ACT CIVIL & ADMINISTRATIVE TRIBUNAL

CLINCH v REP (No. 2) (Discrimination) [2020] ACAT 68

DT 6/2019

Catchwords: **DISCRIMINATION** – vilification and victimisation – gender identity – posts and comments on social media – meaning of incitement – orders made – compensation awarded

Legislation cited:
ACT Civil and Administrative Tribunal Act 2008 s 9
Civil Law (Wrongs) Act 2002 s 35
Discrimination Act 1991
Human Rights Commission Act 2005 s 53A
Trade Practices Act 1974 (Cth)

Cases cited:
Australian Capital Territory v Wang [2019] ACAT 65
Australian News Channel Pty Ltd v Voller [2020] NSWCA 102
Bottrill v Sunol [2018] ACAT 21
Clinch v Rep [2020] ACAT 13
DLH v Nationwide News Pty Ltd (No.2) [2018] NSWCATAD 217
Fairfax Media Publications; Nationwide News Pty Ltd; Jones v Toben [2002] FCA 1150
Giorgianni v. The Queen [1985] HCA 29
Kovac v Australian Croatian Club Ltd (No 2) [2016] ACAT 4
Mewett v University of Canberra [2018] ACAT 61
Sunol v Collier (No 2) [2012] NSWCA 44
Yorke v Lucas (1985) 158 CLR 661

Tribunal: Senior Member B Meagher SC (Presiding)
Senior Member K Katavic

Date of Orders: 8 September 2020
Date of Reasons for Decision: 8 September 2020

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) DT 6/2019

BETWEEN:

BRIDGET CLINCH
Applicant

AND:

BETHANIE REP
Respondent

TRIBUNAL: Senior Member B Meagher SC (Presiding)
Senior Member K Katavic

DATE: 8 September 2020

ORDER

The Tribunal orders that:

1. The respondent remove from any website or social media, that she owns or controls, and in particular her Facebook page "Beth Rep" as referred to in these proceedings all posts, statements, information, suggestions or implications, including hyperlinks, contained in Exhibit A4.

2. The respondent remove from any website or social media, that she owns or controls, and in particular her Facebook page "Beth Rep" as referred to in these proceedings all posts, statements, information, suggestions or implications, including hyperlinks which are the same or of similar effect, whether directly or indirectly, as those contained in Exhibit A4.

3. The respondent refrain from making, publishing or distributing any statements, information, suggestions or implications, including hyperlinks on any website or social media that she owns or controls, posts which are the same or of similar effect, whether directly or indirectly, as those contained in Exhibit A4.

4. The respondent pay the applicant the sum of $10,000 by way of compensation.

……..
Senior Member B Meagher SC
For and on behalf of the Tribunal

REASONS FOR DECISION

Introduction

1. These proceedings allege unlawful vilification and victimisation based on gender identity under the *Discrimination Act 1991* (**the Discrimination Act**) arising from posts on a social media page operated by the respondent. Some of the background and history of the matter has been set out in *Clinch v Rep* [2020] ACAT 13. The allegations relate to posts on the respondent's Facebook page. The relevant legislation is also set out in full there. It is not repeated here but we will set out important parts where relevant. As a result of an order made in that decision the complainant has reduced the posts complained of to a list that has 32 categories.[1] The posts include posts made by the respondent; posts made by others that she has liked; and posts made by others that have remained on the Facebook page.

2. The complainant made a complaint to the ACT Human Rights Commission (**HRC**). On 13 May 2019, the HRC referred the complaint to the Tribunal in accordance with section 53A of the *Human Rights Commission Act 2005* (**HRC Act)**. The Tribunal regards referrals from the HRC as an application made under section 9 of the *ACT Civil and Administrative Tribunal Act 2008* (**ACAT Act**).[2] We refer to the complainant as the applicant in these reasons.

3. There is some history between the parties. This complaint arose after an earlier complaint of a similar kind. As part of a mediated settlement of that complaint, the respondent agreed to apologise to the applicant using the following agreed words which were posted on the respondent's social media page (**the apology**):

> *I apologise for any hurt I have caused Bridget and for any way I have vilified or victimised her.*

4. The present complaint relates to comments posted in response to the apology and subsequent posts made by the respondent, including comments associated with those posts. On 20 February 2020, the Tribunal decided a preliminary issue regarding the scope of the complaint and made orders.[3] The respondent had

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[1] They are listed in Exhibit A4

[2] *Mewett v University of Canberra* [2018] ACAT 61 at [11]

[3] *Clinch v Rep* [2020] ACAT 13

sought to dismiss the proceedings on several grounds. The Tribunal declined to do so but confined the enquiry as to contravention of the Discrimination Act to conduct occurring between 25 July 2018, being the date the apology was posted, and 18 April 2019.

