

CITATION: *GK v Dovedeen Pty Ltd & Anor (No 3)*
[2011] QCAT 509

PARTIES: GK
v
Dovedeen Pty Ltd
Joan Hartley

APPLICATION NUMBER: ADL134-10

MATTER TYPE: Anti-discrimination matters

HEARING DATE: 4 October 2011

HEARD AT: Brisbane

DECISION OF: **Ann Fitzpatrick, Member**

DELIVERED ON: 25 October 2011

DELIVERED AT: Brisbane

ORDERS MADE: **1. The application is dismissed.**
2. No order as to costs.

CATCHWORDS: Sole operator sex worker – motel
accommodation-comparator – implied repeal
of prior inconsistent provisions

Anti-Discrimination Act 1991, s 106

*Edwards v Hillier & Educang t/as Forest
Lake College [2006] QADT 34*
*Purvis v State of New South Wales
(Department of Education and Training) &
Anor [2003] HCA 62*
*Attrill v State of Queensland [2011] QCAT
361*

APPEARANCES and REPRESENTATION:

APPLICANT: Self represented

RESPONDENTS: Represented by David Edwards, Barrister
at Law

REASONS FOR DECISION

Background

- [1] This matter has been referred from the Anti-Discrimination Commission of Queensland. A complaint was lodged in that Commission on 12 July, 2010 against Dovedeen Pty Ltd which trades as the Drovers Rest Motel at Moranbah, Queensland. The complaint is also against Mrs Joan Hartley, a Director of that company, a manager of the motel and a licensee of the Liquor Licence for the Drovers Rest Motel.
- [2] The complainant alleged that she was discriminated against on the basis of lawful sexual activity in the area of provision of accommodation. She also complained that she was asked unnecessary questions about being a sex worker and that she was overcharged because of her status as a sex worker.
- [3] By Decision made 10 December, 2010 it was ordered that the full name of the complainant not be published in the proceedings and that she be referred to as GK in the proceedings.

Uncontested Facts

- [4] GK is a sole operator sex worker.
- [5] On 28 June, 2010 she was a guest at the Drovers Rest Motel in Moranbah. She engaged in prostitution during the period of her stay at the motel.
- [6] On 29 June, 2010 GK went to reception to settle her account and was told by the second respondent, Mrs Hartley, that next time she came to Moranbah she would have to stay somewhere else. In the course of the conversation it was said by Mrs Hartley that she was not going to allow prostitution in her motel.
- [7] Mrs Hartley confirmed to GK that she would not to be allowed accommodation in the future because GK was a sex worker.
- [8] Mrs Hartley said words to the effect that she had nothing against prostitutes, but she did not want them working from her motel.
- [9] GK complained that she was being discriminated against on the basis of lawful sexual activity. Mrs Hartley responded "So sue me" and said she would call the police if GK came to the motel again.
- [10] GK was charged \$200.00 for her accommodation, which she later established was in excess of the usual nightly rate of \$135.00. When GK rang the Drovers Rest to query the charge, Mrs Hartley told her that it was because it took cleaners twice as long to clean her room and that it was disgusting. GK responded that was rubbish.

- [11] After complaint the Commonwealth Bank reversed the \$200.00 paid on her credit card on the basis that it had been processed without her knowledge of the charge. As a result, the Drovers Rest Motel has not been paid anything for GK's accommodation on the night of 28 June, 2010.
- [12] GK has stayed at the Drovers Rest over the past 2 years, once every month to 2 months for 1 to 2 nights for the purpose of prostitution.
- [13] GK owns an investment property in Moranbah which she has attended to on some visits. On one occasion she informed Mrs Hartley that was the purpose of her stay in Moranbah, when questioned by Mrs Hartley. GK tendered documents to confirm her ownership of the property and visits to attend to its maintenance.

GK's evidence

- [14] GK relied on her contentions filed in this Tribunal on 14 March, 2011, which refer to the facts set out above.
- [15] Her contentions also set out that GK believes she conducts her business discreetly and that her activities have no detrimental impact on the motel otherwise her activities as a sex worker would have been discovered long before they were. On 28 June, 2010 her room was directly opposite the office, unlike the position of her room on other visits.
- [16] GK tendered a statutory declaration from one of her clients as to the tidy nature of her room during his visit. The client was not called to give evidence. I give no weight to this statutory declaration.
- [17] GK acknowledged that she had not been refused accommodation at the Drovers Rest in her own capacity, but rather because she was performing the work of a sex worker at the motel.

