QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*De Soysa Walsh Pty Ltd & Ors v Gitau & Anor* [2024] QCATA 100
PARTIES:	**DE SOYSA WALSH PTY LTD (ACN 082 762 249)** (first applicant) **DAVID WALSH** (second applicant) and **LEACHIA BOLES** (third applicant) v **JACKSON GITAU** (first respondent) **ROSE NG'ANG'A** (second respondent)
APPLICATION NO/S:	APL174-23 APL188-23 APL189-23
MATTER TYPE:	Anti-discrimination matters
DELIVERED ON:	17 September 2024
HEARING DATE:	Determined on the papers
HEARD AT:	Brisbane
DECISION OF:	Member Roney KC
ORDER/S:	**1. To the extent that leave to appeal is necessary, leave to appeal is refused.** **2. Otherwise, the appeals are dismissed.** **3. I grant the parties liberty to apply in respect of any other consequential or other orders which might be required to be made.**
CATCHWORDS:	APPEALS – ANTI-DISCRIMINATION – direct discrimination in the accommodation area on the basis of pregnancy and race – cross-complaint of sexual harassment against one party subjected to discrimination on the basis of pregnancy and race

HUMAN RIGHTS – DISCRIMINATION LEGISLATION – DIRECT DISCRIMINATION – where tenants asked the lessor for a break lease because they were having a baby and needed somewhere bigger – where the lessor threatened eviction proceedings if they were to bring the baby home – whether the threat was direct discrimination in the accommodation area on the basis of pregnancy and/or race

HUMAN RIGHTS – DISCRIMINATION LEGISLATION – DIRECT DISCRIMINATION – where tenants were of African origin – where the lessor started a campaign against the tenants of surveillance, being constantly picked on, losing the use of a facility, being served with numerous unjustified notices, declining to assist with utilities, being spoken to in humiliating and offensive ways, and by obstructing access – whether direct discrimination in the accommodation area on the basis of race or another attribute

HUMAN RIGHTS – DISCRIMINATION LEGISLATION – SEXUAL HARASSMENT – where a cross-complaint of sexual harassment was made some months after the tenants' complaints – whether there was sexual harassment – whether the complainant discharged the onus to prove the conduct occurred – *Briginshaw* principles – whether to disturb adverse findings of credit

Anti-Discrimination Act 1991 (Qld), s 7, s 10, s 11, s 7(c), s 7(o), s 8, s 10(3), s 10(4), s 11, s 133
Queensland Civil and Administrative Tribunal Act 2009 (Qld) s (3)(a), s 28, s 29, s 142, s 146, s 147

Australian Gas Light Company v Valuer-General (1940) 40 SR (NSW) 126
Australian Iron and Steel Pty Ltd v Banovic (1989-1990) 168 CLR 165
Body Corporate No. 1 CTS 5908 v Di Marco Investments Pty Ltd [2010] QCATA 66
Briginshaw v Briginshaw (1938) 60 CLR 336
Caloundra City Council v Pelican Links Pty Ltd [2005] QCA 84
Charisteas v Charisteas [2021] HCA 29; 393 ALR 389
CNY17 v Minister for Immigration and Border Protection [2019] HCA 50, (2019) 268 CLR 76
Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194
Collector of Customs v Agfa-Gevaert Ltd [1996] HCA 36; (1996) 186 CLR 389
Duffill v Karingal Pty Ltd t/as the Marble Man ABN 7601914824 [2023] QCATA 114

Drew v. Bundaberg Regional Council [2011] QCA 359
Ebner v Official Trustee in Bankruptcy [2000] HCA 63; 205 CLR 337
Fox v Percy (2003) 214 CLR 118
Friends of Stradbroke Island Association Inc v Sandunes Pty Ltd & Anor [1998] QCA 374; (1998) 101
Gitau & Ng'ang'a v De Soysa Walsh Pty Ltd, Walsh & Boles [2023] QCAT 189
Johnson v Johnson [2000] HCA 48; 201 CLR 488
Leigh v Bruder Expedition Pty Ltd [2020] QCA 246
Minister for Immigration and Citizenship v SZMDS & Anor (2010) 240 CLR 611
Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507
Michael Wilson & Partners Ltd v Nicholls (2011) 244 CLR 427
Oaks Hotels & Resorts Limited v Knauer & Ors [2018] QCA 359
Purvis v New South Wales (Department of Education and Training) (2003) 217 CLR 92; [2003] HCA 62
QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2023] HCA 15
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41
R v Birmingham City Council; Ex parte Equal Opportunities Commission [1989] AC 1155
Re Ecovale Pty Ltd [1999] QCA 067
Rayner v Whiting [2000] 2 Qd R 552
Robinson Helicopter Company Incorporated v McDermott [2016] HCA 22
Robinson v Corr [2011] QCATA 302
Sun v Minister for Immigration and Ethnic Affairs (1997) 81 FCR 71
Shamoon v Chief Constable [2003] UKHL 11
Terera & Anor v Clifford (2017) QCA 181
Vetter v Lake Macquarie City Council (2001) 202 CLR 439
Waters & Ors v Public Transport Corporation (1991) 103 ALR 513; [1991] HCA 49
Wilkes v Andrew [2012] QCATA 173
Warren v Coombes (1979) 142 CLR 531
Yates Property Corporation Pty Ltd (In Liq) v Darling Harbour Authority (1991) 24 NSWLR 156

APPEARANCES & REPRESENTATION: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

REASONS FOR DECISION

Introduction

[1] After a three-day hearing in April 2023, in respect of two complaints brought by the present respondents alleging discrimination on the basis of pregnancy and on the basis of race and acts of racial vilification and victimisation, and a counter-complaint of sexual harassment brought by the third appellant Ms Boles, the Tribunal delivered a judgement shortly thereafter which upheld[1] two of the complaints by the complainants but dismissed other complaints of racial vilification and victimisation, and the counter-complaint brought by the third appellant Ms Boles.

[2] The complaints upheld were that both current applicants, whom I shall refer to in these reasons as the appellants, De Soysa Walsh Pty Ltd and David Walsh, directly discriminated against both respondents Jackson Gitau and Rose Ng'ang'a in the accommodation area on the basis of pregnancy by sending emails of 27 and 30 March 2020, threatening eviction proceedings if they brought their baby home to their rental property after the birth of their child.

[3] The sending of those emails was also the basis for upholding that the appellants had directly discriminated against both respondents in the accommodation area on the basis of race.

[4] It was also held that between 27 March and 2 June 2020, both appellants De Soysa Walsh Pty Ltd and David Walsh directly discriminated against both respondents on the basis of race by conducting a campaign against the tenants of surveillance, being constantly picked on, losing the use of a facility, being served with numerous unjustified notices, the appellants declining to assist with utilities, being spoken to in humiliating and offensive ways, and by the appellants obstructing access. I will turn to the detail shortly.

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1 *Gitau & Ng'ang'a v De Soysa Walsh Pty Ltd, Walsh & Boles* [2023] QCAT 189.

[5] The hearing was limited to liability issues. With the benefit of hindsight, it may have been more efficient to have assessed the compensation payable or other remedy at that time as well. Orders were made so it could be listed for a directions' hearing on a date to be fixed, to enable the Tribunal to decide the question of remedy. No remedy has yet been determined.

[6] The respondents had a fixed term residential tenancy with the first appellant, De Soysa Walsh Pty Ltd, a company controlled by the second appellant, David Walsh. The respondents' unit was one of six in a block of units converted from a suburban house about 60 years ago. The third appellant, Leachia Boles, is Mr Walsh's wife and during the currency of the events was a joint owner of the block of units.

[7] The reasons summarised the issues by identifying that about half way through the fixed lease term, Ms Ng'ang'a told the appellants that she was pregnant and that they wanted to break the lease because the family needed somewhere larger. It was agreed that if a new tenant could be found, then the tenancy would be terminated early. A new tenant was not found, and the tenants indicated to the respondents that they would need to stay to the end of the fixed term. The baby was due just over six weeks before the end of the fixed term and about a month before the baby was due, the appellants told the tenants that if the baby was brought to the unit, it would be an unauthorised occupant and eviction proceedings would be commenced.

[8] The tenants alleged that at about the same time the appellants started to put them under surveillance, constantly picked on them, withdrew a facility, served them with numerous unjustified notices, interfered with their utilities and declined to assist with the utilities, obstructed their access, humiliated them, called them offensive names, and on one occasion physically attacked one of them.

[9] The reasons summarised firstly the allegations of direct discrimination in the contentions as exposing them to less favourable treatment in the area of accommodation and is said to be less favourable treatment by (a) varying the terms of the accommodation and denying a benefit associated with the accommodation by:

(a) interfering with the water and electricity supply to the unit;

(b) interfering with safe access to the unit;

(c) impairing access to the unit and common areas/amenities; and

(d) seeking access to the unit on multiple occasions.

[10] Secondly it was alleged that they had treated the tenants unfavourably in connection with the accommodation by:

(a) informing the tenants that their child, once born, would not be authorised to reside at the unit;

(b) informing the tenants that bringing their child to reside in the unit would be a serious breach of the rental agreement and would result in eviction proceedings;

(c) seeking multiple entries into the unit to intimidate and harass the tenants; and

(d) issuing multiple notices alleging breaches of the rental agreement.

[11] Thirdly it was alleged that they had treated the tenants unfavourably in connection with the accommodation by, on 19 and 25 May 2020, using 'racially discriminatory comments and language towards' Mr Gitau and by association, Ms Ng'ang'a.

[12] The first and second group of allegations were made only against the company and Mr Walsh since only they acted 'in connection with accommodation' and this is not said about Ms Boles. The third allegation was made only against Ms Boles. This was characterised as racial vilification and/or serious racial vilification. That claim was unsuccessful. So, the only claim against the 3rd appellant failed. She has appealed because she brought an unsuccessful claim for sexual harassment.

[13] As can be seen, the tenants alleged that these things happened because they were expecting their baby, and because they were of African origin.

[14] The tenants sought help from a tenant help group and lawyers. Steps were taken to protect the tenants' rights to remain in the premises by applying to the Tribunal, bearing in mind the baby was due soon. The tenants said that despite this, the appellants continued their campaign against them. Finally, a couple of days before the end of the fixed term tenancy, and when the baby was five weeks old, the tenants moved out of the premises.

[15] The reasons summarised the issue on the counter-complaint as one of sexual harassment by which one of the appellants, Ms Boles, says that she was subjected to unwanted comments and gestures of a sexual nature by Mr Gitau over several weeks and which she found offensive and threatening. The sexual harassment complaint appeared in a Statement of Facts and Contentions filed by Ms Boles on 5 April 2022 in ADL024-21, referring to her complaint of 13 December 2020 and her affidavit of 30 March 2022. In those documents Ms Boles says that when she was alone, and in February and March 2020, Mr Gitau would invade her personal space, look her up and down, focus particularly on her breasts and crotch area and would smirk at her as she turned away to leave. Towards the end of March 2020, the harassment became verbal, offensive and threatening and in April and May 2020 Mr Gitau would intercept her in the garden at the rear of the property and say:

(a) You're a good-looking woman. I like women who have a good figure;

(b) You're in good shape for a woman of your age;

(c) I really like pretty black women like you;

(d) What's wrong with you? Don't you like a nice strong black man like me?

[16] Ms Boles also alleged that she used to tell Mr Gitau to leave her alone when he approached her, but after that instead of speaking to her he would leer at her and make low grunting noises when he walked past her. Ms Boles also relied on incidents on 19 and 25 May 2020 as acts of sexual harassment.

[17] The counter-complaint brought by the third appellant Ms Boles was dismissed. She has appealed that decision.

[18] In relation to issues of credit going to the counter-complaint, the Tribunal found in relation to the respondent Mr Gitau that he had a willingness both to mislead and to manipulate the evidence before the Tribunal and that this meant the Tribunal could not wholly rely on Mr Gitau's allegations to decide the complaint and would require his evidence to be corroborated before the Tribunal could rely on it. On the other

hand, there was inconsistency in the accounts given by Ms Boles about the harassment incident and that made it impossible to find as a fact what happened to cause her to shout out that she was being threatened and whether harassment occurred.

[19] The appellants filed an application to appeal on 19 June 2023 and also sought a stay of the decision. On 25 August 2023 the stay application was refused.

[20] The application for appeal seeks orders that the decision be dismissed, the counter-complaint be reversed, that all claims in ADL054-20 and ADL055-20 be dismissed, and the respondent Mr Gitau pay the third appellant Ms Boles damages in an amount determined by the Tribunal, all parties bear their own costs in the original matter, and that the decision of the Tribunal be vacated.

[21] The appellants' stated position is that the reasons and therefore final decisions in these matters are "hopelessly infected with errors of law, mixed law and fact and fact contravening QCAT Act s.146 and s.147".[2]

[22] The reasons for the decision of the Tribunal were lengthy and detailed, and included numerous schedules which summarised the evidence and conducted a review, analysis and findings in respect of it. The learned Member dealt comprehensively with the evidence. The decision could not be criticised as being a limited or superficial analysis of either the evidence, how it ought to be treated, the issues which went to findings of credit, or the analysis and application of the law to those findings.

Appeal on question of law and leave to appeal

[23] Pursuant to s 142 of the *Queensland Civil and Administrative Act 2009* (Qld) ('QCAT Act'), an appeal only lies to this Tribunal on questions of law, unless in relation to appeals on a question of fact or a question of mixed law and fact the Appellant has obtained the Appeal Tribunal's leave to appeal.

[24] Pursuant to s 146 of the QCAT Act, in deciding an appeal against a decision on a question of law, the Appeal Tribunal is not engaged in a rehearing of the matter. By s 147 an appeal to this Tribunal on a question of fact only or a question of mixed law and fact, if leave is granted, is by way of rehearing.

[25] The Appellant raised 10 grounds of appeal. Seven of the grounds were characterised as errors of law, with the remaining grounds said to be either errors of fact or mixed errors of law and fact.

[26] The appellants' submissions were prepared by one of the appellants, Mr Walsh, who has legal qualifications. The reasons identify that Mr Walsh practiced as a solicitor for about 10 years in total, and had 30 years' experience in property letting in Queensland.

