

**NORTHERN TERRITORY ANTI-DISCRIMINATION COMMISSION**

**LOCATION:** DARWIN

**TRIBUNAL:** SALLY SIEVERS  
COMMISSIONER

**DATE OF HEARING:** 29 JULY – 31 JULY 2013

**HEARING NO:** H2013005

**COMPLAINANTS:** MR MICHAEL KAKAKIOS

**RESPONDENTS:**

**First Respondent:** DEPARTMENT OF JUSTICE (Corrections)

**Second Respondent:** MR AARON PACKHAM

**Third Respondent:** MR RICK DRAKE

**COUNSEL:** COMPLAINANT: MR BILL PIPER  
RESPONDENTS: MR CRAIG SMYTH

**DATE OF DECISION:** Written Decision published on 8 November 2013

## REASONS FOR DECISION

### 1. FACTUAL BACKGROUND

- 1.1 The Complainant Mr Michael Kakakios and the Second and Third Respondents Mr Packham and Mr Drake were all prison officers who worked in the kitchen at the Darwin Correctional Centre(DCC) between April and July 2011.
- 1.2 In 2011 DCC was administered by Corrections which sat within the Department of Justice (First Respondent).
- 1.3 Mr Kakakios commenced at DCC in 2008. He commenced in the kitchen as an Acting Senior Industries Officer (A/SIO) in December 2010.
- 1.4 Mr Packham (the Second Respondent) worked in the kitchen at DCC from April 2009; he had a Certificate III in Commercial Cookery. He was the Acting Chief Industries Officer (CIO) from 31 March 2011 until 24 June 2011.
- 1.5 Mr Drake (the Third Respondent) was a prison officer in Alice Springs for thirteen years before taking up a position in DCC in 2004. He was in 2011 a SIO in the kitchen at DCC.
- 1.6 Prior to April 2011, SIO Ms McKenna was the A/CIO in the DCC kitchen working with all three men and at least one other SIO and supervising prisoners from K block who worked in the prison kitchen. The evidence from witnesses was that prior to December 2010 the kitchen was in a poor state and below industry standard.
- 1.7 Mr Packham commenced at the end of March 2011 as Acting CIO this was either his first or second time in the role. He consulted with Ms Dumigan the Acting Human Resources Manager at DCC in April 2011 and May 2011 in regard to the management of Mr Kakakios in the kitchen. In at least one conversation, potentially two he raised the issue that he believed Mr Kakakios would “use the gay card” in response to his attempts to manage him in the kitchen.

- 1.8 On 27 May 2011 Mr Kakakios approached Mr Packham in an office (Mr Drake was also in the office) and raised with him his concerns that Mr Packham had been picking on him. This was a heated exchange and during the conversation both men raised their voices and Mr Packham used the words "I can be a real arse hole sometimes."
- 1.9 On 29 May 2011 Mr Kakakios sent Mr Packham an email setting out what he thought occurred at the meeting, Mr Packham drafted one email and then sent a shorter email to Mr Kakakios on 30 May 2011 after discussing the approach he should take with Mr Drake.
- 1.10 Mr Kakakios had a number of rostered days off and then took some sick leave and returned to work at DCC on 7 June 2011.
- 1.11 Ms McKenna was due back from leave in early June 2011 and about this time she received a telephone call from Mr Drake, where he conveyed to her a number of alleged incidents of sexualised inappropriate behaviour by Mr Kakakios.
- 1.12 Mr Kakakios met with Superintendent Miller on his day off on 9 June 2011; he raised with Superintendent Miller allegations of bullying and harassment by Mr Packham and Mr Drake, including Mr Drake's telephone conversation with Ms McKenna and harassment and bullying on the basis of his sexuality by Mr Packham and Mr Drake.
- 1.13 Mr Kakakios followed up his meeting with Superintendent Miller with an email sent on 10 June 2011.
- 1.14 On 17 June 2011 prisoner Mr Stamp spoke to Mr Packham and alleged he had been inappropriately touched by Mr Kakakios in K block.
- 1.15 A Minute containing prisoner Mr Stamp's allegation was provided to Superintendent Miller at a meeting later in the day on 17 June 2011, attended by Mr Packham, Mr Drake and Deputy Superintendent Tunney.
- 1.16 Superintendent Miller also raised at this meeting Mr Kakakios allegations of bullying and harassment of him by them with Mr Packham and Mr Drake.
- 1.17 Mr Kakakios' last day at DCC was 6 July 2011.

1.18 Mr Kakakios' claims of bullying and harassment of him by Mr Packham and Mr Drake after initial delays were investigated by DCC. Interviews were conducted from August to October 2011 and a Preliminary Investigation Report signed by Kyra Andrews and dated 31 October 2011 (Exhibit 1 Folios 11 &12), was completed.

1.19 The police conducted an investigation into the allegations made against Mr Kakakios by prisoner Mr Stamp and no criminal charges were laid (Exhibit 1 Folio 13).

1.20 Mr Kakakios lodged a complaint with the Anti-Discriminations Commission on 20 October 2011.

## **2 COMPLAINANT'S CASE**

2.1 At the hearing Mr Kakakios alleged harassment by Mr Packham and Mr Drake in his work place on the basis of his sexuality in particular homosexuality.

2.2 The words frequently used in the materials filed by Mr Kakakios are that he was bullied and harassed. It must be clearly stated from the outset that the *Anti-Discrimination Act* (the Act) does not explicitly cover bullying. However conduct may fall to be considered under section 20(1)(a) of the Act.

2.3 The matters that need to be proved by the Complainant are harassment on the basis of his attribute – sexuality in the area of work. These are very precise and onerous requirements and are more prescriptive than the everyday use of these words and phrases.

2.4 The attribute of sexuality is not in dispute. Mr Kakakios identifies as gay and Mr Packham and Mr Drake were aware he was gay.

2.5 Mr Kakakios carries the onus of proof to prove on the balance of probability that there was conduct which amounted to harassment, and that this was on the basis of his sexuality and that this led to him being treated less favourably in any way in connection with his work in the DCC kitchen.

