

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**HUMAN RIGHTS DIVISION**

**ANTI-DISCRIMINATION LIST**

VCAT REFERENCE NO.A144/2009

**CATCHWORDS**

Complaint of gender discrimination in employment - complaint dismissed.

<b>COMPLAINANT</b>	Bernard Laauwen
<b>RESPONDENT</b>	Wilson Parking Australia 1982 Pty Ltd trading as Wilson Security
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Ms S Liden, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	16, 17, 18 March 2010
<b>DATE OF ORDER</b>	22 November 2010
<b>CITATION</b>	Laauwen v Wilson Parking Australia 1982 Pty Ltd trading as Wilson Security (Domestic Building) [2010] VCAT 1948

**ORDER**

1. The complaint is dismissed.
2. Any application by the Respondent for costs must be filed with the Tribunal and served on the Complainant on or before 20 December 2010.

**Member S Liden**

**APPEARANCES:**

For Complainant	Mr Bernard Laauwen, in person, assisted by Ms Rhonda Hare
For Respondent	Ms Susan Zeitz, Solicitor

## REASONS FOR DECISION

### INTRODUCTION

- 1 In 2006, the complainant, Mr Bernard Laauwen, commenced employment as a security guard with the Respondent, Wilson Security, a company which provides an on-site security workforce for various clients. During his employment with the company, Mr Laauwen mainly worked in the control room of the Commonwealth Law Courts. He contends that he was discriminated against in September 2008 when, following a restructure of security arrangements at the Commonwealth Law Courts, three ongoing control room positions, then held by Mr Laauwen, another male guard and a female guard, were reduced to two. He says he was discriminated against because the company decided to offer one position to a female and one to a male. In support of his complaint, he relies primarily on comments he says were made by a fellow employee, Mr Jake Kaya. Mr Laauwen says that, as a result of the discrimination, and the ensuing dispute, he has had to take leave without pay and has suffered considerable financial loss for which Wilson Security should be held liable.
- 2 Wilson Security denies that it ever discriminated against Mr Laauwen. It notes that Mr Kaya denies making the comments as alleged by Mr Laauwen. Wilson Security says that, in any event, Mr Kaya was not in a position of influence in relation to the decision not to offer Mr Laauwen one of the two ongoing control room positions. It maintains that it has comprehensive policies in place in relation to discrimination and takes appropriate action to ensure that its policies are known to all of its employees. Wilson Security says that Mr Laauwen's contract of employment provides that he may be required to work at various locations across the metropolitan Melbourne area and that, a number of alternatives were offered to Mr Laauwen when the number of ongoing control room positions at the Commonwealth Law Courts was reduced. It says that any loss suffered by him is a result of his choice not to accept, or even fairly consider, any of the transfer options it put to him.

### THE TRIBUNAL'S DECISION

- 3 For the reasons that follow, the Tribunal has decided that Mr Laauwen's complaint of discrimination in employment is dismissed.

### SUMMARY OF THE RELEVANT LAW

- 4 Section 14 of the *Equal Opportunity Act* prohibits discrimination in employment. Employers must not treat an employee less favourably than another employee, *because* she or he has one of the attributes

(characteristics) specified in section 6. In summary, section 14 provides that an employer must not discriminate against an employee by denying or limiting access to promotion, or transfer or any other benefits connected with employment or subjecting the employee to any other detriment.

- 5 In this case, the specific attribute relied upon is sex (section 6(k)). Section 8(2)(b) says that the attribute need not be the only or dominant reason for the less favourable treatment, but it must be a substantial reason for the less favourable treatment.
- 6 Section 102 of the Act holds both the individual who engages in the prohibited conduct and that person's employer responsible. The employer's responsibility is known as vicarious liability. However, section 103 of the Act says that an employer will not be vicariously liable for the unwelcome conduct of its employees if it can prove that, as an employer, it took reasonable precautions to prevent the employee from engaging in the unwelcome conduct.
- 7 Section 136 provides that, if the Tribunal finds a complaint or any part of it proven, it may order compensation to be paid and/or require specific action to be taken to redress any loss, damage or injury suffered as a result of the discrimination.

## **THE HEARING**

- 8 The hearing took place over 3 days. The Tribunal heard sworn evidence from Mr Laauwen and from 5 witnesses for the Respondent.