[27] In the Court of Appeal primary submissions must be no more than 10 pages. The Notice of Appeal in the present case attaches 32 pages of submissions in support of the appeal, but none in support of leave to appeal. They then filed a further 95-page submission on 22 September 2023 ('the Applicants' September Submissions') and then a further 42-page submission dated 10 November 2024 which are prolix, repetitive and often not self-evident as to their meaning. The appellants' 22 September

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[2] Appellant's submissions in support of appeal dated 15 June 2023 (Appellant September Submissions) and as noted in the Notice of Appeal, Part C dated 15 June 2023 (Notice of Appeal).

2024 submissions concede the submissions are repetitive, but shoots blame for this home to the Member who decided the case because of what the submissions call the "circularity of the member's reasons". To burden this Appeal Tribunal with submissions which are unnecessarily prolix and repetitive is scandalous and would not be tolerated in any Court or Tribunal. Sometimes the arguments on appeal cannot be dealt with succinctly because of, for example, the length of the trial, or the complexity of the issues it threw up necessitated that. This is not such a case.

[28] Comprehending and resolving the complexly interwoven issues which are repetitiously thrown up in the appellants' submissions is an exercise that reminds one of being thrown into one of the artist M C Escher's famous surrealist images, like a series of staircases that crisscross in a labyrinth-like interior, at seemingly impossible angles so as to traverse them, apparently navigable, but actually not.

[29] Despite that labyrinth-like quality, I have given full and careful consideration to all of those submissions. Many of them cross over between topics and appear to interrelate different heads of appeal with other grounds or arguments in support of the appeal. Some that started life in support of a particular ground of appeal appear in later contentions to support another. My focus in these reasons is to deal with the grounds of appeal and the arguments put forward to support them when the appeal was filed and those which respond to the submissions for the respondents.

[30] I have also carefully reviewed the Applicants' September Submissions. Where these reasons do not specifically traverse any particular argument advanced in any or the submissions, it does not mean that I have not fully considered the submission or the contention being made.

[31] One's overall impression is that in large part, this appeal (which was heard on the papers and without the benefit of oral argument) was conducted by the appellants as an attempt to re-argue a multiplicity of issues which were raised at trial on which the appellants lost, both on the evidence and in law, and as to the proper interpretation to be placed upon evidence where it fell into some particular context or other.

[32] Although some of the grounds of appeal are expressed to be against findings of fact or mixed findings of law and fact for which leave is required, they essentially relate, in one way or another, to challenging the findings of fact. Some of those said to be errors of law are not obviously so. The appellants' submissions did not address the question of what an error of law, error of fact, or mixed errors of fact and law were. I will deal with that issue shortly.

[33] The appellants did not seek leave to appeal in the Notice of Appeal. In the Notice of Appeal, Part E, the appellants have ticked "I do not require leave to appeal in this case" and did not tick "I am seeking leave to appeal". On this basis, the respondents submit, the appeal should only proceed on questions of law, that is, those agitated in Grounds 6 and 9. This Appeals Tribunal has previously held that where no such leave has been sought or obtained the appeal may only be brought on a question of law.[3] In fact though at page 4 of the form it was noted that leave was sought

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[3] Body Corporate No. 1 CTS 5908 v Di Marco Investments Pty Ltd [2010] QCATA 66, [4] (President Wilson J and Member Barlow).

"if the tribunal finds errors of mixed law and fact". I am prepared to treat that as seeking the leave required.

[34] No submission has been made however which addresses the reason why the appellants ought to be granted leave to appeal until the Applicants' September Submissions came in. Both parties cite the decision by Member Dr J Forbes in *Wilkes v Andrew* [2012] QCATA 173 ('*Wilkes*') for the proposition that in respect of the grant of leave, the following principles apply:

> [19] In a case of this kind there is no appeal as of right. It is a prime object of the QCAT Act to resolve disputes, particularly minor ones, quickly and economically. Subject to justice and reason, finality of the primary decision is consonant with those aims. There are well settled principles for deciding whether leave to appeal should be granted. It is not nearly enough for a party to express disappointment at the original decision, or a feeling that justice has not been done. It must be shown that the decision in question is affected, arguably at least, by an appellable error, resulting in a substantial injustice to the intending appellant. It is not such an error to prefer one version of the facts to another, or to attribute more weight to the evidence of witness "A" than to the testimony of witness "B". Findings of fact will not usually be disturbed on appeal if the findings of fact by the original decision maker have rational, albeit debateable support in the evidence. Where reasonable minds may differ, a decision cannot properly be called erroneous, simply because one conclusion has been preferred to another possible view. One clear purpose of a "leave" proviso is to preclude attempts to conduct retrials on the merits.

[35] That is essentially a summary of what has been said in other cases.[4] but it is a fair and useful summary, although it does not focus on the specific considerations that might apply where the only appeal that is permitted without leave is on a question of law. Neither party address on that issue.

[36] There are other factors as well. The principal factors relevant to the grant of leave to appeal where leave is required even where one can appeal on the merits and not merely on a question of law, are well established. Leave to appeal should not be granted unless the decision from which it is sought to appeal is attended with sufficient doubt to warrant its being reconsidered and also that, supposing the decision below to be wrong, substantial injustice would result if leave were refused (*Whiting v Rayner* [2000] 2 Qd R 552 at 553; *Caloundra City Council v Pelican Links Pty Ltd* [2005] QCA 84 at [35]). Other factors may be relevant to the grant of leave to appeal, include whether the appellant/applicant has any interest in the point sought to be raised, whether the points raised in the appeal are merely academic (*Re Ecovale Pty Ltd* [1999] QCA 67) and whether the appeal raises issues of considerable public interest (*Friends of Stradbroke Island Association Inc v Sandunes Pty Ltd & Anor* [1998] QCA 374).

[37] Hence a grant of leave will usually only be given in circumstances where an appeal is necessary to correct a substantial injustice, or where there is a reasonable argument

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[4] For those propositions the following decisions were cited: *Robinson v Corr* [2011] QCATA 302 at [7]; *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41; *Drew v. Bundaberg Regional Council* [2011] QCA 359 at [19]. Fox v Percy (2003) 214 CLR 118 at 125-126; *Minister for Immigration and Citizenship v SZMDS & Anor* (2010) 240 CLR 611 at [131].

that there is an error to be corrected.[5] Any contention regarding errors in findings of fact will not be disturbed unless the findings were not open on the evidence.[6]

[38] Hence appeals on grounds other than error of law will not lead to findings of fact being disturbed on appeal if the findings of fact by the original decision maker have rational, even if debateable, support in the evidence. As the decision in *Wilkes* makes clear, where reasonable minds may differ, a decision cannot properly be called erroneous, simply because one conclusion has been preferred to another possible view. A clear purpose of a "leave" proviso is to preclude attempts to conduct retrials on the merits under the guise of claims that there was inadequate evidence to arrive at a particular finding.

Relevant treatment of findings of fact on appeal

[39] An appeal, including by way of rehearing, which this appeal is not since (subject to leave) it is limited to on questions of law, is a procedure that is concerned with the correction of error.

[40] An appeal on a question of law is concerned with error on questions of law, and those errors must be of such significance that they lead to a different result or that the decision should be overturned.

[41] These principles are of longstanding acceptance and may be found in numerous authorities including High Court authority in *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203, *Warren v Coombes* (1979) 142 CLR 531 at 538-539, *Fox v Percy* (2003) 214 CLR 118.

[42] The High Court has said[7] that the distinction between questions of law and fact is 'vital' in many legal contexts, but it also acknowledged that 'no satisfactory test of universal application has yet been formulated'. The clear implication was that the law-fact distinction produces different results in different fields of law.

[43] It has been said that a question of fact involves an inquiry into whether something happened or will happen, and is quite separate from any assertion as to its legal effect. A question of law involves the identification and interpretation of a norm which is usually of general application. That distinction quickly becomes blurred, however, by the difficulties of classifying the interactions between norm and fact. In *Da Costa v R* [1968] HCA 51; (1968) 118 CLR 186, at 194 Windeyer J said that

> When the distinction [between questions of fact and questions of law] determines whether or not in a particular case an appeal lies, there is room for questioning whether it has in philosophy or logic an essential and abstract and universal character.

[44] Having said that, it is settled that errors of law include applying an incorrect principle of law or making a finding of fact or facts on an important issue which could not be supported by the evidence.

[45] In *Vetter v Lake Macquarie City Council*[8] ('*Vetter*') three members of the High Court explained the underlying principles sufficiently for the purposes of the case at hand,

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5 *Terera & Anor v Clifford* (2017) QCA 181 at [10].
6 *Duffill v Karingal Pty Ltd t/as the Marble Man ABN 7601914824* [2023] QCATA 114 at [10].
7 *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389, 394.
8 (2001) 202 CLR 439 at [24].

which concerned the scope of an appeal confined to a question of law from a trial court exercising workers compensation jurisdiction, when they stated:

> Whether facts as found answer a statutory description or satisfy statutory criteria will very frequently be exclusively a question of law. To put the matter another way ... whether the facts found by the trial court can support the legal description given to them by the trial court is a question of law. However, not all questions involving mixed questions of law and fact are, or need to be susceptible of one correct answer only. Not infrequently, informed and experienced lawyers will apply different descriptions to a factual situation.

[46] The Court went on to say:

> [W]hen it is necessary to engage in a process of construction of the meaning of a word (or phrase) in a statute a question of law will be involved, but ... the question may be a mixed one of fact and law ... [A] question exclusively of law arises ... if, on the facts found only one conclusion is open.[9]

[47] The three members of the High Court in *Vetter* explicitly drew upon the frequently cited distillation of principle by Sir Frederick Jordan in 1940 in *Australian Gas Light Company v Valuer-General* (1940) 40 SR (NSW) 126. That distillation of principle by Sir Frederick Jordan had concluded as follows at 138:

> a word or phrase in a statute or necessarily outside that description, a contrary decision is wrong in law. If, however, the facts so inferred are capable of being regarded as either within or without the description, according to the relative significance attached to them, a decision either way by a tribunal of fact cannot be disturbed by a superior Court which can determine only questions of law.

[48] That conclusion was explained by Sir Frederick to follow from four propositions he had himself extracted from the cases, the fourth of which was to the effect that a finding of fact by a tribunal that a particular set of facts comes within "an ordinary English word or phrase as used in a Statute" is one of fact which:

> can be disturbed only (a) if there is no evidence to support its inferences, or (b) if the facts inferred by it and supported by evidence are incapable of justifying the finding of fact based upon those inferences or (c) if it has misdirected itself in law.[10]

[49] It was for the relevant Member to decide what weight was to be given to particular considerations and the evidence which was before the Tribunal.

[50] The general principles concerned in challenging primary findings of fact in an appeal by way of rehearing are well established, and although applicable in a different context to that here, are helpful. Neither party addressed the issue of what the proper approach to findings of fact are when the appeal is only on a question of law. But assuming leave is potentially available to challenge findings of fact or mixed law and fact, it seems to me that what has been said about the correct approach when there is to be an appeal by way of rehearing set a low benchmark which must, at a minimum, be satisfied.

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9 Ibid, at [27].

10 At 138.

[51] It is accepted that the task of determining the primary facts may be shaped by legal requirements as to natural justice,[11] procedure or evidence, but on the assumption that there is no issue as to adherence to those requirements, fact-finders commit no legal error simply by getting their facts wrong, even drastically wrong. There are exceptions, but they are strictly limited.

[52] The High Court has made clear that findings of fact will not easily be disturbed on an appeal. The appeal is not another opportunity for the parties to re-argue the case that was before the original decision maker. The findings of fact made by the original decision maker will not be disturbed unless the findings were not open on the evidence before the Tribunal. The appeal tribunal will only disturb a finding of fact if there is good reason to do so.

[53] The High Court said in *Robinson Helicopter Company Incorporated v McDermott* [2016] HCA 22 at [43]:

> A court of appeal conducting an appeal by way of rehearing is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings. But a court of appeal should not interfere with a judge's findings of fact unless they are demonstrated to be wrong by "incontrovertible facts or uncontested testimony", or they are "glaringly improbable" or "contrary to compelling inferences". [footnotes omitted].

Factual findings relevant to discrimination in the accommodation area on the basis of pregnancy and race

[54] The Member found in relation to the threat of eviction in emails of 27 March 2020 and 30 March 2020 that:

> [85] The emails of 27 March 2020 and 30 March 2020 read together make the extraordinary statement that the baby when born was not authorised to be at the premises, that this would be a serious breach of the lease, and that it would result in eviction proceedings. [86] Irrespective of the precise legal rights which applied to the situation, the threat of eviction if the tenants brought their baby home after the birth was undoubtedly unfavourable treatment. As he explained when giving evidence, this threat caused Mr Gitau to seek help. He explained that he did not know how the law worked, and he was concerned that the family would be turned out of the premises. In the circumstances it was reasonable for him to seek help.
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> [87] On the face of it, the threat of eviction was made because of the pregnancy. It might be said that the pregnancy merely provided an opportunity to be forthright about the effect of the birth on the tenancy, but bearing in mind that at that time the tenants were clear that they wanted to leave before the end of their fixed term, there was no reason to describe that effect. In Mr Walsh's response to contentions, it is suggested that the threat was a reservation of rights should the tenants

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[11] See, e.g., *Yates Property Corporation Pty Ltd (In Liq) v Darling Harbour Authority* (1991) 24 NSWLR 156, 186, where a mistake of fact as to the scope of a dispute led to a breach of natural justice, which was in its turn characterised as an error of law.

not leave at the end of the fixed term, it being uncertain whether they would leave, or possibly to show that the respondents were not going to be intimidated in any way.45 Again there was no need to reserve such rights or to show such strength. It was the threat that was the unfavourable treatment and there was no need to make such a threat.

[88] Assessing this by applying the terms of section 10 of the AD ACT [the *Anti-Discrimination Act 1991* (Qld)], it is necessary to ask whether the respondents would have made this threat to tenants in the same circumstances as these tenants, but who were not about to have a baby. The answer is clearly no.

[89] … I regard the emails of 27 and 30 March 2020 as part of the campaign and they were therefore also motivated by race. Both the fact of the pregnancy and race were 'substantial reasons' for those emails. In the terms of section 10 of the AD ACT, I ask whether the respondents would have made the threat in the emails to tenants without the attribute of race, and the answer is no.

[55] The Member found in relation to what he described in shorthand as a campaign against the tenants that:

[91] I have found that there was a campaign against the tenants, and that Mr Walsh was strongly influenced by Ms Boles' mistrust of the tenants because of their race and this is why the campaign was conducted.