- 2.6 The standard of proof is the civil standard, that is, on the balance of probabilities. The Commissioner has 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?
- 2.7 The *Briginshaw* test (Dixon J in *Briginshaw v Briginshaw* [\[1938\] HCA 34; \(1938\) 60 CLR 336](#) at 361-362:) is often mentioned in discrimination matters and this test should not be used to impose a higher standard of proof in discrimination matters. However it has been said it should serve as a warning to decision-makers to be careful of the evidence upon which they rely to make findings of facts on the balance of probabilities, when these findings may have serious consequences for the person against who they are made. So, while a higher standard of proof is not imposed, the evidence produced by the complainant must be able to establish that the conduct was more likely to have occurred than not.
- 2.8 The Complainants case as I understand it has a number of features which separately or together he would argue substantiate his case.
- 2.8.1 Firstly after Mr Packham took over as Acting CIO he rode Mr Kakakios harder or picked on him to an extent that he did not with other SIO's, this resulted in the meeting on 27 May 2011, where Mr Kakakios raised these issues.
- 2.8.2 Secondly it is alleged as background and proof of harassment and bullying, the conversation or conversations Mr Packham had with the Acting Manager Human Resources Ms Dumigan, when he said that Mr Kakakios "would use the gay card". This occurred when Mr Packham was discussing management of the kitchen and Mr Kakakios with Ms Dumigan in May 2011.
- 2.8.3 Third that at the beginning of June 2011 Mr Drake telephoned and had other conversations with Ms McKenna alleging that during her absence from the prison Mr Kakakios had engaged in sexualised behaviour in the kitchen with prisoners, including comparing genital size, flicking or motioning towards prisoners groins etc.

- 2.8.4 Fourth Mr Kakakios case is that he had time off from 27 May 2011 and returned to DCC on 7 June 2011, that he was advised that there had been banter in the kitchen by prison officers which disclosed to prisoners Mr Kakakios' sexuality and who his partner was and speculating on their sex life. This resulted in there being an issue about Mr Kakakios sexuality when he returned on 7 June 2011.
- 2.8.5 Fifth is the final two part allegation that Mr Packham and or Mr Drake were proactive in seeking out the allegation from prisoner Mr Stamp that he was inappropriately touched by Mr Kakakios, something they would not have done but for Mr Kakakios being gay.
- 2.8.6 Or in the alternative Mr Packham actually generated/fabricated the complaint against Mr Kakakios as he wanted him out of the kitchen. Mr Kakakios alleges he was set up because of his sexuality and such a set up would not have been undertaken but for his sexuality.

### **3 FACTS NOT IN DISPUTE**

- 3.1 The First Respondent the Department conceded at the outset that if liability was found then the Department accepted vicarious liability for the actions of its employees (particularly Mr Packham and Mr Drake) under section s105 of the Act. Therefore it was unnecessary to determine the propriety or otherwise of the First Respondents, senior management attempts to resolve the complaints brought to them by Mr Kakakios. However some comment will be made on the impact on Mr Kakakios of the management approach, see paragraph 6.5.14.
- 3.2 That during a conversation and possibly two between Acting CIO Mr Packham had with the Acting Manager Human Resource DCC Ms Dumigan, when discussing management of Mr Kakakios in the kitchen, Mr Packham stated he thought Mr Kakakios would" use the gay card" Mr Packham in his evidence placed these comments in context and

Ms Dumigan in hers set out her concerns. These will be discussed below as will the relevance of the comments in the findings in the matter.

- 3.3 There was a meeting between Mr Kakakios and Mr Packman on 27 May 2011, Mr Drake was also there, voices were raised and Mr Packman said "he could be real arsehole". All three men present recall these words being used.
- 3.4 Mr Drake telephoned and conveyed in person to Ms McKenna allegations of inappropriate behaviour that he says Mr Kakakios had displayed towards prisoners, the precise detail of the flicking allegation is in dispute, however the fact that he conveyed allegations of Mr Kakakios comparing genital size and making comments when prisoner Mr Stamp had diarrhoea are not. The truth of these allegations is vigorously denied by Mr Kakakios.
- 3.5 Mr Kakakios met with Superintendent Miller on 9 June 2011 and complained about bullying and harassment on the basis of his sexuality by Mr Packman and Mr Drake in the DCC kitchen. Mr Kakakios followed this meeting up with an email to Superintendent Miller on 10 June 2011.
- 3.6 Mr Packham prepared a Minute, setting out allegations he says were made by prisoner Mr Stamp to him on the morning of 17 June 2011. The Minute was provided to Superintendent Miller on 17 June 2011.

#### **4 ASSESSING THE EVIDENCE**

- 4.1 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 and looking into each area of disputed facts, the quality of evidence and issues that may impact on the accuracy of each witness in the evidence they gave in each area.
- 4.2 The best evidence is clearly what a person sees hears or experiences with their own senses e.g. they are one of the participants in a conversation or see an incident with their own eyes. 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.

4.3 Also all witnesses have something vested in the outcome, the Respondents, and the Complainant and his work colleagues who gave evidence all appear to have chosen sides in whether what occurred was acceptable. Also others gave evidence as managers on their employer's procedures that they are responsible for administering.

## **5. OBSERVATIONS ON EACH WITNESS WHO GAVE EVIDENCE AND PROVIDED MATERIALS.**

5.1 Mr Kakakios, gave his evidence in a precise manner, and was prepared to make concessions during cross-examination. He was clearly visibly upset when some of the more vulgar allegations made against him by Mr Drake were raised with him.

5.2 The evidence he gave around what was said and his expectations of ongoing employment in the kitchen was less reasonable than other areas. Also there is clearly a difference of views about, the appropriateness of preparing special meals for other prison staff. Also a clear difference in the evidence he and Superintendent Miller gave about what was to happen after the meeting on 9 June 2011. Mr Kakakios evidence was that the allegations would be formally investigated which is, different from Superintendent Miller's perception. Mr Kakakios largely gave his evidence in a measured way.

5.3 Ms Tammie Dumigan in her oral evidence raised the issue of the accuracy of the dates in her original time line that she sent to Ms Glew on 4 July 2011. In her evidence she stated she was on leave in late May early June 2011. However she confirmed that the sequence of events was accurate. Some areas of her evidence remained unclear even after she gave evidence and was cross-examined. Further due to the limited time she worked in the prison I give little weight to her impressions of prison officers.

5.4 Ms Marilyn McKenna is a prison officer with 25 years experience. She clearly aligned herself with Mr Kakakios however in regard to Mr Drake

she placed the best possible interpretation on what he conveyed to her. Ms McKenna's impressions prior to leaving the kitchen in April 2011, of the working relationship Mr Kakakios and Mr Packham and Mr Drake are valuable. Her evidence remained consistent; across the material she provided to the various parties in relation to this matter. She thought the other officers in the kitchen were jealous of Mr Kakakios and that it was obvious that Mr Packham and Mr Drake did not get on with Mr Kakakios. An area in her evidence where I have had to weigh up competing versions is her recollection of what Mr Drake said Mr Kakakios did in regard to flicking at prisoners' groins.

