with Mr Bryars, in mid 2005, Mrs Smyth and Mr Rawiri's evidence is that Mr Kerr was not welcome and efforts were made to ensure he not be there by the time Mrs Smyth returned home. This incident is set out above.
- 8.44. Mrs Smyth's case is that after she had been to Mr Kerr's home in Palmerston, sometime around August/September 2004, Mr Kerr only visited her home three or four more times in late 2004. The exact time period is unclear as she alleges that her partner at the time, Mr Rawiri, told Mr Kerr to back off and that Mr Kerr was not welcome at her home, after October/November 2004.
- 8.45. In cross-examination, Mrs Smyth is questioned about the number of times Mr Rawiri met Mr Kerr. It is established that these contacts occurred between August/September 2004 and before Mr Rawiri told Mr Kerr to stop contacting Mrs Smyth in around October 2004.
- 8.46. In cross-examination, Mrs Smyth was asked if Mr Rawiri was jealous of her relationship with Mr Kerr. Mrs Smyth denies that he was. She was also asked if Mr Rawiri went through her phone and again this is denied. This allegation was never raised with Mr Rawiri in cross-examination. It is alleged in cross-examination that Mrs Smyth discussed her relationship with Mr Rawiri with Mr Kerr and Mrs Smyth agrees that she may have.
- 8.47. Of note is the fact that Mrs Smyth commenced her relationship with Mr Bush in the middle of 2005, and the first time Mr Bush came across Mr Kerr was 19 August 2006. This suggests that whilst there were visits prior to the January 2005 incident, as set out above, visits by Mr Kerr to Mrs Smyth's home were far less frequent when Mr Bush was in Mrs Smyth's life.
- 8.48. As set out in Mrs Smyth's case above, the request to not visit her home is raised in the letter dated 4 March 2005.²¹⁸
- 8.49. I find that visits by Mr Kerr to Mrs Smyth's did occur up until January 2005; however they were far less frequent than Mr Kerr alleges. This is consistent with Mrs Smyth's evidence of visits to her home by Mr Kerr, apart from the other unwelcome visits set out above after January 2005 which were not encouraged.

²¹⁸ Exhibit C9

8.50. Mr Kerr's related allegation that his visits to Mrs Smyth's home were due to reasons such as visiting pets are not supported by any other evidence.

2005 - Issue regarding wood on the pool table

8.51. Alleged events such as the allegation of wood on the pool table appear to be raised in the table to blacken the credibility of people in Mrs Smyth's life or Mrs Smyth herself. The allegation was that in 2005 Mrs Smyth rang Mr Kerr after work stating that she thought Mr Rawiri had come to her house and moved some wood across her pool table. She said she felt scared and requested Mr Kerr to attend her residence which he did.²¹⁹

8.52. Mrs Smyth denies any knowledge of this event as relayed by Mr Kerr in his witness statement.

Birthday Party

8.53. It is alleged by Mr Kerr that Mrs Smyth held a birthday party for him in either January 2004 or 2005.²²⁰ Mr Kerr can't recall precisely if it was 2004 or 2005. The table on page 4 of Mr Kerr's statement specifies January 2005.

8.54. A witness, Mrs Romeo, was called by the Respondent's on this issue having only been located after the start of the hearing. Mrs Romeo's statement²²¹ and her evidence is that she attended a party at Mrs Smyth's home in either 2004 or 2005. Mrs Romeo can't be more specific as to the exact year she attended the birthday party. Mrs Romeo's evidence regarding the party does not go beyond the fact that she attended the birthday party in either 2004 or 2005.

8.55. Mrs Romeo gave evidence of the party being held at Kilfoyle Crescent in Nakara, and described a house which fits the description and photos tendered of Mrs Smyth's home²²² over the relevant period.

8.56. Mrs Romeo also gave evidence of having seen Mr Kerr with a women buying coffee and got the impression that they had more than a working relationship. There is very little detail given by Mrs Romeo to support this statement. In cross-examination, Mrs Romeo was unable or did not articulate why she thought this, other than it was her impression from conversations she had with Mr Kerr.

²¹⁹ Exhibit R51

²²⁰ Exhibit R51, Page 4

²²¹ Exhibit R52

²²² Exhibit C26, Annexure R

- 8.57. Mr Kerr's submissions concede that he can't recall if the party happened in 2004 or 2005.
- 8.58. Mrs Smyth strongly denies that she held a birthday party for Mr Kerr at her home at any time but particularly denies January 2005 as this was just after the 8 January 2005 incident involving Mr Kerr breaking into her home. A January 2005 party also seems to be unlikely considering the material exchanged between Mr Kerr and Mrs Smyth in March 2005 and the card Mr Kerr gave her in January 2005,²²³ apologizing for his behaviour over the Christmas/New Year period. As Mrs Smyth had been a FOIT in NTSO since August 2003, it is more likely that the party occurred in January 2004.
- 8.59. I find that a birthday party was held for Mr Kerr by Mrs Smyth and that on the basis of other material it is unlikely to have been in January 2005 but at an early time in January 2004, before the change in the way they related to each other, including Mr Kerr being told to leave Mrs Smyth alone by Mr Rawiri which occurred late in 2004.

Picked up Mrs Smyth's son from school in 2005

- 8.60. Mr Kerr alleges that he looked after Mrs Smyth's son and collected him from school on a number of occasions.²²⁴
- 8.61. He specifically recalled one occasion when he went to the school/preschool to collect Mrs Smyth's son, Jack, as there had been an incident and he took him to McDonalds as the toy in the Happy Meal pacified him. Mr Kerr cannot remember if he went back to work or went home afterwards. Mr Kerr also includes another occasion when he looked after Jack, when Mrs Smyth went out one evening and another time when he stayed at her home, in Jack's bedroom, as his house was being fumigated.
- 8.62. There is support for Mr Kerr's involvement in picking Jack up from school in Mr Taylor's statement. Mr Taylor commented on overhearing arrangements for Mr Kerr to pick up Mrs Smyth's son and also arrangements for Mr Kerr to borrow her ute.²²⁵
- 8.63. Mrs Smyth's case also alleges an incident where Mr Kerr did collect her son from school. Mrs Smyth's details differ from those in Mr Kerr's account. This material was tendered by Mrs Smyth as part of her dissatisfaction with the way Mrs Clayden and NTSO management treated her and that Mr Kerr's

²²³ Exhibit C6

²²⁴ Exhibit R51, Page 4

²²⁵ Exhibit R61, Paragraphs 70 and 73

involvement with her son was not at her request but a request by Mrs Clayden's. Mrs Clayden strenuously denies the allegations.

- 8.64. However it is clear over the time period Mr Kerr did on at least one occasion collect Mrs Smyth's son from school.
- 8.65. Mrs Smyth does not agree with Mr Kerr's statement that he babysat Jack nor had any other involvement with her son. Whilst this is not an area that is crucial to the case it is clear that various times throughout their friendship there was greater involvement in each other's lives than what was conceded.

Meeting of Mrs Smyth's brother Josh and a trip to Litchfield 2005/2006

- 8.66. Mr Kerr gave evidence of taking Mrs Smyth, her son and a person he identified as her step brother to Litchfield in his commodore sedan. He also included this information in his witness statement in the table of materials²²⁶ as either occurring in 2005 or 2006. The table notes "I met Ms Smyth's step brother (Josh?). On one occasion I recall taking Ms Smyth, her son and step brother to Litchfield Park for the day".

"On the day that I took Ms Smyth, her son and step brother to Litchfield Park, Ms Smyth informed me that she had had a fight with her boyfriend, Mr Bush. Ms Smyth got quite drunk through the course of the day. Upon nearing Noonamah, where mobile phone coverage was re-established, her mobile phone went off maybe a dozen times with missed calls and texts. Ms Smyth advised they were from Mr Bush. I recall this as an example of Ms Smyth's episodes of rage and revenge but ultimately she got over them."

