



Administrative Decisions Tribunal New South Wales

Medium Neutral Citation	Walker v Wakehurst Golf Club Ltd [2011] NSWADT 213
Hearing Dates	16 May 2011
Decision Date	05/09/2011
Jurisdiction	Equal Opportunity Division
Before	A Scahill, Judicial member E Heiss, Non Judicial member J Schneeweiss , Non judicial member
Decision	<p>The complaint of discrimination by the Respondent as a Registered Club against the Complainant is substantiated and the following orders are made in respect of that complaint:.</p> <p>1)The Respondent is enjoined from continuing the unlawful conduct pursuant to section 108(2) (b) of the ADA.</p> <p>2)The Tribunal orders that the Respondent Club cease discriminating against the Applicant on the grounds of her gender in respect of the opportunities to play in her same gendered competition on the Weekends available to her class of membership.</p> <p>The complaint of victimisation in relation to the Respondent Club's letter to the Complainant of 31 May 2010 is substantiated and the following orders are made in respect of that complaint:.</p> <p>The Tribunal orders that within 14 days of the publication of these reasons that the Respondent provide the Applicant with a letter addressing the following issues:</p> <ol style="list-style-type: none">An apology for not consulting with the applicant prior to imposing the restrictionsA retraction of the implication that the Applicant had been disrespectfulAn apology for the upset attested to by the Applicant caused by the receipt of the letterA copy of this letter to be placed on any membership file relating to the Applicant. <p>3.The second complaint of victimisation in relation to the Club's change of Membership rules is dismissed.</p> <p>4. The respondent is to pay two-thirds of the applicant's costs as agreed or, if not agreed, as assessed in accordance with the Legal Profession Act 2004.</p>
Legislation Cited	Anti-Discrimination Act 1977
Cases Cited	Australian Broadcasting Tribunal v Bond [1990] HCA 33; (1990) 170 CLR 321
Texts Cited	Rees, N, Lindsay, K and Rice, S (2008) Australian Anti Discrimination Law Text, Cases and Materials; Federation Press Sydney.
Category	Principal judgment
Parties	Susan Walker (Applicant) Wakehurst Golf Club Ltd (Respondent) Mary Cunningham (Applicant)

Representation	Gordon Salier AM (Respondent)
	Counsel Elizabeth Raper (Applicant)
File Number(s)	101025

REASONS FOR DECISION

- 1 This matter involves a complaint of sex discrimination in the Registered Clubs provisions of the Anti Discrimination Act 1977 (ADA) and 2 complaints of victimisation.

The Applicant, Ms Walker is a Full Lady Member of the Wakehurst Golf Club Ltd, the Respondent. Ms Walker alleges that the Respondent discriminated against her in relation to her membership of the club on the grounds of her sex in a number of ways. These included limiting the number of women who could play in the women's weekend competition on Sunday mornings, further limiting the numbers and reducing the tee times for the women's weekend competition on Sunday mornings commencing in June 2009 and in changing the conditions of Full Lady membership such that she could no longer compete in special competitions on Tuesdays and Sundays - limiting special competitions to Tuesdays. The Applicant alleges that the Respondent did not alter the conditions of Full Men's membership in the same ways.

- 2 The Applicant further alleges that after she complained to the Anti Discrimination Board (ADB) in September 2009 about the alleged discrimination she was victimised by the Club because she had made the complaint. The Applicant cites interactions with Club officials and a letter received from the Club dated 31 May 2010 informing her that she was no longer to talk to members of the Ladies or Match Committees about any future decisions made by these Committees. The Applicant alleges further victimisation when on 28 April 2011 the Club changed categories of membership for the Club - such that women can no longer play in the Sunday women's competition.

Procedural Matters

The Complaints as referred to the Tribunal from the ADB did not include a second complaint of victimisation made by the Applicant concerning the projected consequences of the Respondent Board's Special Resolution of 28 April 2011. The parties consented on the day of hearing to the Tribunal amending the complaint to include the second complaint pursuant to section 103 of the ADA.

The Applicant also indicated on the day of hearing that she did not intend to pursue a complaint relating to section 33 of the ADA and the provision of services by the Respondent Club.

Complaint and Legislative Provisions

The Applicant complains about 3 actions of the Respondent as constituting sex discrimination and 2 actions as constituting victimisation.

The first action of the Respondent that the Applicant complains of is the limiting of tee times for

what the Applicant refers to as the Weekend Women's Competition between July and November 2009 to between 8.45am to 9.09am on Sundays when the tee off period for the Weekend Men's Competition on Saturday was between 6.30am to 12.30pm. The Applicant alleges that as a result, the ratio of weekend (premium time) same gendered competition playing times for men and women members was for men - 62.27% and for women - 5.44% at a time when the percentage of male members to female members of the Club was approximately 70% men to 30% women. The Applicant alleges that by this action the Respondent is in breach of section 34A(2) (a) of the ADA in limiting the Applicant's access to a benefit - that is her gender allocated competition in circumstances where it did not similarly limit male members' access to this benefit. The Applicant also alleges that this action of the Respondent is in breach of section 34A(2) (c) in that it submitted her to a detriment. The Applicant alleges that this is direct discrimination in terms of section 24 (1) (a) of the ADA.