- 5.5 Mr Drake, was articulate and firm in his views in evidence in chief, however argumentative and very reluctant to make reasonable concessions in cross-examination when different versions of events were raised with him. In his evidence it was clear that the new Acting SIO Kakakios was more hands on in the kitchen than him and did things differently. Mr Drake was also very firm in his views about there being a set menu in the DCC kitchen and no special meals for prison staff, and the problem this caused if it was not adhered to. Mr Drake was reluctant to concede that Mr Packham's behaviour was inappropriate in his meeting with Mr Kakakios on 27 May 2011. However he was very firm in his view that Mr Kakakios' conduct was not acceptable.
- 5.6 It was clear from Superintendent Miller's evidence that his meetings with staff such as Mr Kakakios were one of the many tasks he performed. Whilst Superintendent Miller's perception and evidence was that he elicited what Mr Kakakios wanted from their meeting on 9 June 2011, he did not read the follow up email from Mr Kakakios dated 10 June 2011 which clearly set out that he ".....formally request that these two Officers be counseled on what is appropriate workplace behaviours".
- 5.7 Mr Packham gave evidence in the morning on 31 July 2013 in a forthright and controlled manner, he presented very creditably. In cross-examination his greatest area of discomfort, concerned the issue that he did not take action to remove prisoner Mr Stamp from the kitchen after the 17 June 2011 allegations.

- 5.8 It was also suggested in cross-examination that his credit was affected by not checking after the prisoner Mr Stamp allegation was made whether Mr Kakakios was on duty on that day. This will be dealt with below.
- 5.9 The major area to be evaluated is the circumstances and use of the phrase “use the gay card”. This will also be examined extensively.
- 5.10 It is with reluctance that I comment on prisoner Mr Hulley: and make findings in regard to prisoner Mr Hulley, as he was not called for the allegations made against him to be raised with him. However there is both reliance and then criticism of prisoner Mr Hulley in the presentation of the complainant’s case, and this needs to be commented on. It is submitted I should rely on his evidence e.g. that there was banter in the kitchen in regard to Mr Kakakios’ sexuality, both in person to Mr Kakakios and in the investigation report but then in regard to drawing prisoner Mr Stamp’s allegations to Mr Packham’s attention it is submitted that prisoner Mr Hulley is unreliable and manipulative.
- 5.11 As I stated I did not have the benefit of evidence from prisoner Mr Hulley. It is clear that all prison officers’ apart from Mr Packham who later discovered it, thought that prisoner Mr Hulley was manipulative and unreliable. I view material where prisoner Mr Hulley is the only source of evidence with a great deal of suspicion.

## **6 ISSUES & FINDINGS OF FACT**

- 6.1 ***The relationship between Mr Packham and Mr Drake with Mr Kakakios, after April 2011.***
- 6.1.1 Ms Dumigan refers to there being a falling out in the kitchen but cannot recall who told her. She also had conversations with Mr Kakakios about bullying/harassment. At the same time Mr Packham was talking to her about the difficulties he was having managing Mr Kakakios in his new role as Acting CIO.
- 6.1.2 Ms McKenna was clear that Mr Packham and Mr Drake did not like Mr Kakakios.

- 6.1.3 Mr Kakakios was pretty clear that Mr Packham simply did not like him (Exhibit 1 Folio 4 par 10).
- 6.1.4 Mr Packham and Mr Drake did not concede this. However it is clear that Mr Packham had difficulties managing Mr Kakakios in the kitchen. Mr Packham's statement and evidence was that he enjoyed working with Mr Kakakios and there was not a problem when they were both SIO's. The difficulties for Mr Packham in his management of Mr Kakakios arose after Mr Packham became Acting CIO.
- 6.1.5 Mr Drake did not like the way Mr Kakakios went about his work in the kitchen. Mr Drake thought Mr Kakakios and Mr Packham got on cordially.
- 6.1.6 I find that it was not a cohesive work place in the DCC kitchen between April and July 2011.

## 6.2 ***Use of the gay card.***

- 6.2.1 It is clear that Mr Packham said in a conversation to Ms Dumigan after discussing management issues regarding Mr Kakakios in the kitchen that he thought Mr Kakakios would "use the gay card".
- 6.2.2 Ms Dumigan in a time line (Exhibit 1 Folio 17) attached to an email dated 4 July 2011 clearly sets out two occasions on which Mr Packham said he though Mr Kakakios would "use the gay card". The first in May in a conversation Mr Packham came to speak to her about Mr Kakakios being defiant, and ".. that he needs to have a tough conversation but that he knows the "gay card' is going to be played". The second when Mr Packham was going home because of friend's death, later in, May "he mentioned what he thought would happen is happening and Mr Kakakios is using the gay card..."
- 6.2.3 Ms Dumigan told Mr Kakakios of the "gay card" comment around 30 June 2011 after the prisoner Mr Stamp allegation (T96).

6.2.4 Ms Dumigan's evidence is that her response to Mr Packham's comments where that if his dealings with Mr Kakakios were professional there should be no reason for Mr Kakakios to go down that road. Ms Dumigan said it seemed strange and she felt unsure as to why Mr Packham would even mention it.

6.2.5 However in her evidence it appears there was just one conversation from the following exchange (T 93).

"And did he at that time ask for your assistance or any guidance about how to handle the matter?---No, because I think that was the same time as when he was talking about how Michael had asked another favour .....

Right. Did he say to you that he was going to speak to Michael again? Or he thought that he needed to speak to Michael again?---He was because he was going to do the appraisal.

And did he say to you how he thought that - - -?---He didn't think it would go well.

Is that when he said to you that he was afraid or he thought that Mr Kakakios might play the gay card?---I think so, yes. It was all the same day. Same conversation before he left.

Did he explain to you further what he meant by that?---No, because I straight away said that as long as he stays professional it wouldn't come to that."

6.2.6 Mr Packham in his evidence and statement admits the phrase was used but only in one conversation at a time he was under extreme stress as a friend had just died (31 July 2013 T4).

"MR PACKHAM: I actually left the kitchen. I was on my way – my best friend had just died, from Alice Springs. My father was dying of cancer as well. As I went past the demountables, which is the security demountables, Ms Dumigan was there. I was to have a meeting with her on that day. I'm pretty sure I was going to see her. I was actually leaving the jail. As I saw her I caught up with

her and I said that, that I believed he was playing the gay card. It wasn't a derogatory meaning; it was more of the fact that I didn't have time; I needed to speak to her and it was in – my recollection is that I believed Michael was going to put discrimination on me due to his sexuality; it was the way it sounded at the time. I was upset. I was – especially with my father and my best mate dying. It was the wrong choice of words, I admit that. I'm not infallible to making mistakes myself. So – but I did say it on the way out of the jail, and I was going home to catch a plane to my friend's funeral.”