- 8.67. Mr Kerr in his evidence stated that Mrs Smyth was drinking throughout the day and received many phone messages from Mr Bush once they came back into mobile reception.
- 8.68. Mrs Smyth was offended by the use of the term 'step-brother' to identify Josh, who she calls her brother. Mrs Smyth in cross-examination denied travelling to Litchfield with Mr Kerr and she stated Josh visited at the same time as her Aunt in the middle of 2006. Christine Nestor's affidavit was tendered²²⁷ however she refers to a visit in October 2005 and does not refer to Josh.
- 8.69. Mr Bush had met Josh and was aware they went on a day trip. He gave no evidence to support the allegation that they went with Mr Kerr to Litchfield, or that he had had a fight with Mrs Smyth, that day over the phone.

²²⁶ Exhibit R51, Page 5

²²⁷ Exhibit C32

8.70. I find that Josh did come to Darwin and may have met Mr Kerr. However it appears the purpose of recounting the incident was an opportunity to attack Mrs Smyth's credit which was done by implying that Mrs Smyth was a big drinker. Apart from Mr Kerr's account there was no evidence from any other witnesses, that Mrs Smyth was a big drinker during this time which was in contrast to the large amount of evidence provided by NTSO staff that Mr Kerr had a problem throughout this period. Mr Kerr also raised other allegations to imply negative aspects of the relationship that Mrs Smyth was in.

2005/2006 Mrs Smyth caught Mr Bush cheating on her with his ex-wife.

8.71. Mr Kerr included in his table of materials and in evidence that Mrs Smyth had caught her partner, Mr Bush, cheating on her with his ex-wife. Mr Kerr can't recall exactly but thought Mrs Smyth either phoned or texted Mr Bush's ex-wife as she was annoyed.

8.72. Mr Bush, in cross-examination conceded that the above occurred and that he and Mrs Smyth did have an argument about it. Mrs Smyth does not concede this occurred. There is support for this event occurring however very unclear when and how Mr Kerr was told about this by Mrs Smyth.

8.73. This is another example of involvement in each other's lives throughout this time period.

Mid to late 2006 Mr Kerr attended Royal Darwin Hospital (RDH) due to Mrs Smyth's son being admitted

8.74. Mr Kerr included in his table of events and gave evidence of Mrs Smyth's son Jack being a patient at the children's ward in at RDH. Mr Kerr thought he may have been suffering from heat stress. Mr Kerr alleged that he and Mrs Smyth took turns sitting with Jack while the other had a smoke. He said that Mrs Smyth had just purchased the jumping castle business that day. Mr Bush says in cross-examination that he vaguely remembers Jack being in hospital in 2006.

8.75. In cross-examination Mrs Smyth was questioned about her son attending RDH in mid to late 2006. She concedes that her son was in hospital with an abscess on his arm in 2006 after being shown a document which was not tendered. Once that was established the questioning did not return to the allegation that Mr Kerr attended with her, which had initially been denied. There is evidence that Mrs Smyth's son was in hospital in 2006 so there is external support for this aspect of this allegation however not for Mr Kerr's involvement.

Mr Kerr's role regarding Mrs Smyth's resignation

8.76. Mr Kerr's evidence is that Mrs Smyth rang him the afternoon she tendered her resignation, and asked him to take her resignation letter off the fax machine and place it on Ms McKay's chair, which he did. This is also detailed in his witness statement, in the table of materials.²²⁸

"Mrs Smyth rang me on the afternoon that she tendered her resignation. I think she advised that she was at Casuarina. She said she did not want to come into the office in case her supervisor, Wendy McKay, tried to talk her out of resigning. I advised her that Ms McKay and the Commissioner of Superannuation, Kathleen Clayden, were out of the office at a seminar (or the like).

Ms Smyth asked me to collect her resignation from the fax machine and place it on Ms McKay's chair. This I duly did and immediately left the office".

8.77. All aspects of this are denied by Mrs Smyth when questioned. The issue was not raised with other NTSO staff.

8.78. Mr Bush's evidence is that he was with Mrs Smyth on this day however his evidence initially was she went into work and handed it to Mrs Clayden, which does not assist in resolving this issue.

Mr Kerr took Mrs Smyth's possessions from the office to her residence

8.79. Mr Kerr included in his table of materials and in his evidence that he brought Mrs Smyth's personal belongings from the office to her residence after her resignation. This is denied by Mrs Smyth.

8.80. Mr Kerr claims that he was still in contact with Mrs Smyth after her resignation. Mrs Smyth denies this. Mrs Smyth at one stage says that their only contact after she left the NTSO was when he called her nine months later and acted like they were friends.

8.81. This is in contrast to other material in Mrs Smyth's case that Mr Kerr sent her hostile text and voice messages after her resignation. This is supported by Mr Bush, who says he saw these messages in his statement.

8.82. This is another example where Mr Kerr alleged amicable contact and Mrs Smyth denies.

²²⁸ Exhibit R51, Page 7

Mr Kerr attended Mrs Smyth's home with his niece in October 2006.

8.83. Mr Kerr included in his table of materials and in his evidence that he took his niece to see Mrs Smyth at her home in October 2006. In the table he stated:

"I attended Ms Smyth's residence with my niece, Naomi Kerr, prior to taking Naomi (who was visiting Darwin) to the Mindil Beach markets. I am certain this was after Ms Smyth had resigned. Ms Smyth did not show any malice towards me or otherwise indicate in any way that she was unhappy about my visit. I can remember that she seemed very excited about her plans to expand her jumping castle business".

8.84. Mr Kerr states in evidence that Mrs Smyth spoke of the potential to buy more jumping castles and she spoke of her other businesses. Mr Kerr, in evidence, added that Mrs Smyth appeared to be quite drunk and he cut the visit short. This is a matter not covered in his statement and is another example of the type of added detail previously discussed made to create a negative impression of Mrs Smyth.

8.85. The evidence of Mr Kerr's niece's visit is contained in a statement from Ms Naomi Carroll (nee Kerr)²²⁹ and Ms Carroll also gave evidence at the hearing. Ms Carroll in evidence stated that she attended Mrs Smyth's home with her uncle, in October 2006, before the last Mindil Beach Markets for the year.

8.86. In cross-examination, Mrs Smyth questioned the timing of the trip as it was not in the university holidays and that there was no supporting documentary evidence. Ms Carroll's response was that the trip did not coincide with university holidays.

8.87. In Ms Carroll's statement it is clear that part of the discussion at Mrs Smyth's home was about what Mrs Smyth had been up to since leaving work. Ms Carroll included a reference to the jumping castle business.²³⁰

8.88. Mrs Smyth denied in evidence that this visit occurred and makes reference to the fact that this was soon after she had resigned from the NTSO.

8.89. Mrs Smyth raised with Ms Carroll, that she had known Mr Kerr from work since 2003 and had never met Ms Carroll, on any of what Ms Carroll had claimed to be her annual visits to Mr Kerr. There was nothing in Mrs Smyth's cross-examination of Ms Carroll that impacts on my finding that Ms Carroll was giving evidence to the best of her ability about events 8 to 9 years earlier.

²²⁹ Exhibit R41

²³⁰ Exhibit R41

- 8.90. I find that as this visit to Mrs Smyth's home by Mr Kerr and his niece is supported by evidence from Ms Carroll, who in cross-examination did not waiver in her evidence that the visit occurred and that it occurred after Mrs Smyth had finished work at NTSO as they discussed what Mrs Smyth had been up to since her resignation.
- 8.91. It is submitted by the Respondent's that at this time Mr Kerr and Mrs Smyth had an amicable relationship which makes it unlikely that various allegations against Mr Kerr could be true.
- 8.92. However this is an overly simplistic extrapolation from this evidence. The visit is consistent with other evidence in the case that over the relevant time Mr Kerr and Mrs Smyth were in and out of each other's lives as circumstances changed.