The applicant's claim

5. The applicant alleges the respondent engaged in unlawful vilification based on gender identity on two grounds:

   (a) The first is related to the comments attributed to the apology and the respondent's 'likes' in respect of particular comments.

   (b) The second is related to a series of posts the respondent made herself after the apology was posted and the further posts by others responding to them.

6. The applicant also alleges she has been the subject of victimisation by the respondent because of her complaint to the HRC and these proceedings, evidenced by her posts on social media.

7. The applicant seeks the following orders:

   (a) An order preventing the respondent from further vilifying trans people or the applicant on the basis of being trans.

   (b) An order that the respondent delete all previous derogatory and vilifying media and social media posts that refer to her or trans people.

   (c) An apology as drafted by her.

   (d) General damages which she puts at $10,000.

   (e) Aggravated damages of $10,000.

8. The applicant provided a table of posts and associated comments which she relied upon to evidence her claim. Apart from the apology, there are 32 individual posts made by the respondent. The applicant claims that the comments that follow the respondent's posts are evidence of actual incitement. The respondent adopted the numbering in that table for the purposes of setting out her position and

submissions. The Tribunal has also used the applicant's numbering to refer to posts and comments in these reasons.

The respondent's position

9. Generally, the respondent argued that she had no control or authorship of comments attributed to the apology or other posts thereafter. She submitted they were not her words and therefore she could not be said to have vilified or victimised the applicant. She also argued that the posts and comments did not rise to a level that could be said to incite vilification or victimisation. There are similar arguments made when addressing the individual posts in Exhibit R3 and we have considered them in reaching our conclusions.

Evidence relied upon at the hearing

10. The applicant filed documents with the Tribunal the following documents which she tendered:

    (a) The referral from the HRC, including many posts on the Facebook page of the Respondent[4].

    (b) Applicant's submissions dated 14 July 2019.[5]

    (c) Applicant's submissions dated 7 March 2020.[6]

    (d) Applicant's schedule of posts now relied on.[7]

    (e) Email dated 2 July 2020.[8]

    (f) Statement of Jennifer Atkinson dated 23 February 2020.[9]

11. The applicant verified the factual contents of her written submissions after being sworn and was not cross examined. One was a statement by her and another a submission by her that was objected to in part.[10] We accept the submissions have mixed assertions and facts. This is not an uncommon feature of material relied

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[4] Exhibit A1
[5] Exhibit A2
[6] Exhibit A3
[7] Exhibit A4
[8] Exhibit A5
[9] Exhibit A6
[10] The respondent objected to paragraphs 1-5, 8, 9 and 12-19 of the applicant's submissions dated 14 July 2019.

upon by self-represented litigants in this Tribunal. The Tribunal is not bound by the rules of evidence. Some of the statements would be admissible and we will only rely on them. Subject to those objections there was no factual issue with the applicant's evidence.

12. While the applicant was not cross examined, she did present her case on her own behalf and appeared to us to be an honest witness. She occasionally found it difficult to suppress her anger at what she saw as disrespect in submissions by counsel for the respondent. We inferred from this, that she was understandably sensitive in relation to the subject matter of the complaint. We did not think that counsel for the respondent was intending any disrespect.

13. The respondent also relied on the following documents which were tendered:

    (a) Witness statement dated 11 October 2019, excluding paragraphs 21-22.[11]

    (b) Supplementary evidence consisting of other posts that were on the Facebook page that were in chronological order.[12]

    (c) A table of responses to the complained of posts.[13]

14. Exhibit R3 responded to Exhibit A4 although the numbering was different. [14] We have provided numbering references when we look at individual posts.

15. The respondent verified her statement and was also not cross examined. We did not have a real opportunity to observe the demeanour of the respondent but as her evidence has not been the subject of cross examination there is little scope for disagreeing with her evidence.