- 3 The second action of the Respondent that the Applicant complains of is its June 2009 decision to reduce the number of women who could play in the Women's weekend Competition played on Sunday from 32 to 20 places in circumstances where it did not limit the number of men who could play in the Men's weekend Competition played on Saturdays. The Applicant alleges that by operation of section 34A(2) (a) this limited the Applicant's access to a benefit of membership - that is the benefit of playing competition golf against other women. The Applicant alleges that this action is also in breach of section 34A(2) (b) in that it varied her terms of membership of the Club which allowed her access to weekend same gendered Competition and further that by operation of section 34A(2)(c) that it subjected her to a detriment.
- 4 The third action of the Respondent that the Applicant complains of is the refusal, commencing 29 November 2009, to allow Full Lady Members to compete in the Sunday Women's Competition - when previously they had done so. The Applicant alleges at the same time no similar change was made in relation to full male members. The Applicant alleges that this constitutes discrimination on the grounds of her sex by operation of section 34A(2) (a) in that it limited access to a benefit, that is of playing in all the events available at the Club on the weekend. The Applicant also alleges that by operation of section 34A(2) (b) that this varied the terms of her membership in that she was no longer able to compete in the special competitions open to women in circumstances where male members were not so limited. The Applicant further alleges that by operation of section 34A(2)(c) that the Respondent's action also subjected her to a detriment.
- 5 The fourth action of the Respondent that the Applicant complains of is that on the 31 May 2010 the Club wrote to her informing her that she was no longer to talk to members of the Ladies or Match Committees about any future decisions made by these Committees. The Applicant alleges that she has been subjected to a detriment as a result of her complaint to the ADB in breach of section 50 of the ADA in relation to victimisation.
- 6 The fifth action of the Respondent that the Applicant complains of is that when on 28 April 2011 the Club changed categories of membership for the Club - such that women can no longer play in the Sunday women's competition that this subjects the Applicant to a detriment as a result of her complaint to the ADB in breach of section 50 of the ADA in relation to victimisation.
- 7 The Applicant alleges that the Respondent is in breach of section 34 A (2) (a) of the ADA by

limiting the Applicant's access to a benefit. The Applicant describes that benefit to be the opportunity for women to play in their same gender-allocated competition on the weekend.

- 8 Further the Applicant alleges that the Respondent is in breach of section 34 A (2) (b) of the ADA by varying the terms of her membership and 34A(2) (c) by subjecting her to the detriment of fewer opportunities to secure a place in the same gender weekend competition and a smaller pool of participants once a place was secured.

Respondent's Defence

- 9 For its part the Respondent agreed that it is a Registered Club within the meaning of the ADA. The Respondent denied discriminating against the Applicant on the grounds of her sex in breach of section 34 A(1) and (2). In the alternative, the Respondent also relied on the provisions of section 34A(4) and (5) of the ADA. The Respondent argued that it is not practicable for the use or enjoyment of the benefit of a round of golf to be used or enjoyed to the same extent by both men and women whereupon it follows that men and women are each entitled to a fair and reasonable proportion of the use and enjoyment of the benefit of a round of golf and that this is provided by the Respondent's current competitions for its male and female members and its mixed competition.
- 10 The main points of the Respondent's argument are as follows:
- Between 1 July 2009 to 30 November 2009 the demands for golf by women members were greater on Tuesdays and Thursdays;
 - The Weekend Women's Competition is incorrectly referred to. It is in fact the Sunday Business Ladies competition and that it was only ever intended for Business Ladies who could not play in the main Lady Members' competitions - played during the week on Tuesdays and Thursdays. The 24 spots now available are ample for the 12 working ladies. As the Applicant was a Full Lady Member her main competition day was on Tuesdays. If she wished to play another competition game she could play in the Sunday Medley (mixed) Competition.
 - The Applicant had not experienced any disadvantage in that the Applicant had played competition golf in 18 of 21 Sundays in the July to November 2009 period by playing in the Business Ladies competition and the Medley competition. Further the Applicant had played thirty three times during the period in the Tuesday, Thursday and Sunday competitions making her seventeenth out of eighty one Full Lady members in the number of competition games played.
- 11 The Respondent argued that the appropriate circumstances of comparison in terms of section 24(1) (a) was Sunday play, not weekend same gendered competition, and that in this respect women members had enjoyed 49.8% of the competition places available on Sunday through competing in the Business Ladies Competition or the Sunday Medley (mixed) competition from July to November 2009 and that this represented a fair and reasonable proportion of playing times between men and women.

The Respondent also argued that it had waiting lists for the male members' competitions on Wednesday and Saturday but that there was no need for waiting lists for the Ladies' competitions on Tuesday, Thursday or the Sunday Business Ladies - inferentially because of the lack of demand.

- 12 The Respondent argued that from April 2007 to November 2009 male members played 8,408 rounds of golf while female members played 7,752 - the inference being that male and female members had enjoyed comparable access to a round of golf.

Victimisation Defences

- 13 The Respondent argued in respect of the Applicant's complaint of victimisation concerning the letter sent to her by the Club on 31 May 2010 informing her that she was no longer able to speak to members of the Ladies or Match Committees about any future decisions made by these Committees that it had not subjected her to a detriment because of her complaint. The Respondent argued that the Applicant had not been subjected to disciplinary proceedings and therefore had not suffered a detriment and that the direction was not the result of her complaint to the ADB, but rather her interactions with members of the Ladies Committee.

The Respondent also rejected the Applicant's further complaint of victimisation based on the Club's constitutional change in membership categories by special resolution of 28 April 2011 - arguing that as a result of non gendered membership categories it followed that from 1 July 2011 there will no longer be exclusively men's or ladies competitions on any day of the week.