9. FURTHER SPECIFIC FINDINGS OF FACT & APPLICATION OF THE LAW

- 9.1. I need to now draw together the findings on the facts or make findings on the facts and then apply the law (as set out earlier) to these and then make ultimate findings as to whether there has been prohibited conduct established against Mr Kerr. It is only once any findings of prohibited conduct are made against Mr Kerr that I move onto consider the potential vicarious liability of the NT Treasury or more precisely the Northern Territory of Australia.

Relationship

- 9.2. The first area to consider is both the general and specific evidence in regards to the scope of Mrs Smyth and Mr Kerr's friendship/relationship.
- 9.3. In general neither Mr Kerr nor Mrs Smyth's evidence on the scope of their relationship is to be accepted fully as both accounts are to be viewed cautiously. The evidence suffers, like all evidence in this case, from the passing of time. It is my general finding that the relationship was not as confined and discrete as Mrs Smyth asserts and also not as all-encompassing and expansive as Mr Kerr alleges between the years 2003 to 2006. The scope and extent of their relationship varied over time.
- 9.4. It is most relevant to look at individual events and what the evidence is of the relationship at that particular time and around the incident. It is not as simple as saying they were friends so Mr Kerr could not have done this or it could not have occurred because Mrs Smyth continued to have contact with Mr Kerr throughout her employment.

- 9.5. It is of limited relevance that Mr Kerr says in regard to the various incidents involving Mrs Smyth, Ms Milan and Mrs Watters, that they had all moved on or he had a good relationship with them after. It is not uncommon in cases such as these that numerous factors are at play to explain why Mrs Smyth continued interactions with Mr Kerr not the least his ongoing assistance to her in performing her job.
- 9.6. It is also of limited relevance to making findings of sex discrimination or sexual harassment that Mr Kerr says he did not intend to offend, humiliate or intimidate Mrs Smyth or that Mr Kerr lacked awareness of the impact of his conduct on Mrs Smyth
- 9.7. It is also clear, even during the hearing that Mrs Smyth still felt indebted to Mr Kerr for the work place assistance he gave her, and she was reluctant to complain or take the matter further in 2005/2006 because of this. Throughout this time Mrs Smyth's perception was that she would lose her job if she complained. Mrs Smyth does not say sacked but just that to remain in her role would be untenable.
- 9.8. The findings in regard to Mrs Smyth's and Mr Kerr's relationship at various times between August 2004 and the end of 2006 are relevant to the assessment of what a reasonable person would have anticipated in section 22. In particular sections 22(2) and (3) the relationship between the other person and the person engaging in the conduct are relevant.
- 9.9. As set out above, Mr Kerr and Mrs Smyth did not know each other before Mrs Smyth commenced work at NTSO in August 2003. They became friendly through the unofficial work assistance Mr Kerr provided and also the fact they were both smokers and would smoke at the same time at Palm Court office.
- 9.10. I will deal with the issue of work place touching separately however contact did increase towards the end of the financial year and other related activities in 2004. Mrs Smyth was on HDA during September/October in 2004 in the work place which left her with greater reliance on Mr Kerr.
- 9.11. Around this time Mr Kerr rang Mrs Smyth and she attended his home. All the available evidence shows during this period of time that Mr Kerr was struggling with personal issues; the loss of his father and drinking heavily. After the incident at his home there was a change in the dynamic of their relationship from work colleagues to assistance with personal problems.
- 9.12. The offer of assistance and the taking up of the offer of assistance is clear in the limited number of documents created at the time. Both Mrs Smyth and Mr Kerr mention it to third parties.

- 9.13. Mr Kerr took this up initially through visits, telephone calls and texts to discuss his struggles. He refers to her assistance to Mr Fernandez and on a card as his own GROW.
- 9.14. There was then an increase and change in text messages and phone calls received from Mr Kerr. This is set out above and demonstrates a similar progression to the incident with Ms Watters; work relationship which moved to a personal relationship and then to become harassing
- 9.15. I accept as set out in the material above that their relationship in this time period changed from work colleagues to a friend offering help to some-one struggling and then further intensified becoming too much for Mrs Smyth and the contact became intrusive. Then the incident on 8 January 2005 occurred.
- 9.16. It can be seen from the available evidence that the relationship deteriorated before the January 2005 incident, and further deteriorated in response to the incident which was reflected in the card referring to how Mr Kerr was over Christmas and New Year²³¹ and then in the exchange of letters.²³² It is also clear from the evidence that Mrs Clayden noticed the deterioration of the relationship at this time.
- 9.17. After January 2005 the evidence on the sequence events varies markedly between the Complainants and both Respondents evidence. I find that the relationship did vary throughout the rest of 2005 and 2006. I find Mr Kerr was not welcome to attend Mrs Smyth's home after early 2005.
- 9.18. The unwelcome conduct towards Mrs Smyth by Mr Kerr was not constant and as set out above there is little assistance in assessing the relationship from the evidence and comments from work colleagues as they were not aware of time frames and exact details of events. The evidence is largely general observations and not time specific, for the period from August 2003 to the end of 2006.
- 9.19. The finding on the sequence of events from February 2005 to October 2006 is set out below,
- 9.20. There are differences in how both parties say the relationship continued after Mrs Smyth resigned. Mrs Smyth says Mr Kerr was vitriolic and he reacted like she left him. Mr Kerr says he assisted her with providing her resignation letter to her supervisor and delivered her possessions to her. This evidence is of

²³¹ Exhibit C6

²³² Exhibit C8 and C9

little relevance to the findings I have to make on the allegations pursued at the hearing.

Sequence of events

- 9.21. As set out above it is for Mrs Smyth to establish the sequence of events that she says supports the allegations that she has made and will prove prohibited conduct under the Act.
- 9.22. The evidence Mrs Smyth lead in her case is cogent and supported by other material up until the time the First Respondent's allege she first disclosed she was having difficulties with the way Mr Kerr was behaving in February 2005 and I have made findings in regard to events up until this time.
- 9.23. In making findings on the sequence of events from February 2005 until August 2006, I make them based on the various documents which I find were created at the time by NTSO management. Particularly the file note made by Mr Fernandez which records events he was told by Ms McKay on 7 February 2005.
- 9.24. In a case with so much variance in people's recollections the source documents such as emails and file notes created at the time form the backbone of the decision.
- 9.25. In regard to the witnesses including Mrs Smyth who gave evidence supportive of Mrs Smyth sequence, I make the assessments set out below.
- 9.26. Whilst I find Mr Rawiri generally a very convincing and credible witness he was not aware of all events taking place in Mrs Smyth life. His evidence in regard to these events towards the end of his relationship with Mrs Smyth are less reliable and have been influenced by his concern for Mrs Smyth even after their relationship ended.
- 9.27. In regard to Ms McKay who also supports Mrs Smyth's version of when events were conveyed to management, when the mediation took place and the alleged meeting with Mrs Clayden on 21 August 2006, her evidence has to be viewed very cautiously and is not able to be relied on as she herself was involved in conflict and performance management with NTSO around this time.
- 9.28. It is clear from documents Ms McKay created at the time that she resigned from NTSO because of alleged bullying and harassment by Mrs Clayden and she believed this also happened to others that they were bullied and victimised into resigning. I find her ongoing hostility to NTSO management

has coloured her recollection and reconstruction of events involving what NTSO management did or did not do in regard to Mrs Smyth.