16. Consequentially, we set out what are uncontested facts.

Facts

17. The facts that emerge from the applicant's evidence are as follows:

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[11] Exhibit R1
[12] Exhibit R2
[13] Exhibit R3
[14] It preceded A4 which was provided in compliance with the earlier order of the Tribunal. Hence the numbering differences

(a) Ms Clinch first came to know of the respondent after International Women's Day in 2018. The respondent had made comments that led the applicant to make her first complaint to the HRC. The applicant had been told about them by friends and she believes they were on Reddit, Instagram and Facebook. The posts were shared widely across various social media platforms also. It led to an article in Australian media. After she made the complaint this was also made known by the respondent in the same manner. The respondent had been banned by Twitter for this. This last statement may be inadmissible, but it is conceded by the respondent in her statement.

(b) This first complaint led to a mediated outcome in ACAT that involved an apology which was posted by the respondent on her Facebook page on 25 July 2018.

(c) This was followed by 304 comments and shared six times. It is Instance 1 in Exhibit A4.

(d) The applicant regarded what followed as a breach of the mediated agreement and brought proceedings in ACAT to enforce this but discontinued them and made the complaint the subject of these proceedings instead.

(e) Ms Clinch describes herself as a somewhat minor political figure. She ran for election in 2016 and 2018 once at Federal level and once at State level. She had been a member of the Greens. She is no longer involved or a member of a party.

(f) She had been in the Australian Defence Force and in 2010 medically transitioned from life as a male to female. She made submissions to the ADF and they changed their policy that prevented trans service. This put her in the public eye, and she was invited to speak at universities and other community events about this. At a recent event she was pictured with a local councillor and that picture was put on the councillor's social media platform. This led to disapproving emails and phone calls to the councillor. Some of this is the subject of the posts here numbered 31.

(g) Ms Clinch has for the moment withdrawn from public life because of these matters.

(h) She says she cannot put a value on the hurt and impact by having to deal with the complaint and the length of time involved. She left the Greens party because if it. She has found it impossible to shut out the comments as even if she does not look for them, others tell her about them. She has felt humiliated and distressed and fears a repetition of the ACAT egg incident.[15] She has withdrawn from public life. She realised how far it had affected her when Ms Rep was banned by Facebook for a month for an unrelated event and this felt like a weight taken from her.

18. The facts that emerge from the respondent's evidence is as follows:

(a) Ms Rep says in her statement that she is active on social media. She is banned from Twitter and chiefly uses Facebook from which she has been banned from time to time for differing reasons. She does not know all her followers, but many are feminists and lesbians who she says are, like her, supportive of gender nonconformity but are concerned about the impact of "trans activism" on woman's spaces, services and opportunities. She says that as her page is public, posts offer differing and opposing perspectives. She has 757 followers and 1776 friends in total. They include friends, family, old fans / listeners from prior radio jobs she has had in various places, passengers from her time as a tour guide and feminists – the majority of whom she knows only online.

(b) She has been involved in various political organisations, which are predominantly feminist.

(c) In addition to the apology she paid $700 to the applicant to resolve the earlier complaint.

(d) She asserts that the applicant uses what she describes as a derogatory term of TERF about her and her followers. She attached a post by the applicant dated 30 August (the year is not expressed but we assume it was 2018 and was on the applicant's social media page). The post gives a thumbs up to a wiki definition of TERF which on its face is descriptive of the views of the group and not especially offensive – the word exclusionary may be thought

[15] *Clinch v Rep* [2020] ACAT 13 at [57]

an overstatement of the views of some. It is accompanied by words that are quite critical of such persons namely "regressive, misinformed, hateful little creatures…" The comment appears to follow the initial posts following the apology. As will be seen, many of those posts are hard to excuse on any level and no doubt sparked a reaction from the applicant. The words used are restrained by comparison with the comments that appeared on the respondents Facebook page but are not helpful.

(e) The respondent identifies as a feminist with issues concerning trans activism and an interest in political activity that highlights this.

(f) Importantly, the respondent explains the chronology of the initial posts. She has provided extra posts and commentary putting the initial complaints into context.[16]

(g) She says the initial comments were not of concern until after comments by Kelley Glanney and Jordan Aldred, when the discussion became heated and by the end there were 299[17] comments of which 205 were directly following on from these posts which were certainly provocative and anti-feminist.

(h) She says she was not an active participant in the discussion but admits as the applicant has pointed out that she 'liked': some-shown by a thumbs up by a reader whose name can be gleaned by hovering over the symbol with a computer mouse.

(i) The respondent says that she did not invite the comments or coordinate them. The posts are by people many of whom she does not know personally. She says she believes to be true her responses to the complaint in Exhibit R3.