The Relevant Legislation

- 14 The Tribunal considered the following provisions of the ADA

What constitutes discrimination on the ground of sex

- 15 Section 24 of the ADA provides

(1) A person ("the perpetrator") discriminates against another person ("the aggrieved person") on the ground of sex if, on the ground of the aggrieved person's sex or the sex of a relative or associate of the aggrieved person, the perpetrator:

(a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of the opposite sex or who does not have such a relative or associate of that sex, or

(b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons of the opposite sex, or who do not have such a relative or associate of that sex, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.

(1A) For the purposes of subsection (1) (a), something is done on the ground of a person's sex if it is done on the ground of the person's sex, a characteristic that appertains generally to persons of that sex or a characteristic that is generally imputed to persons of that sex.

Registered clubs

- 16 Section 34A of the ADA provides

(1) It is unlawful for a registered club to discriminate against a person who is not a member of the registered club on the ground of sex:

(a) by refusing or failing to accept the person's application for membership, or

(b) in the terms on which it is prepared to admit the person to membership.

(2) It is unlawful for a registered club to discriminate against a person who is a member of a registered club on the ground of sex:

(a) by denying the person access, or limiting the person's access, to any benefit provided by the registered club,

(b) by depriving the person of membership or varying the terms of the person's membership, or

(c) by subjecting the person to any other detriment.

(3) Nothing in subsection (1) or (2) renders unlawful discrimination by a registered club against a person on the ground of sex if membership of the registered club is available to persons of the opposite sex only.

(4) Nothing in subsection (1) (paragraph (a) excepted) or subsection (2) renders unlawful discrimination by a registered club against a person on the ground of sex if the discrimination occurs in relation to the use or enjoyment of any benefit provided by the registered club where:

(a) it is not practicable for the benefit to be used or enjoyed:

(i) simultaneously, or

(ii) to the same extent,

by both men and women, and

(b) either:

(i) the same, or an equivalent, benefit is provided for the use of men and women separately from each other, or

(ii) men and women are each entitled to a fair and reasonable proportion of the use and enjoyment of the benefit.

(5) In determining any matter relating to the application of subsection (4), regard shall be had to:

(a) the purposes for which the registered club is established,

(b) the membership of the registered club, including any class or type of membership,

(c) the nature of the benefits provided by the registered club,

(d) the opportunities for the use and enjoyment of those benefits by men and women, and

(e) any other relevant circumstance.

Victimisation

17 Section 50 of the ADA provides

(1) It is unlawful for a person ("the discriminator") to subject another person ("the person victimised") to any detriment in any circumstances on the ground that the person victimised has:

(a) brought proceedings against the discriminator or any other person under this Act,

(b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act,

(c) alleged that the discriminator or any other person has committed an act which, whether or not the allegation so states, would amount to a contravention of this Act, or

(d) otherwise done anything under or by reference to this Act in relation to the discriminator or any other person,

or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects that the person victimised has done, or intends to do, any of them.

(2) Subsection (1) does not apply to the subjecting of a person to a detriment by reason of an allegation made by the person if the allegation was false and not made in good faith.

Liability of principals and employers

18 Section 53 of the ADA provides

(1) An act done by a person as the agent or employee of the person's principal or employer which if done by the principal or employer would be a contravention of this Act is taken to have been done by the principal or employer also unless the principal or employer did not, either before or after the doing of the act, authorise the agent or employee, either expressly or by implication, to do the act.

(2) If both the principal or employer and the agent or employee who did the act are subject to any liability arising under this Act in respect of the doing of the act, they are jointly and severally subject to that liability.

(3) Despite subsection (1), a principal or an employer is not liable under that subsection if the principal or employer took all reasonable steps to prevent the agent or employee from contravening the Act.

(4) For the purposes of subsection (1), the principal or employer of a volunteer or unpaid trainee who contravenes Part 2A is the person or body on whose behalf the volunteer or unpaid trainee provides services.

Act done because of unlawful discrimination and for other reasons

19 Section 4A of the ADA provides

If:

(a) an act is done for 2 or more reasons, and

(b) one of the reasons consists of unlawful discrimination under this Act against a person (whether or not it is the dominant or a substantial reason for doing the act), then, for the purposes of this Act, the act is taken to be done for that reason.

Proof of Exceptions

20 S104 of the ADA provides

Where by any provision of this Act or the regulations conduct is excepted from conduct that is unlawful under this Act or the regulations or that is a contravention of this Act or the regulations, the onus of proving the exception in any proceedings before the Tribunal relating to a complaint lies on the respondent.

Procedure of Hearing

21 The Hearing proceeded by way of reliance on the Affidavits of Ms Walker and the General Manager for the Club - Mr. Glen Hickey. In order to clarify the status of the Club's Constitution in relation to membership - the Tribunal took the unusual step of asking to hear from the Respondent's sole witness Mr. Hickey first- specifically in relation to the General meeting of Members of the Club held on 28 April 2011 which had passed a Special Resolution amending the Club's gendered membership categories to non gendered categories.

22 The Applicant then gave evidence followed again by Mr Hickey as to the balance of issues. The affidavit of Lea Shapeira dated 27 October 2010 filed by the Applicant was taken into evidence without the witness being called for cross examination.

Issues

23 There were few significant factual issues of difference between the parties. Essentially the parties agreed on the actions at the root of the Applicant's case which had prompted her complaints- the range of tee off times available to players in the Sunday Business Ladies competition; the reduction and subsequent increase in the number of places in the Sunday Ladies competition from June 2009; the limiting of Full Lady Members' access to the Sunday Ladies Competition; the letter sent to the Applicant on 31 May 2010 and the Club's Special Resolution of 28 April 2011 changing the membership categories. It is the characterisation of these actions and whether they constitute sex discrimination or victimisation in terms of the ADA that is subject to dispute.