- 9.29. In regard to the mediation Ms McKay was also not personally involved in the mediation, organising, attending or debriefing on it.
- 9.30. Ms Laughton also supported aspects of Mrs Smyth's case however was prepared to concede that other alternative time frames or explanations for events were possible. Whilst these were very reasonable concessions it means that largely her evidence is ultimately not supportive of the sequence of events Mrs Smyth alleges. Ms Laughton also conceded she had some residual issues with the way she was treated during her employment by NTSO management.
- 9.31. Mr Bush gave evidence of events in August 2006; however his oral evidence was affected by the hours he had worked that day and was vague and of little assistance. Further in his statement the bulk of his evidence about matters in the sequence is evidence of what he was told by Mrs Smyth. As for all of the crucial meetings Mrs Smyth had with NTSO management he was not present.
- 9.32. In regard to Mrs Smyth while as set out early I largely accept her version of events up until February 2005, as it is supported by documents created at the time and other witness accounts. Her evidence about what NTSO management did or did not do after this time is tainted by her ongoing hostility to NTSO management, particularly Mrs Clayden.
- 9.33. A further factor that may have effected Mrs Smyth's reconstruction of events is her ongoing disappointment with the outcome, she was no longer employed nor had her career with all the benefits it entails and others remained employed. Disappointment with herself as even though she repeatedly said to NTSO management she was able to handle it herself in the end she was left without a job and reflecting on what occurred and what she believes should have happened.
- 9.34. However the overwhelming factor in the way in which the evidence was given in Mrs Smyth's case is her disappointment with what NTSO management did, in retrospect and the resulting outcome for her.
- 9.35. For all of these reasons I do not accept the sequence of events lead in Mrs Smyth's case in regard to what NTSO management did. This applies to events involving NTSO management in February and March 2005 and then February and August 2006.

- 9.36. I do not find that Mrs Smyth's allegation that she told no-one at NTSO of what occurred until August 2006 is supported by the evidence. It is likely that the full scope of Mr Kerr's inappropriate behaviour particularly the events on 8 January 2005 were not disclosed in the initial disclosures to NTSO management in February 2005.
- 9.37. I find it was this disclosure which commenced the sequence of events as set out in the First Respondent's case, of NTSO management trying to engage with Mrs Smyth and get her to make a formal complaint and Mrs Smyth repeatedly saying she would handle it herself.
- 9.38. I also find as set out above that letters were exchanged on 3 and 4 March 2005, again setting out Mrs Smyth's concerns with Mr Kerr's behaviour. These letters are inconsistent with Mrs Smyth's case that she told no-one until August 2006.
- 9.39. I also find as set out in the discussion of the First Respondent's case that the mediation occurred on 7 March 2005. Which is not only supported by documents created at the time by Mrs Clayden but also by the sequence of events, that concerns were raised on 7 February 2005, and with discussion of how to approach the concerns raised. Mrs Smyth was reluctant to make a formal complaint, as she was attempting to deal with the conduct herself and then the exchange of letters which enable the issue to be discussed more broadly.
- 9.40. I also find as set out above that Mrs Clayden had a conversation with Mrs Smyth in February 2006, after she became aware that Mr Kerr had purchased a home close to Mrs Smyth's and it is in this conversation that a great deal of detail about behaviour by Mr Kerr towards Mrs Smyth in her home was disclosed. As set out above I am satisfied that the email dated 3 March 2006 was created at the time and records areas covered in the conversation. The fact that various incidents are combined and the name of Mrs Smyth's partner is incorrect reassures me that the document was not fabricated for these proceedings. Further as stated earlier this email corroborates in part Mrs Smyth's account of events on 8 January 2005.
- 9.41. Further background findings are that whilst events on 19 and 20 August 2006 occurred and Mr Kerr attended Mrs Smyth's home. I do not accept Mrs Smyth case for the reasons set out above, that she raised these matters in the manner she gave evidence of on 21 August 2006, with Mrs Clayden.
- 9.42. I find that in February 2006 as set out in the First Respondent's case Mrs Smyth had discussed Mr Kerr's inappropriate conduct with Mrs Clayden. As

set out above it resulted in NTSO management offering assistance but Mrs Smyth again stating she would handle it.

- 9.43. I make this decision in the context of the sequence of events that I am satisfied occurred, the raising of the issue initially in February 2005, mediation before this time and action by NTSO. I do not find that Mrs Smyth has proven that the 21 August 2006 meeting occurred. In regard to this alleged meeting unlike other meetings and events held in the NTSO there are no emails, notes or memoranda made at the time in 2006 to support the event occurring and when it occurred.
- 9.44. Aspects of what was alleged to be said by Mrs Clayden have been proven not to be factually true in the case or there is strong reason why they would not have been said. For example 5 or 6 women had not been harassed by Mr Kerr, only two allegations have been made out. The mention of Mr Kerr committing suicide if the matter was raised with him is very strongly refuted by Mrs Clayden, on two bases: one Mrs Clayden was unaware in 2006 that Mrs Smyth's husband had committed suicide, and two because of Mrs Clayden's very personal experience with suicide. I accept unreservedly that this was not said by Mrs Clayden.
- 9.45. Mrs Clayden and the rest of NTSO management team gave evidence that this meeting did not occur and also that there was only one mediation which occurred in 2005 not 2006.
- 9.46. Further the alleged 21 August 2006 conversation is only relevant in arriving at my findings if Mrs Smyth's sequence of events is found proven as a potential trigger and then proof of detriment in a victimisation claim. A victimisation claim on this basis falls down at the first hurdle for consideration under the Act as it is not a complaint to the ADC or other conduct that falls under section 22(1) of the Act.
- 9.47. Further as set out above I do not find that Mrs Smyth has established to the required standard that she was forced to resign from NTPS, because of Mr Kerr's conduct and Mrs Clayden and NTSO management's inaction around his conduct. The alternative explanation held by her work colleagues and reinforced by the comments in the farewell card are that Mrs Smyth left to pursue her business interests.
- 9.48. A further and related matter is that I do not find that there is any evidence, apart from Mrs Smyth's allegation to support the suggestion that NTSO management and Mr Kerr actions deliberately occurred on particular days of significance for Mrs Smyth, e.g. her birthday.

Workplace touching in 2005

- 9.49. As set out at paragraph 6.55 I made the finding that touching such as Mr Kerr placing his hands on Mrs Smyth's shoulders, rubbing up and down her arms and touching her head and hands occurred in the office from around June 2004 until January 2005, whilst Mr Kerr was assisting Mrs Smyth.
- 9.50. Mrs Smyth's evidence was that she regarded his touchy feely contact as harmless at first but as it increased it became unwelcome.
- 9.51. Applying the law as set out above this conduct of Mr Kerr's falls to be considered under section 22(2) (a) "...conduct which is by another person, is unwelcome act of physical intimacy". As stated in the cases discussed earlier it is not a requirement that Mrs Smyth tell Mr Kerr it was unwelcome.
- 9.52. This conduct that occurred in the workplace was not solicited or invited. The test that is to be applied is subjective and it is Mrs Smyth's case that the physical intimacy was unwelcome as stated in her evidence, supporting material and at the time of her letter dated 4 March 2005.
- 9.53. The likelihood of this having occurred is strengthened by the tendency evidence which was lead in regard to Mr Kerr's conduct towards Ms Milan in 2002.
- 9.54. As the conduct being considered is in the workplace it is not relevant that Mr Kerr believes that this is the way he has always conducted himself or others think of him as touchy feely.
- 9.55. To substantiate sexual harassment the facts also need to satisfy the second limb of section 22 which is either to establish section 22 (e) or (f). It is not necessary to satisfy both however if I am wrong I will deal with the facts available for each.
- 9.56. Firstly section 22(2)(e) read with section 22(3) is to be considered. I will only consider section 22(2)(e)(ii) as Mr Kerr says he did not have the intention to offend, humiliate or intimidate and there was no other specific evidence on this issue. Section 22(2)(e)(ii) contains an objective test and has a low threshold of a "reasonable person would anticipate the possibility that another person would be offended, humiliated or intimidated by the conduct". The matters in Section 22(3) also need to be considered even though they are not exhaustive of matters to be considered, and relevantly section 22(3)(c) is the relationship between the two people.