[92] As explained in schedule 4[12] not all the events complained of by the tenants should be considered as part of the campaign, and not all the events are in fact relied on.

[93] It is my finding therefore that the company and Mr Walsh did directly discriminate against the tenants on the basis of race (in addition to the threat of eviction proceedings in the emails of 27 and 30 March 2020) by conducting a campaign against them consisting of a breach notice dated 29 March 2020 issued about the clothes dryer, locking the tenants out of the laundry room on 30 March 2020, issuing a breach notice about the bin collections on 1 April 2020, filming Ms Ng'ang'a on 5 April 2020, issuing a breach notice about water being thrown off the balcony on 11 April 2020, issuing a breach notice about allegedly false complaints about loss of water on 14 April 2020, not dealing quickly with the tenants' problems with water on 14 April 2020, issuing a breach notice about repeated breaches on 16 April 2020, not dealing quickly with the tenants' problems with water on 16 April 2020, speaking mockingly to Ms Ng'ang'a on 18 April 2020, issuing a breach notice about a visit by an NBN contractor on 20 April 2020, by an inspection of 24 April 2020 and the issue of a breach notice on 24 April 2020, filming Ms Ng'ang'a on 27 April 2020, not dealing quickly with the tenants' problems with electricity on 7 May 2020, calling Mr Gitau a piece of shit on 19 May 2020, placing an iron sheet near the front of the car port and placing a trailer in an inconvenient position for the tenants and not responding to Mr Gitau's emails of 19 and 22 May 2020 about this, and obstructing the car port with a trailer on 2 June 2020.

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12 Which was a table setting out the evidence in considerable detail.

> [94] By itself such discrimination is not actionable. It must come within one of the areas of the AD ACT for there to be an actionable contravention. Here it can be seen that all the acts of direct discrimination come within either section 83(b) (denying or limiting access to any benefit associated with the accommodation) or section 83(d) (treating a person unfavourably in any way in connection with the accommodation.
>
> [95] The liability of the company arises from the provisions of section 133 of the AD ACT that is to say that when he contravened the AD ACT he was acting in the course of work or while acting as agent for the company.
>
> [96] Agent as used in section 133 are defined in the schedule to the AD ACT as: agent means a person who has actual, implied or ostensible authority to act on behalf of another [97] Mr Walsh agreed when giving evidence that in making the residential tenancy agreement the company was acting as trustee for the De Soysa Family Trust. Since the company was the named lessor in the residential tenancy agreement and Mr Walsh was its sole director and shareholder, in anything to do with the tenancy he was obviously acting as he agent of the company, and section 133 is obviously engaged.
>
> [98] Mr Walsh however, submits that section 133 does not apply because he was not an agent for the company, that the company's only role was as corporate trustee of the trust. Since the company was the lessor, and therefore had given the tenants the right to occupy the unit, and a company must act through other people, I cannot see how these submissions can succeed.

[56] There is much criticism throughout the appeal submissions[13] including Grounds 7 and 8, that there has been some error in relation to the use of the word "campaign" by the Member. There is nothing to that because the word, as explained by the Member, was used to collectively describe a series of findings of fact (set out in schedule 4 to the reasons) as to the applicants' conduct.[14]

[57] The use of that word as shorthand is unobjectionable. The relevant question is whether the findings of fact that are caught by that descriptor were open on the evidence and based on findings of weight, probability and proper inference, and not glaringly improbable or contrary to compelling inferences, those findings of fact should not be overturned.

Factual findings relevant to the counter-complaint for sexual harassment

[58] The Member found[15] in relation to the alleged sexual harassment of Ms Boles that:

> [192] Ms Boles has been quite inconsistent describing what happened between video 1 and video 2 to cause her to shout out that she was being threatened.
>
> [193] The first account was in a statement to the police made on 29 May 2020, just four days after the event. In that statement she said that Mr Gitau came up to her and pushed his shoulder directly into her right shoulder,

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13 Applicants' September Submissions, [45]-[46] p 12, [63] p 16, [65]-[66] p 18, [114.4] p 38, [209] p 65.

14 Applicants' September Submissions, [45]-[46] p 12, [63] p 16, [65]-[66] p 18, [114.4] p 38, [209] p 65.

15 Schedule 3 to the reasons.

forcing her backwards and her fall was broken by her car. She said that a while later, maybe a few seconds, Mr Gitau moved back towards his car. Hence, she shouted out about being threatened. She said that due to being pushed there was an exacerbation of a pain in her back from a previous injury. There was no mention of sexual harassment in the statement.

[194] The second account was in her complaint to [Queensland Human Rights Commission ('QHRC')] about Mr Gitau's sexual harassment, dated 13 December 2020. She said that Mr Gitau came up to her on 25 May 2020 and was smirking and he said 'you're black, why don't you like a good-looking black man like me'. She ignored him and he turned around went back to his unit and a moment later came back out and walked up to her holding his crotch and said: What's wrong with you. Can't handle a good piece of black meat like I have?

[195] She said in the complaint that at that point she shouted out about being threatened. There is no mention of any physical contact between Mr Gitau and Ms Boles at all and no mention of a car.

[196] Ms Boles was asked in cross examination about why the complaint did not mention any physical contact and her explanation was that the complaint was only about sexual harassment.

[197] I do not think this is a good explanation bearing in mind the gravity of the allegation as it later emerged when Ms Boles gave evidence in the hearing. She said: I walked passed him onto the boot of my car to check whatever I was checking for and as I was leaning down doing whatever I was doing I felt something coming up behind me and as I'm coming up (Mr Gitau) came to me and pushed me into the car, as he was pushing me into the car he was grabbing his private parts looking at me, sneering, and said what's wrong with you don't you like a good piece of black meat like I have. All of this was happening at the same time. As Mr Gitau was doing that I was saying 'help, help, help'. By that time (the neighbour) is coming down the stairwell, I'm pushing passed Mr Gitau going where I was going, Scott was coming down the stairs and I said he's threatening me.

[198] This account is unlikely to be true either, because if as Ms Boles told the police, the physical assault was sufficient to exacerbate pain in the back from a previous injury, merely shouting out: He's threatening me, David, he's threatening me would have considerably understated what happened.

[199] My conclusion is that the inconsistency in the accounts given by Ms Boles makes it impossible to find as a fact what happened to cause her to shout out that she was being threatened. This has an impact on the sexual harassment counter complaint, considered above.

[59] In summarising this evidence and the findings the Member held:

[131] The difficulty is that the evidence from Ms Boles is difficult to accept. In schedule 3 I referred to the quite different accounts given by Ms Boles about what happened on 25 May 2020 between video 1 and video 2, which is one of the main allegations in the sexual harassment complaint. She was asked in cross examination why she did not mention the alleged sexual harassment on that day (which is version 2 of what happened that day) to the police in the statement made on 29 May 2020. Her

explanation was that she did mention the sexual harassment to the police officer who was taking the statement but was told that it was not appropriate for inclusion in the statement. This seems inherently unlikely, and it does not accord with her explanation for the delay in raising the sexual harassment at all, which was that she did not want Mr Walsh to know about it and she only felt strong enough to tell him about it towards the end of November 2020. It is much more likely that Mr Boles did not mention sexual harassment to the police officer at all, if she was trying to keep it from Mr Walsh, because he had control of preparing the evidence for the tribunal and this included her statement to the police.

[132] Ms Boles' complaint of sexual harassment is not helped by her considerable exaggeration of what she was alleging. When asked in cross-examination why she appeared in the video to be calmly walking away from where the sexual harassment was alleged to have happened, she said: I'd just been sexually assaulted – one step away from being raped. [133] It is suggested in final written submissions written on behalf of Ms Boles that this should not affect her credibility – it 'was obviously a statement as to how Ms Boles felt at the time'. But this is precisely the difficulty with this evidence – if at a time when Ms Boles is obliged to provide truthful evidence (to the tribunal) she says something based on how she felt at the time without explaining that she is doing so, then it casts doubt on whether the allegations describe something that actually happened.

[134] Ms Boles accepted in cross examination that she told the police that Mr Walsh did not have a golf club in his hands when he went for Mr Gitau near the end of video 2. She said that the reason for this was that she did not see the golf club. But then, in contradiction to this, she said that she saw the golf club in his hands after the fight. Further discrepancies emerged about this when asked about what she had said in her affidavit in support of the sexual harassment complaint. I did not find Ms Boles' answers to these questions satisfactory and they tend to reduce the value of her evidence about the sexual harassment.

[135] One weakness is why the sexual harassment complaint was not made earlier. There was no hint of any such allegation until the QHRC complaint of 13 December 2020, yet this complaint referred to incidents which occurred from about March 2020 onwards. It is suggested by Mr Walsh in contentions filed on Ms Boles behalf that she did refer to the complaint before. But that is a reference to this statement: Mr Gitau ... would approach me when I was on my own in the rear garden of the property and would harass me with race-based comments on the theme of 'why are you with that white man?' Initially I would ignore him and walk away but found this behaviour increasingly intolerable when (they were claiming pregnancy and parenting discrimination, had made false claims about water and electricity disruption, abuse in the NBN incident and the noises they made) It can be seen it is not a good point at all to refer to this earlier material which makes no suggestion of sexual harassment.

[136] Ms Boles and Mr Walsh were aware that some explanation for the delay would be required and so an affidavit was prepared.60 The explanation in that affidavit was that she did not want to tell Mr Walsh about the sexual harassment and only felt strong enough to do so towards the end

> of November 2020. When asked about this when she was giving evidence, she said that she did not want to tell him about it because she would have to tell him about other aspects of her life. Although this might make some sense from an emotional standpoint,61 logically it makes no sense and further weakens the explanation.
>
> [137] My conclusion about the sexual harassment complaint is that the evidence from the complainant Ms Boles is not sufficiently cogent or reliable to prove the basic facts of the complaint. The complaint fails and is dismissed.

The specific grounds of appeal

Bias and the comparator – Ground 1

[60] Ground 1 asserts that the appellants have a reasonable apprehension of bias because of the Member's reasoning or in the alternative, by not being afforded procedural fairness and or natural justice contrary to QCAT Act s 28(2) and (3)(a). They later make a submission on Grounds 1, 4 and 5 collectively under the heading "The Comparator".

[61] As to Ground 1, the appellants submit that a reading of the plain words of the reasons leads to the reasonable apprehension that the evidence has been interpreted to suit a predetermined outcome – discriminatory and unfavourable treatment on the base of race – in order to sustain the claim of direct discrimination on the pregnancy attribute.

[62] Ground 4 asserts an error of law in that the Member misdirected himself as to the meaning of 'Comparator', how it is formulated and how it is applied. Ground 5 asserts an error of law in application of his "alternate methodology" in the decision in *Petrak v Griffith University & Ors* [2020] QCAT 351 ('*Petrak*') to address the issue of identifying a 'real reason' for unfavourable treatment is misapplied because it by-passes the need to identify a 'Comparator'.

[63] The second element of this point is that the Member did not identify a comparator, despite his own finding in the decision in *Petrak* and the observations of the appeal tribunal, and so it is objectively reasonable for this Tribunal to conclude that:

(a) Since the member was very aware of the requirement to identify a comparator;

(b) And the Member chose to by-pass this, legally required step; and

(c) The only plausible explanation for his not identifying a comparator was to "support the reasoning applied by the Member so that the Member might find in favour of the tenants".

[64] The appellants also assert that they have a reasonable apprehension of bias "because of the Member's reasoning" and or in the alternative, "by not being afforded procedural fairness and or natural justice contrary to QCAT Act s.28(2) and (3)(a)".

[65] The appellants assert in support of Ground 1 that the bias was apparent on day one at the outset of the hearing. They introduce evidence of this in their submissions asserting that when, in response to a question from Mr Walsh, the Member stated, while looking at Mr Walsh "this is not Perry Mason" in what sounded to Mr Walsh and Ms Boles, like a derogatory tone. Additionally, they say, at the end of day two, after the Member and clerk had left the room, Mr Walsh waited for counsel to clear their files and papers before attempting to organise and pack his. A moment later the

Member re-entered the room while looking at the floor, glanced up and saw Mr Walsh and stated sotto voce "Oh Christ" in what sounded to Mr Walsh as a contemptuous tone bordering on a sneer, as the Member returned to the bench and started making notes. Mr Walsh gathered his papers and as he left apologised for interrupting the Member who did not look up while he muttered something unintelligible in response.

[66] In later submissions the appellants submitted that the "reasonable apprehension of bias started on day 1 of the hearing," and thereafter became "more entrenched at the close of day 3 during the Member's prolonged exposition on his capacity to make inferences". It was submitted that the Member's bias was founded on his "personal disapproval of and or dislike for, both Mr Walsh and Ms Boles".

[67] There is no sworn evidence that those things occurred. There was no challenge to the member then or anytime in the subsequent two days and no request that he recuse himself on the ground of bias. None of these matters were raised during the hearing.

[68] This seems clearly to amount to an allegation of actual and also perhaps apprehended bias.

[69] Actual bias requires a finding that the decision-maker was 'so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented'.[16]

[70] Any such conclusion is antithetical to fair and impartial decision making, particularly in the exercise of judicial power. Accordingly, a finding of actual bias is a 'grave matter', which courts should 'not lightly' reach.[17]

[71] Claims of actual bias must also be 'distinctly made and clearly proved'.[18] A further difficulty associated with actual bias arises from the very particular nature of its test, which is a subjective one about the actual state of mind about the actual decision-maker.[19]

[72] It may be readily accepted that procedural fairness generally requires that the decision-maker must act without bias or an appearance of bias (the 'bias rule'). To satisfy the bias rule, the decision-maker must objectively be considered to have an impartial and unprejudiced mind on the question that they are required to decide. An apprehension of bias arises in the circumstances where a fair-minded observer might reasonably suspect that the decision-maker was not impartial.

[73] In my view the conduct asserted to have been observed did not demonstrate the Member was in fact biased nor did it demonstrate "personal disapproval of and or dislike for, both Mr Walsh and Ms Boles".

[74] Even were it capable of giving rise to an apprehension that he had personal disapproval of and or dislike for, both Mr Walsh and Ms Boles, it may readily be said that judicial officers are called upon daily to decide whether to accept or reject evidence on the basis of credit, and sometime based on their opinion as to the honesty

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16 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 532 [72] (Gleeson CJ and Gummow J) ('*Jia Legeng*').