24 The Tribunal notes that as a result of the Club's Special Resolution of 28 April 2011, changes will occur in membership categories from 1 July 2011. The Tribunal is unable to predict what may happen on 1 July 2011 to Competitions when the changes of membership category are to become operative. This is outside the complaint period. The Tribunal has only considered the situation between the Applicant and the Respondent up until the date of hearing.

Onus of Proof

25 The applicant has the onus of proof. The principles in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 must be borne in mind, in the sense that the seriousness of the allegation and other relevant factors are to be taken into account before determining whether the Tribunal is satisfied that a contravention of the AD Act has occurred. (See *Dutt -v- Central Coast Area Health Service (EOD)* [2003] NSWADTAP.) However section 104 of the ADA provides that the Respondent bears the onus of establishing proof of exceptions under the ADA - in this instance section 34A of the ADA.

Respondent's Evidence

26 Mr Hickey gave evidence about the Club's Special General Meeting Resolution of 28 April 2011 which had moved to change to a non gendered membership structure. He asserted that as a result from 1 July 2011 there would no longer be a Ladies Competition on Sundays.

Applicant's Evidence

27 The Applicant's evidence was that she had joined the Wakehurst Golf Club Ltd, the Respondent, on 15 July 2005. At that time the Respondent offered gendered membership with 9 categories of membership. Ms Walker became a Full Lady Member of the Club which is described in the Club's brochure as "7 day membership and the member is eligible to play in all competitions for ladies and mixed events".

28 The Applicant set out the 5 types of competitions available to members between July 2005 to June 2009 -

- Mens weekday competitions on Mondays and Wednesday and Weekend on Saturday;
- Womens weekday competitions on Tuesdays and Thursdays and Weekend on Sundays
- Medley (mixed) on Sundays

29 The Applicant stated that she joined a club as she enjoyed the opportunity to play competition golf against other women; representing her club in competition golf and the social aspect of playing golf with other women. She elected to take up Full Lady Membership as this offered the choice of playing in women's competitions on Tuesday and on the weekend, that is Sundays, and Club championships on Tuesdays. By comparison - limited Lady Membership did not permit the holder to play in Club Championships. The Applicant considered that playing competition golf against other women on the weekends, non working days, was a benefit of her membership of the Club.

30 The Applicant referred to the Club's Annual Reports which appear to show that the relative percentages of male and female members of the Club were very stable between June 2005 (shortly before the Applicant joined the Club) 71.9% men and 28.1% women, moving to 69.9% men and 30.1% women in June 2009.

31 The Applicant noted that the Men's weekend competition is played on Saturdays - with tee off time from 6.30am-12.30pm.

The Women's weekend competition was played on Sundays with tee off times from 8.45am to 9.09am.

After this the Sunday Medley Competition, a mixed Men's and Women's competition tees off.

- 32 The Applicant considered that the weekend days - Saturdays and Sundays - were the premium time to play golf - unhindered by work commitments. The Applicant also conceded that she frequently played competition golf on Tuesday as she was able to take time away from work.
- 33 The Applicant noted that full male members were able to play same gendered competition golf on Saturdays and then in the Medley (mixed) competition on Sunday after the Sunday Ladies Competition. The Applicant noted that women do not have the option of playing any competition golf on Saturday. The Applicant also noted that from time to time the Weekend Women's competition is cancelled e.g. from December to February and to accommodate special events. The Applicant stated that the Saturday competition for Male Members was not similarly cancelled or interrupted.
- 34 The Applicant stated that she became aware of the Board's decision of 23 June 2009 to reduce from 32 to 20 the number of spots in the Sunday Ladies Competition when she was asked to attend a meeting on 30 June 2009 in the Club Boardroom. The Applicant stated that at that meeting she became aware that a limitation was to be placed on the time when women could place their names down for weekend competition and that it was proposed to prevent Full Lady members from putting their name down for the Sunday morning competition until Limited Lady Members had had an opportunity to put their names down. The Applicant stated that when she protested about this reduction in her access to weekend competition she was advised by Mr Hickey that she should change her membership to Limited Lady to retain access to Sunday Competition. The Applicant did not wish to do so as she wished to play in the club Championships on Tuesdays - not available to limited Lady members. The Applicant stated that thereafter when she tried to put her name down for the Sunday competition on 18 and 26 July 2009 that her access was blocked by a Club website message "membership Category Blocked". She understood this to mean that Full Lady Members were not permitted to play in the Sunday Competition.
- 35 The Applicant then referred to conversations with the Lady Captain, Ms Webster, in which the Applicant expressed her concerns and sought reasons for the changes. The Applicant asserted that she was advised by the Lady Captain Ms Webster that the changes were made because there had been complaints that male members had been unable to play on Sundays in the Medley competition because of a lack of playing spots. The Applicant also referred to waiting lists for Weekend Women's Competition in August 2009 and July 2010. The Applicant noted that in October 2009 the Board increased playing spots in the Sunday Competition for Ladies but that in November 2009 it restricted the capacity for Full Lady members to play for their Club Medal to Tuesdays only. At the same time there was no change in the conditions for Full Male Members. The Applicant considered that these moves by the Club were designed to discourage and prevent Full Lady Members from playing on the Weekend in order to accommodate the requests from male members for more Sunday time.

1 st Victimisation Complaint

- 36 In respect of her complaint of Victimisation the Applicant had made a formal written complaint to the Board of the Club on 7 August 2009 expecting that it would be considered by the Board at its meeting on 25 August 2009. She received a response from the General Manager prior to the meeting - in her view unsatisfactorily dismissing her concerns. This prompted her complaint to the ADB on 24 September 2009. The Applicant gave evidence that she was criticised for her

complaints about the changes to the Women's Weekend competition by the Lady President and Board Member Ms Ludvik at the AGM on 15 October 2009 and again on 10 November 2009.