GK's claims

Stress, anxiety and hurt and humiliation

- [18] GK is seeking an award of \$30,000.00. The claim is for economic loss, for hurt and humiliation, and for a medical condition of stress, anxiety and depression arising out of this matter. GK tendered a letter from her treating General Practitioner, Dr Shah setting out the nature of the condition. Dr Shah was not called to give evidence.
- [19] GK tendered a letter from herself to this Tribunal dated 16 September, 2011, which indicated that she was suffering increased stress as a result of non-compliance by the respondents to Directions given by the Tribunal. She also said that she has turned clients away because she has not been emotionally able to perform her work. She said that as of

10 September, 2011 she has ceased working altogether due to the ongoing demands and stress of the case as the hearing drew nearer.

Economic Loss

- [20] Of the sum claimed an amount of \$20,000.00 is claimed for economic loss.
- [21] The economic loss claim is calculated on the basis that her average daily earnings are \$2,000.00. GK says that last year she visited Moranbah 5 times, however if she had been able to stay at the Drovers Rest she would have gone 10 times and that she has lost \$20,000.00 income from the reduced visits. Her evidence was that accommodation in Moranbah is in very short supply and without the ability to stay at the Drovers Rest her ability to stay in the town for the purpose of her work has been reduced. GK tendered bank statements and extracts from her diary showing the number of appointments she had with clients on given visits to Moranbah. The material supports GK's evidence that she stayed in Moranbah for 1 to 2 nights on a monthly basis and that her earnings from 4 to 8 clients a day was in the order of \$2,000.00 or more per day.
- [22] In her evidence during cross examination GK said that she had been discriminated against by other motels in Moranbah, but that she had settled her claims without a hearing occurring.
- [23] She admitted that she is able to use other motels when she visits Moranbah, but that her ability to work from the town is minimized if she cannot obtain accommodation in a motel. GK said that she does not like to use only one motel. In that way she seeks to minimize her impact on the motel she uses. GK said that there are only 6 motels in Moranbah and that she has to book ahead, sometimes up to 3 months. Taking one motel out of the available accommodation minimizes her ability to work, particularly on her chosen days of Wednesday and Thursday which are busy times.
- [24] It was put to GK in cross examination that any stress she has suffered and any consequent economic loss was merely the natural result of being involved in a legal process which is stressful to all participants. GK denied this contention.
- [25] I accept GK's evidence that she is suffering stress and anxiety as a result of both the event in question and the legal process in which she is involved. Without Dr Shah or another treating medical practitioner appearing as a witness to give evidence it is not possible to say what the severity of the medical complaints may be or their amenability to treatment.

Other orders

- [26] GK's contentions also seek an order that she be entitled to stay at the Drovers Rest Motel without any restrictions being placed upon her or her business activities.
- [27] She seeks an apology from Mrs Hartley for the way she was treated on 29 June, 2010. She seeks an assurance that there will be no malicious gossip made about her by Mrs Hartley or her staff at any time and that she will not be discriminated against again.

Evidence of Mr Hartley

- [28] Evan John Hartley a Director of the respondent gave evidence. He is also the licensee and nominee of the Liquor Licence applying at the Drovers Rest.
- [29] Mr Hartley gave evidence that until December, 2009 the Drovers Rest had been run by an employed manager, however, it was necessary for he and his wife to return to Moranbah to run the motel as it was being substantially run down and losing value. He said that one of the problems was that the motel was known as a "whorehouse".
- [30] He noted that against GK's name in the motel records was a note – "working girl". He said that she was asked on one visit what business she had in Moranbah. GK responded that she had an investment property. Mr Hartley said that until 28 June, 2010 he did not realize what GK was doing whilst at the motel. Other junior staff had given her accommodation on other occasions.
- [31] Mr Hartley said that a man in the room next door to the room rented by GK on the day in question complained about men coming and going from GK's room. Mr Hartley suggested he put his complaint in writing and that was done. The letter of complaint was tendered, being exhibit 20. The author was not called to give evidence. GK said that she would have like to question the author. Given that the author was not called I attribute limited weight to that evidence.
- [32] Mr Hartley said that his training as part of obtaining a Liquor Licence was that he was unable to run or permit to be run a business out of the rooms, other than accommodation. He said he understood that legally he could not allow people to operate out of the room to, for example sell shirts, do tax returns or anything else. Mr Hartley said he gave instructions to his management at the motel not to allow "working girls" in.
- [33] Mr Hartley said that he understood the legal position to be that he could not discriminate against a "working girl" as such, but that under the *Liquor Act 1992* he could not allow her to use the room for her work.
- [34] Mr Hartley tendered a letter from the Department of Justice and Attorney-General, Compliance (Liquor) to the effect that its file reveals