17 *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71, 127, 133 (Burchett J).

18 *Jia Legeng*, 531 [69].

19 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 437–8 [33] (Gummow ACJ, Hayne, Crennan and Bell JJ).

or truthfulness of parties, and that may involve in some cases, "disliking them". That does not demonstrate actual bias or apprehended bias.

[75] As for apprehended bias, the applicable principles are also well established and are not in dispute.

[76] The "double 'might'" test as articulated in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337 at [6] was recently reaffirmed in *Charisteas v Charisteas* [2021] HCA 29; 393 ALR 389 at [11]:

> The apprehension of bias principle is that "a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".

[77] In *Johnson v Johnson* [2000] HCA 48; 201 CLR 488, the majority (consisting of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) made the following relevant remarks:

> [12] ... The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasise that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by some judges of the capacity or performance of their colleagues. At the same time, two things need to be remembered: the observer is taken to be reasonable; and the person being observed is "a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial".

[78] Reference may also be had to what has been said in *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50; (2019) 268 CLR 76 at [55], and *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15 at [37], (Kiefel CJ and Gageler J) by reference to *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 to the effect that a finding of apprehended bias is not to be reached lightly and that the criterion for the determination of an apprehension of judicial bias is concerned with the real and not remote possibility a fair minded lay-observer might reasonably apprehend the judge or judicial officer might not bring an impartial mind to the resolution of the question to be decided.

[79] In my view the conduct of the Member said to have been observed would not lead a fair-minded lay observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

[80] Tribunal Members do not have an associate or an assistant to pack up what is on the Members' hearing table although it is usually required to be removed from the court at the end of each hearing day. This means that Members usually come into the hearing room after the parties and their representatives have left. It can sometimes occur that Members think the court has been cleared, but it has not, and they walk back in to work on the material and only then find that the parties are still there or packing up. According to the version of events set out in the submissions nothing was said to or about Mr Walsh. Indeed, according to Mr Walsh, he realised that he had interrupted the Member and apologised for doing so. Whatever comment the Member made would have reflected the fact that he may have had some annoyance at having to have this encounter with only one party present. Interpreting the two words said to have been used as contemptuous, or bordering on a sneer, involves some considerable

speculation as to what was in the mind of the Member at that moment. The other matters which are said to evidence bias through the next few days are described only at a level of generality and again involve the appellants' interpretation of the basis for the Member's stated belief that he was entitled to draw certain inferences from the evidence.

[81] The appellants next contend that

> [t]he inferences and findings made by the Member are inherently unlikely and not supportable on the evidence that was before the Member and came about as a result of the Member remaking the tenants' case to focus only on pregnancy and race direct discrimination as the bulk of the tenants' claims were unsupported by evidence and or unsustainable in the context of the evidence put before the tribunal.

[82] This involves an allegation that the Member remade the tenants' case to focus only on pregnancy and race. It also compounds notions that the Member engaged in bias in drawing inferences and findings inherently unlikely and not supportable on the evidence.

[83] Since the Member rejected the other bases for the respondents' claims, it is hardly surprising that the reasons were required to and did focus on the evidence and legal analysis surrounding:

(a) the events surrounding the direct discrimination against both respondents in the accommodation area on the basis of pregnancy by sending emails of 27 and 30 March 2020, threatening eviction proceedings if they brought their baby home to their rental property after the birth of their child;

(a) the events surrounding the direct discrimination against both respondents in the accommodation area on the basis of race by conducting a campaign against the tenants of surveillance, being constantly picked on, losing the use of a facility, being served with numerous unjustified notices, declining to assist with utilities, being spoken to in humiliating and offensive ways, and by obstructing access.

[84] In my view the reasoning of the Member could not be said, in and of itself, to have led a fair-minded lay observer to reasonably apprehend that the member did not or might not have brought an impartial mind to the resolution of the question he was required to decide. I do not accept either that the Member drew inferences and findings inherently unlikely and not supportable on the evidence in relation to the claims he upheld. I will deal with those inferences and findings shortly.

[85] Next, the appellants submit that in respect of the QCAT Act s 28(2) and 3(a), the reasons show, contrary to the tenants' evidentiary burden, that the Member has substituted his own reasoning in lieu of the tenants' stated claims to be then able to find direct discrimination to have occurred. The tenants claimed less favourable treatment as against their identified comparator referencing 'harassment and victimisation' in the form of the notices served on them and other incidents, and which were claims dismissed by the Member. They did not cite a "campaign".

[86] It is not easy to identify with any precision exactly what this proposition entails. It seems to suggest bias again by the Member having substituted his own reasoning (or basis?) for the tenants' claims when they did not make those claims themselves because their only claims were for harassment and victimisation.

[87] First, it is clearly wrong to suggest that the tenants' only claims were for harassment and victimisation. They included the claims of direct discrimination that were upheld.

[88] Secondly, the Member did not impermissibly remake the respondent's case to find against the appellants, nor create his own methodology to provide a novel framework in which to find against the appellants as the appellants' September 2023 submissions contend.[20] Rather, the Member identified his reasoning, examined the evidence, assessed credibility not necessarily adversely to the appellants, and drew inferences he thought were open in reaching the decision and identified his reasoning.

[89] Thirdly the fact that the Member described the conduct of the appellants as a "campaign" does not reveal bias, in circumstances where the Member identified the conduct forming the campaign, and explained what use was to be made of this word, which was a shorthand way of identifying its effect.[21]

[90] Next the appellants submit[22] that instead of assessing the *Anti-Discrimination Act 1991* (Qld) ('AD Act') s 7(c) and (g) direct discrimination claims by reference to the tenants' reasons (that is, their evidentiary burden), the Member substituted his own methodology, ignoring the case law requirement to identify a comparator, and created impermissible extensions of the law permitting himself to argue that he can find as fact the "real reasons" Mr Walsh acted as he did (Ms Boles' purported influence as applied to Mr Walsh to which he was "unconsciously" and "unknowingly" vulnerable).

Bias and the comparator – Grounds 4 and 5

[91] Grounds 4 and 5 involve a submission[23] that there was a deliberate failure by the learned Member to identify a comparator so that the learned Member could find that Mr Walsh and De Soysa Walsh Pty Ltd directly discriminated against the respondents.

[92] Again, it is not easy to identify with any precision exactly what this proposition entails but it seems to suggest bias again by the Member having failed to identify a comparator and doing so deliberately. The relevant attributes were pregnancy and race. The comparator was obviously persons who did not have the attributes which the respondents had in those respects. The Member referred to the comparators in his reasons as being tenants in the same circumstances as the respondents who were not of African origin and were not about to have a baby. Since the relevant attributes were pregnancy and race, no exercise involved having to exclude from the comparator description any characteristics that a person with those attributes has.[24]

[93] The current test in section 11 of the AD Act involves determining the appropriate comparator group for proportional comparison. This has been shown to be problematic.

[94] The comparator is the predominant means of determining causation in Australian discrimination law. The comparator is an actual or hypothetical person who does not have a particular protected attribute (sex, race, disability etc). Courts construct the comparator and are required to place them in similar factual circumstances to the

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20 Applicants' September Submissions, [28], [114].
21 Reasons, [46]-[47] and [51]-[52].
22 Applicants' September Submissions, [191]-[198].
23 Applicants' June Submissions, [52]-(65]; September Submissions, [191]-[209], [199] p 61-65.
24 Reasons, [83] and [88], cf. Applicants' September Submissions, [191]-[198].

complainant. Then, it is necessary to ask whether the complainant was treated less favourably than the comparator in those circumstances. If the answer is yes, that generally establishes the relevant discrimination (subject to defences). The comparative formula is found in the formulation of 'less favourably' tests in the *Sex Discrimination Act 1984* (Cth) (s 5A), the *Disability Discrimination Act 1992* (Cth) (s 5) and the *Age Discrimination Act 2004* (Cth) (s 14).

[95] The use of comparators has attracted stinging criticism. It was described as akin to conceptual 'shackles' in the joint dissent of Kirby and McHugh JJ in *Purvis v New South Wales* (2003) 217 CLR 92 ('*Purvis*'). Indeed, dicta from the House of Lords[25] has suggested that comparators should be relegated to the status of analytical tools for reaching a conclusion of discrimination rather than necessary preconditions. Numerous bodies have suggested that the comparator test should be simplified at the federal and state levels. The NSW Law Reform Commission in its 1999 review of the *Anti-Discrimination Act 1977* (NSW) identified 'widespread dissatisfaction … conceptual difficulties … artificiality and resulting complexity'. More recently, the Australian Human Rights Commission noted, 'the application of the comparator test … has presented significant difficulties, including complexity in interpretation and uncertainty of outcome' (p 279).

[96] Criticisms of comparators aside, the short point here is that not only there was there no deliberate failure by the learned Member to identify a comparator, because he did as I shall explain shortly, and even if there had been such a deliberate failure, it does not establish or even arise as a basis to show bias or apprehended bias.

Motive for discrimination and unconscious conduct – Ground 2

[97] The findings, in this part concern the second element of racially discriminatory conduct, i.e. conducting a campaign against the tenants on the basis of race.

[98] Ground 2 asserts that the Member has made an impermissible extension of the meaning of the AD Act s 10(3) contrary to the plain language of the legislation. Conceptually that could be seen as an error of law if it occurred.

[99] Section 10(3) of course provides that the discriminating person's motive for discriminating is irrelevant. The section includes an example in these terms and which the appellants rely on:

> R refuses to employ C, who is Chinese, not because R dislikes Chinese people, but because R knows that C would be treated badly by other staff, some of whom are prejudiced against Asian people. R's conduct amounts to discrimination against C.

[100] The appellants submit that:

(a) The text of the "example" is part of the legislation. As the AD Act was assented to 9 December 1991, s 14(3) of the *Acts Interpretation Act 1954* (Qld) applies to s 10(3) and that on a plain reading, the example shows that R has directly discriminated against C, who is Chinese, because R did not hire C on the basis of race because R knew some other staff were prejudiced against Asian people.

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25 *Lord Scott and Lord Nicholls' speeches in Shamoon v Chief Constable* [2003] UKHL 11.

In other words, the relevant "motive" is a conscious, knowing awareness on the part of R that some of his staff are race prejudiced.

(b) However, the Member identifies a new meaning in the section. That is, contrary to the plain language of the example, the member impermissibly extends the identified "motive" to an action or intention that is unconsciously held.

(c) The reasons at [82] cite AD Act s 10(3) as authority for the proposition [because] "I cannot say Mr Walsh intentionally acted on the basis of race." [and] "section 10(3) clearly makes it irrelevant that the perpetrator has no such intention [the motive]" [then it was because] "The reason is that the perpetrator may well act unconsciously."

(d) The reasons then state at [83] that, having created a new impermissible meaning for s 10(3), that is 'acting unconsciously', the Member can find that the purported campaign was conducted on the basis of race.

[101] First of all, one does not need to go to the example to understand what state of mind must be established. The concept has been widely discussed in numerous decisions to which I shall turn in a moment. But it is clearly wrong to assert that the example shows that one must have some conscious, knowing awareness that Mr Walsh's so-called campaign was based on race or that in the example given in s 10, knowledge that some of his staff are racially prejudiced. The example demonstrates that the relevant less favourable treatment was done on the basis of race. And that is precisely what the Member held here.

[102] The appellants rely on the well-known principles to be derived from the decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 ('*Briginshaw*') as to what is the proper method for the application of the civil standard to proof of facts. In that regard the principles were conveniently summarised in this context in *Leigh v Bruder Expedition Pty Ltd* [2020] QCA 246 at [16], where Sofronoff P as he then was, stated:

> Dixon J said that the application of the civil standard to proof of facts was not a mere mechanical comparison of probabilities. Rather, the fact finder must feel an actual persuasion of the occurrence of the relevant fact before its existence can be found. An opinion that a state of facts exists may be held according to indefinite gradations of certainly. However, except in criminal cases, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. Reasonable satisfaction on the balance of probabilities is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of the allegation made, the inherent unlikelihood of an occurrence, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. His Honour said:
>
> > "This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based upon a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained".

[103] If the ground of appeal under consideration is whether the tribunal of fact created a new impermissible meaning for s 10(3), that is in finding that one could contravene

the AD Act by 'acting unconsciously', so the Member could find that the purported campaign was conducted on the basis of race, arguments about: whether an issue has been proved to the Member's reasonable satisfaction; seriousness of the allegation made; the inherent unlikelihood of an occurrence; or the gravity of the consequences flowing seem to have no useful work to do. It seemingly has no relevance to the issue raised under this head, and the reliance on it borders on nonsensical.

[104] Reliance on the *Briginshaw* principles also pops up in other places in the appellants' arguments under differing heads, rarely with a clear comprehension of what if any significance they actually have to the point being made.

[105] Returning to the issue of whether the Member has made an impermissible extension of the scope or meaning of s 10(3) of the AD Act contrary to the plain language of the legislation and departing from discussion of the *Briginshaw* principles, s 10(3) of the AD Act provides that "the person's motive for discriminating is irrelevant". Section 10(1) of the AD Act requires that the complainants establish that the respondent has treated them or proposed to treat them in a discriminatory way "on the basis of" the relevant attribute or attributes.

[106] In my view, the Member clearly did not create a new impermissible meaning for s 10(3), or find that one could contravene the Act by 'acting unconsciously', in the sense of having no consciousness as to the conduct being engaged in, as distinct from having an affirmative consciousness that the conduct being engaged in was for a discriminatory purpose or motivated by such a purpose.

[107] One can see the use of that expression elsewhere in the reasons. For example, in dealing with racially stereotypical views:

> [99] From the evidence it can be seen that Ms Boles holds deeply held prejudices against, and stereotypical views about African people, and African men in particular. She had a deep distrust of African men. She had 'reservations' about the tenants upon first meeting seemingly because they were from Kenya,48 and from her perception these views were reinforced as time went on so that at least by 25 May 2020 she openly called Mr Gitau a 'bush nigga' which in her understanding meant that he was completely disreputable and unworthy.
>
> [100] Ms Boles was remarkably frank and open about her views to the tribunal. This is rare. Usually such views are not openly expressed in a formal setting. And in many cases such views are not even recognised and understood by those holding them, but are acted upon unconsciously.