- 37 The Applicant became aware that the Sunday Women's Competition on Sunday 30 May 2010 had been changed from the Competition medal level of the game, Stroke, to the shorter stableford format. She had been unable to get her name on the list for the 30 May 2010 because the list had been filled prior to her getting access as a Full Lady Member and was concerned that she would not be able to get her name on the list for the next weekend competition game. When she contacted the Lady Captain Ms Webster to enquire why the format had been changed to the non medal competition stableford format the Applicant gave evidence that Ms Webster advised that it was done to accommodate the Men's Matchplay and Men's Master Pennants to be played on Sunday.
- 38 The Applicant then received the letter dated 31 May 2010 advising her that she was no longer to speak to members of the Ladies or Match Committees about any future decisions made by these Committees.

The Respondent's Evidence

- 39 Mr Hickey noted that the Sunday Women's Competition - which he referred to as the Business Ladies Competition - had been established to ensure that Business Ladies who were unable to play in the main Ladies competition on Tuesdays during the week could play in competition on Sundays. This is confirmed in a letter dated 23 July 2009 to a club member in which Mr Hickey refers to "the premium Sunday times" (the Sunday Business Ladies Competition) as having been made available to "working ladies unable to play during the week." This is also evidenced in the Club's website on 9 August 2009 where Sunday Competitions are listed as "Mixed/Business Girls/Cadets."
- 40 Mr Hickey noted in his evidence that in respect of the number of playing spots in the Sunday morning Ladies competition, that in the period from February 2007 to June 2009 there were only 4 occasions on which all 32 spots for Ladies were taken up. Further there were only 10-12 Limited Lady members who were employed Monday to Friday. The Club intended the Sunday competition for Business Ladies to be restricted to limited lady members who worked during the week. The decision to reduce the number of playing spots from 32 to 24 was based on this scenario. Further Mr Hickey explained the Club's decision to reduce the numbers of tee off opportunities for the Sunday Ladies Competition as a response to the demand for extra weekend Medley (mixed) spots.
- 41 Mr Hickey noted that the 8 spots were allocated to the mixed Medley Sunday competition - open to both women and men.
- 42 Mr Hickey noted that in all practicality the Applicant was able to play in Competition on Tuesdays as evidenced by her playing record.
- 43 In the Club's defence Mr Hickey affirmed that the same and equivalent benefits of the Club are provided by proportion to both men and lady members. Mr Hickey referred to a Booking Rounds Report dated 15 December 2010 covering the periods 1 April 2007 to 30 November 2009 and 1 July 2009 to 30 November 2009. In particular the gender breakdown in these 2 reports showed that between 1 April 2007 to 30 November 2009 64,335 men played a round of

golf while 36,755 women played a round of golf. In the period 1 July 2009 to 30 November 2009 10,926 men played a round of golf while 6,829 women did so.

- 44 He also noted that the Club compared favourably to other nearby Clubs in respect of the amount of Competition time available to Lady members.

Evidence about Victimisation Complaint

- 45 In respect of the first victimisation complaint Mr noted that there had been friction between the Applicant and the Ladies' Captain. He indicated that in the usual circumstances of an accusation of disrespect against a Captain of the Club that a procedure under the Rules of the Club would be followed which involved writing to the member providing an opportunity for a hearing in relation to the accusation. In this instance because of the pending discrimination complaint it was decided to go "low key" and issue a letter suggesting future enquiries of match playing decisions be dealt through a Board Member. Mr Hickey further noted that there had been no disciplinary action taken or recorded against the Applicant.
- 46 In respect of the second complaint of victimisation Mr Hickey gave evidence that as a result of the changes to the Club's membership categories by Special Resolution of 28 April 2011 it followed that there could no longer be special men's or women's competitions and that this was not as a result of victimising the Applicant for bringing the complaint.
- 47 Mr Hickey also made the point that there were only approximately 12 occasions when the Applicant was adversely affected and that the Tribunal should take into account the steps it was taking to change its membership structure.

Discussion and Findings

- 48 The Tribunal finds that the respondent is a Registered Club to which the provisions of the Act apply. Further the Tribunal finds that the Club is vicariously liable for the actions of its employee, the General Manager, Mr Hickey in terms of section 53 of the ADA.
- 49 For the Applicant to succeed in her claim she must show that she was treated less favourably on the grounds of her sex than the Respondent Club treated or would have treated a male in similar circumstances.
- 50 The concept of "treated" or "treatment" includes both differential treatment of the Applicant by the Respondent and the causation for the differential treatment.
- 51 It is a question of fact for the Tribunal as to whether the treatment of the Applicant by the Respondent was objectively less favourable than its treatment of male members. Further the Tribunal needs to determine the relevant circumstances in which the unfavourable treatment on the grounds of sex occurred - "in the same circumstances, or in circumstances which are not materially different" (section 24(1) ADA - as a matter of fact. (see *Haines v Leves* (1987) 8 NSWLR 442 at 457) and *Rees, N, Lindsay, K and Rice, S* (2008).
- 52 The Tribunal has determined that the circumstances of the comparator should be described as "a golf club member's access to compete in same gendered competition golf on the weekend". It was around this issue that the actions of the Respondent were focussed in making changes to playing conditions for Lady members.