## **COMPLAINANT'S CASE**

### ***Mr Laauwen's Evidence***

- 9 Mr Laauwen told the Tribunal that he had been employed in the security industry since 2001, and had been employed by Wilson Security since 2006. In September 2008, he held one of three positions in the control room of the Commonwealth Law Courts in Melbourne. Following renegotiation of the site contract, one of those positions was no longer required and therefore someone would need to be transferred. He said that he advised Wilson that a transfer would cause him hardship.
- 10 Mr Laauwen said that, on 8 September 2008, he was advised by his supervisor, Mr Joe Lo Giudice, that he would be the one to be transferred out of the control room, but no reason was given. He did not ask Mr Lo Giudice why he had been chosen. According to Mr Laauwen's then partner, Ms Rhonda Hare, when she queried the decision later that day, Mr Joe Lo Giudice told her that he and Mr Jake Kaya had made the decision. Mr Lo Giudice had advised Mr Laauwen that there would be other positions available at the site but Mr Laauwen considered these to be unacceptable because they were all "Level 2" positions and as a control room operator, he had been at "Level 3".

- 11 According to Mr Laauwen, on the following day, 9 September 2008, Mr Kaya made a comment in the control room to the effect that one female and one male had been chosen. No one else was present when Mr Kaya “blurted” this out. Mr Laauwen said that he told Mr Kaya that, if that was the case then he would be taking legal action. Mr Laauwen stated that, immediately after the conversation, he made a written note recording it. A copy of this note was annexed to his witness statement. He said there was “no way” that he had misunderstood Mr Kaya’s statement. In his view, the company never believed that Mr Kaya had made the statement and never seriously investigated the matter.
- 12 In cross-examination, he conceded that Mr Kaya was not the decision-maker. However, when the veracity and reliability of his note was challenged, he continued to assert that the note he had made was entirely his hand-writing and was entirely contemporaneous.
- 13 After his shift ended, Mr Laauwen went to the Victorian Human Rights and Equal Opportunity Commission where he had arranged to meet Ms Hare and obtain some advice. He and Ms Hare then returned to the work site and had an unscheduled meeting with Mr Lo Giudice. He advised them that he had been the sole decision maker in relation to the decision to transfer Mr Laauwen, and stated that the female control room operator had not been treated more favourably than him.
- 14 Mr Laauwen and Ms Hare then went to Wilson Security’s head office where they met with Client Services Manager, John Wilcher. Mr Laauwen told Mr Wilcher that he wanted to remain at the Commonwealth Law Courts site for a number of reasons which included that he did not have his own transport and travelling to another site would disadvantage him financially, and that the female officer who had apparently secured one of the two positions had actually already accepted a transfer which was temporarily “on hold”. Mr Laauwen says that Mr Wilcher advised him that there were a few different options in relation to a transfer, including a roving position at the Department of Treasury, and possibly a return to the Commonwealth Law Courts control room if a position there became available in the future. Mr Laauwen said he was also offered the option of retrenchment.
- 15 In cross-examination, Mr Laauwen agreed that he did not raise his concerns about being the victim of sex discrimination at these meetings despite having previously attended the Commission for advice. He said that his aim at that stage was to try to resolve the dispute. He did not agree with the suggestion that his failure to raise any complaint of sex discrimination at these meetings was entirely inconsistent with his assertion that he had been deeply offended by the discriminatory way in which he had been treated.
- 16 Mr Laauwen said that, after the meetings with Mr Lo Giudice and Mr Wilcher, he decided to accept retrenchment. He gave Mr Lo Giudice a letter to this effect on 12 September 2008. However, he was later advised

by Mr Wilcher that retrenchment was not being offered. Mr Laauwen said that, at this point, due to his frustration, he punched his hand into a door. Mr Lo Giudice suggested that he leave his shift early, and he did so. He said he was upset because he felt he had been discriminated against and he found that a bitter pill to swallow. He had reluctantly accepted the option of retrenchment but then that was taken away from him too.