- 6.2.7 Mr Packham later in his evidence admits it was inappropriate.
- 6.2.8 Ms Dumigan states she raised the use of the phrase with Superintendent Miller an event Superintendent Miller cannot recall. He recalls Mr Kakakios performance in the kitchen being raised but not this specific allegation.
- 6.2.9 Ms Dumigan was uncomfortable with the phrase and later questioned Mr Packham's motivation; however she offered advice to Mr Packham to remain professional. Ms Dumigan did not treat Mr Kakakios less favourably due to the comments, and as set out below if they were conveyed to Superintendent Miller he did not recall them or act on them.
- 6.2.10 Superintendent Miller's evidence supports this as after he received Mr Kakakios complaint he did raise it (not in a timely manner) with Mr Packham and Mr Drake when he met with them on 17 June 2011. There is a suggestion that in this meeting he treated Mr Packham and Mr Drake's later allegation against Mr Kakakios as tit for tat, because of Mr Kakakios earlier complaint. The impression being of some scepticism of the allegation against Mr Kakakios because of his earlier complaint not the other way around.
- 6.2.11 Ms Dumigan speculated why the comment was made which Mr Kakakios has adopted in the presentation of this case, he speculates that the comments were made to disadvantage him in

relation to any future complaint he may make to management. However I cannot find that the comments were acted on by management. Mr Packham gave evidence that he did not contemplate that they would be. Mr Packham thought wrongly that his conversations with Ms Dumigan would be kept confidential (T26 31 July 2013). Mr Packham reiterated a number of times in cross examination that he did not intend his comments to go further and thought they were said in confidence.

6.2.12 I find the phrase was, clearly said at least once and in the context of seeking assistance on managing Mr Kakakios in the work place. It is also clear it was said at a time of personal distress.

6.2.13 It is conceded by Mr Packham that use of the phrase was inappropriate. Whether the findings of fact set out above are found to be harassment under the Act or more broadly substantiate prohibited conduct under the Act will be considered below.

### **6.3 Meeting 27 May 2011 and email exchange**

6.3.1 In the lead up to this meeting it is clear that a number of matters had been raised by Mr Packham as Acting CIO with Mr Kakakios as Acting SIO. In emails attached to Mr Packham's statement the issues raised included food being left out, cleanliness, and an inappropriate email. Also Mr Packham had contacted Human Resources to obtain assistance in how to manage Mr Kakakios.

6.3.2 Ms McKenna's view was that Mr Kakakios was outgoing, energetic and got prisoners working hard and that the food quality and service improved after Mr Kakakios started work in the kitchen (Ms McKenna exhibit 1 folio 5).

6.3.3 Mr Packham's evidence was not that Mr Kakakios' standards dropped but that his attitude to Mr Packham changed once Mr Packham was in the position of Acting CIO. Mr Kakakios stopped taking directions and instructions from him in particular in relation to giving away meals to prison staff, leaving out food etc, he was defiant.

- 6.3.4 The evidence from the three men present at the meeting and email exchange after include common features, including that Mr Packham and Mr Drake where in the SIO office and Mr Kakakios approached the office and waited till they finished their conversation before a heated exchange “yelling and screaming”. Issues raised by Mr Kakakios included that Mr Packham was picking on him, kitchen hygiene, free food to other prison staff etc.
- 6.3.5 Mr Packham is a big man and he raised his voice and said, “I can be a real arsehole” (Packham evidence 31 July 2013 T5, and cross-examination).
- 6.3.6 Mr Kakakios in an email after the event stated that he found Mr Packham's conduct threatening, however also stated in his email “After Fridays meeting I hope all the matters raised have been resolved”.
- 6.3.7 Mr Drake's evidence in regard to the meeting was that Mr Kakakios was unprofessional in raising these matters with Mr Packham when he was present. Mr Drake conceded reluctantly in cross-examination that both men were unprofessional. Mr Drake thought Mr Packham and Mr Kakakios had sorted things out they shook hands at the end.
- 6.3.8 Mr Packham (exhibit 1 Folio 9) thought he managed to convince Mr Kakakios that he wasn't picking on him. In the evidence of Mr Packham and Mr Drake there was no mention that the conduct complained of occurred because Mr Kakakios was gay. Mr Kakakios' email dated 29 May 2011 also does not refer to the reason for the issues between himself and Mr Packham being his sexuality.
- 6.3.9. However Mr Packham's draft email raises the issue that Mr Kakakios needed to modify his behaviour in the work environment “...i.e sexual innuendo jokes that are not appropriate in this prison environment”.

- 6.3.10 Mr Packham brief email response demonstrates he thought matters ended that Friday afternoon.
- 6.3.11 Whilst in submissions there is a suggestion that the raised voices and the use of the phrase by Mr Packham “that he could be a real arse hole”, were bullying and harassment, this conversation was initially raised not as part of the allegation of harassment but rather as background to it and that the campaign of harassment started from after the meeting on 27 May 2011. This is relevant for each of the allegations considered below.
- 6.3.12 It is clear this incident has been reinvigorated in light of the later allegations, however I find as all three men viewed it at the time the concerns between the two men had been aired, and that was the end of the matter at that point. There was no allegation that Mr Kakakios’ sexuality played a part in what was primarily a difference of views on the appropriateness of Mr Packham’s management of Mr Kakakios.
- 6.3.13 However the meeting occurred in an area, which was in the hearing of prisoners in the kitchen and the entirely probable suggestion, is made that prisoners may have overheard and taken up and amplified what they perceived as a dispute or difference between the three prison officers. This may in some ways explain the material conveyed to Mr Kakakios on his return to work on 7 June 2011. However as no prisoners were called by either party this possibility could not be explored.

**6.4 *Mr Drake’s comments to Ms McKenna over the phone and in person regarding sexualised conduct by Mr Kakakios.***

- 6.4.1 It is clear from the evidence of Mr Drake and Ms McKenna and their statements (the two participants in the conversations) that Mr Drake said things to her over the phone before she returned to work (end May 2011, early June 2011) and once she returned to work which involved allegations of inappropriate sexualised behaviour towards prisoners by Mr Kakakios.

- 6.4.2 Mr Kakakios case is that the allegations were part of a concerted campaign of bullying and harassment of him by Mr Drake.
- 6.4.3 The allegations made included:
- 6.4.4 Commenting on the prisoners' penis size, including comparing his penis size to those of prisoners. A specific incident is referred to in Mr Drake's statement, but Ms McKenna has generalised this in her relaying of the conversation and Mr Kakakios recall varies again.
- 6.4.5 A crude comment to prisoner Mr Stamp, when prisoner Mr Stamp had diarrhoea, to the effect Mr Kakakios had something to plug it up. Mr Drake is the only person to give evidence of this incident, and it is vigorously denied by Mr Kakakios.
- 6.4.6 Also a disputed allegation as to what precisely was said in regard to Mr Kakakios, motioning towards prisoners' groins resulting in them jumping back. Ms McKenna's evidence is she was told this involved flicking prisoners in the groin area with a tea towel (or wet tea towel). Mr Drake denies this is what he said, Ms McKenna is firm he did (she was pressed and remained firm under cross-examination) and this is what she conveyed to Mr Kakakios. Mr Drake was equally firm that what he conveyed was that Mr Kakakios dropped his shoulder and used the back of his hand in one movement to gesture towards prisoners' genitals, causing the prisoners to jump back.
- 6.4.7 It is unnecessary to make a finding on precisely what was said, the intent was to convey that Mr Kakakios engaged in sexualised behaviour towards prisoners that involved inappropriate motion towards the groin of prisoners.
- 6.4.8 Ms McKenna did not believe any of the allegations of sexualised behaviour. Firstly she just did not think they were true and she confirmed this by asking Mr Kakakios who denied all allegations.