- 53 The Tribunal is satisfied having heard the evidence of both parties that the treatment complained of by the Applicant in fact occurred - the limiting of tee times and the limiting of spots for Lady members to compete in the Sunday morning Lady members competition and the decision that Full Lady members could not compete for the limited spots in the Sunday Ladies competition. The Tribunal is satisfied that tee off times for Male members weekend competition on Saturday were restricted to 6.30am to 12.30pm, and it is also satisfied that no changes or limitations were placed on the Male members' same gendered weekend competition. It does not appear from the evidence before the Tribunal that any consideration was given by the Club to altering the conditions or entitlements of the Male member categories of membership to deal with demand.
- 54 The Tribunal must determine whether the grounds for the differential treatment between male and female members were on the grounds of the Applicant's gender. In the matter of *Nicholls and Nicholls v Director General Department of Education and Training (No2)* [2009] NSWADTAP 20 the ADT Appeals Panel of NSW determined that the question a Tribunal should ask when addressing the causation element of direct discrimination is whether the person's sex.... is at least one of the 'real, 'genuine' or 'true' reasons for the treatment. The Tribunal is satisfied that the real reason restrictions and limitations were placed on the Applicant's access to competition were the fact that she was not a male member of the Club, but rather a female member. The Club wished to increase the access of male members to Sunday play..

Access to a benefit and detriment

- 55 In respect then of the first matter of which the Applicant complains, that is the limiting of her access to a benefit by limiting of tee times for the Weekend Women's Competition between July and November 2009 to between 8.45am to 9.09am on Sundays when the tee off period for the Weekend Men's Competition on Saturday was between 6.30am to 12.30pm the Tribunal has considered the meaning of "benefit". In the matter of *Gardiner v NSW WorkCover Authority* ([2003] NSWADT 184) the Tribunal considered the meaning of "a benefit" and determined that it should have its ordinary meaning, which is advantage or opportunity. In the matter of *Ellis v Mount Scopus Memorial College* [1996] VADT 16 (29 March 1996) the Victorian Civil and Administrative Tribunal determined:

"The notion of benefit and detriment is an objective one. It does not depend on the subjective perceptions of either the Complainant or the Respondent (RV Equal Opportunity Board ex parte Burns [1985] VicRp 31; [1985] VR 317; O'Callaghan v Loder (1984) EOC 92-023; Leonard v Youth Hostels Associations and Anor (1995) EOC 92-763). It is broad enough to cover any advantage or disadvantage, as long as it is real and not illusory."

- 56 The Tribunal has determined that in terms of section 34(2) (a) of the Act that the benefits provided by membership of the Club include access to same gendered competition at premium playing times - that is on the weekend. Both parties referred to weekend playing times as premium. The Tribunal rejects the Respondent's submission that the circumstances for comparison are "Sunday" play and that the access of Lady members to the Medley mixed competition provides ample access to Lady members to competition. It is clear from the tee times cited respectively for male members on Saturday and female members on Sunday that full male members have many more opportunities to tee off than full female members in their same gendered competitions on the weekend.

57 The Tribunal considered the distinction made by Mr Hickey in relation to the access to the Weekend Women's competition on Sunday as being intended for Business Ladies who could not play a competition game during the week. The Tribunal could not find a formal reference in the Club's Constitution to the categories Business Girls or Business Ladies - and there did not appear to be an equivalent category such as Business Boys or Business Gentlemen for men. It is not clear when the Business Ladies or Business Girls category commenced, how a member became designated as belonging to it, or how the category's playing times were monitored or regulated. The Respondent did not make a distinction amongst its male members based on their "business" status. Male members did not have their access to same gendered competition on the weekends limited by reference to their "business" status. The Tribunal considers that this distinction made within the group of female members which functioned to limit the Applicant's access to a benefit was discriminatory on the grounds of her sex.

Respondent's Defence

58 The Tribunal then considered the Respondent's defence. In terms of section 34A (4) and (5) of the ADA it is not practicable for the use or enjoyment of the benefit of a round of golf to be used or enjoyed to the same extent by both men and women. Men and women are however each entitled to a fair and reasonable proportion of the use and enjoyment of the benefit of a **round of golf** (Tribunal's emphasis). This was provided by the Respondent's current competitions for its male and female members and its mixed competition. The Respondent bears the onus of establishing both aspects of this defence. (*Corry & Ors v Keperra Country Golf Club* (1986) EOC 92-150 at 76,492)

59 The Tribunal does not agree with the Respondent's application of the provisions of section 34A (4) and (5). The Tribunal finds that the appropriate circumstances to consider are not a round of golf - but rather the opportunity to play a same gendered weekend competition game of golf which is a benefit of membership of the Club for both male and female members of the Club. The Tribunal notes that non Club members, that is members of the public, may also play a round of golf on the course. The benefits of becoming a member include access to specific competitions not available to non members and priority in using the course at recognised premium demand times - the weekends.

A fair and reasonable proportion

60 In referring to the concept of "a fair and reasonable proportion of the use and enjoyment of the benefit" contained in section 34A (4) and the matters listed in 34A (5) the Respondent appropriately referred to waiting lists and demand for playing time although it was not clear to the Tribunal how these lists were collated. In terms of the matters listed in 34(5) The Tribunal considers that the Club should also have considered the use of male and female membership ratios, the distinctions between Full and Limited membership and the relative opportunities of women and men as a basis to making conclusions of fair and reasonable proportion. Reference to the relative membership percentages for example would suggest that a fair and reasonable proportion of the opportunity to play in a same gendered weekend competition game of golf would have been closer to the 70% male - 30% female membership split - than the 62.27% male and 5.44% female opportunities presented by the Respondent's arrangements from July to November 2009.