(j) She says the few posts she made involve gender critical comments that reflect her views which she says are honest and reasonable in an ongoing discussion about the impact of what she describes as aggressive trans activism on the human rights of women. She describes herself as a radical feminist and she maintains that there is a need to resist aggressive trans

[16] These are all in Exhibit A4 Item 1-18 and Item 2 in Exhibit R3

[17] There were more as we explain later

activism. We will assume that there are individuals who engage in such activity, and that the posts of Aldred are seen by the respondent as an example of this.

(k) She maintains she has not vilified anyone. We will assume that she believes this but need to establish objectively whether that is so.

(l) She has also suffered some financial hardship and stress caused by the complaints.

(m) The respondent says she is supportive of gender non-conformity and concerned about the impact of trans activism on women's spaces, services and opportunities. She resides in the ACT and works as a radio presenter at two local stations.

19. We make the following findings in respect of the respondent's evidence. The respondent could have deleted the comments made against the apology or someone else might have made a complaint about them to the HRC. They were rude, offensive and unacceptable. The comments complained of by the applicant concern many of the posts that followed. The applicant has identified some comments the respondent 'liked' but gave up looking further as they were distressing. Some of those liked are complained of. In submissions, the respondent's counsel says that it merely highlights the comment and does not imply approval of it. That may be an intention, but it is not what a normal reader would think.

Jurisdiction

20. The respondent again relied on the lack of jurisdiction argument dealt with in the interim decision.

21. At the hearing, subject to objection as to content, the applicant tendered the witness statement of Jennifer Atkinson,[18] stating she was an ACT resident and had accessed the material in the ACT.

[18] Exhibit A6

22. It was conceded by the respondent that the material was accessed in the ACT. For the reasons in the interim decision coupled with this further evidence the jurisdictional argument cannot succeed.

Aid and abet argument

23. The respondent's counsel assumed that the liability of the respondent was for aiding and abetting the vilification or victimisation. He drew our attention to *Yorke v Lucas* (1985) 158 CLR 661 (***Yorke***).

24. The applicant maintained that she was not relying on section 73 of the Discrimination Act.[19]

25. In *Yorke*, the High Court decided that even though misleading conduct then proscribed under section 52 of the *Trade Practices Act 1974* (Cth) may be innocent for a person to aid and abet it he or she must have knowledge of the a breach of section 52. Referring to section 75B of the Trade Practices Act[20], the majority said[21]:

> *the proper construction of par.(c) requires a party to a contravention to be an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention.*

26. Section 75B is not the same as section 73 of the Discrimination Act. The word 'knowingly' is absent. Arguably such knowledge may not be necessary. However, the knowledge required in *Yorke* was knowledge that the information conveyed was wrong. The case relied on a culpable driving case[22] where there was strict liability for the driver, but the accomplice was only guilty because he knew the vehicle had faulty brakes. The knowledge that is required is not a subjective intention to mislead but a knowledge of the facts that objectively made the statement misleading.

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[19] *A person who aids, abets, counsels or procures someone else to do an act that is an unlawful act is taken, for this Act, also to have done the act.*

[20] It refers to a person who *(a) has aided, abetted, counselled or procured the contravention*… and *(c) has been in any way, directly or indirectly,*
knowingly *concerned in, or party to, the contravention.*

[21] *Yorke* at [18]

[22] *Giorgianni v. The Queen* [1985] HCA 29

27. The applicant relied on conduct of the respondent in inserting her own posts, liking specific posts of others and not removing particular posts that she knew of. She argued in effect that the respondent was guilty as a primary participant. She relied on *Voller v Nationwide News* (***Voller***) now the subject of a decision of the NSW Court of Appeal.[23] She also relies on *Jones v Toben* [2002] FCA 1150.

28. In *Voller*, Basten JA met an argument similar to that made here as follows:

> *The defendants sought to distinguish this finding on the basis that they had played no such active role in relation to the postings on their Facebook page. The point of distinction may be accepted; however, it does not follow that they were not publishers. They facilitated the posting of comments on articles published in their newspapers and had sufficient control over the platform to be able to delete postings when they became aware that they were defamatory. Applying the general law as qualified by the provisions of the Defamation Act, including s 32, the primary judge did not err in concluding that, in the circumstances revealed in the evidence, the defendants were publishers of third party posts on their Facebook pages.*[24]

29. It is true that the capacity of a large media organisation to employ a moderator distinguishes it from an individual such as the respondent. It seems to us, however, as expressed in the earlier decision on the preliminary question the respondent has the capacity to shut down the page or remove offending posts once she becomes aware of them and she chose not to. Whilst *Voller* was directed at the act of publication it is this act that is caught by section 67A.