- 9.57. As set out above, at the time of this conduct, features of their relationship included; Mrs Smyth's reliance on Mr Kerr as an unofficial mentor to enable her to do her first end of the financial year, someone she smoked and had coffee with, someone she offered to assist and did provide support to with his personal problems, and towards the end a person who was calling and texting her frequently.
- 9.58. There is nothing in the features of their relationship that detract from or make the conduct be seen as other than unwelcomed physical contact of the type described. It is clear if they were just work colleagues a reasonable person would anticipate the level of unwelcomed physical contact would possibly result in a female colleague who was being assisted being offended or intimidated.
- 9.59. I find nothing in their relationship at the time which would change the finding that applying the objective test that a reasonable person would have anticipated the possibility that the other person would be offended or intimidated. The objective reasonable person in the similar position to Mr Kerr would not think this was an appropriate level of physical intimacy in the work place, whilst assisting someone with work and would have anticipated the possibility that the person being touched would be intimidated and/or offended by the contact.
- 9.60. The alternative basis is Section 22(2)(f), as Mrs Smyth gave evidence, it is clear she believed she would suffer detriment, or might even lose her job if she complained which is not uncommon in sexual harassment cases. It is clear that this is not what happened in 2004 to 2005 but this was Mrs Smyth's perception and in regard to the broader allegations in this matter something she said to both her partners Mr Rawiri and Mr Bush and also Ms McKay. It is an issue she raised as to why she did not say something about the touching at the time.
- 9.61. The issue is then whether that is a reasonable belief. It may well be in light of Mrs Smyth's and other staff's view that Mr Kerr wielded influence beyond his level, due to his specialist knowledge and longevity in the office. It should also be viewed in the light that often when women do complain of sexual harassment in the work place, they are forced out of the work place. As set out above my view is that it is either section 22(2) (e) or (f) that need to be established and section 22(2) (e) is the stronger limb on the available evidence.
- 9.62. On the balance of probabilities, I find the touching in 2004 and 2005 was sexual harassment in the workplace under section 22 of the Act.

9.63. There is not sufficient evidence to make such a finding in regard to the allegation that similar touching occurred during Mrs Smyth's HDA in March to April 2006, as it is referred to only in passing and not supported by the type of evidence that supports the findings for the earlier period.

Phone calls and texts

9.64. The next area to consider is the phone calls, voice mail and text messages that Mrs Smyth received from Mr Kerr after she visited his home in August/September 2004 and the application of section 20 or section 22 of the Act.

9.65. This material has to be viewed in light of the visit to Mr Kerr's home in August /September 2004 and Mr Kerr's personal struggles and alcohol consumption over this time. As well as Mrs Smyth's offer of future help to Mr Kerr during this visit, specifically that he could text or phone her if he needed someone to talk to.

9.66. It is clear from both the conversations Mr Kerr had at the time and Mrs Smyth's evidence that she helped Mr Kerr with what he was struggling with. This is what did occur initially and Mr Kerr was still saying this to Mr Fernandez in January 2005 and refers to it in the card he gave to Mrs Smyth in early 2005.

9.67. As I have found at paragraphs 6.81 to 6.83 above, the phone calls and texts became frequent and intrusive. They intruded on Mrs Smyth's family life and were referred to in her letter dated 4 March 2005, as something that had to stop.

9.68. Relevantly, I find on Mrs Smyth's evidence that the nature of the texts and messages changed over time; from seeking help (as offered) to asking about her whereabouts and enquires about what she was doing. These messages and texts increased and became harassing. I am reassured in this finding by the material and events that also happened to Ms Watters, where Mr Kerr's conduct, in regard to email, phone calls and texts followed a similar pattern.

9.69. Similar to Ms Watters they did not stop when requests were made to Mr Kerr to stop the conduct. It is clear this behaviour was harassment, and harassment of Mrs Smyth as a female on the basis of her sex. It is not the type of conduct Mr Kerr engaged in with male colleagues

9.70. There is no evidence of the sexual nature of these calls for them to be considered under the sexual harassment provisions, apart from a general statement in the initial complaint that they were of a sexual nature. No

evidence was given during the hearing or in the material tendered of details of a sexual nature in these calls, texts or voice mail messages. It remained just an allegation.

- 9.71. This conduct will be considered under the sex discrimination provisions of the Act. Section 20(1) (b) provides “harassment on the basis of an attribute”. The calls repeatedly made to Mrs Smyth by Mr Kerr and subject of these calls which changed from concerns about himself, to queries of what she was doing and what she was up to are not types of calls he would make to a male peer.
- 9.72. However, this is not sufficient to prove prohibited conduct and I need to then consider the connection or nexus to work, as a further element to substantiate discrimination under section 20 as “... an area of activity”. In this case the area is work.
- 9.73. At the commencement of this decision is a consideration of the case law in Australia regarding connection to work in vicarious liability cases, which are relevant for interpreting this phrase. The Act in general requires a link between the discrimination alleged and a public area.
- 9.74. On the factual material in this case they were work colleagues, however in regard to the calls which occurred and the intensity to which they increased they were out of work hours, and they commenced after Mrs Smyth attended at Mr Kerr’s home to offer him support and whilst on this visit she made an offer of ongoing assistance. The phone calls, texts (and some visits to her home) initially commenced as Mr Kerr sought help with his personal issues and Mrs Smyth providing this assistance. Whilst this was a generous and humane offer made by Mrs Smyth to a man who she thought had little family or friends to support him it changed their relationship from work colleagues to something different.
- 9.75. It is also clear that over time the type of phone calls changed from assistance to the phone calls becoming intrusive and personal, I find in light of the case law set out above that the nexus to the work was broken by the visit to Mr Kerr’s home and by the offer of support in August/September 2004 and then the help that was given and at the time accepted by Mr Kerr both over the phone and in visits to Mrs Smyth’s home
- 9.76. I do not find that harassment on the basis of sex in the area of work has been substantiated.

Visit to Mrs Smyth's home 8 January 2005

- 9.77. The next issue to consider is do the factual findings in regard to the incident at Mrs Smyth's home on 8 January 2005, fit within the requirements of section 22, sexual harassment.
- 9.78. The details of the incident are found at paragraphs 6.98 onwards, and are to be considered under either section 22(2)(a) or section 22(2)(d) of the Act. There are two aspects to the incident that will be the focus. First is Mr Kerr being found naked in Mrs Smyth's son's bed in Mrs Smyth's home after masturbating and the other is when he approached Mrs Smyth upstairs and placed her hand on his penis through the material of his shorts.
- 9.79. The second aspect fits section 22(2)(a) "...unwelcome act of physical intimacy." The question is then which section does being in her home naked and having masturbated fit into. It will be considered under section 22 (2)(d) "engages in any other unwelcome conduct of sexual nature." The question is, is being nude enough to establish sexual nature or does there need to be a finding of having masturbated? As both are present in this incident it fits within the section.
- 9.80. The Act requires the consideration and application of facts to the law in this level of minutia.
- 9.81. The next area is then to move onto section 22(2)(e) as Mr Kerr's evidence is that he did not intended to offend, humiliate or intimidate, the conduct needs to consider under the objective test in section 22(2) (e) (ii) and again this is why the relationship evidence is important.
- 9.82. At the time of these events, Mr Kerr and Mrs Smyth had worked together from August 2003 and Mr Kerr was Mrs Smyth's unofficial mentor. There were other aspects to their relationship; they smoked together, Mrs Smyth offered to help Mr Kerr when he was struggling with personal problems, a sequence of out of office visits and phone calls which were initially to seek support and assistance with his personal problems as was offered by Mrs Smyth outside the bounds of their work relationship had occurred and over a period of time included phone calls and texts and visits to Mrs Smyth's home. The phone calls and text later became intrusive and harassing and Mr Kerr was warned off by Mr Rawiri.
- 9.83. Even in light of these circumstances surrounding the relationship, with all the events under consideration, I have little difficulty in finding that a reasonable person taking into account these aspects of the relationship would anticipate the possibility of Mrs Smyth being offended, humiliated or intimidated by Mr

Kerr's conduct on 8 January 2005, both the fact that he was naked in her son's room and the conduct from Mr Kerr after he approached Mrs Smyth upstairs.