[108] The reference here to someone acting upon racially prejudiced opinions unconsciously is not a reference to whether they are in fact acting upon those views, but whether they are conscious of the fact that they are doing so. The prohibition on direct discriminatory conduct on the basis of another's protected attribute operates with respect to so called unconscious acts or non-intentional ones, as long as the basis for, or one of the bases for, the conduct was the relevant attribute.

[109] AD Act s 10(4) provides that if there are two 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. The focus here is on reasons for conduct, not motive or intent.[26]

[110] The High Court in *Australian Iron and Steel Pty Ltd v Banovic*[27] ('*Australian Iron and Steel*') was concerned allegations of direct discrimination on the basis of sex, or gender. It was alleged that workers were retrenched because they had not been employed before a particular date. It was said that this amounted to discrimination on the basis of gender because the waiting period for employment with that employer was for a longer period for women than it was for men. Hence female workers were being retrenched because the male workers had in effect been employed longer, and before the relevant cutoff date. In the joint judgment of Justices Deane and Gaudron it was held that:

> ... in the ascertainment of the true basis of an act or decision it may well be significant that there is some factor, other than the ground assigned, which is common to all who are adversely affected by that act or decision. In certain situations that common factor may well be seen to be the true basis of the act or the decision. And that may also be the case where some factor is identified as common to a significant proportion of those adversely affected".
>
> "Even if it could be said that a factor common to all or a significant proportion of those who were adversely affected by the decision of AIS to retrench by the "last on, first off" method was that they were women, a further finding that that was the true basis of the decision would be necessary to render [the equivalent to section 10] applicable .... There is no finding to that effect by the Tribunal.

[111] Hence the court in *Australian Iron and Steel* concluded since the reason for retrenchment was the time at which employees were employed, and even though women were more affected by those retrenchments because they were more likely to have been employed later, there was no direct discrimination.

[112] The High Court revisited the issue in *Waters & Ors v Public Transport Corporation* (1991) 103 ALR 513; [1991] HCA 49.

[113] The complaints of discrimination there arose out of a direction by the Minister for Transport to the Public Transport Corporation to introduce changes to the public transport system. One of these changes was a new ticketing system for public transport involving travellers making a scratch mark on tickets. The other change involved the removal of conductors from some trams. The disabilities of the individual appellants made it difficult or impossible for them to use the scratch tickets. Some of them could not travel on trams which did not have conductors. The Board determined that the changes involved discrimination and ordered the Corporation to discontinue the changes.

[114] In examining the extent to which a causal connection between the basis for the relevant act and alleged direct discrimination, members of the court differed. Mason CJ and Gaudron J (Deane J agreeing) held under the heading "Section 17(1): does it require an intention or motive to discriminate?" at pages 520-521 as follows:

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26 See *Purvis v State of New South Wales* (2003) 217 CLR 92, [155]-[163]; *Bindaree Beef Ply Ltd v Riley* (2013) 85 NSWLR 350, [94] (Basten JA); *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, [23] (Kiefel J)

27 (1989-1990) 168 CLR 165, at 176-7.

> There is some force in the suggestion that the expressions "on the ground of the status" and "by reason of the private life" in s 17(1) look to an intention or motive on the part of the alleged discriminator that is related to the status or private life of the other person: see Department of Health v Arumugam [1988] VR 319, per Fullagar J at 327. However, the principle that requires that the particular provisions of the Act must be read in the light of the statutory objects is of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation, the courts have a special responsibility to take account of and give effect to the statutory purpose: Ontario Human Rights Commission v Simpsons-Sears Ltd, at 547; see also Street, at CLR 487, 566. In the present case, the statutory objects, which are stated in the long title to the Act, include, among other things, "to render unlawful certain Kinds of Discrimination, to promote Equality of Opportunity between persons of different status". It would, in our view, significantly impede or hinder the attainment of the objects of the Act if s 17(1) were to be interpreted as requiring an intention or motive on the part of the alleged discriminator that is related to the status or private life of the person less favourably treated. It is enough that the material difference in treatment is based on the status or private life of that person, notwithstanding an absence of intention or motive on the part of the alleged discriminator relating to either of those considerations. A material difference in treatment that is so based sufficiently satisfies the notions of "on the ground of" and "by reason of".

[115] A similar view was adopted by the House of Lords in *R v Birmingham City Council; Ex parte Equal Opportunities Commission* [1989] AC 1155 in relation to section 1(1)(a) of the *Sex Discrimination Act 1975* (UK) which proscribed less favourable treatment on the ground of sex. Lord Goff of Chieveley (with whom the other members of the House agreed) said (at 1194): "*The intention or motive of the defendant to discriminate… is not a necessary condition of liability*".

[116] His Lordship noted (at 1194) that, if intention or motive were relevant: "it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy. In the present case, whatever may have been the intention or motive of the council, nevertheless it is because of their sex that the girls in question receive less favourable treatment than the boys" (emphasis added). (See also the discussion by Deane and Gaudron JJ in *Australian Iron and Steel*, at CLR 176–7).

[117] McHugh J differed with this approach, distinguishing between the tests to be applied as to motive, intent and causation depending on whether the discrimination was direct or indirect. He said at 103 ALR 513 at 552-553:

> The words "on the ground of the status or by reason of the private life of the other person" in s 17(1) require that the act of the alleged discriminator be actuated by the status or private life of the person alleged to be discriminated against. I am unable to accept the statement of Lord Goff of Chieveley in *R v Birmingham City Council; Ex parte Equal Opportunities Commission* [1989] AC 1155 at 1193–4, and the statements of Deane and Gaudron JJ (at CLR 176-7) in *Banovic* concerning intention or motive to discriminate if they are intended to suggest that it is not a necessary condition of liability that the conduct of the alleged discriminator (the discriminator) be actuated by status or private life in a provision such as s 17(1).

With great respect to Deane and Gaudron JJ, I think that the examples given by them in *Banovic* as to intention or motive not being a necessary condition of liability are cases which are caught by the concept of indirect discrimination which fall within section 17(5). The words "on the ground of" and "by reason of" require a causal connection between the act of the discriminator which treats a person less favourably and the status or private life of the person the subject of that act (the victim). The status or private life of the victim must be at least one of the factors which moved the discriminator to act as he or she did. Of course, in determining whether a person has been treated differently "on the ground of" status or private life, the Board is not bound by the verbal formula which the discriminator has used. If the reason for the use of the formula was that it enabled a person to be treated differently on the ground of status or private life, then "the ground of" the act of the discriminator was the status or private life of the victim: see *Umina Beach Bowling Club Ltd v Ryan* [1984] 2 NSWLR 61, per Mahoney JA at 66. But if the discriminator would have acted in the way in which he or she did, irrespective of the factor of status or private life, then the discriminator has not acted "on the ground of the status or by reason of the private life" of the victim. Likewise, if the discriminator genuinely acts on a non-discriminatory ground, then he or she does not act on the ground of status or private life even though the effect of the act may impact differently on those with a different status or private life. Thus, in *Director-General of Education v Breen* (1982) 2 IR 93, the Court of Appeal of New South Wales held that the Director-General had not acted "on the ground of sex" in selecting principals for non-secondary schools from a primary school promotions list rather than an infant's school promotions list even though the use of the former list favoured male teachers. Only 1.5 per cent of teachers on the infants list were male but on the primary schools list 39 per cent of the teachers were male. Absent an intention to use the primary list to disadvantage females, discrimination in a case such as Breen can be established only by relying on a provision similar to section 17(5). At the relevant time, however, the Act had no such equivalent.

The effect of the introductory words of section 17(5), however, is that an act which falls within that sub- section is deemed for the purpose of section 17(1) to constitute treating "the other person less favourably than the first-mentioned person treats or would treat a person of a different status or with a different private life". If the alleged discriminator has in fact treated the other person "less favourably", in the circumstances specified in section 17(1), then discrimination is made out and section 17(5) is irrelevant. Section 17(5), therefore, operates only in situations where section 17(1) is inapplicable. The hypothesis upon which section 17(5) is built is that the alleged discriminator has not in fact treated the other person "less favourably". Yet discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different. Thus, both direct and indirect discrimination involve the notion of one person being treated "less favourably" than another.

How then can a case of indirect discrimination come within section 17(5) and yet not come within section 17(1)? The answer is that in section 17(5) "discrimination" is defined in an artificial sense and is dealing with situations where a requirement or condition is imposed equally but has an adverse or more adverse effect on persons of a particular status or with a different private life. A person may be guilty of discrimination under section 17(5) although he or she was not actuated in any way by status or private life.

[118] In *Purvis* the High Court considered these authorities in the context of a claim of disability discrimination.

[119] In that case the relevant Act stated that it was unlawful for an educational authority to discriminate against a student "on the ground of" the student's disability. It stated that a person discriminates against another person on the ground of that person's disability if, "because of" the person's disability, the discriminator treats him or her 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.

[120] Chief Justice Gleeson said that

> In Australian Iron & Steel Pty Ltd v Banovic, Deane and Gaudron JJ said that it is necessary to determine the "true basis" for the act or decision. This indicates that it is the reason for the decision that must be considered. Their Honours referred with approval to Lord Goff's statement in Birmingham regarding motive and intent to discriminate. They accepted that genuinely assigned reasons may in fact mask the true basis for the decision. Dawson J also said that the test is not subjective – the mere assertion of a ground that is not sex will not prevent the act from being discriminatory if the "true basis" for the act in question is in fact sex.

[121] After referring to the judgements referred to above from *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 (‘*Waters*’), of Mason CJ and Gaudron J and that also of McHugh J, the Chief Justice said at [159]-[160]:

> “…However, McHugh J's misgivings were more the result of the ambiguous use of the words "intention" and "motive" in Birmingham and Banovic than any real difference of approach with that of Deane and Gaudron JJ.
>
> [160] The reasoning in discrimination cases in this Court is consistent with the view that, while it is necessary to consider the reason why the discriminator acted as he or she did, it is not necessary for the discriminator to have acted with a discriminatory motive. Motive is ordinarily the reason for achieving an object. But one can have a reason for doing something without necessarily having any particular object in mind.

[122] After referring to later authority he said:

> [166] The weight and course of authority no longer accepts that the "but for" test is the accepted test of causation in the context of anti-discrimination legislation. That is because that test focuses on the consequences for the complainant and not upon the mental state of the alleged discriminator. Although the Commissioner said that he was applying the "but for" test, the extract referred to from the reasons of Kirby J in IW v City of Perth is not expressed as a "but for" test. Correctly, it focuses on the "real reason" for the alleged discriminator's act.

[123] The leading judgment in *Purvis* was delivered by Gummow, Hayne and Heydon JJ. For present purposes, relevantly, they identified the issue under consideration here as the “second issue” in the appeal, identified as being whether the Commissioner’s conclusion that the student’s behaviour occurred as a result of his disability and that "*in this case, Daniel's behaviour is so closely connected to his disability that if ... less favourable treatment has occurred on the ground of Daniel's behaviour then this will*

amount to discrimination on the ground of his disability". They did not reference in their reasons the cases discussed by the Chief Justice on how to identify the "true basis" for the act or decision.

[124] The question was posed in these terms by reference to what was required to show direct discrimination:

> [224] 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 of 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.
>
> [225] In the present case, the circumstances in which Daniel was treated as he was, included, but were not limited to, the fact that he had acted as he had. His violent actions towards teachers and others formed part of the circumstances in which it was said that he was treated less favourably than other pupils. Section 5(1) then presented two questions: (i) How, in those circumstances, would the educational authority have treated a person without Daniel's disability? (ii) If Daniel's treatment was less favourable than the treatment that would be given to a person without the disability, was that because of Daniel's disability? Section 5(1) could be engaged in the application of section 22 only if it were found that Daniel was treated less favourably than a person without his disability would have been treated in circumstances that were the same as or were not materially different from the circumstances of Daniel's treatment.

[125] Hence those judges held that the 'circumstances referred to in section 5(1) are all of the objective features which surround the actual or intended treatment of the disabled person' by the alleged discriminator. In *Purvis*, the circumstances in which the student was treated as he was included, but were not limited to, the fact that he had acted as he had. His violent actions towards teachers and others formed part of the circumstances in which it was said that he was treated less favourably than other pupils were. Accordingly, the comparator was a student who was not disabled, but who had acted in the same violent manner as had Daniel. Callinan J agreed with Gummow, Hayne and Heydon as to the circumstances that were to be ascribed to the comparator.

[126] The judgement of the dissenting judges McHugh and Kirby JJ, on the issue of the appropriate comparator and as to the causation issue are informative. As to the former they said:

> [130] Provisions that extend the definition of discrimination to cover the characteristics of a person have the purpose of ensuring that anti-discrimination legislation is not evaded by using such characteristics as "proxies" for discriminating on the basic grounds covered by the

> legislation. But the purpose of a disability discrimination Act would be defeated if the comparator issue was determined in a way that enabled the characteristics of the disabled person to be attributed to the comparator. If the functional limitations and consequences of being blind or an amputee were to be attributed to the comparator as part of the relevant circumstances, for example, persons suffering from those disabilities would lose the protection of the Act in many situations. They would certainly lose it in any case where a characteristic of the disability, rather than the underlying condition, was the ground of unequal treatment.

[127] In relation to the causation question McHugh and Kirby JJ said;

> [148] The words "because of" in s 5(1) of the Act indicate that it is the reason why the discriminator acted that is relevant. This interpretation is also consistent with s 10 of the Act, which refers to an act done for two or more "reasons". In dealing with s 10 the Explanatory Memorandum to the Disability Discrimination Bill also stated that "[i]n relation to direct discrimination the reason that someone has done a particular discriminatory act is very important." However, the cases show differences of opinion concerning the relevance of the alleged discriminator's motive or intention.
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> [149] A "but for" test was applied by Lord Goff of Chieveley in R v Birmingham City Council; Ex parte Equal Opportunities Commission where his Lordship said:
>
> > There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. The intention or motive of the defendant to discriminate … is not a necessary condition of liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex. [Otherwise] it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but … because of customer preference, or to save money, or even to avoid controversy.
>
> [150] By placing the words "intention" and "motive" together and denying that either is necessary for a finding of direct discrimination, his Lordship opened the way for the submission that direct discrimination does not contain an intention element. However, intention and motive are not the same thing.
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> [151] In James v Eastleigh Borough Council, Sir Nicolas Browne-Wilkinson VC rejected the "but for" test. His Lordship said:
>
> > [O]ne is looking, not to the causative link between the defendant's behaviour and the detriment to the plaintiff, but to the reason why the defendant treated the plaintiff less favourably. The relevant question is 'did the defendant act on the ground of sex?' not 'did the less favourable treatment result from the defendant's actions?'
>
> [152] His Lordship said "the legally determinant matter is the true reason for the defendant's behaviour, not his intention or motive in so behaving."