30. This was explained by Branson J in *Jones v Toben* when she said at [73]:

> *In my view, the placing of material, whether text, graphics, audio or video, on a website which is not password protected is an act which causes words, sounds, images or writing to be communicated to the public in the sense that they are communicated to any person who utilises a browser to gain access to that website.*

31. Counsel for the respondent also made the point that defamation was a tort of strict liability. She argued that comparison with defamation cases was problematic where aiding and abetting was relied on. In defamation cases there is a defence of innocent dissemination.

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[23] *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller* [2020] NSWCA 102

[24] *Voller* at [47]

32. For the purposes of resolving this case we will assume that it is necessary for us to be persuaded that the elements of the contravention relied on were known to the respondent at relevant times and that unlike defamation the absence of innocent dissemination needs to be proved by the applicant.

33. The respondent's submissions in respect of the specific posts and comments is considered below.

34. The respondent also drew or attention to the decision of Allsop P, as he then was, in *Sunol v Collier (No 1)* [2012] NSWCA 44. We accept that there can be quite robust language used in advancing an argument and the implied constitutional rights to free speech will ensure that some latitude may be afforded to participants in discussion. We have borne this in mind in assessing the particular posts complained of.

Has the respondent engaged in unlawful vilification and/or victimisation of the applicant?

35. 'Gender identity' is defined in the dictionary of the Discrimination Act to mean the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person, with or without regard to the person's designated sex at birth.

36. Vilification is the subject of section 67A of the Discrimination Act which relevantly states:

> ***Unlawful vilification***
>
> *It is unlawful for a person to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the ground of any of the following, other than in private:*
>
> **Examples—other than in private**
>
> *1. screening recorded material at an event that is open to the public, even if privately organised*
>
> *2. writing a publicly viewable post on social media*
>
> *3. speaking in an interview intended to be broadcast or published*
>
> *4. actions or gestures observable by the public*
>
> *5. wearing or displaying clothes, signs or flags observable by the public*

Note. Serious vilification is an offence under the Criminal Code, s 750.

However, it is not unlawful to—

(a) make a fair report about an act mentioned in subsection (1); or

(b) communicate, distribute or disseminate any matter consisting of a publication that is subject to a defence of absolute privilege in a proceeding for defamation; or

(c) do an act mentioned in subsection (1) reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and presentations of any matter.

37. Victimisation is proscribed by section 68. Omitting parts, it says:

1. It is unlawful for a person (the first person) to subject, or threaten to subject, another person (the other person) to any detriment because—

(a) the other person, or someone associated with the other person—

(i) has taken discrimination action*; or*

(ii) proposes to take discrimination action*; or*

And

"discrimination action" means any of the following:

(a) begin a proceeding in the ACAT or a court in relation to this Act;

(b) make a discrimination complaint*;*

38. In its earlier decision, the Tribunal considered the applicable legal principles governing vilification and victimisation.[25] We do not repeat those here, but provide the following summary of those principles:[26]

(a) An objective test must be used.

(b) 'incite' means "to rouse, to stimulate, to urge, to spur on, to stir up or to animate and covers conduct involving commands, requests, proposals, actions or encouragement".

(c) It is not necessary to establish any one was incited or an intention to incite.

[25] *Clinch v Rep* [2020] ACAT 13 at [34]-[39]
[26] Adopted from *DLH v Nationwide News Pty Ltd (No.2)* [2018] NSWCATAD 217 at [10]

(d) The act must be capable of inciting the prescribed reactions in an ordinary member of the class to whom the act is directed/the audience or likely audience.

(e) The context in which the act occurred must be used to assess the capacity of the public to incite the relevant reaction.

(f) The persons to who the act is directed, the audience or likely audience must be identified and considered.

(g) The assessment must be made by reference to the 'ordinary' member of the relevant audience.

Consideration of the apology and associated comments

39. The apology attracted many comments. The comments facility was not deactivated at all after the apology was posted. The respondent 'liked' several comments. The applicant provided the Tribunal with a sample of 18 comments and did not keep track of all those which the respondent 'liked'.

40. The applicant did not complain about the apology. It is the start of the group of comments complained about. The respondent argues that the comments selected by the applicant are cherry picking and omit the large number of aggressive posts by Jordan Aldred and others that are themselves hateful. She says she did not delete either type of post so that the picture was not distorted.