- 9.84. The biggest hurdle in the case is again the issue of the Act not covering all sexual harassment that occurs in the community but that sexual harassment has to be linked to an area of activity under the Act and in this case it is work.
- 9.85. As set out above, it is clear that this incident happened at Mrs Smyth's home, and Mr Kerr was a work colleague but as previously set out there was a change in their relationship which took it out of the sphere of just work colleagues. This occurred when Mrs Smyth visited his home and then offered to help him with his struggles which she did over the next couple of months. He visited her home to discuss what was happening for him, they discussed his problems on the phone. Mrs Smyth believed he had no friends or family available to assist. Mr Kerr in a card he gave to Mrs Smyth in January 2005 refers to her as his own GROW, in reference to a self-help group that Mrs Smyth had recommended/referred him to. It is also clear from Mr Kerr's conversations with his supervisor Mr Fernandez recorded in his file note²³³ that "LS who was a real mate and was helping him though things".
- 9.86. This change in their relationship and the events from August/September 2004 outside the workplace and at each other homes etc. takes the conduct by Mr Kerr on 8 January 2005 out of the realm of work and breaks the required nexus to public area of activity of work. There is a break and change in dynamics with the humane and generous offer to help.
- 9.87. Similar reasoning also applies to each of the other incidents complained of in Mrs Smyth's case that occur at her home. Incidents in April 2005, May 2005 and August 2006 are similar and largely not disputed by Mr Kerr as stated on each occasion Mr Kerr is found asleep, naked in chair or just naked in a chair on Mrs Smyth's back veranda.
- 9.88. The events whilst very distressing and no-one should have to go through this type of experience they do not have the legally required nexus or connection to the workplace that is required to prove sexual harassment or sex discrimination under the Act.
- 9.89. I do not need to determine if each event would fit within section 22 or whether it is unwelcome conduct of a sexual nature. As set out above, the matter falls down in regard to the nexus or link to work as all three incidents clearly did not occur at work. Unlike the decided cases discussed at the beginning of this

²³³ Exhibit R67, Attachment A

decision, there is not a direct link between events at work and the conduct at Mrs Smyth's home. Whilst conduct maybe seen by the general community as harassment and sexual harassment it does not fit within the limited definition provided by the Act. None of the three incidents set out above fit within section 22 so therefore Mrs Smyth has not proven prohibited conduct by Mr Kerr in regard to these events which occurred at her home. This does not take away from the severity of the impact of the conduct on Mrs Smyth even though it does not fit within the provisions of the Act.

Emails

- 9.90. The next area to consider is the various emails received in the workplace which were tendered at the hearing and which clearly have a connection to the work place. The emails include an email sent on 22 December 2005 titled dear Alcohol²³⁴ dealing with alcohol which was sent after Mr Kerr had signed the Harassment in the Workplace policy. Whilst there is a tenuous link to it being of a sexual nature this does not take away from it being generally inappropriate for the work place.
- 9.91. As found above there were three emails dated, 17 March 2006, 23 March 2006 and 23 August 2006, which are to be considered under section 22(2)(d) as "... engage in unwelcome conduct of a sexual nature". Mrs Smyth's evidence (as it is a subjective test that is being applied) is that these emails where unwelcome. Further in regard to the sexual nature of the emails it is clear by reading the text of each of them that they contain material of a sexual nature.
- 9.92. The question to be decided is whether section 22(2)(e)(ii) is substantiated on the material found to be proven in this matter.
- 9.93. As set out in section 22(3), the relationship is a factor to be considered, at this time as their relationship followed a sequence of events; exchange of letters, setting of boundaries, a mediation session, discussing Mr Kerr's case of there being a misunderstanding and Mrs Smyth's view that he wanted a sexual relationship. There had been a time period where there were no incidents and in March or April 2006 Mrs Smyth was on a HDA so there was greater workplace reliance on Mr Kerr to assist her.
- 9.94. These matters, as previously stated, are to be taken into account in the objective test by looking at the context of the relationship. On the sequence found proven, Mr Kerr was aware of the boundaries and that the attention was not welcome or appropriate.

²³⁴ Exhibit C23

- 9.95. In this context and in the work context generally it is not the answer to this type of allegation (as submitted by the Respondents) that Mrs Smyth never said it was not ok. Mr Kerr admitted the jokes were risqué and crude.
- 9.96. I find in regard to the two emails in March 2006 and one in August 2006, that in the context and circumstance of events in Mrs Smyth's case and the sequence of events after February 2005 in the Respondent's case, including the efforts NTSO management to sort things out, that a reasonable person would have anticipated the possibility that the other person would be offended by the content of these three emails.

Alleged Victimisation

- 9.97. As stated above, to prove victimisation a trigger event needs to be identified and proven, that is a complaint under the Act to the ADC, that a person intends to make a complaint or alleges an act which would amount to a contravention of the Act.
- 9.98. Mrs Smyth's complaint to the ADC was not made until 2011, the evidence does not disclose that at any time before this she had made a complaint to ADC or had intended to make such a complaint.
- 9.99. It would appear that Mrs Smyth's allegations of victimisation against both Mr Kerr and NT Treasury are based on general community understanding of victimisation, her allegation appears to be once she disclosed material to Mrs Clayden on 21 August 2006, she was victimised by Mrs Clayden's response and inaction. I have found that Mrs Smyth's allegations of a conversation with Mrs Clayden on 21 August 2006 have not been proven to the required level, and would not substantiate victimisation even if they had been proven.
- 9.100. The finding is that the factual basis for the victimisation allegation, in the very precise way that it must be proven under the Act has not been established.
- 9.101. The alternative alleged by Mrs Smyth during the hearing was the letter she wrote to Mr Kerr on 4 March 2005, was a complaint, however not a complaint to ADC, and apart from alleging that this complaint was not dealt with under the Harassment in the Workplace policy, and a later allegation that NTSO management planned to get rid of her, there is no specific allegation of detriment after March 2005. This alternative allegation is also not supported by the facts and even if the facts were found to be established they would not substantiate the very specific requirements of victimisation under section 23 of the Act, there being no complaint to ADC or specific detriment articulated.
- 9.102. The allegation of victimisation of Mrs Smyth by Mr Kerr suffers from the same difficulty, in that there was no complaint to the ADC or mention of it. There is

mention of “..formal action against you for harassment” in Mrs Smyth’s letter to Mr Kerr on 4 March 2005, however it is not on this basis that Mrs Smyth has argued her case. It was more generalised allegation of ongoing involvement in her life after she has left NTSO.

9.103. If the trigger was the letter 4 March 2005, the detriment suffered in the work place by Mrs Smyth because of Mr Kerr’s conduct is not articulated, on the factual findings he was away for much of the later part of 2005. The victimisation claim against Mr Kerr was largely not argued at the hearing.

9.104. To summarise two areas of prohibited conduct by Mr Kerr have been substantiated by Mrs Smyth. These are the workplace touching between June 2004 and January 2005 and three emails in 2006.

10. VICARIOUS LIABILITY – NT TREASURY’S RESPONSIBILITY

10.1. The next area to consider is whether the NT Treasury or more specifically NTG are vicariously liable for the prohibited conduct of Mr Kerr the touching in work place between June 2004 until January 2005 and the three emails on 17 and 23 March 2006 and 23 August 2006..