no approval to conduct any business other than that which is the subject of the licence granted for the Moranbah Drivers Rest Motel.

- [35] GK cross examined Mr Hartley as to his understanding of what “business” might be. He responded that it might be selling shirts or working as a working girl. He could not express an opinion as to whether it was any monetary transaction.
- [36] Mr Hartley gave evidence that “we own the rooms” and that under the *Liquor Act 1992* they did not have to make rooms available.
- [37] He said that he had refused accommodation to other “working girls”.

Mrs Hartley’s evidence

- [38] Mrs Hartley’s evidence was consistent with GK’s version of events. She responded to a question during cross examination as to whether she thought GK might be humiliated by a comment that Mrs Hartley “did not want the motel used as a whorehouse”. Mrs Hartley said that she did not intend to humiliate GK just to say that she did not want her to work at the motel.
- [39] She also gave evidence that on 28 June, 2010 she watched men come in and out of room 17 which had been rented to GK. On one occasion a young man was wandering through the motel and when she called out to him he said that he was looking for Room 17.

Respondent’s Submissions

- [40] The respondents submitted that:
- (a) GK can book ahead and stay at other motels and hotels in Moranbah. She is unable to say that any loss of income has been caused because she cannot stay at the Drivers Rest.
 - (b) No evidence was called about the shortage of accommodation in Moranbah generally.
 - (c) She never admitted to the Hartleys that she was a sex worker.
 - (d) The alleged stress and anxiety suffered by GK is common to all litigants. Dr Shah’s letter says that the stress was a result of the anti-discrimination court case. As she chose to bring the claim, any upset which has caused her economic loss should not be for the respondents to meet.
 - (e) There has been no evidence from an accountant as to the claimed \$30,000.00 loss. There has only been an unsubstantiated version from the witness box. Bank statements cannot prove her losses.
 - (f) Mr and Mrs Hartley as licensees would be in breach of the Liquor Licence to permit a prostitution business to be conducted from the

motel. In this regard GK has admitted giving a service to the public for money.

(g) Section 152 of the *Liquor Act 1992* provides:

“(1) A licensee must not, without the chief executive’s prior approval-

(a) Conduct or permit to be conducted, or advertise or represent himself or herself as conducting, on the licensed premises, a business other than –

(i) that authorised by the licence; or

(ii) a business for which the licensee is a wagering agent under the *Wagering Act 1998*; or

(iii) a business under the authority of a gaming machine licence under the *Gaming Machine Act 1991*; or

(b) Supply or permit to be supplied, on the licensed premises, a service to the public other than that authorised by the licence.

Maximum penalty – 25 penalty units

(h) There are no authorisations for other business in relation to the licence.

(i) The *Anti-Discrimination Act 1991* cannot authorize something in breach of another Act.

(j) Section 106 of the *Anti-Discrimination Act 1991* is relied upon as an exemption for discrimination, in that a person may do an act that is necessary to comply with, or is specifically authorised by an existing provision of another Act.

(k) If the respondents have discriminated against GK it is on the basis that she is working as a prostitute, not on the basis of her status as a sex worker.

GK’s submissions

[41] GK submitted:

(a) Insofar as section 106 of the *Anti-Discrimination Act 1991* is relied upon, it only relates to an act necessary to comply with an “existing provision” of another Act. “Existing provision” means a provision in existence at the commencement of section 106. Section 152 of the *Liquor Act 1992* was not in existence at the commencement of s 106 of the *Anti-Discrimination Act 1991*, therefore s 106 cannot be relied upon to grant an exemption.

(b) The *Liquor Act 1992* does not repeal the *Anti-Discrimination Act 1991*.