41. We accept that the respondent did not immediately know or have reason to expect that this would ensue but early on she became aware of them and chose to leave them there. Leaving the anti-feminist rants on the page could have had no other effect than it would provoke her followers to respond in kind and they did. The fact that the anti-feminist comments are unacceptable does not make the responses to them acceptable. Once she was aware of the comments and did not remove them, she is responsible for them. We explain elsewhere the legal arguments about primary and secondary publishing and the knowledge necessary not to be an innocent disseminator and/or an aider and abettor. Assuming the comments complained of are objectively such that they fall within section 67A or section 68 of the Discrimination Act then the complaint is made out.

42. We consider the relevant comments below:

(a) Comment 1.1 (R2.3): clearly the language expresses views that attack transwomen in a humiliating way. Given the context it must be taken to include the applicant. The audience is described by the respondent in her statement and they would clearly be and were incited by such language. The audience is wider than that – as explained by the applicant – and earlier had gone onto other media and was shared widely. The respondent actually 'liked' this post and we reject the explanation that this does not mean she should be taken as approving it. We accept that robust language expressing a point of view is not necessarily a contravention of the Act and that the bar is high. This post contravenes section 67A.

(b) Comment 1.2 (R2.4): it is said this has been removed but it is likewise a contravention of 67A. It was also 'liked' by the respondent.

(c) Comment 1.3 (R2.1): this is not as bad. On its own it would not be a contravention of section 67A but given what followed and the assertion that she hears about the violence against women perpetrated by trans activists – which impliedly the applicant is – it is part of a vilification of men – including the applicant – who transition to women and contravenes section 67A by being allowed to remain, and by being 'liked' by the respondent.

(d) Comment 1.4 (R2.2) is in the same category as 1.1. There is an argument that the applicant is a bully and that this is not about gender identity. This is unpersuasive. It attacks the applicant by attributing male aggression to her and uses offensive language in doing so. It contravenes section 67A.

(e) Comment 1.5 (R2.6) on its own it may not be so bad but in its context, it continues to incite what was already a growing list of vilifying comments. It was 'liked' by the respondent and contravenes section 67A.

(f) Comment 1.14 (R2.15) also breaches section 68.

(g) Comment 1.19 (R 2.11) is an example of the impact of the incitement. The writer says "I hate Bridget and I don't even know who he is."

43. The balance of comments at item 1 of Exhibit A4 are all the same.

44. We find the sample of comments relied upon by the applicant which were 'liked' by the respondent contravene section 67A or section 68 and do not attract any of the exemptions in that provision. The apology itself is not the subject of complaint and nor could it be. However, the respondent had the following options: deactivate comments from the beginning or deactivate comments once they escalated. The respondent claimed she did not do so because she did not want to censor the views expressed by other people. Regardless of her personal philosophy on censoring other people's views, these were made on a social media page for which the respondent was responsible. The respondent therefore had the ability to shut down comments or at least not allow them to escalate in the manner they did. We also find that this was compounded by the respondent reacting to certain comments. Again, she had a choice. Even if the respondent was not minded to deactivate comments, there was no need to react to them. We find the respondent's conduct in this regard contravenes section 67A without exception. It was simply not necessary. To do so unnecessarily added fuel to a conflict that the apology was supposed to end.

45. We do not repeat every comment in these reasons but consider the following examples are consistent with our finding:

> *I just went Bridget's page* [sic]. *Penis people once again bullying women.*
> *Biology is reality.*
> *#istandwithbeth*[27]

> *Bridget Clinch is a male bully, and the Greens letting him swing his dick like this?*
> *I am showing this to every female supporter I know – my bother may suck, but he still used to be a politician – of all three parties. Certainly none of the older women in any of my craft classes, or support groups for fibro or endo believe that Bridget is a woman.*
> *All women should see the Green's misogyny and contempt for women. I was about to update my membership but instead I'm leaving.*[28]

> *I'm not entirely* [sic] *what has happened but it seems to me as though through some sort of legal process Beth has been made to deny reality. Your sisters stand with you and support you Beth.*[29]

[27] Exhibit A4, item 1.2, comment 'liked' by the respondent
[28] Exhibit A4, item 1.4, comment 'liked' by the respondent
[29] Exhibit A4, item 1.5, comment 'liked' by the respondent

46. We do not see any greater public purpose in promoting a debate that consistently falls below any standard of respectable discourse on both sides and there is no justification for the comments to remain.