Further in relation to the flicking allegation as she interpreted it she did not think it was true because of the absence of tea towels in the kitchen for some time prior to the allegation.

- 6.4.9 The allegation in regard to comparing penis sizes was conveyed to Mr Kakakios by Ms McKenna on 8 June 2011 after Mr Drake left the work place. The other allegation regarding motioning at prisoners groins was conveyed on 18 June 2011 after the prisoner Mr Stamp complaint had been made.
- 6.4.10 The allegations where denied by Mr Kakakios at the time when they where raised with him by Ms McKenna and where denied by Mr Kakakios in his evidence and statements (T 17). Mr Kakakios is supported by Ms McKenna who worked with him in strenuously denying the truth of the allegations specifically stating that this type of conduct is not in his character.
- 6.4.11 Mr Drake asserts he saw the incidents which is why he conveyed them to Ms McKenna. In evidence in chief he said he did this to give Ms McKenna an update so she didn't walk into possible issue (T132). In cross-examination (T 138) he said, so she not walking into headlong possibilities of trouble. Mr Drake believed she was returning as their supervisor.
- 6.4.12 Mr Drake as set out below denied he had a broader agenda in raising these issues with Ms McKenna (T 142.)
- 6.4.13 "MR PIPER: And I suggest or say that - and I need to put to you that your comments to Ms McKenna were part of a deliberate attempt - - -? ---Not true.

If I can finish the question.

CMR SIEVERS: You've just got to let him finish.

MR PIPER: Part of a deliberate attempt to prejudice Ms McKenna's mind against Mr Kakakios, using his sexuality? ---Not true.

- 6.4.14 Mr Drake's version of events also includes both evidence and material; in his statement that Mr Kakakios apart from these specific incidence he conveyed to Ms McKenna, over the time Mr Drake worked with Mr Kakakios could be quite crude, often referring to male genitalia in conversations, but was funny and had shown him pictures on his work email. This evidence was very general no emails where tendered in evidence of jokes or pictures and no other witnesses besides Mr Packham where called to support the allegations.
- 6.4.15 Mr Packham in his statement (Exhibit 1 Folio 8 paragraph 27) refers to Mr Kakakios, commenting on genitalia of prisoners, rude jokes inappropriate emails and innuendo to support the specific allegations that are made by Mr Drake. Mr Packham in his statement (Exhibit 1 Folio 8 paragraph 29) says that he did not see the flicking at prisoners groins with tea towels but he did see motioning towards prisoners with Mr Kakakios' hand like he was dropping something and then causing prisoners to pull back away from him. This allegation does not refer to prisoners groins and was not clarified in evidence.
- 6.4.16 There were no prisoners called to the truth or otherwise of Mr Drake's claims against Mr Kakakios. The alleged conduct was not reported to DCC management.
- 6.4.17 The Respondents case is that the Mr Drake claims do not have anything to do with Mr Kakakios sexuality but where made because the behaviour was inappropriate.
- 6.4.18 Mr Drake said it wasn't his place to raise the conduct directly with Mr Kakakios but to past it onto his immediate manager.
- 6.4.19 Mr Kakakios (T 17) complained to Superintendent Miller at their 9 June 2011 meeting about Mr Drake's comments to Ms McKenna that he was making comments about prisoner's penis size.

## **6.5 The work place that Mr Kakakios returned to on 7 June 2011**

- 6.5.1 It is alleged by Mr Kakakios in the presentation of his case that banter about his sexuality occurred during the time that he was away after the 27 May 2011 meeting until he returned to the DCC kitchen on 7 June 2011. Specifically that prison officers disclosed Mr Kakakios' sexuality and who his partner was to prisoners, which resulted in there being an issue with his sexuality in the kitchen on his return which had not been the case prior to this.
- 6.5.2 Mr Kakakios named Acting CIO Packham as the officer who disclosed this information to prisoners in his email to Superintendent Miller on 10 June 2011. However in his evidence in July 2013 Mr Kakakios could not recall it being a named prison officer. The case was run on the basis that by a process of elimination with the number of SIO's in the kitchen at the time it had to be Mr Packham and or Mr Drake.
- 6.5.3 Mr Kakakios was told this information second hand from prisoner Mr Hulley on 7 June 2011. Prisoner Mr Hulley told Mr Kakakios that he was told by prisoner Mr Dunstan, that prison officers where talking about Mr Kakakios' sexuality and who his partner was and that it occurred for three days straight (T 31 to 33).
- 6.5.4 All prison officers (apart from Mr Packham) gave evidence that prisoner Mr Hulley was regarded by them as manipulative, untrustworthy and some went as far as to say they would not believe allegations prisoner Mr Hulley made (Ms McKenna, T 105).
- 6.5.5 The only evidence to support the allegation of banter is from a source that is viewed as manipulative and unreliable. Further the reliability of the evidence is further compromised by it being hearsay that is prisoner Mr Hulley telling Mr Kakakios what another prisoner told him. The evidence is by the time Mr Kakakios first makes the complaint to Superintendent Miller a number of steps away from the source.

- 6.5.6 The other area of evidence relied on by Mr Kakakios to support this allegation is the prisoner accounts provided in the internal investigation and the investigation report (Exhibit 1, Folios 11&12).
- 6.5.7 Four prisoners were spoken to in the internal investigation, prisoner Mr Dunstan knew of Mr Kakakios sexuality from prisoner Mr Bissett and thought his partner was a police officer. Prisoner Mr Kelly was aware of the information being passed around, but was not aware of who Mr Kakakios partner was. Prisoner Mr Gamble did not hear anything. Prisoner Mr Hulley was aware through family of Mr Kakakios sexuality and was the most forthcoming, however as stated above his reliability and trustworthiness are questionable.
- 6.5.8 The Respondents ran the argument that Mr Kakakios and his partner's sexuality were widely known by prisoners before June 2011, and Mr Kakakios fairly conceded that there were other ways prisoners could have found out, including prisoner Mr Bissett who lived in the same area. However the important point is not that prisoners could have found out other ways but that after this time Mr Kakakios felt that prisoners treated him differently (T 34).