- (c) In relation to these submissions GK relied on *Angus James MacDonald, Leslie Conrad Connolly and Leonard Cherti v Queensland Rail*.¹
- (d) Section 152 of the *Liquor Act 1992* is not as broad as the respondents submit. The emphasis in the section is on the licensee not carrying out another business, not on clients of the motel.
- (e) GK's conduct, in any event falls short of conducting a business, which she contends means most of a business. In her case she does not run her business from Moranbah.
- (f) The respondents did not want to rent a room to her because she was a sex worker.
- (g) In relation to the guest's complaint tendered by the respondents, she did not think the author found her conduct offensive. Further he was encouraged by Mr Hartley to make the complaint.
- (h) The respondents showed their prejudice by saying they did not want their motel known as a "whorehouse". They have said that she misled them when asked the nature of her business and have defamed her character. They have referred to her as a prostitute, when she is a "sex worker" who runs a lawful business.
- (i) She is a sole operator who works by herself, for herself. She arranges her own accommodation.
- (j) Finally, she thought that the *Anti-Discrimination Act 1991* protected the conduct of her business as a sex worker, because if she is not conducting that business then she is not a sex worker. She said that she does not run her business from any one motel, only part of her business.

Findings

- [42] I find that the events on 29 June, 2010 occurred as described by GK in her complaint and contentions.
- [43] I find that GK was told in effect, that she would not be provided with accommodation at the Drovers Rest in future because she had engaged in prostitution whilst at the Drovers Rest in the past and the proprietors did not want her to engage in prostitution during any future stay.
- [44] I find that Mr and Mrs Hartley were not refusing future accommodation to GK because of her occupation as a sex worker, but rather because they did not want prostitution undertaken in their motel.
- [45] I find that GK has suffered hurt and humiliation, stress and anxiety as a result of the events which occurred on 29 June 2010 and that she has sustained economic loss through being unable to use the Drovers Rest Motel for the purpose of prostitution as she has in the past. I will now consider whether GK has been discriminated against such that she would be entitled to an award of compensation and other orders.

[46] I am unable to make any finding in relation to the allegation that GK was asked unnecessary questions. No evidence was put before me in relation to the questions complained about.

Has GK been discriminated against?

Legislative background

[47] The *Anti-Discrimination Act 1991* sets out Parliament's reasons for enacting the Act, including to "*protect and preserve the principles of dignity and equality for everyone.*"

[48] Section 6 provides:

"(1) One of the purposes of the Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation.

(2) This purpose is to be achieved by –
(a) prohibiting discrimination that is –
(i) on a ground set out in part 2; and
(ii) of a type set out in part 3; and
(iii) in an area of activity set out in part 4;
Unless an exemption set out in part 4 or 5 applies..."

[49] Section 7 provides:

"The Act prohibits discrimination on the basis of the following attributes
 –
 ...
(l) lawful sexual activity"

[50] Lawful sexual activity is defined in the Act as "*a person's status as a lawfully employed sex worker, whether or not self-employed.*"

[51] There are two categories of lawfully employed sex worker. The first is employed in a brothel licensed under the *Prostitution Act 1999*. The second is a person known as a sole operator sex worker, whose activities are lawful provided his or her activities do not infringe the provisions of the *Queensland Criminal Code* with respect to prostitution. In general terms this means that the sole operator must work alone and other than a permitted body guard must not have any assistance to engage in prostitution. He or she is not a street prostitute.ⁱⁱ

[52] Section 8 provides:

"Discrimination on the basis of an attribute includes direct and indirect discrimination on the basis of-
(a) a characteristic that a person with any of the attributes generally has; or

- (b) *a characteristic that is often imputed to a person with any of the attributes; or*
- (c) *an attribute that a person is presumed to have, or to have had at any time, by the person discriminating; or*
- (d) *an attribute that a person had, even if the person did not have it at the time of the discrimination.”*

[53] Section 9 provides:

“The Act prohibits the following types of discrimination –

- (a) *direct discrimination;*
- (b) *indirect discrimination.”*

[54] Section 10 provides:

“(1) Direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different.

Example –

R refuses to rent a flat to C because –

- *C is English and R doesn’t like English people*
- *C’s friend B, is English and R doesn’t like English people*
- *R believes that English people are unreliable tenants.*

In each case, R discriminates against C, whether or not R’s belief about C’s or B’s nationality, or the characteristics of people of that nationality, is correct.