- 61 The Tribunal also considers that the concept of fair and reasonable is not met by reducing the conditions of membership of Full Lady Members in favour of Limited lady Members without considering how demand might be met by altering the conditions of Full and limited male members.
- 62 The Tribunal finds that the Applicant was treated less favourably on the grounds of her sex in that the Respondent limited her access to the benefit of a same gendered competition game of golf on the weekend on the grounds of her gender. The Tribunal also finds that the defence argued by the Respondent under section 34A (4) and (5) is not made out.

Detriment

- 63 The Applicant argued that this was also a detriment in terms of section 34A (2) (c) of the Act. The notion of detriment has been considered in *Shaikh v Commissioner, NSW Fire Brigades* (1996) EOC 92-808 and *Sivananthan v Commissioner of Police* [2001] NSWADT 44. It has been held that detriment should be given its common meaning of "loss, damage or injury". It has also been held in those cases that "the detriment suffered by the complainant must be real and not trivial" and "whether something constitutes a detriment must be determined objectively and not subjectively" (see *Sivananthan* at paragraph 41). In the circumstances the Tribunal considers that the limitation of tee times on Sundays was a loss of opportunity afforded through Club membership and therefore is also a detriment to the Applicant.
- 64 It follows then that the Respondent's decision to reduce the places for the Sunday Ladies competition from 32 to 20 in July 2009 when they were not similarly reduced for male members' Saturday competition in July 2009 was a limitation on the Applicant's access to a benefit of her membership based on her sex. The Tribunal also considers that this subjected the Applicant to a detriment.
- 65 The Applicant also claimed that this was a variation to the terms of her Full Lady membership in circumstances where the terms of a Full male membership were not varied. The Tribunal could not find reference to terms of membership dealing explicitly with tee times for men's and women's same gendered competitions on weekends. However extracts from the Club's Board Minutes in June, through to November 2009, show an intention to vary the number of tee times by reference to the various categories of Lady membership. The Tribunal has accepted that this change in tee numbers implicitly if not explicitly altered the terms of the Applicant's Full Lady membership, when the terms of Full Men's' membership were not altered.
- 66 It further follows that the Respondent Board's decision in June 2009 to prevent Full Lady Members from playing in the Sunday Ladies Competition was a limitation of access to a benefit the Applicant had previously enjoyed in circumstances where full Male members did not similarly have their access to the benefit of playing same gendered weekend competition reduced. It also varied the implicit terms of the Applicant's membership and constituted a detriment to her. While the Applicant did continue to play in Sunday competitions the Tribunal considers that this occurred in spite of the Board's determination and by dint of her own efforts to continue to play when possible.

1 st complaint of Victimisation

The Tribunal has considered the complaint of victimisation in relation to the letter to the

- 67 Applicant of 31 May 2010. The Tribunal accepts that the contents of the letter constituted a detriment to the Applicant both in that she was given no opportunity to comment on the allegations prior to the Board requiring her to direct future enquiries to the Board or Mr Hickey and that she was denied access to the usual avenues of enquiry about decisions accorded to other members.
- 68 The Club specifically denies in that letter that the matter is connected to the Applicant's complaint. The Respondent did not explain however why it departed from the requirements of natural justice or why it had retained the limitation of the Applicant's access to the usual enquiry lines open to Club members even until the date of hearing. The Tribunal considers that the alleged behaviour if proven could not be considered to be a serious matter of indiscipline. The Tribunal noted the applicant's uncontradicted evidence, , of comments made about and to her concerning her complaint by Ms Ludvik in October and November 2009 and also her conversation with Ms Webster on 26 May 2010 concerning a proposed alteration to the format of the Weekend Women's Competition on 30 May 2010. In order to determine the causal connection between the Applicant's making of a complaint and the detriment she complained of as victimisation the Tribunal must be satisfied that the fact of the Applicant having lodged complaints of discrimination was a real, genuine or true reason for being subjected to the detriment. *Nicholls and Nicholls v Director General, Department of Education and Training (No 2)* [2009] NSWADTAP 20 at [37].
- 69 The Tribunal concludes on the balance of probabilities that the real reason for the Respondent Club's decision to limit the Applicant's access to the usual avenues of enquiry without having raised the matter with the Applicant was the Applicant's complaints about the Club's actions in limiting the operation of the Weekend Women's Competition on Sunday. The Tribunal finds that this constitutes victimisation.
- 70 As indicated the Tribunal was at the date of hearing unable to determine what might happen in the future to the Ladies and Men's competitions as a result of the change to Club membership categories made by Special Resolution in April 2011. The Tribunal notes however that the change in Membership structure does not mean that the Club cannot offer same gendered competitions to members. This is clearly foreseen by the provisions of section 34A (4) and (5). The Tribunal dismisses the second complaint of victimisation.

Relief

- 71 The Applicant has sought that the respondent be enjoined from continuing the unlawful conduct pursuant to section 108(2) (b) of the ADA. The Tribunal does order that the respondent Club cease discriminating against the Applicant on the grounds of her gender in respect of the opportunities to play in her same gendered competition on the Weekends available to her class of membership.
- 72 The Applicant has sought that the Tribunal make specific orders concerning amendment of the Weekend Women's Competition conditions. The Tribunal does not make such orders but considers there is sufficient guidance in the legislation and in the reasons provided in this decision for the Respondent to amend its approach to this matter, relying upon information readily available to the Respondent Club concerning membership ratios and demand.