"MR SMYTH: You did not hide the fact that you were gay, did you?"

MR KAKAKIOS: I didn't make an issue of it.

MR SMYTH: It's quite conceivable, isn't it, Mr Kakakios, that prisoners could have figured it out?

MR KAKAKIOS: They may have, but they never treated me any differently".

- 6.5.9 However the difficulty in substantiating this part of Mr Kakakios allegation, apart from did the banter actually occur is attributing responsibility for it to Acting CIO Packham or SIO Mr Drake. Both Mr Packham and Mr Drake gave sworn evidence it was not them;

Mr Packham in his statement (Exhibit 1 Folio 8) and evidence (T7 31 July 2013) and Mr Drake in his evidence on 30 July 2013 (T144).

- 6.5.10 It is very clear it was an issue of concern for Mr Kakakios at the time and he raised it with Superintendent Miller on 9 June 2011 and followed it up in his email dated 10 June 2011.
- 6.5.11 After his meeting with Superintendent Miller, Mr Kakakios gave evidence that still more was going on and that the work environment was strange. He stayed away from Mr Packham and Mr Drake as he didn't trust them (T T59.5). Mr Drake stated that Mr Kakakios acted differently towards him on the weekend of 11 & 12 June 2011 (exhibit 1, Folio 7 paragraph 12).
- 6.5.12 Mr Kakakios case was that this was the first time his sexuality became an issue in the work place.
- 6.5.13 However to prove prohibited conduct under the Act there has to be credible evidence that the event occurred, who did it as well as evidence of the impact on the complainant. In this case Mr Kakakios has not in presenting his case discharged the onus of proof to the required level as to what occurred in the days he was absent, and who was responsible for this and how it came about. This allegation cannot be relied on to substantiate the allegation of harassment.
- 6.5.14 I will briefly comment here on a matter that Mr Kakakios stated led to greater stress and also the continuation of inappropriate behaviour in the work place being the lack of timeliness by Superintendent Miller in addressing the issues Mr Kakakios raised with him, either himself or through a delegate with Mr Packham and Mr Drake. No action was taken from 9 June 2011 to 17 June 2011 – 8 days and the internal investigation did not commence until August 2011.

## **6.6 Prisoner Mr Stamp allegations made on 17 June 2011**

- 6.6.1 It is clear that an allegation was made by prisoner Mr Stamp that he was inappropriately touched by Mr Kakakios. The truth or otherwise of this allegation is not a matter to be decided in these proceedings. The issues to be considered are whether the complainant's allegations which are made in the alternative are able to be substantiated and if substantiated do they on their own or in conjunction with the other allegations prove prohibited conduct.
- 6.6.2 This allegation was presented in two alternative ways; firstly that Mr Packham was proactive in seeking out the allegation from prisoner Mr Stamp, something he would not have done but for Mr Kakakios being gay. The alternative is that Mr Packham actually generated the complaint against Mr Kakakios as he wanted him out of the kitchen. It was a set up because of Mr Kakakios sexuality a set up that would not have occurred but for his sexuality.
- 6.6.3 To consider these allegations I will firstly set out the sequence of events as the evidence disclosed them, particularly as conveyed by Mr Packham and others who corroborate or add to or place doubt on the sequence.
- 6.6.4 These events are set out in Mr Packham's statement and evidence (exhibit 1 Folio 8 and also evidence 31 July T 7 onwards).
- 6.6.5 Mr Packham was acting CIO in the kitchen at DCC on 17 June 2013, and commenced duty at 5.30am. He was approached by prisoner Mr Hulley who told him that prisoner Mr Stamp had been inappropriately touched by Mr Kakakios. This conversation took 5 to 10 minutes. This conversation was seen to occur by Ms McKenna.
- 6.6.6 Mr Packham then spoke to prisoner Mr Stamp. In his statement it is unclear how this occurred, however in his evidence (31 July

2012 T 31) Mr Packham says prisoner Mr Hulley left and he went out and asked prisoner Mr Stamp to come into the office (31 July T36.30). Mr Packham spoke to prisoner Mr Stamp in the office. Prisoner Mr Stamp told him that Mr Kakakios had touched him on the penis (the actual word he used was "the stick") and that it had occurred on the evening of 15 June 2011.

- 6.6.7 Mr Packham spoke to prisoner Mr Stamp for approximately 20 minutes, asking questions about what happened, whether there were witnesses. Mr Packham gave prisoner Mr Stamp options of how to proceed; including that Mr Packham could speak to the Superintendent, or write up a formal report and go to see the Superintendent. Mr Packham also told prisoner Mr Stamp what would happen after was that police would investigate the matter.
- 6.6.8 The Minute Mr Packham prepared is (Exhibit 1 folio 8 AP8) three paragraphs long. Mr Packham said it took him about fifteen minutes to prepare. Mr Packham then tried to obtain an urgent meeting with Superintendent Miller. This did not occur and the report was provided to Superintendent Miller at a prearranged meeting about another matter that afternoon.
- 6.6.9 Prior to the meeting Mr Packman showed the Minute to Mr Drake.
- 6.6.10 Ms McKenna in her evidence and statement saw each of these meetings taking place however did not hear what was said. Ms McKenna's evidence was the meeting with prisoner Mr Stamp in the office took a long time and that when Mr Drake came on shift he either joined the meeting or there was a long meeting between Mr Drake and Mr Packham. Ms McKenna gave evidence of an additional long conversation of fifteen minutes to half hour duration between Mr Packham, Mr Drake and prisoner Mr Hulley in the kitchen. This was not the evidence of Mr Packham or Mr Drake.

- 6.6.11 Mr Drake recalls briefly asking prisoner Mr Stamp how he was and also having a brief conversation with prisoner Mr Hulley. However Mr Drake and Mr Packham's evidence does not support the occurrence of a later longer conversation with prisoner Mr Hulley.
- 6.6.12 There was also a large amount of evidence on just what procedure should be followed to report a prisoner's complaint against a prison officer.
- 6.6.13 The evidence on the procedure once a complaint is made by a prisoner comes from numerous sources. As a side issue an attack on both Mr Packham and in some ways Mr Kakakios credit was made in regard to what was the proper procedure for moving forward a prisoner's complaint. None of the staff involved including Mr Kakakios had read the applicable DCC procedure (exhibit 2). Both Mr Packham in proceeding at the time and Mr Kakakios and other prison staff in commenting on what occurred relied on their knowledge of previous practice or what they would have done.
- 6.6.14 Ms McKenna (T 102-3) and Mr Drake had never written up a prisoners complaint. Ms McKenna and Mr Kakakios view was that it was not normal practice for a prison officer to write up a prisoner complaint against another prison officer. Superintendent Miller (T163 -164) agreed it was unusual for a prison officer to type up a prisoner's complaint.
- 6.6.15 However the Standard Operating Procedure in place at the time (exhibit 2) at paragraph 5.3 require an immediate report to the Deputy Superintendent Operations, examination of the prisoner, the Deputy Superintendent Officer in charge will be responsible for collecting full and relevant reports by all staff involved in the incident, which must be submitted prior to the end of the shift and the matter must be referred to the police for investigation. It is

clear no-one in this matter followed the process even after it was reported to Superintendent Miller.