- (2) *It is not necessary that the person who discriminates considers the treatment is less favourable.*
- (3) *The person’s motive for discriminating is irrelevant.*
- (4) *If there are 2 or more reasons why a person treats, or proposes to treat, another person with an attribute less favourably, the person treats the other person less favourably on the basis of the attribute if the attribute is a substantial reason for the treatment.”*

[55] Indirect discrimination has not been alleged in this case and would not appear to be relevant.

[56] Section 81 provides:

“A person must not discriminate in the accommodation area if a prohibition in sections 82 to 85 applies.”

[57] Section 82 – Discrimination in pre-accommodation area, provides:

“A person must not discriminate against another person-

- (a) *by failing to accept an application for accommodation; or*

- (b) *by failing to renew or extend the supply of accommodation; or*
- (c) *in the way in which an application is processed; or*
- (d) *in the terms on which accommodation is offered, renewed or extended.”*

[58] Section 83 – Discrimination in accommodation area, provides:

“A person must not discriminate against another person-

- (a) *in any variation of the terms on which accommodation is supplied; or*
- or*
- (b) *in denying or limiting access to any benefit associated with the accommodation; or*
- (c) *in evicting the other person from the accommodation; or*
- (d) *by treating the other person unfavourably in any way in connection with the accommodation.”*

[59] None of the exemptions specified in the Act, for discrimination in the accommodation area, appear relevant.

[60] Accommodation is defined in the Act to include a *“hotel or motel”*.

[61] The respondent relies on the general exemption in section 106 of the Act, which provides:

“(1) A person, may do an act that is necessary to comply with, or is specifically authorised by –

- (a) *an existing provision of another Act; or*
- (b) *an order of a court; or*
- (c) *an existing provision of an order or award of a court or tribunal having power to fix minimum wages and other terms of employment; or*
- (d) *an existing provision of an industrial agreement; or*
- (e) *an order of the Anti-Discrimination Tribunal.*

(2) *In this section –*

existing provision *means a provision in existence at the commencement of this section.”*

Analysis

[62] I find on the facts that the respondents have:

- expressed an intention that the provision of accommodation to GK will not be renewed in the future;
- treated GK unfavourably in connection with accommodation by refusing to allow her a room in the future; and
- varied the terms on which the accommodation was supplied by charging an extra \$65.00 for cleaning, beyond the usual charge, without informing GK prior to making the charge.

- [63] I have found that the respondents objected to the conduct of prostitution in their motel and that was the reason for refusing future accommodation to GK. It is clear from the remedies sought by GK that she wishes to be free to take rooms at the Drovers Rest for the purpose of continuing her prostitution business.
- [64] The question to be answered is whether, having found unfavourable treatment, the respondents have directly discriminated against GK in the area of activity of accommodation.
- [65] To establish direct discrimination, I must find that:
- (i) the respondents treated GK, having the attribute of the status of lawfully employed sex worker
 - less favourably than another person would be treated,
 - who does not have the status of lawfully employed sex worker
 - in circumstances that are the same or not materially different (s 10); and
 - (ii) the treatment was on the basis of a characteristic or attribute a sex worker has or is assumed to have (s 8).
- [66] It is important to note that although the attribute set out in section 7 of the Act is “lawful sexual activity”, it would not appear that the conduct of lawful sexual activity is protected from discrimination. The definition of “lawful sexual activity” refers to a person’s “status” as a lawfully employed sex worker. Status is defined in the Macquarie dictionary as: “*condition, position or standing socially, professionally, or otherwise*”ⁱⁱⁱ. In other words discrimination under section 7 of the Act is prohibited, in the first place, because of a person’s job descriptor as a sex worker.
- [67] It is possible that engaging in prostitution could be caught by the expanding effect of section 8(a) of the Act. That is, engaging in prostitution is a “characteristic” of a person who has the status of lawfully employed sex worker. On this reasoning, engaging in prostitution may form the basis of discrimination if it is undertaken by a lawfully employed sex worker.
- [68] The alternative argument is that the conduct of prostitution cannot be described as a characteristic or attribute of a sex worker. It is the activity undertaken by a sex worker.
- [69] On this reasoning there could not have been direct discrimination on the basis of the attribute of having the “status” of a lawfully employed sex worker, because the unfavourable treatment was on the basis of the activity of prostitution. Similar reasoning was adopted by President Dalton SC in *Edwards v Hillier & Educang Ltd t/as Forest lake College*^{iv}. That would dispose of GK’s claim.
- [70] In the end, I do not need to determine this point, because for the reasons set out below, I find that GK’s claim cannot succeed, even if it were the

case that engaging in prostitution is a characteristic of a lawfully employed sex worker.