73 The Applicant has also sought that the Tribunal make orders in relation to Full Lady Membership entitlements. The Tribunal considers that as the Respondent has moved to abolish gendered membership that these orders are not necessary.

74 The Applicant has also sought to be able to communicate directly with members of the Ladies and Match Committees and that a retraction and written apology be provided by the respondent concerning the letter to the Applicant of 31 May 2010. At hearing Mr Hickey indicated that this restriction had been lifted. The Tribunal orders that within 14 days of the publication of these reasons that the Respondent provide the Applicant with a letter addressing the following issues:

1. An apology for not consulting with the applicant prior to imposing the restrictions;
2. A retraction of the implication that the Applicant had been disrespectful; and

An apology for the upset attested to by the Applicant caused by the receipt of the letter.

A copy of the apology to be placed on any membership file relating to the Applicant.

75 The Applicant has sought that the Respondent pay the Applicant's costs. This issue is dealt with separately below.

Costs

76 Each of the parties has submitted that the costs of this matter should be borne by the other party. Generally speaking in this jurisdiction each party bears its own costs. However s 110 of the ADA provides the EOT with power to apply the provisions of s 88 of the Administrative Decisions Tribunal Act and depart from this presumption. It is this power that each party has asked the Tribunal to exercise.

Section 88 Costs

(1) Each party to proceedings before the Tribunal is to bear the party's own costs in the proceedings, except as provided by this section.

(1A) Subject to the rules of the Tribunal and any other Act or law, the Tribunal may award costs in relation to proceedings before it, but only if it is satisfied that it is fair to do so having regard to the following:

(a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings by conduct such as:

- (i) failing to comply with an order or direction of the Tribunal without reasonable excuse, or
- (ii) failing to comply with this Act, the regulations, the rules of the Tribunal or any relevant provision of the enactment under which the Tribunal has jurisdiction in relation to the proceedings, or
- (iii) asking for an adjournment as a result of a failure referred to in subparagraph (i) or (ii), or
- (iv) causing an adjournment, or
- (v) attempting to deceive another party or the Tribunal, or
- (vi) vexatiously conducting the proceedings,

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,

(d) the nature and complexity of the proceedings,

(e) any other matter that the Tribunal considers relevant.

- 77 The Applicant submitted that if the Applicant were to be successful in her complaints that the Tribunal should exercise its discretion to require the payment of the Applicant's costs by the respondent as the Applicant had only sought to have the Respondent comply with Anti Discrimination law and had not sought damages for herself.
- 78 The Respondent submitted that the Applicant should in any event pay the Respondent's costs. There were only approximately 12 occasions when the Applicant was adversely affected; there had been no disciplinary action against the Applicant and that the Tribunal should take into account the steps it was taking to change its membership structure.
- 79 In the circumstances the Applicant has been successful in 2 of her 3 complaints.
- 80 The Tribunal notes that the Applicant's complaints arose out of the actions of the Club's Board and administration - without reference to the Club's membership. All of the actions involved limiting access of female members of the Club by reference to their membership in female categories. The matters complained of were not dictated by the Club's gendered membership structure. Each of the discriminatory actions could have been reversed by the Board or the Club Administration determining to act differently. It has had that opportunity since the Applicant commenced raising the issues formally in June 2009 and its first receipt of the Applicant's complaint to the ADB in October 2009. The Special Resolution of the Club on 28 April 2011 was not necessary and did not act to alleviate the problems complained of by the Applicant.
- 81 Even to the date of hearing the limitation of the Applicant in her dealings with Club officials subject of the victimisation complaint has remained in place.
- 82 The Respondent did not contest the factual assertions on which the Complainant's case was based.
- 83 Further the Respondent has sought to rely upon the provisions of section 34A (4) and (5) in its defence in contradictory ways. It has both argued that it is not possible for women and men to enjoy a round of golf to the same extent, while submitting that the engagement of male and female members in a medley or mixed round should be satisfactory to a female member. Further it has relied upon the provision of proportional access to competitions as a defence while asserting that the same law prevents it from offering male and female same gendered competition in the future.
- 84 In the circumstances it is the Tribunal's view that there was no tenable basis in law for the Respondent's case.
- 85 The Tribunal also considers it relevant that the Applicant has not sought the award of damages in this matter - but rather a change in the Respondent's actions.
- 86 Accordingly the Tribunal considers it fair to award costs to the Applicant in respect of two thirds (2/3) of her complaints.

Orders

The complaint of discrimination by the Respondent as a Registered Club against the Complainant is substantiated and the following orders are made in respect of that complaint:.

1)The Respondent is enjoined from continuing the unlawful conduct pursuant to section 108(2) (b) of the ADA.

2)The Tribunal orders that the Respondent Club cease discriminating against the Applicant on the grounds of her gender in respect of the opportunities to play in her same gendered competition on the Weekends available to her class of membership.

The complaint of victimisation in relation to the Respondent Club's letter to the Complainant of 31 May 2010 is substantiated and the following orders are made in respect of that complaint..

The Tribunal orders that within 14 days of the publication of these reasons that the Respondent provide the Applicant with a letter addressing the following issues:

- a. An apology for not consulting with the applicant prior to imposing the restrictions
- b. A retraction of the implication that the Applicant had been disrespectful
- c. An apology for the upset attested to by the Applicant caused by the receipt of the letter
- d). A copy of this letter to be placed on any membership file relating to the Applicant.

3.The second complaint of victimisation in relation to the Club's change of Membership rules is dismissed.

4. The respondent is to pay two-thirds of the applicant's costs as agreed or, if not agreed, as assessed in accordance with the Legal Profession Act 2004.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Last updated 18 March 2011