47. The respondent submitted that 'liking' such comments did not constitute vilification or victimisation. She further submitted the comments concerned a political affiliation and were not directed at gender identity. We do not agree. The comments either name the applicant or refer to her as being male. The respondent's reaction to those comments falls within section 67A.

Consideration of the respondent's posts

48. As many of the posts contain language that is vile and offensive, we do not intend to repeat them here. We will identify the posts being discussed by the numbers given to them by the parties in Exhibits A4 and R3. We will endeavour to deal with the arguments made by the parties to each post but will, once the same argument is repeated, do so as succinctly as possible and will not continue with such detail once a representative sample is explained.

49. Post 2 (R3) is a cartoon that might be amusing in less heated discourse. It was drawn by the respondent. It was regarded by her as tongue in cheek. Predictably it drew more vilifying comments and in the context of the last five days of extreme comments only served to exacerbate the situation as evidenced by comments at 2.1 and 2.2. It contravenes section 67A.

50. Post 3 (R4) is by the respondent and contravenes section 68 and was certain to provoke worse.

51. Post 4 (R5) is by the respondent and is also intended to be self-mocking but could only have led to more extreme comments.

52. Post 5 (R6) contravenes section 67A. The comments are consistent with incitement.

53. We do not intend to continue articulating each post and the conclusions we have reached. The foregoing is a sample. The remaining posts all fall into similar categories. We have been through them all at the hearing and reviewed them to prepare these reasons. The problems with the balance is that they are the same as

what we have described so far. Not only was the respondent just allowing the posts to remain, she was actively stirring the debate and predictably got many more vilifying and victimising posts.

Unlawful vilification

54. Using the numbering in Exhibit A4, the applicant claimed posts 2, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 24, 26, 28, 29, 30, and 31 by the respondent contravene section 67A.

55. It is significant that the first post in this series (2) was posted on 30 July 2018, only five days after the apology. The post coincided with comments continuing to accrue against the apology. The posts are reasonably frequent. They also have a common transgender theme. There are a significant number of comments attributed to each post. Further, some of the posts name the applicant or are about the applicant or contain an image of the applicant.[30] These also have comments attributed to them.

56. Having regard to the principles set out above, we consider the posts identified by the applicant contravene section 67A. We do not consider any of the exceptions apply. While it is not necessary to establish actual incitement, we regard the comments as evidence of incitement, nonetheless.

57. The respondent submitted some of the posts should be viewed as light-hearted or pejorative reference to herself. It is difficult to reconcile the posts in that context particularly where they follow a common theme related to gender identity and are aimed at like-minded people.

Unlawful victimisation

58. We also agree with the applicant that the posts that she has identified as victimisation contravene section 68. Using the numbering in Exhibit A4, posts 3, 16, 23 and 33.1 constitute victimisation.

[30] Exhibit A4 items 18, 20, 22, 23, 24, 30, 31

59. Post 3 (R4), post 16 (R20) and post 23 (R30) are implicitly about the applicant. In the context of other posts and comments which identify the applicant, it is not difficult to find these posts infer the respondent is talking about the applicant.

60. Post 33.1 (R46) is in fact a comment by the respondent following a post by her calling out the applicant for making a complaint and taking the matter to the tribunal. The respondent's comment which names the applicant and these proceedings is plainly victimisation.

What orders should be made?

61. We are persuaded that an order should be made requiring the respondent to delete or other remove from her Facebook page that is open to the public all the posts complained of as well as any that may have been posted since that have the same character. We are also persuaded that she should refrain from making or enabling or not removing such posts in the future. We were given no assistance with the content of such orders but have used orders that reflect what was ordered in *Jones v Toben* [31] and *Bottrill v Sunol* [2018] ACAT 21 (which orders were derived from the form of orders made in earlier cases in VCAT).

62. We are not minded to order an apology. Courts have explained why they are often inappropriate. In *Jones v Toben* at [106] Branson J said:

> *…I do not consider it appropriate to seek to compel the respondent to articulate a sentiment that he plainly enough does not feel. As Hely J pointed out in Jones v Scully at [245], "prima facie the idea of ordering someone to make an apology is a contradiction in terms". The applicant did press for an order requiring a "retraction" by the respondent. I understood the applicant to be seeking a statement of retraction by the respondent. In the circumstances, it seems to me that the practical distinction between an apology and a statement of retraction is slight. I do not consider it appropriate to order the respondent to issue any statement of retraction*.