- [71] The Act requires me to consider whether or not GK was treated less favourably than another person without the attribute relied upon, in circumstances which are the same or not materially different.
- [72] There was no evidence on this issue put at the hearing. To consider the issue, it is necessary to choose a hypothetical comparator, or person against whom the treatment of GK can be compared.
- [73] I am guided in the choice of comparator by the reasoning of the majority of the High Court in *Purvis v New South Wales*^v. That case concerned an allegation of disability discrimination under the federal *Disability Discrimination Act 1992*. In that context the Court explored the question of the appropriate comparator. Its reasoning has now been adopted in areas outside disability discrimination, including in the area of employment on the basis of parental status, family responsibilities and age discrimination.^{vi}
- [74] The *Purvis* case raised the question of whether a school had discriminated against a disabled pupil, by expelling him because of his violent behaviour. Section 5(1) of the *Disability Discrimination Act 1992 (C/W)* provides that a person discriminates against another person if because of that person's disability, the discriminator "*treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.*"
- [75] In that case the comparator was held by the majority to be a student without a disability but one who exhibited violent behaviour.
- [76] By analogy, in this case the appropriate comparator is a person without GK's attribute as a lawfully employed sex worker, but with the same desire to obtain a room for the purpose of prostitution.
- [77] The comparator is not merely a person who is not a lawfully employed sex worker, who seeks a room at the motel. The same circumstances which occurred on 29 June, 2010 involving GK must be imposed on the hypothetical situation involving the comparator.
- [78] Gummow, Hayne and Heydon JJ, said at paragraph [224] of the decision in *Purvis*:

"The circumstances referred to in s 5(1) are all of the objective features which surround the actual or intended treatment of the disabled person by the person referred to in the provision as the "discriminator". It would be artificial to exclude (and there is no basis in the text of the provision for excluding) from consideration some of these circumstances because they are identified as being

connected with that person's disability. There may be cases in which identifying the circumstances for intended treatment is not easy. But where it is alleged that a disabled person has been treated disadvantageously, those difficulties do not intrude. All of the circumstances of the impugned conduct can be identified and that is what s 5(1) requires. Once the circumstances of the treatment or intended treatment have been identified, a comparison must be made with the treatment that would have been given to a person without the disability in circumstances that were the same or were not materially different."

- [79] I find on the basis of the respondents' strongly held objection to prostitution being conducted at the Drovers Rest, that any person wishing to engage in prostitution would be denied accommodation. In other words, GK was not treated less favourably than another person, who is not a lawfully employed sex worker, in circumstances where that person seeks a room for the purpose of engaging in prostitution. For that reason I find that GK was not the subject of direct discrimination by the respondents on 29 June, 2011.
- [80] GK did not submit any evidence on which I could find that another sex worker who had used a room for prostitution would not be charged a higher rate to cover cleaning. Accordingly, I am unable to find direct discrimination has occurred for this reason.
- [81] I consider that the purpose of providing protection from discrimination to a person having the status of lawfully employed sex worker, such as GK, is not to ensure that she is able to conduct her business, but to protect her personal dignity. That is consistent with the objects of the Act. If she were to seek accommodation from a motel for her own rest and shelter, without intending to engage in prostitution in the room, she should be treated no less favourably in being provided a room than any person who is not a lawfully employed sex worker. Such an interpretation gives meaning and weight to the word "status" in the definition of lawful sexual activity.
- [82] If that were not the case the owner and managers of a motel would confront the risk that they may breach other laws and common law rights.
- [83] Gummow, Hayne and Heydon JJ said at [227] in *Purvis*:
- "...in a case like the present, the construction we have described allows for a proper intersection between the operation of the Act and the operation of state and federal criminal law.*

At [228], they said:

"It would be a startling result if the Act, on its proper construction, did not permit an employer, educational authority, or other person

subject to the Act to require, as a universal rule, that employees and pupils comply with the criminal law. Yet if the appellant's submission is right, the 'circumstances' to which s 5(1) refers can include no reference to disturbed behaviour (even disturbed criminal behaviour) if that behaviour is a characteristic of, or consequence of, the actor's disability. Understanding the operation of the Act in this way would leave employers, educational authorities, and others subject to the Act, unable to insist upon compliance with the criminal law without in some cases contravening the Act."