[153] But on appeal the House of Lords reversed the decision. Lord Goff, together with Lord Bridge of Harwich and Lord Ackner, reaffirmed the objective "but for" test as the relevant test. However, the dissentients, Lord Griffiths and Lord Lowry, criticised the "causative" approach as dispensing with essential statutory criteria. Lord Lowry said:

> It can thus be seen that the causative construction not only gets rid of unessential and often irrelevant mental ingredients, such as malice, prejudice, desire and motive, but also dispenses with an essential ingredient, namely, the ground on which the discriminator acts. The appellant's construction relieves the complainant of the need to prove anything except that A has done an act which results in less favourable treatment for B by reason of B's sex, which reduces to insignificance the words 'on the ground of.' Thus the causative test is too wide and is grammatically unsound, because it necessarily disregards the fact that the less favourable treatment is meted out to the victim on the ground of the victim's sex. (original emphasis)

[154] Since James, however, the United Kingdom courts have moved away from the "but for" test. In Nagarajan v London Regional Transport, Lord Nicholls of Birkenhead held that it is necessary to consider the reason of the alleged discriminator but that his or her motive is irrelevant. His Lordship said:

> [I]n every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator …
>
> The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred … Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the complainant's job application was racial, it matters not that his intention may have been benign.

[155] In Chief Constable of the West Yorkshire Police v Khan Lord Nicholls again rejected the "but for" test. He said:

> For the reasons I sought to explain in Nagarajan v London Regional Transport … a causation exercise of this type is not required … The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.

[156] The House of Lords recently affirmed these principles in Shamoon v Chief Constable of the Royal Ulster Constabulary. Lord Hope of Craighead said that in most cases "the reason why" will call for some consideration of the mental processes of the alleged discriminator.

[157] These more recent English authorities are consistent with the approach taken by the Australian courts. In Australian Iron & Steel Pty Ltd v Banovic, Deane and Gaudron JJ said that it is necessary to determine the "true basis" for the act or decision. This indicates that it is the reason for the decision that must be considered. Their Honours referred with approval to Lord Goff's statement in Birmingham regarding motive and intent to discriminate. They accepted that genuinely assigned reasons may in fact mask the true basis for the decision. Dawson J also said that the test is not subjective – the mere assertion of a ground that is not sex will not prevent the act from being discriminatory if the "true basis" for the act in question is in fact sex.

[158] In Waters v Public Transport Corporation, Mason CJ and Gaudron J (Deane J agreeing) approved the view of Deane and Gaudron JJ in Banovic that motive or intention to discriminate is not required. Their Honours said that it is enough if the difference in treatment is based on the prohibited ground, notwithstanding an absence of motive or intention.

[159] In Waters, McHugh J rejected the statement of Lord Goff in Birmingham and the statements of Deane and Gaudron JJ in Banovic concerning motive or intention, in so far as they might suggest that it is not a necessary condition of liability that the conduct of the alleged discriminator was actuated by the prohibited ground. His Honour said:

> The words 'on the ground of' and 'by reason of' require a causal connexion between the act of the discriminator which treats a person less favourably and the status or private life of the person the subject of that act ('the victim'). The status or private life of the victim must be at least one of the factors which moved the discriminator to act as he or she did.
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> However, McHugh J's misgivings were more the result of the ambiguous use of the words "intention" and "motive" in Birmingham and Banovic than any real difference of approach with that of Deane and Gaudron JJ.

[160] The reasoning in discrimination cases in this Court is consistent with the view that, while it is necessary to consider the reason why the discriminator acted as he or she did, it is not necessary for the discriminator to have acted with a discriminatory motive. Motive is ordinarily the reason for achieving an object. But one can have a reason for doing something without necessarily having any particular object in mind.

[161] Subsequent decisions have applied this approach to the question of causation. In Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd Lockhart J said:

> The plain words of the legislation … necessarily render relevant the defendant's reason for doing an act, that is the reason why the defendant treated the complainant less favourably.

[162] His Honour also said that the presence of intention, motive or purpose relating to health does not necessarily detract from the conclusion that there is discrimination on the prohibited ground – in that case, sex.

[163] In University of Ballarat v Bridges, having considered the decisions in Banovic and Waters, as well as dictionary definitions, Ormiston J concluded that both "ground" and "reason" connote a basis that actuates or moves a person to decide a matter or to act in a particular way. His Honour said:

> [N]otwithstanding that it has been said on many occasions that the Act should be given a broad interpretation, the object of the legislature was to look at the reasoning process behind the decision, conscious and unconscious, at least so far as direct discrimination is concerned.

[164] His Honour said that motive and purpose should be treated as largely irrelevant so long as it can be shown that the person charged intended to do an act that in fact amounts to unlawful discrimination.

[165] It is true that statements of Toohey J and Gummow J in IW v City of Perth might appear to support a "but for" test in discrimination cases. Kirby J, after referring to the "reasons for the conduct of the alleged discriminator", said that the "but for" test applied by the House of Lords in James and by this Court in Banovic and Waters was "the correct test". In IW v City of Perth, however, the references to the "but for" test were expressed in relation to a decision of a corporate body that was made by its Councillors casting votes.

[166] The weight and course of authority no longer accepts that the "but for" test is the accepted test of causation in the context of anti-discrimination legislation. That is because that test focuses on the consequences for the complainant and not upon the mental state of the alleged discriminator. Although the Commissioner said that he was applying the "but for" test, the extract referred to from the reasons of Kirby J in IW v City of Perth is not expressed as a "but for" test. Correctly, it focuses on the "real reason" for the alleged discriminator's act. The Commissioner appears to have wrongly characterised the principle that he applied – which was the correct principle. He correctly held that the benevolent motive of the principal did not excuse the discriminatory treatment of Mr Hoggan.

[167] The Commissioner also correctly found that, because Mr Hoggan was treated less favourably because of his behaviour, he was discriminated against on the ground of his disability. Mr Hoggan's behaviour is a manifestation of his disability. In X v McHugh (Auditor-General for the State of Tasmania), Sir Ronald Wilson said that it is enough if an employer is shown to have discriminated because of a manifestation of a disability. The decision in X v McHugh was followed in Y v Australia Post where the Commission said:

> [T]o discriminate against a person suffering a mental disorder because of the behaviour of that person which directly results from that mental disorder, is to discriminate against that person because of the mental disorder.

[168] The validity of this principle can be seen by considering situations where the disability manifests itself in ways that society perhaps finds more acceptable than in cases where the disability manifests itself in dangerous

> conduct. In Randell v Consolidated Bearing Co (SA) Pty Ltd, for example, an employer was held to have discriminated against an employee on the ground of his disability by dismissing him because of his difficulties with the stock numbering system used in the employer's warehouse. These difficulties were a manifestation of the employee's dyslexia.
>
> [169] The Commissioner also found that the reason for Mr Hoggan's exclusion from the school, unlike the reason for his suspensions, included issues other than his behaviour. The Commissioner found that, although Mr Hoggan's behaviour was a factor in his exclusion, it was not the only factor. He found that the principal had also acted because Mr Hoggan was unable to cope with the stresses of high school life as a result of his disability. Section 10 of the Act states that, if an act is done for two or more reasons and one of the reasons is the disability of a person (whether or not it is the dominant or a substantial reason for doing the act), the act is taken to be done for that reason. Because the Commissioner found that the decision to exclude Mr Hoggan was made on this basis, the Commissioner's decision can be supported without having to consider issues relating to behaviour.
>
> [170] In our view, when the Act is applied according to its true construction, the Commissioner was correct in finding that the State through its agents had discriminated against Mr Hoggan.

[128] As Justice McHugh said in *Waters* "on the ground of" and "by reason of" require a causal connection between the act of the discriminator which treats a person less favourably and the status or private life of the person the subject of "the victim". The protected attribute, to use the language of the Queensland Act, must be at least one of the factors which moved the discriminator to act as he or she did. And as his Honour said, of course, in determining whether a person has been treated differently "on the ground of" that matter this Tribunal is not bound by the verbal formula which the discriminator has used. If the reason for the use of the formula was that it enabled a person to be treated differently on the ground of status or private life, then "the ground of" the act of the discriminator was the status or private life of the victim.

[129] What the Member found in this context of what the basis for the campaign was as follows;

> [78] I think that the real reason appears from the respondents' own evidence about Ms Boles' attitude towards Africans, to African men in particular, and towards the tenants. In schedule 6 it can be seen that she mistrusted the tenants from the outset because they were from Kenya. She must have told Mr Walsh at that time because she says that he answered:
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> > being from Kenya was no reason to discriminate against the applicants
>
> [79] She considered that the tenants exhibited the same type of poor behaviour and attitudes as she had perceived from Africans when she lived in the USA. This is why she called Mr Gitau a 'bush nigga' who would be a person she would not trust and was dishonest and disreputable.
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> [80] When at the end of his evidence I asked Mr Walsh about the influence of Ms Boles on his decision making, although he skirted round this he did finally accept that he would have taken her views into account. Although he denied that it would not have altered his decision making, I think he

> underplayed this. Ms Boles has an obvious strong character40 and knows how to influence Mr Walsh as shown by what happened on 25 May 2020. In the hearing this manifested itself as her repeated prompting of him when he was cross examining the witnesses. Her own evidence shows that she has influence on Mr Walsh on matters concerning tenants.41 These things and her intense dislike of African men and intense mistrust of the tenants leads me to find that she did influence Mr Walsh on his decision making. Effectively, Mr Walsh's suspicions about the tenants being dishonest and disreputable were fed by Ms Boles.
>
> [81] In any case, this must be my conclusion by reaching an inference in the circumstances. When this can be done was explained in McCauley v Club Resort Holdings Pty Ltd (No 2) [2013] QCAT 243.42 In the absence of a more probable explanation for the campaign and by a process of rational deduction (and not mere speculation, guesswork or assumption) to support the inference, it may properly be inferred that the reason why the respondents held the tenants in such suspicion and why they were considered to be so dishonest and disreputable, and hence that it was necessary to conduct the campaign, was Ms Boles' views. There is no other plausible explanation.
>
> [82] I cannot say that Mr Walsh intentionally acted on the basis of race. I believe he was alert to the possibility of race discrimination, as can be seen from his remark to Ms Boles when she expressed reservations about the tenants when she first met them.43 However, section 10(3) clearly makes it irrelevant that the perpetrator has no such intention. The reason is that the perpetrator may well act unconsciously.
>
> [83] On my finding therefore the campaign was conducted on the basis of race. In this respect I note that the attribute of 'race' includes colour, descent or ancestry, ethnicity or ethnic origin and nationality or national origin. As required by section 10 of the AD Act I ask whether the respondents would have conducted the campaign against tenants in the same circumstances as the applicant tenants but who were not of African origin and I answer this in the negative.

[130] Perhaps the use of the word unconscious was a poor choice of word to describe what the Member was saying, which was that Mr Walsh did not need to have a conscious awareness that the, or a, basis for his conduct, was the race of the respondents, but he did act in the way that he did on the basis of their race.

[131] In my view this ground is not made out.

Vicarious liability of the first appellant company for the conduct of Mr Walsh – Ground 3

[132] Ground 3 asserts an error of law in that the Member misdirected himself as to the proper meaning of and application of the AD Act s 10(3) and (4) and s 133 in that the Member misdirected himself as to the meaning and proper application of s 133 by finding the first appellant De Soysa Walsh vicariously liable for the actions of Mr Walsh.

[133] The company's vicarious liability was said to arise from Mr Walsh's actions under section 133 of the AD Act, that is to say that when he contravened the AD Act he was acting in the course of work or while acting as agent for the company. If this ground

of appeal was successful, it might result in the first appellant company being exculpated, but it would not affect the finding against Mr Walsh.

[134] As identified earlier, the Member found on this issue as follows;

> [95] The liability of the company arises from the provisions of section 133 of the ADA that is to say that when he contravened the ADA he was acting in the course of work or while acting as agent for the company.
>
> [96] Agent as used in section 133 are defined in the schedule to the ADA as: agent means a person who has actual, implied or ostensible authority to act on behalf of another
>
> [97] Mr Walsh agreed when giving evidence that in making the residential tenancy agreement the company was acting as trustee for the De Soysa Family Trust. Since the company was the named lessor in the residential tenancy agreement and Mr Walsh was its sole director and shareholder, in anything to do with the tenancy he was obviously acting as the agent of the company, and section 133 is obviously engaged.

[135] In their written submissions however on this head, instead of a clear focus on what is required to be shown to succeed on this point the appellants lapse into yet another seemingly irrelevant analysis of the failure to apply the principles to be derived from the decision in in *Briginshaw* under this head as well.

[136] The appellants submit that:

(a) The Member misdirected himself as to the proper meaning of and application of the AD Act s 10(3) and (4). The reasons at [54] cite s 10(4) as the legislative basis for understanding the validity of finding a 'substantial reason' for identifying the claimed unfavourable treatment.

(b) The relevant part of the AD Act s 10(4) is " ... the person treats the other person less favourably on the basis of the attribute if the attribute is a substantial reason for the treatment."

(c) The Member, in his reasons at [54], impermissibly extends the plain meaning of the subsection by first stating he is interested in the "substantial reasons for the campaign."

(d) Then the Member claims "In considering this, it should be borne in mind that the real reasons for less favourable treatment may not be known or recognised and may be covert or unconscious. So, it may be necessary to consider what, unknowingly, had influenced those reasons and caused the campaign to be implemented." For the sake of completeness, it is noted that, on the plain meaning of the word, "covert" reasons are still consciously known to the person acting. In this circumstance a 'perpetrator' knows what they are doing but hides it so as to disguise their actual motivations.

(e) The Member's reasoning, as quoted here for Grounds 2 and 3, is in stark opposition to the principles to be derived from the decision in *Briginshaw* as set out above.

(f) Neither the legislation, properly understood and applied, nor the principles to be derived from the decision in *Briginshaw* permit a decider of fact to posit that "a perpetrator may well act unconsciously", that reasons for action(s) might be

"unconscious" and or that the "perpetrator" was influenced "unknowingly" in their actions. A decider of fact must show and or be seen to, act with balance and objectivity. Exercising a discretion, based on unconscious and unknown influences, cannot be done by the decider of fact claiming that they know the 'real reason' something was or was not done, as against the evidence and respondent 'perpetrator' and or other parties' claims as to their stated reasons.