10.2. Section 105 is set out in full below and discussed above;

“105 Vicarious liability

(1) If:

- (a) a worker of a person does an act in connection with his or her work that is unlawful under this Act; or
- (b) an agent of a person does an act in connection with his or her duties as an agent that is unlawful under this Act,

this Act applies in relation to the person as if the person had also done the act.

(2) Subsection (1) does not apply if the person shows that he or she took all reasonable steps to prevent the worker or agent from doing the act referred to in that subsection.

(3) For the purposes of subsection (2) and without limiting the matters that may be taken into account in determining whether the person has taken all reasonable steps, the following matters are to be considered:

- (a) the provision of anti-discrimination training by the person;
 - (b) the development and implementation of an equal employment opportunity management plan by the person;
 - (c) the publication of an anti-discrimination policy by the person;
 - (d) the financial circumstances of the person;
 - (e) the number of workers and agents of the person.
- (4) If, after the hearing of a complaint, the Commissioner finds that prohibited conduct alleged in the complaint is substantiated in respect of an act that a person is taken to have done under subsection (1), the Commissioner must, before making an order that an amount be paid to the complainant for loss or damage caused by the prohibited conduct:
- (a) consider the extent of steps taken by the person to prevent the prohibited conduct; and
 - (b) take those steps into consideration in determining the proportion of the amount to be paid to the complainant by the person.

10.3. The factual matters that are relevant are; what action NT Treasury via NTSO, the employer took before 2004 in regards to the touching and emails to prevent this type of behaviour, and what they did after the events in 2005 as the emails where sent in March and August 2006.

10.4. There are two aspects to consider, firstly what infrastructure, policies, procedures and training existed and second what happened at a personal level in the workplace in regards to Mr Kerr and Mrs Smyth knowledge of these and then the responses of management once matters where raised with them in February 2005. The action management took once they were aware of the alleged inappropriate conduct by Mr Kerr in 2005 including the harassing phone calls and texts is relevant as this is background to the conduct which has the legal nexus to work that is the three emails.

10.5. The First Respondent's case relies heavily on the existence of the Northern Territory Treasury's Harassment in the Work Place Policy (the Policy) and the provision of Anti-Discrimination training to staff. The Policy was tendered in the proceedings but most relevant is whether it was actually in place at the time of the incidents and what training and knowledge staff had on it.

- 10.6. The Policy, unlike the Equity and Diversity policy tendered during the hearing, does not include version control or promulgation date. The Equity and Diversity policy sets out that it is from October 2006.
- 10.7. The NT Treasury 2002/03 Annual Report (a document created at the time) refers to the development of the Harassment in the Workplace policy. It states that the policy underpins the Harassment Awareness Sessions, presented by ADC, which all staff had attended over the past 18 months.²³⁵
- 10.8. Ms Temple's evidence by comparison as to when and how the policy was distributed is very imprecise. She says that it would have gone out in an email and certain training would have been provided to staff. Ms Temple says that it also would have been available on the Treasury's intranet 'Insight', and discussed with senior management who would then inform staff at team meetings.
- 10.9. Ms Temple was unable to give evidence as to when the policy was first introduced, she thinks around 2005, as she worked on the policy before going on maternity leave which was from December 2004 to July 2005. She also gave evidence that training on the policy would have been in the first half of 2005.
- 10.10. In the NT Treasury 2004/05 Annual Report notes in parts 4 – 11 that the Harassment Contact Officers were appointed across Treasury and all completed a two day training course with the NT Anti-Discrimination Commission.
- 10.11. The Annual Report mentioned the Anti-Discrimination and Harassment, Cross Cultural Awareness and Indigenous Awareness Training courses were provided to all Treasury staff.²³⁶ There is nothing similar in the 2005/06 report, apart from under Code of Conduct it states "However given some recent incidents of unprofessional behaviour on the part of new and current staff further consideration needs to be given to reminding and refreshing staff knowledge of their requirements under the Code of Conduct".²³⁷
- 10.12. I find that the Annual Reports prepared at the time are a more accurate reflection of when the Policy was introduced over the imprecise oral evidence of Ms Temple ten years after the event.
- 10.13. It is also clear that after March 2005 Mr Kerr was aware of the Policy having been taken through it by Mr Fernandez on 9 March 2005.

²³⁵ Exhibit C26, Page 22

²³⁶ Exhibit R73, Annexure E

²³⁷ Exhibit R73, Annexure E

10.14. Mr Glenwright a witness called by Mrs Smyth and who worked for NTSO and attended NTSO Management Group meetings but had no involvement in dealing with Mrs Smyth's issues knew of the Policy because he thought it would be followed in a situation where harassment is alleged. However, he was not aware of it being made known to staff.

Training

10.15. There was also general evidence that Anti-Discrimination Training had been offered ever since an earlier ADC complaint was lodged. No evidence was provided of when this training commenced, and it is not appropriate for the Anti-Discrimination Commissioner to conduct independent enquires in regard to this.

10.16. There are a number of aspects to the evidence; firstly was the Anti-Discrimination training part of the FOIT training generally and was it part of the training when Mrs Smyth commenced and secondly is there evidence of other Anti-Discrimination Training courses offered throughout Treasury including NTSO which Mr Kerr undertook in his time with NTSO and before 2003.

10.17. Attendance records from February and March 2005 show that Mrs Smyth, Mr Kerr, Commissioner Clayden, Mr Taylor, Mr Fernandez and Ms McKay all attended this Anti-Discrimination training.²³⁸

10.18. The FOIT program included Anti-Discrimination training in 2003²³⁹ on the outline of training to be offered

10.19. In Ms Temple's witness statement, she also commented that during the time Mrs Smyth was employed at the NTSO, Anti-Discrimination and Harassment training were provided to Treasury employees every 18 months to 2 years.²⁴⁰

10.20. The courses offered included "basic" discrimination training, "advanced refresher" training, for staff that had already completed the basic training and "advanced" training for managers.²⁴¹

10.21. I find on the available evidence that Anti-Discrimination training was offered to NTSO staff including Mr Kerr over the relevant time period and the Policy was in place prior to the June 2004, when the inappropriate work place touching commenced.

²³⁸ Exhibit R73, Annexure D

²³⁹ Exhibit R73, Annexure A

²⁴⁰ Exhibit R73, Paragraph 12(g)

²⁴¹ Exhibit R73, Paragraph 12(g)

- 10.22. It should be noted that the Policy was not a sexual harassment policy. The policy repeatedly refers to work place harassment. It does not mention sexual harassment and does not include a definition of sexual harassment.
- 10.23. There are very different control and power dynamics with sexual harassment than other forms of workplace harassment. The understanding and ways to address sexual harassment have also evolved over the last ten years. Recent case law such as *Richardson v Oracle Corporation Australia Pty Limited* {2013} FCA 102 (confirmed on appeal) the court considered the issue of whether a training package (in a sexual harassment case) met the test of “all reasonable steps” and found it did not and gave guidance on what would be expected in that case and in the future to meet the “all reasonable steps” test.
- 10.24. The evidence and events in this matter have to be assessed against expectations ten years ago in 2004 to 2006 which might not meet current expectations or be adequate as a policy or for training in this area in 2015/16 but needs to be measured against the expectations and requirements of that time.
- 10.25. NT Treasury had in place Anti-Discrimination training and the Policy at the relevant time and as will be set out above Mr Kerr was taken through the policy in March 2006.
- 10.26. The next area to consider is what occurred after management were advised of the events in February 2005 and if they took all reasonable steps, as outlined above, to prevent further touching, emailing, and general inappropriate behaviour.
- 10.27. It is not clear if the allegations in 2005 disclosed to NTSO management included workplace touching or inappropriate use of the work emails, however generally NTSO management dealt with the allegation as general inappropriate conduct by meeting with Mrs Smyth and offering support, monitoring Mr Kerr in the work place, and moving him to a different desk. Then after the March 2005 letters both parties were sent to mediation, and there was follow up after the mediation meeting and management explained and had each of them sign the Policy.
- 10.28. The question then is does this activity meet the requirement of section 105 (2) “...took all reasonable steps to prevent the worker....from doing the act...”.
- 10.29. Section 105 (3) sets out some of the matters to be considered in making this assessment, including anti-discrimination training, and the publication of anti-discrimination policies. This is not an exclusive list but a list of suggested activities.