- [84] Consistent with the comments of Gummow, Hayne and Heydon JJ; by considering any unfavourable treatment of GK as compared to another person in circumstances which involve the sequelae to GK's status as a sex worker, that is engagement in prostitution, the respondents are able to comply with their statutory and legal obligations.
- [85] If I am wrong and refusing a room to a person with the status of lawfully employed sex worker, who intends to use the room for prostitution, does amount to direct discrimination then the following may be some of the outcomes:
- a motel owner would be obliged to rent rooms to as many sex workers who requested them, lest the motel owner discriminates against each of them. The result would be that if he knows at least 2 sex workers are engaged in prostitution at the motel he may face criminal prosecution under section 229K of the *Criminal Code*, for having an interest in premises used for prostitution.
 - The motel owner is potentially exposed to prosecution, for a number of offences set out in the Prostitution section of the *Criminal Code*, including section 229H, indirectly participating in the provision of prostitution, by enabling a person to engage in prostitution through the provision of the room in which the prostitution occurs.
 - There are also offences which impact on the motel owner if a young person is permitted to be at a place used for the purposes of prostitution by 2 or more prostitutes. In the case of a motel which is used by families as part of the travelling public, children are likely to be present at the motel.
 - The licensee may have permitted a business other than provision of accommodation to be conducted from licensed premises, in breach of section 152 of the *Liquor Act 1992*.
 - The motel owner as innkeeper would be unable to exercise the innkeeper's entitlement at common law to refuse accommodation if the innkeeper believes the guest's presence would cause annoyance to other guests.
- [86] To avoid these very serious outcomes, the motel owner must successfully establish that any discrimination on the motel owner's part is not unlawful because, either:

- (a) the motel owner can claim the benefit of an exemption, which in this case is the general exemption under section 106 of the Act. That is, the motel owner has complied with a provision of an Act which was in existence at the date of commencement of section 106 on 30 June, 1992; or
- (b) the motel owner has complied with a provision of an Act which although it came into force later than 30 June, 1992, has the effect of repealing the *Anti-Discrimination Act 1991* to the extent of any inconsistency between the Acts.

- [87] In the case of the *Liquor Act 1992*, the relevant parts of section 152 came into force on 1 July, 1992. The current Chapter 22A of the *Criminal Code Act 1899* was inserted into the *Criminal Code* on 1 February, 1993.
- [88] Accordingly compliance with the *Liquor Act 1992* or the *Criminal Code* would not bring the respondents within the scope of the exemption in section 106, as the relevant provisions of these Acts did not pre-exist section 106.
- [89] No argument was raised before me in relation to the motel owner taking action so that the *Criminal Code* is not infringed. I will not explore that issue further in this Decision, although I consider it is open to argument on the facts of this case.
- [90] Section 152 of the *Liquor Act 1992* was, however, squarely raised by both parties. If I am wrong in my earlier reasoning and the effect of refusing a room to a person with the status of lawfully employed sex worker, for the purpose of prostitution, is that direct discrimination has occurred within the meaning of the *Anti-Discrimination Act 1991*, then I need to ask whether the relevant sections of the *Anti-Discrimination Act 1991* have been impliedly repealed by s 152 of the *Liquor Act 1992*.
- [91] GK relied on the decision of *Angus James MacDonald, Leslie Conrad Connolly and Leonard Cherti v Queensland Rail*ⁱⁱ. Member Keim of the Anti-Discrimination Tribunal decided that the *Transport Infrastructure Act 1994*, being relevantly a set of published standards designed to achieve efficiency, affordable quality and cost effectiveness did not expressly or impliedly repeal the provisions of the *Anti-Discrimination Act 1991*. Relying on the finding in *MacDonald's* case, GK argues that the *Liquor Act 1992* does not impliedly repeal the *Anti-Discrimination Act 1991*.
- [92] The question has recently been considered by Senior Member Endicott in this Tribunal, in the matter of *Attrill v State of Queensland*ⁱⁱⁱ. That case involved a consideration of part 7 of the *Public Service Act 2008* which permits the employer to take action in relation to public service employees who are absent from work because of mental or physical incapacity and which may result in termination of their employment

based on the worker having an impairment. Section 15 of the *Anti-Discrimination Act 1991* prohibits an employer terminating employment on the basis of an impairment.