(g) The decider of fact must be shown to determine facts on an objective analysis of the evidence, not a subjective 'looking behind the veil' to establish the real reasons as determined by the decider of fact.

(h) If such was the legislative intent it would have been readily accomplished by inserting a few words in the subsections - for example, (a) in s 10(3) "some of whom are or might be prejudiced", and (b) in s 10(4) "the person treats the other person, knowingly or unknowingly, less favourably on the basis of the attribute if the attribute...".

(i) The Member creates a rationale that neither the tenants nor their multitude of legal advisors over three years and two counsel at hearing, proposed.

(j) By reading into the legislation to support impermissible extensions of the meaning of the legislation, the Member negatively colours his reasons and makes final decisions 1 and 2 that are unjust on their face as well as errors of law.

[137] None of that goes to the issue of whether vicarious liability is established.

[138] The company was clearly acting in its relevant dealings with the tenants through Mr Walsh because he was dealing with them not as some stranger to the situation but because the issues between them arose on the context of a landlord and tenant relationship and he was the guiding mind and will of the Company. Since it had no corpus or independent mind, it can only have acted in its dealings with its tenants through an agent with actual or at least ostensible authority.

[139] Reliance was placed on some things said in *Oaks Hotels & Resorts Limited v Knauer & Ors* [2018] QCA 359 which is said to be "on point with respect to this issue". It is not. It concerned conduct by an employee towards another outside of work hours and the issue was whether it occurred in the course of the employee's work. Here we are concerned with whether Mr Walsh was an agent of the company when he acted as he did.

[140] The appellants submit that it follows "as a matter of logic" that should a "campaign" have been carried out by Mr Walsh as it was found to have done (and it is to be noted this submission does not go to the discriminatory conduct in sending the email threatening eviction), as a matter of law, it was outside his duties as a director. Tacked on to that proposition is another labyrinth-like proposition that "the "campaign" cannot exist as it depends on the impermissible assertions of unconscious and unknowing motivations, and there is no relevant action by Mr Walsh, as director, for which the company can be vicariously liable".

[141] As to agency, the factual finding is that Mr Walsh was acting as agent when he did what he did. And he clearly was. There is no evidence or finding that he was acting outside his duties as a director when he did those things nor would one expect to see

such evidence in a case involving a family company controlled by a particular individual who, when he acted in respect of the company's affairs, acted as its agent.

[142] There is no substance to this ground of appeal.

The error of law in interpreting COVID-19 Emergency Response Regulation – Ground 6

[143] Ground 6 asserts an error of law in that the Member misdirected himself as to the proper meaning and application of the *Residential Tenancies and Rooming Accommodation (COVID-19 Emergency Response) Regulation 2020* (the 'Regulations').

[144] It is said that the reasons at paragraphs [56] to [58] and [67] reference the Regulations. The context of the reference may be seen in the following passage of the reasons which are concerned with the evidence of a campaign against the respondents:

> *The stated reasons for the campaign*
>
> [56] The stated reasons for the campaign appear mainly from the Response to Contentions filed on 10 November 2020 in ADL054-20,15 but the stated reasons are boosted by a considerable amount of hindsight in later documents, in the filed evidence, in evidence given in the hearing and in the final written submissions.
>
> [57] The stated reasons need to be understood in the context of the developing pandemic at the time. On 29 March 2020 an announcement was made by the Australian Prime Minister that the National Cabinet, representing the Commonwealth, its Territories and States, had agreed that there would be a moratorium on evictions on persons who were in financial distress as a result of Covid-19 for the next six months.
>
> [58] In Queensland this was implemented by the Residential Tenancies and Rooming Accommodation (COVID-19 Emergency Response) Amendment Regulation 2020 (Qld) which provided a moratorium on eviction for tenants in Covid hardship even if their fixed term ended. For those tenants not in Covid hardship a notice to leave at the end of the fixed term would still be effective.
>
> [59] When at the end of his evidence I asked Mr Walsh to explain the 'reason why' he made much of the tenants' alleged breaches of the rental agreement, in particular the noise emanating from their unit, and the allegation that while the respondents were away in the USA, they had someone else living in the unit. This is also explained in detail in the respondents' final written submissions.
>
> [60] The tenants accept that soon after moving in they had some friends over and there was some noise and possibly rudeness, but they say that the person who was seen coming and going to the unit when the respondents were in the USA was a relative who merely visited from time to time.
>
> [61] I have not resolved the factual disagreements about those earlier alleged breaches because even at their highest they do not explain the campaign. The alleged breaches were in the past and any repeat of such alleged breaches could be managed. For example, with respect to noise, the tenants apologised the first time this happened, and responded to later complaints.

> [62] In any case, there was no point in the campaign if it were conducted because of past breaches because the tenancy was due to end on 12 June 2020 anyway.
>
> [65] The respondents say that one of the reasons why the respondents started the campaign was because they believed that the tenants 'were positioning themselves to make financial demands upon the respondents', which is referring to financial advantage having agreed to a break lease…
>
> [66] At the end of his evidence, Mr Walsh suggested that a reason was that the tenants appeared to be seeking 'compensation'. In final written submissions this has been explained as meaning that the tenants were 'angling for unwarranted or unjustified financial benefits'. This is not Mr Walsh admitting to having conducted any part of the campaign because the tenants had made a complaint to QHRC, but is the same as the stated belief that the tenants were positioning themselves to make financial demands upon the respondents dealt with in the paragraph just above.
>
> [67] In final written submissions the respondents say that when they became aware that the tenants were abandoning the search for a new tenant on about 6 April 2020, they were concerned that the tenants might try to stay in the unit past the end of the fixed term. This is unlikely to be a reason because the respondents had served a notice to leave which would normally mean, as Mr Walsh was well aware, that a termination order could quickly be obtained from the tribunal. The only impediment might have been the Covid-19 eviction moratorium, but this could only be engaged in the case of Covid-19 hardship, and there was nothing to suggest to the respondents [that the tenants] had such hardship.

[145] I have added the words "that the tenants" in the last line so that the sentence clearly expresses the Member's obvious intent. This finding then is essentially that the explanation given by the appellants for why they acted as they did, namely that the tenants might try to stay in the unit past the end of the fixed term, was rejected because the appellants had knowledge or a belief that they could gain possession easily by law and that under the covid laws for tenants not in hardship, a notice to leave at the end of the fixed term would still be effective. It does not involve any error of law; it is a basis upon which to reject a version of the facts given by Mr Walsh. But if it did involve some legal analysis, in any event the analysis is concerned with whether the explanation for what the appellants did sat with what they knew were their legal rights. This is a finding of fact.

[146] The proper meaning and application of the Regulations, and whether it had the effect the appellants contend for, did not need to be decided, and does not need to be decided here because it will not affect the outcome of the appeal.

[147] Even if it had to be decided, it is clear that the Member's finding that the effect of the Regulations was that a notice to leave at the end of a fixed term would be effective unless the tenants were in hardship is correct and clearly set out in s 9(3) of the Regulations which state

> If the tenant is suffering excessive hardship because of the COVID-19 emergency, the lessor must, before the term of the agreement ends, offer the tenant an extension of the term to 30 September 2020 or an earlier date requested by the tenant.

[148] Additionally, it is argued, the way in which the Member misdirected himself as to the proper meaning and application of the Regulations raises the Ground 1 reasonable apprehension of bias. I have already dealt with that or another variation on that theme above. I will say though that the proposition that a decision maker who makes an error of law in interpreting a statute is ipso facto demonstrating bias or is conduct giving rise to a reasonable apprehension of bias does not bear scrutiny. If it is meant to suggest the "error" was made dishonestly, and contrary to the member's judicial oath, there is not a shred of evidence to support that most serious contention.

[149] Leave to appeal on Ground 6 is refused.

The errors of mixed fact and law, or errors of fact – Grounds 7 to 10

[150] Grounds 7 to 10 inclusive contend that there were errors of mixed fact and law, or errors of fact. When one reads the argument, however, there is no consistency as to whether they were such errors, and in some cases the assertion is made that they were errors of law.

[151] Grounds 7 and 8 are that the Member made multiple findings of fact there were not open on the evidence before the Tribunal, particularly in respect of the incidents on 19 and 25 May 2020 and the 'water supply' and 'electricity supply' issues. Depending on the particular finding of fact referred to, many examples in this ground interact in this labyrinth-like interior with Ground 1 I am told. So, the appellants say that Grounds 7 and 8 relate to the Member's findings about the conduct of the "campaign".

[152] I have already dealt with this issue of what this entailed and whether it matters or not, whether it was a conscious campaign to get a desired outcome or not, and whether it matters where the Member found that the offending conduct was discriminatory and was on the basis of the protected attributes.

[153] The complaint here is first that "the Member's heading in the reasons, before applying any reasons, already identifies Mr Walsh's actions as a "campaign" raising Ground One issues". It is a point without substance, because it is a heading to the topic that is about to be discussed not a finding and does not reveal bias even if it was a finding the basis for which is in the following paragraphs.

[154] The appellants next submit that at the end of day three of the hearing the Member asked Mr Walsh after his cross-examination by counsel whether he agreed that his enforcing lease terms was "robust". Mr Walsh's response was that, while he would not describe it in those terms, he accepted that "robust" might be used as a descriptor of his approach to the tenants. The appellants submit that at no time did the Member ask Mr Walsh to address the proposition that he was conducting a "campaign" against the tenants utilising the so-called 'robust' approach.

[155] The appellants submit that on the plain meaning of the word, a 'campaign' is a planned series of actions to achieve a predetermined or desired outcome. The Member does not explain how Mr Walsh could plan a 'campaign' when he had no knowledge of what the tenants would do from one day to the next. The appellants submit that the reasoning implies premeditation by Mr Walsh without stating it or adducing evidence to support the inference.

[156] Contrary to the appellants' submissions, there was no finding that Mr Walsh accepted that he conducted a "campaign".[28] Mr Walsh accepted he acted "very robustly" and admits that if the findings in schedule 4 of the reasons are accepted as having happened, that the conduct could be reasonably said to constitute less favourable treatment.[29] Even if he did not accept that, it was a finding clearly open to the Member, indeed one that was almost inescapable.

[157] It is a peculiarity of the appellant's position that they seeming not to dispute that there was a period when there was ongoing antagonistic behaviour directed towards the tenants. The Member held in effect that the stated explanation put forward on the appellants' case was implausible. It might be reasonably assumed that the ordinary reasonable landlord does not direct continued and antagonistic behaviour towards tenants for no reason. Yet we have lengthy and convoluted submissions, which attack a finding which merely characterizes this continued and antagonistic behaviour as a campaign. It matters not to the outcome of this appeal whether it is characterized as a campaign or not.

[158] The grounds are without substance and leave to argue them is refused. Even if leave had been granted, they would be rejected as being without substance.

[159] Ground 9 is that the Member conflated the claim of discrimination based on family responsibilities for the claim based on pregnancy and that the finding of direct discrimination based on pregnancy was not open on the evidence and resulted from the Member misdirecting himself as to the AD Act s 7, s 8, and s 10.

[160] The appellants submit that during his cross-examination Mr Walsh asked both tenants to identify the discrimination they say they suffered in respect of the claimed attributes of pregnancy and family responsibilities. Other than recite that 'you harassed and victimised us by serving notices on us' neither tenant could enumerate any other activity that might constitute discrimination.

[161] Mr Walsh says he asked the tenants to distinguish, having referenced to the AD Act, between pregnancy, s 7(c), and family responsibilities, s 7(o). Neither tenant could and in fact were firm in repeating that the two attributes meant the same thing and could offer no explanation as to why, given the AD Act distinguished the two attributes as distinct heads of claim, they would insist AD Act s 7(c) and (o) were the same thing.

[162] He concedes that the AD Act s 7(o) claim was not pursued nor was evidence oral or written introduced by the tenants or their counsel to support it. That is not surprising since the matter proceeded on different discriminatory attributes other than family responsibilities.

[163] In some futile attempt to draw all this together the ultimate point is that "as no reference to s 8 of the AD Act was made, the s 8 concept of a "characteristic" that is associated with an attribute does not feature in the reasons". It follows as a matter of logic and law that if characteristics of an attribute do not feature in the reasons, the relevant attribute is not part of the claim. It cannot be said the baby once born was a "characteristic" of the s 7(c) pregnancy versus s 7(o) family responsibilities.

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28 Applicants' September Submissions, [237] p 70.

29 Applicants' September Submissions, [63(b)] p 16.

[164] Doing the best I can with this confusing submission, discriminatory conduct on the basis of someone's pregnancy and pending childbirth is not the same as discriminatory conduct on the basis of someone's family responsibilities, although conceptually they might cross paths, or both occur if a pregnant person had other children. The bases for them are different: the characteristic of the foetus and the child to whom a parent will give birth or have parental responsibilities already is not a relevant consideration. There was no need to reference any case involving parental responsibilities in the reasons.

[165] The Member did not conflate the claim of discrimination based on family responsibilities with the claim based on pregnancy. This ground is without substance and leave to argue it is refused. Even if leave had been granted the ground would be rejected as being without substance.

[166] Ground 10 asserts an error of law and or law and fact, in that the final decision and reasons both identify what the submissions call emails 1 and 2 as relevant discrimination for the AD Act s 7(c), in circumstances where email 1 merely restates a lease contract terms and the plain language of email 2 refers to a s 7(o) dismissed claim. This said to be related to Ground 1, bias. Because "to this mixed error of law and fact can reasonably be added Ground 1 as it is inconceivable that the Member was not aware of these errors". So, an accusation is here made of judicial misconduct by making knowingly false findings.

[167] There is no merit to or evidence to support such an accusation. I will say no more about bias and findings of fact.

[168] The appellants submit that the email of 27 March 2020 relevantly states "To avoid doubt, please note that your lease authorises the two of you as tenants. Your child, once born, is not authorised to be at the Premises." The appellants submit that as a matter of fact the email does not, contrary to what is asserted in the decision and reasons, threaten eviction or anything else for that matter.