63. We agree and that is the case here.

Compensation

64. The power to make an order awarding compensation is contained in section 53E(2)(c) of the HRC Act. In *Kovac v Australian Croatian Club Ltd (No 2)*

[31] [2002] FCA 1150

[2016] ACAT 4 (***Kovac***) at [51]-[55] the tribunal adopted the "material contribution" test, that is, did the breach materially contribute to the particular losses claimed. The tribunal found the following losses were compensable:

(a) The physical and psychological injuries pleaded.

(b) Humiliation.

(c) Loss of salary and other employment entitlements during the time the applicant was off work due to the effects of the breach.

65. The tribunal considered the principles for the assessment of the quantum of damages, including the role of community norms and comparative verdicts. It acknowledged that there is no fixed amount or range of damages that might be awarded.

66. Each case must be considered in light of its own facts and assessment made of the amount which can be fairly regarded as reasonable compensation for the injuries and disabilities which the particular applicant has sustained from the unlawful act. However, the award must conform to a general pattern established by precedent and can neither be manifestly excessive nor manifestly inadequate. It must fall within a range defined by those two parameters and provide proper compensation for what has been suffered.

67. In *Kovac,* the tribunal also held that it had no power under section 23 of the ACAT Act to award interest or to award costs under section 48 of the ACAT Act.

68. There are similar provisions in other states. It has been suggested in some interstate cases that a different approach from a tortious assessment might be applicable. The preponderance of authority would seem to be that the award, if any, should be compensatory only and seek to put the applicant in the same position as she would be if not for the conduct complained of. Here, there is no claim for economic loss. There is no medical evidence suggesting psychiatric harm. Unlike defamation awards there is no element of vindication in the amount and, in any event, that is provided by the other orders which are not made in defamation cases. The award is similar to the injury to feelings aspect of defamation awards. In a personal injury case in the ACT, no damages would be

awarded as there is no established psychiatrist injury (see *Civil Law (Wrongs) Act 2002* section 35).

69. In her statement and in her demeanour in the running of the case, the applicant explained the impact on her both as a private person and also in her public life as an aspiring politician. We accept her evidence.

70. In *ACT v Wang* [2019] ACAT 65, it was submitted that the award appealed from was about seven times more than previous awards under the section and it did not refer to comparable decisions or fall within a pattern of such awards. The Tribunal noted that in *Kovac* $62, 000 was awarded and so the submission was not correct. Nonetheless, the awards have not been large. Each case is different. In *Kovac No2* the applicant had suffered from a medical condition of chronic adjustment disorder. The amount for non-economic loss was $30,000.

71. In this case the applicant submitted that aggravated damages should be awarded. This is a form of compensatory damages which might be awarded where the conduct of the respondent makes the harm worse. Here the applicant submits that is the case because of an absence of apology and the refusal to concede. We think that the continued harm occasioned by having to run the case is reflected in the award that would be made normally and the conduct of the respondent did not add to that as in a defamation case where truth is pleaded. The award must take into account the ongoing nature of the harm.

72. In all the circumstances we have concluded that the amount of compensation should be $10,000.

Orders

73. For the reasons set out above, we make the following orders:

    (a) The respondent remove from any website or social media, that she owns or controls, and in particular her Facebook page “Beth Rep” as referred to in these proceedings all posts, statements, information, suggestions or implications, including hyperlinks, contained in Exhibit A4.

    (b) The respondent remove from any website or social media, that she owns or controls, and in particular her Facebook page “Beth Rep” as referred to in

these proceedings all posts, statements, information, suggestions or implications, including hyperlinks which are the same or of similar effect, whether directly or indirectly, as those contained in Exhibit A4.

(c) The respondent refrain from making, publishing or distributing any statements, information, suggestions or implications, including hyperlinks on any website or social media that she owns or controls, posts which are the same or of similar effect, whether directly or indirectly, as those contained in Exhibit A4.

(d) The respondent pay the applicant the sum of $10,000 by way of compensation.

……..
Senior Member B Meagher SC
For and on behalf of the Tribunal

HEARING DETAILS

FILE NUMBER:	DT 6/2019
PARTIES, APPLICANT:	Bridget Clinch
PARTIES, RESPONDENT:	Bethanie Rep
COUNSEL APPEARING, APPLICANT	N/A
COUNSEL APPEARING, RESPONDENT	A Greinke
SOLICITORS FOR APPLICANT	N/A
SOLICITORS FOR RESPONDENT	Feminist Legal Clinic Inc
TRIBUNAL MEMBERS:	Senior Member B Meagher SC Senior Member K Katavic
DATES OF HEARING:	10 July 2020