10.30. The extent to which management were involved is part of meeting the “ took all reasonable steps” test, particularly in light of the repeated evidence from all three witnesses in management that said that Mrs Smyth said she would deal with it herself and did not want to make a complaint.

10.31. I am satisfied that NTG through NT Treasury agency NTSO did take all reasonable steps to prevent Mr Kerr’s prohibited conduct under the Act, by providing Ant-Discrimination training, the Harassment in the Workplace policy which was in place before June 2004, and then once made aware of the general inappropriate conduct allegations again took Mr Kerr through the Policy, moved his desk and instituted limited monitoring, spoke to Mrs Smyth offered support and options and had them attend mediation in March 2005, as well as monitoring the situation and raising concerns again in February 2006.

10.32. I am satisfied that NTG are not vicariously liable for the prohibited conduct found against Mr Kerr.

11. DECISION & ORDERS

11.1. For the reasons set out above, I find that only two of the matters covered by the complaint substantiate prohibited conduct, specifically sexual harassment of Mrs Smyth by Mr Kerr. The touching of Mrs Smyth by Mr Kerr in the workplace between June 2004 and January 2005 and the three emails sent on 17 and 23 March 2006 and 23 August 2006.

11.2. I am not satisfied that the NTSO as part of NT Treasury, formally the Northern Territory Government are vicariously liable for this conduct.

11.3. The matter now needs to proceed to the second phase and for the parties Mrs Smyth and Mr Kerr to make submission on what orders would be appropriate under section 88 and 89 (of the Act prior to amendment in 2015, see Attachment C) in light of the findings above and prohibited conduct found against Mr Kerr.

11.4. I will receive written submissions and supporting evidence from Mrs Smyth to be filed with the ADC by 7 March 2016, response by Mr Kerr by 4 April 2016 and brief response to anything new raised by Mr Kerr’s submission from Mrs Smyth by 18 April 2016.



Sally Sievers – Commissioner

Date: 1 February 2016

WITNESS LIST**Complainant – Linda Smyth**

Name of Witness	Attendance
Linda Smyth	In person
Michael Rawiri	In person
Cy Bush	In person
Wendy McKay	In person
Harold Glenwright	In person
Catherine Weber (formerly Wauchope)	In person
Kerrina Watters (formerly Dove)	By Video-link (Tweed Heads)
Sharon Laughton	In Person
Christine Nestor	Not attending
Andrew MacKenzie	Not attending

Respondent – Northern Territory Treasury and Doug Kerr

Name of Witness	Attendance
Doug Kerr	In person
Kathleen Clayden	In person
Gerard Taylor	In person
Keith Fernandez	In person
Marie Tonks	In person
Lyn Isard	In person
Gail Humble	In person
Sarah Temple	In person
Debbie Charles	In person
Cherie Zahra (nee Spiers)	Video-link Innisfail
Deanna Spiers	Video-link Brisbane
Martin Bryars	Video-link Cairns
Naomi Kerr (Carroll)	Video-link Brisbane
Esmeralda Milan (Emmy)	Video-link Blacktown

List of recorded Telephone Conversations

Person	Date of recording
Martin Bryars	6 April 2009
Martin Bryars	9 March 2010
Keith Fernandez	13 November 2012
Harold Glenwright	26 February 2009
Lorraine James (NT Police)	11 July 2012
Doug Kerr	17 February 2011
Doug Kerr	27 February 2011
Sharon Laughton	20 February 2011
Emmy Milan	25 May 2012
Emmy Milan	27 May 2012
Louise Page (Director EASA)	9 March 2007
Louise Page (Director EASA)	12 January 2015
Rhonda Schulz	16 May 2012
Rhonda Schulz	13 July 2012
Sarah Temple	18 Novembver 2013
Kerrina Watters (nee Dove)	2 June 2012
Catherine Weber (nee Wauchope)	14 November 2013

ANTI- DISCRIMINATION ACT

19 Prohibition of discrimination

- (1) Subject to subsection (2), a person shall not discriminate against another person on the ground of any of the following attributes:
- ...;
 - (b) sex;
 -;

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; or
 - (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.

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; or
 - (b) makes an unwelcome demand or request (whether directly or by implication) for sexual favours from the other person; or
 - (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; and
 - (b) any impairment that the other person has; and
 - (c) the relationship between the other person and the person engaging in the conduct; and

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; or
 - (b) has given, or intends to give, evidence or information in connection with proceedings under this Act or
 - (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) Victimization 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.

31 Discrimination in work area

- (1) A person shall not discriminate:
 - (a) in deciding who should be offered work; or
 - (b) in the terms and conditions of work that is offered; or
 - (c) in failing or refusing to offer work; or
 - (d) by failing or refusing to grant a person seeking work access to a guidance program, vocational training program or other occupational training or retraining program; or
 - (e) in developing the scope or range of a program referred to in paragraph (d).
- (2) A person shall not discriminate:
 - (a) in any variation of the terms and conditions of work; or
 - (b) in failing or refusing to grant, or limiting, access to opportunities for promotion, transfer, training or other benefit to a worker; or
 - (c) in dismissing a worker; or
 - (d) by treating a worker less favourably in any way in connection with work.
- (3) A person shall not discriminate against a worker on the grounds of the worker's religious belief or activity by refusing the worker permission to carry out a religious activity during working hours being an activity:
 - (a) of a kind recognized as necessary or desirable by persons of the same religious belief as that of the worker; and
 - (b) the performance of which during working hours is reasonable having regard to the circumstances of the work; and
 - (c) that does not subject the employer to any detriment.

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.

89 Apologies and retractions

- (1) In addition to an order under section 88, the Commissioner may order a respondent to apologize to a complainant or a complainant to apologize to a respondent and make such retractions as the Commissioner considers appropriate.
- (2) For the purposes of subsection (1), the Commissioner may order an apology or retraction to be published or made in such manner as the Commissioner thinks fit.

105 Vicarious liability

- (1) If:
 - (a) a worker of a person does an act in connection with his or her work that is unlawful under this Act; or
 - (b) an agent of a person does an act in connection with his or her duties as an agent that is unlawful under this Act,

this Act applies in relation to the person as if the person had also done the act.

- (2) Subsection (1) does not apply if the person shows that he or she took all reasonable steps to prevent the worker or agent from doing the act referred to in that subsection.
- (3) For the purposes of subsection (2) and without limiting the matters that may be taken into account in determining whether the person has taken all reasonable steps, the following matters are to be considered:
 - (a) the provision of anti-discrimination training by the person;
 - (b) the development and implementation of an equal employment opportunity management plan by the person;
 - (c) the publication of an anti-discrimination policy by the person;
 - (d) the financial circumstances of the person;
 - (e) the number of workers and agents of the person.
- (4) If, after the hearing of a complaint, the Commissioner finds that prohibited conduct alleged in the complaint is substantiated in respect of an act that a person is taken to have done under subsection (1), the Commissioner must, before making an order that an amount be paid to the complainant for loss or damage caused by the prohibited conduct:
 - (a) consider the extent of steps taken by the person to prevent the prohibited conduct; and
 - (b) take those steps into consideration in determining the proportion of the amount to be paid to the complainant by the person.