- 6.6.16 Superintendent Miller in his evidence was of the view that if the complaint was brought to him he would expect it to be placed in writing.
- 6.6.17 However Superintendent Miller also agreed in cross-examination that an alternative approach for complaints would be the superintendent's parade (T 162).
- 6.6.18 Mr Kakakios case was run on the basis that the other more usual options were, a phone call to the Ombudsman, solicitor or family member, or filling in a form for a superintendent's parade. Ms McKenna (T102-3) supported this evidence.
- 6.6.19 This is also supported by the file note prepared by Deputy Superintendent Tunney after the 17 June 2011 meeting. It records; "Superintendent Miller queried why he had not received a report on this allegation when they had become aware of the allegation and why Phillip Stamp had not requested a Superintendents Parade to see him with the allegation".
- 6.6.20 It is clear alternatives existed on how the allegation could have been progressed but I do not find that the approach taken was indicative of a set up or wrong. Superintendent Miller also said (T163 -164) it was prison officers' job to gather the basic facts.
- 6.6.21 It is clear writing up a prisoners' complaint is unusual. However as can be seen by the Minute itself it is not an extensive document, it is a very basic account of the allegation.
- 6.6.22 I do not find because it was not the usual way to deal with a complaint that this proves to the level required that the allegation was a set up or a fabricated allegation. I also do not find on the basis of the same analysis that it demonstrates an overzealous or vigorous pursuit of the allegation.

6.6.23 Further Mr Packham (31 July 2013 T 8) gave sworn evidence that he did not fabricate the Stamp allegation or encourage prisoner Mr Stamp to make the allegation. Further under cross-examination Mr Packham denied that he pursued the allegation because of Mr Kakakios' sexuality (31 July 2013 T 42).

6.6.24 Mr Drake was also cross-examined in regard to the allegations being a set up or pursued because of Mr Kakakios sexuality. Mr Drake (T. 141).

"PIPER: I'm asking you whether you would have done the same with - if the allegation was about any other prison officer who was heterosexual?---Of course I would".

6.6.25 Further Mr Packham's credit was attacked as it was asserted that he should have checked documentation, which would have shown that Mr Kakakios was not on duty on the day of the alleged incident. This is not sustainable as an attack on his credit as it is inconsistent with the other criticism in Mr Kakakios case that Mr Packham was, too proactive in the pursuit of the complaint from prisoner Mr Stamp. It was a matter to be pursued by those whose job it was to investigate the incident once it was raised as it had to be with senior management.

6.6.26 Also weighing against the allegation being a fabrication is Mr Kakakios own evidence of an incident of rough house he participated in with prisoner Mr Stamp and prisoner Mr Kelly, which occurred in very similar broad circumstance to those surrounding the prisoner Mr Stamp allegation.

6.6.27 Also weighing against fabrication is when the allegation was investigated by police prisoner Mr Stamp maintained the allegation throughout the process. During the hearing I heard of numerous adverse consequences for prisoner Mr Stamp, such as being removed from working in the kitchen and from K block.

- 6.6.28 There was also the evidence from Mr Drake about the evening of 17 June 2011 including how upset prisoner Mr Stamp was and the need to remove him from the kitchen over the weekend.
- 6.6.29 Mr Kakakios to support his allegation that the prisoner Mr Stamp complaint was a set up because of his sexuality, relies on evidence given anonymously to police ( Exhibit 1 folio 13, page 22) by an unidentified witness who alleges that Mr Kakakios was being set up etc. I am unable to give any weight to this evidence, it's anonymous and the accuracy and reliability of the statement has not been and cannot be tested. It cannot be relied on to support the inference being suggested by Mr Kakakios against Mr Packham and Mr Drake.
- 6.6.30 It is clear from Mr Kakakios evidence, that the making of, and investigation of the prisoner Mr Stamp allegation affected both his working life in the prison and his life generally, including relations with his extended family, particularly after the NT News published an article referring to the allegation.
- 6.6.31 Mr Kakakios to prove the allegations relies on the inference he says I should draw from long meetings with prisoners, the unusual way the complaint was written up by Mr Packham and the evidence given anonymously to police.
- 6.6.32 I do not accept the inferences that I am being asked to draw to support Mr Kakakios' case that the prisoner Mr Stamp complaint was fabricated or over vigorously pursued by Mr Packham. The allegation once made had to be brought to the attention of authorities. It may not have followed the course other prison officers would have taken or followed the procedure strictly set down by DCC itself. However the Minute does not show an extensive investigation, it sets out basic information. A 5 to 10 minute initial conversation and then a 20 minute conversation with prisoner Mr Stamp are not indicative of an excessive

investigation, and do not support the case that Mr Kakakios alleges.

6.6.33 Also against the inference that Mr Kakakios is asking me to draw is the sworn evidence of both prison officers that it was not a set up and that it is a matter that they would have pursued against any prison officer, not just Mr Kakakios as a gay prison officer.

6.6.34 The allegations in the alternative put forward by Mr Kakakios are not supported by the evidence, therefore this allegation cannot be considered to support the overall allegation of harassment on the basis of sexuality in the work place.

### **6.7 Do it the gay way comments**

6.7.1 This phrase was used after Mr Kakakios had left the DCC kitchen on 6 July 2011.

6.7.2 Ms McKenna reported the use of the phrase and spoke to staff about it being inappropriate. She states it occurred on 8 July 2011, and was a phrase used by Mr Packham when speaking to two prisoners who were preparing salads. The phrase was also on a blackboard in the prison kitchen. (Ms McKenna's evidence, statement. and File note Folio 2C Section 77 report).

6.7.3 Ms McKenna spoke to both Mr Packham and Mr Drake about this on 11 July 2011. However did not convey the event to Mr Kakakios until 3 September 2011.

6.7.4 The explanation given by both Mr Drake and Mr Packham was that it was a phrase used in the ABC TV series Angry Boys which was being watched by prisoners. Mr Kakakios does not accept this and had watched the series to check for the phrase and he gave evidence that it did not occur in the series. This leaves me with the word of two officers against one. The series was not tender or a transcript of the dialogue provided.

6.7.5 The phrase was not used in Mr Kakakios presence and Mr Drake and Mr Packham deny it was used in relation to Mr Kakakios.

Mr Kakakios was not advised of the comments until September 2011.