[169] The appellants submit that the member, in both the reasons and decision, stated as a fact (i.e. that there was a threat of eviction) when it did not. In respect of email 2, the appellants submit that the member incorrectly applied a s 10(4) finding to a s 7(c) attribute claim when email 2, on its plain language, can only apply to the dismissed claim for family responsibilities.

[170] The finding that a basis for the sending of both emails was the pregnancy which he knew of was correct because a substantial reason for each email being sent was the fact that Ms Ng'ang'a was pregnant.[30]

[171] This is clear from the terms of the emails themselves. In the email from Mr Walsh on 27 March 2020 he stated: "To avoid doubt please note that your lease authorises the two of you as tenants. Your child, once born, is not authorised to be at the premises". In the email from Mr Walsh 3 days later on 30 March 2020 he stated: "Please inform me as to your intentions as bringing a child to reside at the premises is a serious breach of your lease that will result in my instigating eviction proceedings".

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30 Reasons, [81],

[172] The contention that the 30 March 2020 email was not discrimination on the basis of pregnancy under s 7(c) of the AD Act has been addressed the findings about ground 9.

Alleged errors in applying ss 28 and 29 of the QCAT Act and the counter-complaint appeal

[173] These grounds, which involve the arguments in support of the appeal from the dismissal of the counter-complaint in APL 189-23, were not given a number in the original grounds of appeal. However, the September submissions identify that what was said in relation to Grounds 1 and 7 are relied upon as the basis upon which it is sought to argue this part of the appeal.

[174] The allegations which founded the counter-complaint were set out in the Affidavit of Leachia Boles dated 30 March 2022, at [11]-[42], and were as follows;

(a) in February and March 2020, Mr Gitau would approach Ms Boles and invade her personal space, while remaining silent he would look Ms Boles up and down, usually smirking as she would turn away and leave;

(b) towards the end of March 2020, this 'silent' behaviour became more verbal, offensive and threatening;

(c) in April and May 2020, when Mr Gitau intercepted Ms Boles at the garden, at the rear area of the property, he stated words such as "you're a good-looking woman. I like women who have a good figure", "you're in good shape for a woman of your age", "I really like pretty black women like you" and "what's wrong with you? Don't you like a nice strong black man like me?";

(d) on 19 May 2020, whilst Mr Walsh, Mr Nisbett and Ms Boles were sitting in the carport when Mr Gitau stood no more than a metre from Ms Boles, started a 'flexing routine' and said "pretty good hey?" ... "better than that old white man you're with wouldn't you say?", following which (amongst other things being said) Mr Walsh said sarcastically "wow, that's impressive isn't it Leachia?" and Ms Boles said "yeh, not bad for a bush n*gga";

(e) on 25 May 2020, in between the two videos Mr Gitau took that day, Mr Gitau walked up to Ms Boles, said "you're black, why don't you like a good-looking black man like me?", pushed his shoulder into hers, held his crotch and said "what's wrong with you? Can't handle a good piece of black meat like I have?

[175] As for the context of the events of 25 May 2020 Mr Gitau said that he was in his carport hanging out washing and:

(a) Ms Boles passed by Mr Gitau's carport. He asked Ms Boles words to the effect of "why do you call another black person a monkey?" Ms Boles replied "What you n*gger?" and walked away.

(b) Mr Gitau replied "Yeah, tell me - how does a black person call another black person a monkey? In front of white people?"

(c) Mr Gitau went back inside the Rental Property and told Ms Ng'ang'a about what happened.

(d) Several hours later, Mr Gitau then went outside to check the washing and Ms Boles came outside her unit. Mr Gitau asked her words to the effect of "why do

you call another black person a monkey? Hmm?" Ms Boles responded with "what n*gga?" and continuing slurs to that effect.

(e) Ms Boles walked towards the stairs at the back of the house and another person Mr Nesbitt was walking down the stairs. Mr Gitau started a recording on his phone. Ms Boles started to yell "He's threatening me. David, he's threatening me!" Mr Nesbitt said words to the effect of “We'll go and talk to David”.

(f) Within moments, Mr Walsh came directly towards Mr Gitau with a golf club and said "Alright, fucker, start talking." Mr Gitau backed away and Mr Walsh said "start talking, fucker, c'mon" and moved closer to Mr Gitau. Mr Gitau called out to Ms Ng'ang'a to record the incident. Mr Walsh advanced on Mr Gitau with the golf club. Mr Gitau called out to Ms Ng'ang'a to record the incident. Mr Walsh used the golf club to push against the rack that Mr Gitau was standing behind, in the process striking Mr Gitau's hand and causing him physical injury. Mr Walsh said "Yeah. Alright, c'mon. We're gonna see the coppers". Mr Gitau said "call the po - yeah, call the police, Call the police, call the police. Call the police. Call the police" and again called out to Ms Ng'ang'a with words to the effect of "Record him hitting me, C'mon, record, record!". Ms Boles then said words to the effect of "threatening me, go on, hit him David".

(g) At some point, Mr Walsh and Mr Gitau disengaged long enough for Mr Gitau to call the police.

[176] Ms Ng'ang'a's evidence supported Mr Gitau's recollection of the events of 25 May 2020, although she only witnessed the events from when Mr Walsh approached Mr Gitau.

[177] Mr Gitau has filed two videos that he recorded that day. They show that Mr Gitau's recollection of the events that occurred during the time of the recordings is accurate although they do not record everything that happened.

[178] Ms Boles' more recent evidence generally accepted that what was recorded in the videos is what happened although earlier, before the videos were seen she had given a different version. Ms Boles then alleged that in between the time that the two videos were recorded (which she says was short), Mr Gitau made comments and approached her, including pushing his shoulder into hers in the way described above, that is he pushed his shoulder into hers, held his crotch and said “what's wrong with you? Can't handle a good piece of black meat like I have?”

[179] In the submissions that accompanied the appeal application the appellants submitted that it was “unconscionable and contrary to QCAT Act s 28(2) and (3)(a) to dismiss Ms Boles' claim by finding her evidence to be lacking consistency and cogency such as it "makes it impossible to find as a fact what happened" when the very evidence that would eliminate the purported deficiencies in Ms Boles' evidence has been found as a fact to have been altered and or destroyed by Mr Gitau. That is a reference to video footage of one incident involving an encounter between Mr Gitau and Ms Boles. The appellants allege that Ms Ng'ang'a, on cross-examination, “repeated and supported Mr Gitau's falsehoods and misrepresentations as to the reasons for the gap in the videos and that the obvious improbability of Mr Gitau's explanations about the gap led the Member to find Mr Gitau had tampered with the evidence”.

[180] The evidence did not establish that whatever the gap there was in the videos demonstrated that there was once video footage of the sexual harassment alleged to have occurred and which would have corroborated what Ms Boles says happened ie that Mr Gitau walked up to Ms Boles, said "you're black, why don't you like a good-looking black man like me?", pushed his shoulder into hers, held his crotch and said "what's wrong with you? Can't handle a good piece of black meat like I have?

[181] The member did not consider whether even if that conduct occurred in the way she described, in context, whether it could objectively amount to sexual harassment. There would have been cause to consider whether in context, if those things occurred that they were anything other than a provocative response to his being called racially insulting and demeaning things and whether his response was a mocking way of dealing with her and Mr Walsh.

[182] The suggestion that someone who was to his being called racially insulting and demeaning things by the alleged victim of later harassment, who several hours later, when Mr Gitau then went outside to check the washing and Ms Boles came outside her unit and he asked her "why do you call another black person a monkey? Hmm?", to which Ms Boles responded with "what n*gga?" and continuing slurs to that effect would then engage in sexual harassment of her, suggesting she should find him sexually attractive is not an easy one to reconcile with ordinary human experience. People being insulted, who want an explanation for it do not ordinarily try to engage in seductive sexual behaviour toward their attacker. The Member did not specifically aver to this aspect of the case, but it ought to suggest that the harassment story had demonstrably implausible features.

[183] The appellants rely on s 28(2) of the QCAT Act, pursuant to which in all proceedings, the Tribunal must act fairly and according to the substantial merits of the case.

[184] Once again, it is only with considerable difficulty that this Tribunal is able to discern precisely what the grounds of appeal are under this head, and what the arguments in favour of them are.

[185] Doing the best I can with what has been said in the submissions the first point seems to be that the appellant Ms Boles should have succeeded at least on the incident on 25 May 2020 which was partially videoed. It is submitted that:

> The law requires only one instance of sexual harassment to be found to have occurred for a claim of sexual harassment to be sustained. Even if the 'leering' and '19 May' incidents as per the above are displaced, the '25 May incident' cannot be. Ms Boles' claim is dismissed for lack of evidence allowing Mr Gitau to benefit from his own tampering with the essential evidence.

[186] First, if one instance of sexual harassment was found to have occurred it does not mean that others occurred. Further, the Member held in relation to the events of 25 May 2020:

> [99] From the evidence it can be seen that Ms Boles holds deeply held prejudices against, and stereotypical views about African people, and African men in particular. She had a deep distrust of African men. She had ‘reservations’ about the tenants upon first meeting seemingly because they were from Kenya,48 and from her perception these views were reinforced as time went on so that at least by 25 May 2020 she openly called Mr Gitau a ‘bush nigga’ which in her understanding meant that he was completely disreputable and unworthy.

[187] The Member set out in schedule 3 his factual findings and they have been set out earlier in these reasons, as well as the findings in relation to them.

[188] I have recited above his favourable findings as to her credit. It was held that she gave quite different accounts about what happened on that day. It was held that she did not mention the alleged sexual harassment on that day in the 2nd version of what happened that day to the police in the statement made on 29 May 2020. Her explanation of why she did mention the sexual harassment to the police officer was rejected as implausible. She engaged in considerable exaggeration of what had happened, and despite being seen in a video at the time calmly walking away from where the sexual harassment was alleged to have happened, she said she had just been sexually assaulted – one step away from being raped, when no such thing had happened.

[189] She told the police that Mr Walsh did not have a golf club in his hands on that day when he went for Mr Gitau near the end of the events depicted in the second video. She said that the reason for this was that she did not see the golf club. But then, in contradiction to this, she said that she saw the golf club in his hands after the fight. This was a matter that seemed to suggest tailoring the evidence to suit her case or the interests of Mr Walsh.

[190] The respondents' complaint of discrimination was lodged on of 6 April 2020. On 24 November 2020 the respondent Ms Ng'ang'a applied to join Ms Boles to her complaint, something she said was intended from the outset but which had not happened at that time. Before that was dealt with by the Tribunal, on 1 December 2020 there was a compulsory conference in both complaints and directions were given on that occasion for submissions to be filed about whether Ms Boles should be joined as a respondent to Ms Ng'ang'a complaint in ADL055-20. Then out of the blue, on 13 December 2020 Ms Boles made her sexual harassment complaint to QHRC against Mr Gitau. There was no hint of any such allegation of sexual harassment until that QHRC complaint of 13 December 2020, yet the complaint referred to incidents which had allegedly occurred from about March 2020 onwards and there was no satisfactory explanation for why no such complaint was made earlier or even referred to anywhere.

[191] In the September submissions the appellants allege that the Member held personal disapproval of Ms Boles, which led to inappropriate or incorrect findings in breach of ss 28 and 29 of the QCAT Act, and those findings were used to justify the finding that Mr Walsh was influenced by Ms Boles unconsciously and unknowingly. It again invokes arguments of bias and judicial dishonestly and contraventions of judicial oath.

[192] For example, it is submitted that Ms Boles' evidence "has been framed by the member to create an appearance of objectivity in order for the Member to be able to make his predetermined findings".

[193] Another asserted example is that a

> reasonable consideration of the totality of the Member's reasons leads to the inevitable conclusion that the Member has demonstrated actual bias or in the alternative, the reasonable apprehension of bias. It is further submitted that this bias is understandable should the tribunal consider the above submissions in the context of an objective consideration of what is submitted, the Member's apparent personal dislike of Ms Boles and Mr Walsh.

[194] The learned Member ultimately dismissed all the complaints of discrimination against Ms Boles because the offending words were not unfavourable treatment 'in connection with the accommodation' or on the basis of race and were not racial vilification and/or serious vilification. This was despite finding that Ms Boles had called Mr Gitau a "nigga" or "nigger" on 25 May 2020 in the circumstances I have just set out.

[195] There is no basis to hold that the Member felt personal disapproval of Ms Boles, which led to inappropriate or incorrect findings in breach of ss 28 and 29 of the QCAT Act, but even if he did disapprove of some of her conduct, that does not establish any error of law, and this appeal is not an opportunity to reopen findings of credit.

[196] There is no basis to find that this decision was a predetermined one, and that the findings were tailored to arrive at a particular result. There is no basis for contending that there was actual or apparent bias.

[197] The reasons for the dismissal of Ms Boles' claim in ADL024-21, the sexual harassment claim, are those set out in the judgement at [131]-[137]) concluding with "My conclusion ... is that the evidence from the complainant Ms Boles is not sufficiently cogent or reliable to prove the basic facts of the complaint.". Schedule 3 sets out the facts and I have set them out earlier in these reasons. At Schedule 3 paragraph [199], the Member concludes that the inconsistencies in her evidence "[make] it impossible to find as a fact what happened to cause her to shout out" that day, and as to whether there was an act of sexual harassment which led to it.

[198] I have set out earlier in these reasons and just now in summary form the factual findings relevant to the counter-complaint for sexual harassment and the findings that were made in relation to her credit. Those findings are an entirely conventional analysis leading to a finding of unreliability in the evidence of a complainant.

[199] The onus of proving the factual allegations fell on Ms Boles and she was required to do so to the so called *Briginshaw* standard which she did not, for various reasons, that depended upon her lack of credibility and acted in ways which were inconsistent with having been sexually harassed at the time. There was also a lack of contemporaneous objective evidence that the events occurred as she alleged that they did.

[200] In my view the Member did not err in making the findings that he did on the counter-complaint.

[201] It follows that, in my view, the learned Member did not err in law, or make errors of mixed fact or law, or errors in his application of the law to the relevant facts and the appeal on Grounds 1 to 10 must fail. To the extent that leave was required to appeal on any of those grounds, leave is refused.

Orders

[202] For the reasons that I have given the challenges to the findings of fact cannot be accepted and leave to appeal on those questions of fact and/or mixed questions of law and fact is refused.

[203] The orders that I make are that the appeals be dismissed and that the leave to appeal to the extent that it is required is refused.

[204] I grant the parties liberty to apply in respect of any other consequential or other orders which might be required to be made.