[93] Senior Member Endicott said that it appeared impossible to reconcile the provisions in Part 7 with the provisions in section 15. She found that there was such a case of *“inconsistency, contrariety or repugnancy that the two Acts cannot be reconciled. The provisions of part 7 must have impliedly repealed the unlawful discrimination provisions in section 15...”*^x.

[94] It is worth repeating extracts from the cases relied on in *Atrill*. In particular, *Goodwin v Phillips*^x in which Griffith CJ stated:

“that where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. It is immaterial whether both Acts are penal Acts or both refer to civil rights. The former must be taken to be repealed by implication. Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.”

[95] In *Ferdinands v Commissioner for Public Employment*,^{xi} Gummow and Hayne JJ stated: *“It has long been recognised that even though one statute does not expressly repeal an earlier statute, the later statute must be read as impliedly repealing the earlier, if the two are inconsistent. Inconsistency lies at the root of this principle.”* *Atrill* notes that their Honours quoted with apparent approval the words of Gaudron J in *Saraswati v The Queen*^{xii} which warned that there must be very strong grounds to support the implication for there is a general presumption that the legislature intended that both provisions should operate.

[96] In this case the inconsistency between sections 82 and 83 of the *Anti-Discrimination Act 1991* and section 152 the *Liquor Act 1992* is that if it is direct discrimination not to provide a room to a person with the status of lawfully employed sex worker for the purpose of prostitution, a licensee and motel owner can never comply with the *Liquor Act 1992* which prohibits the licensee permitting the conduct of a business from the rooms. That is a direct inconsistency such that the two Acts cannot be reconciled. On this basis I find that section 152 of the *Liquor Act 1992* impliedly repeals the unlawful discrimination provisions of section 82 and 85 of the *Anti-Discrimination Act 1991* to the extent to which section 152 requires the licensee to refuse to allow a room to be used to carry on the business of prostitution.

- [97] I find on the basis of GK's tendered diary extracts revealing up to 8 clients a day visiting her room for the purpose of prostitution and from which she earned in excess of \$2,000.00 per day, that she was conducting a business in the room rented by her at the Drovers Rest. I find that it is immaterial that she also conducted her business of prostitution in other places. To also conduct business elsewhere does not mean that the commercial transactions GK engaged in on a regular basis and at considerable profit at the Drovers Rest were not the conduct of a business.

Conclusion

- [98] I find that GK has not been the subject of direct discrimination in the area of accommodation.
- [99] Without making a finding of direct discrimination, but for the purpose of a full exposition of the matters put before me, I find that if I am wrong and GK has been directly discriminated against, that s 152 of the *Liquor Act 1992* permits the Licensee to take steps to ensure a business is not conducted from the motel other than the provision of accommodation, without infringing section 81 of the *Anti-Discrimination Act 1991*.

Orders

- [1] I order that the application be dismissed.
- [2] The respondents have not sought costs. I make no order as to costs, particularly in light of section 100 of the *Queensland Civil and Administrative Tribunal Act 2009*.

i Anti- Discrimination Tribunal Queensland, Nos H119/96, H 122/96 and H124/96.
 ii Crime and Misconduct Commission Queensland, "Regulating Prostitution an Evaluation of the Prostitution Act 1999 (Qld)", December 2004.
 iii *Macquarie Concise Dictionary* 4th edition, 2006, p.1194.
 iv [2006] QADT 34 at para 85.
 v (2003) 217 CLR 92.
 vi *Virgin Blue Airline Pty Ltd v Stewart* [2007] QSC 075; and *Edwards v Hillier & Educang t/as Forest Lake College* [2006] QADT 34.
 vii *MacDonald and ors v Queensland Rail* QADT Nos H119/96,H122/96 and H124/96.
 viii [2011] QCAT 361.
 ix *Attrill v State of Queensland* [2011] QADT 34 at [21].
 x (1908) 7 CLR 1 at 7.
 xi (2006) 80 ALJR 555.
 xii (1991) 172 CLR 1 at 17.