- 6.7.6 Whilst the comments reflect very poorly on Mr Packham and the culture that existed in the DCC kitchen, they postdate Mr Kakakios' presence in the kitchen and more crucially there is no direct evidence to link them to Mr Kakakios.
- 6.7.7 I find that the phrase was used as it is admitted by Mr Packham, and heard by Ms McKenna and confirmed by Mr Drake, what is missing is any evidence that it has any connection to Mr Kakakios that is required to establish harassment of him. See the discussion re harassment set out below.

## **6.8 Investigations**

- 6.8.1 An Internal investigation titled 'Preliminary Investigation Report- Alleged Claims of Harassment from PO Michael Kakakios' (Exhibit 1 Folio 11 & 12) conducted interviews in August, September and October 2011 and produced a report dated 31 October 2011. The process followed was that a corrections investigator interviewed prisoners and prison officers in regard to the allegations, and found insufficient evidence to proceed to a formal investigation.
- 6.8.2 The Respondents in their submission did not rely on the report. The Respondent's submissions point to numerous inconsistencies in the report and the way information in file notes of significance did not make it into the report. The Respondent submitted I should not rely on the material in the report to assist in substantiating Mr Kakakios allegations.
- 6.8.3 There was a Police investigation into prisoner Stamp's allegation; The investigation occurred between June to August 2011, no charges were ever laid.

## **7 THE ACT AND INTERPRETATION OF THE RELEVANT SECTIONS**

- 7.1 The relevant sections of the Act are at "Attachment A".

- 7.2 As stated the applicable sections of the Act, require proof of a number of matters to establish discrimination. Mr Kakakios case alleges harassment on the basis of Mr Kakakios sexuality in the work place.
- 7.3 A number of relevant phrases are defined in the Act or have been interpreted in cases decided by various courts in Australia.
- 7.4 As stated earlier there is no doubt about the attribute of sexuality fitting within the definition and being proven.
- 7.5 The word harassment is not defined in the Act, whereas sexual harassment is at s 22 of the Act. There is no NT case law to provide guidance on what is meant by harassment under the Act.
- 7.6 The Respondent's submissions set out the law in Australia on the use of the word harassment in the Commonwealth *Disability Discrimination Act 1992* where 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.2. to disturb persistently; torment, as with troubles, cares, etc."
- 7.7 Also later cases use other dictionary definitions to assist in interpreting harassment. However after much analysis the cases and definitions offer broad guidance but state that individual cases turn on their own facts. The common features are "troubled repeatedly by the other".
- 7.8 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.
- 7.9 The final requirement is establishing less favourable treatment, which is less favourable than a worker who did not have such an attribute (s 20(2) and also s 31(2) (d)). I agree with the Respondents submission that it is self-evident if harassment is proven to have occurred on the basis of an

attribute at work, it would constitute less favourable treatment in connection with work.

7.10 As set out above the burden of proof in s91 of the Act is on the balance probabilities. See the discussion above at paragraphs 2.6 & 2.7.

## **8 APPLYING FACTUAL FINDINGS TO THE LAW**

8.1 In line with the findings of fact made above the only two areas that remain to be considered under the Act, are the use of the phrase “use the gay card”, and secondly to consider Mr Drake’s conduct in advising Ms McKenna of a number of allegations of sexualised behaviour.

8.2 These allegation need to be considered in light of the relationship between Mr Packham, Mr Drake, and Mr Kakakios, which has been set out above and is demonstrated by the heated exchange on 27 May 2011.

8.3 Firstly considering the use of the phrase “play the gay card” by Mr Packham. It was not conveyed to Mr Kakakios until the end of June 2011. The issue is whether its use and the context of it use fits within the broad definition of harassment, as set out above in paragraph 7.6. I find that it does not; it was a limited occurrence, not said in the presence of Mr Kakakios or his work colleagues as a group but in a one on one conversation. Further even if it where conveyed to Superintendent Miller there is no evidence that it influenced the way he dealt with Mr Kakakios or influenced his management of Mr Kakakios.

8.4 Whilst as I have said the use of the phrase reflects poorly on Mr Packham it does not substantiate harassment resulting in less favorable treatment of Mr Kakakios in his work place as defined under the Act.

8.5 The final area to apply findings of fact to the law is Mr Drake’s comments to Ms McKenna alleging sexualised behaviour by Mr Kakakios. It is clear that three incidents where raised. The question is was this conduct harassment. If as stated in the Respondents submissions it could be proven that it was the deliberate spreading of false rumours, it may fit

within the definition. The next step would then be to prove that it was due to Mr Kakakios sexuality.

8.6 Mr Kakakios bears the onus of substantiating the allegation that Mr Drake knew they were false and they were part of a campaign of harassment due to his sexuality. Against this is the evidence from Mr Drake that he saw the incidents and believed them to be true and he conveyed them to Ms McKenna as he wanted her to do something about them, before Mr Kakakios landed himself in trouble.

8.7 I find in line with the material set out above that Mr Drake when he conveyed the allegations to Ms McKenna believed them to be true. On this finding the events do not fit within the definition of harassment under the Act.

8.8 Further there is also no evidence of the next requirement to prove the allegation, which is that the information was conveyed because of Mr Kakakios sexuality. There is no direct evidence of this. Mr Kakakios asks me to draw an inference from the ongoing relationship tensions. I am unable to do this as there is the direct evidence from Mr Drake, that he did not do it because of Mr Kakakios sexuality but because he believed the behaviour was inappropriate.

8.9 As it is for Mr Kakakios to prove the allegation on the balance of probabilities, I am not satisfied that Mr Kakakios has met the onus of proof in regard, to this allegation.

## **9 CONCLUSION**

9.1 As set out above there were two areas of conduct about which I made factual findings, where I needed to apply the provisions of Act to decide if prohibited conduct had been proven. However when applying the provisions of the Act to the incidents I have found they do not substantiate the allegation of harassment on the basis of sexuality at work.

9.2 As set out in the body of the findings, the other incidents relied on due to the findings of fact do not support the case put forward by Mr Kakakios and did not need to be considered under the sections of the Act.

9.3 However even though the findings of fact or the application of the facts to the Act do not reach the level to establish prohibited conduct under the Act, the conduct alleged is clearly unacceptable in the work place, it is disrespectful to all concerned, and has had a serious impact, on moral and productivity. It has pitted workers against each other over a number of years.

## 10 DECISION:

For reasons set out above, I find that the conduct alleged in the complaint, harassment on the basis of sexuality at work is not substantiated, and I dismiss the complaint.



Sally Sievers  
Commissioner  
8 November 2013

ANTI- DISCRIMINATION ACT

**Interpretation**

(1) In this Act:

**sexuality** means the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality.

**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:

.....;

(c) sexuality;

.....;

**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.

### **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.