- 17 The following day, Mr Laauwen attended his doctor, who assessed him as suffering from a stress reaction. The doctor provided Mr Laauwen with a certificate for at least 5 days sick leave and recommended that this be followed by a period of annual leave. Mr Laauwen followed this advice.
- 18 Mr Laauwen subsequently requested a meeting with Mr David McFadden, Wilson Security's Operations Manager and this took place at Wilson's head office on 17 October 2008. The meeting was attended by Mr Laauwen and his partner Ms Hare, and by Mr McFadden and Human Resources Advisor, Ms Abbey Hampson. Ms Hare outlined the reasons for Mr Laauwen's objection to being transferred, including his view that the decision was discriminatory. He and Ms Hare were of the view that their concerns were ignored. At the end of the meeting, Mr Laauwen lodged a request for leave without pay.
- 19 A further meeting between the same parties took place on 19 November 2008. As a result of Mr Laauwen indicating at that meeting that he was unable to stand or walk for lengthy periods due to a previous motorcycle accident, he was asked by Wilson Security to complete and submit a medical clearance by 5 December 2010. The company was critical of him for not previously having updated his personnel file to include this information about this injury.
- 20 Mr Laauwen subsequently applied to the Tribunal for an injunction to stop the company from demanding the medical clearance. At a hearing on 3 December 2008, his application was dismissed. Mr Laauwen then provided Wilson Security with a letter from his doctor, dated 5 December 2008, in which the doctor recommended that he avoid work duties involving excessive walking.
- 21 By letter dated 8 December 2008, Wilson Security advised Mr Laauwen that, given his doctor's recommendation and his other needs and requirements, it had been decided that he should be transferred to a position at Melbourne University, commencing 15 December 2008. No job description or roster was provided, and Ms Hare responded on his behalf by phoning Wilson Security to advise that he would not be reporting to that site.
- 22 In a letter to Wilson Security dated 12 December 2008, Mr Laauwen confirmed his refusal to accept the transfer and provided a number of reasons for objecting to the transfer, including the lack of a roster and the fact that he would need to use 4 modes of public transport to get to the location. In cross-examination however, he conceded that he had made

assumptions but no actual enquiries as to his options for getting to the Melbourne University site on public transport.

- 23 Mr Laauwen then remained on leave without pay. In January 2009, he abandoned his application to renew his security licence. He said that he effectively had no option but to let the licence lapse because he had no current job description to provide and no funds with which to pay the renewal fee.
- 24 In May 2009, communication with Wilson Security resumed. Following advice from Ms Hare that his security licence had lapsed, the company advised Mr Laauwen, in writing, that this suggested he did not intend to return to work as a security officer. The letter also warned him that unless he provided evidence that his licence had been renewed, the company would have no option but to terminate his employment.
- 25 On 11 May 2009, Mr Laauwen and Ms Hare met with Ms Hampson and Ms Danielle Caruana, Human Resources Business Partner for Wilson Security. Ms Hare again outlined Mr Laauwen's objections to the company's actions and provided a letter confirming those objections. By letter dated 18 May 2009, the company advised him that his request for a further period of leave without pay had been granted to enable him to finalise his legal claims against it, and that he would need to apply to further extend this if those claims remained unfinalised after 31 August 2009. He was reminded that to recommence work, a current security licence was required.
- 26 Mr Laauwen noted that:
- He was not given 2 weeks written notice of his proposed transfer as required under the applicable enterprise bargaining agreement;
  - He believed he had a better knowledge of the computer system at the site than the other 2 control room operators;
  - He had been a control room operator at the Commonwealth Law Courts site longer than the female guard who was not being transferred;
  - He believed there was a conflict of interest behind the decision to transfer him;
  - He had less flexibility in relation to transfers than his colleagues at the Commonwealth Law Courts site because he did not have his own vehicle;
  - He believed that as a result of the company's decision to transfer him, he lost income, used his annual leave, and lost his career in security because he had been unable to renew his security licence;
  - He lost the benefits that would have flowed from the new roster arrangements at the Commonwealth Law Courts site because night shifts and Sunday shifts were going to cease and that would have made

travelling to the site easier and lessened the fatigue that he had been experiencing as a result of the previous roster.

- 27 Mr Laauwen also noted that he had been given various inconsistent advice as to who had made the decision that he was to be transferred from the Commonwealth Law Courts site; ranging from Mr Lo Giudice being the sole decision maker, to Mr Kaya being the decision maker, to Mr Lo Giudice and Mr Kaya and Mr Dean McGrath being the decision makers.
- 28 Since being on leave without pay, Mr Laauwen had received only a small amount of income from helping a friend with the loading of a truck, for which he had earned less than \$1000. He said that he had been ineligible for any payment from Centrelink because he was considered to remain employed by Wilson Security, and he had survived with the support of Ms Hare and her family and friends. He conceded the situation had been a strain on their relationship and a strain on a number of friendships.
- 29 In cross-examination, Mr Laauwen agreed that he had not made any job applications and had made little to no effort to obtain income from alternative employment. He also agreed that he had assumed that Wilson Security would object to his working elsewhere without ever seeking the company's view as to that matter.
- 30 Mr Laauwen had asserted that his contract with Wilson Security was site specific. However, in cross-examination he conceded that Clause 9(b) of that contract provided that he may be required to work at a variety of locations across the Melbourne metropolitan area or other locations as required from time to time.
- 31 In cross-examination he also agreed that when he had initially applied to Wilson Security in February 2006, he had stated he was not suffering from any injuries. He agreed that he had not advised the company of a motor vehicle accident in which he had been injured in November 2006 and said he had not considered it relevant to his work at the time because the control room operator position he held at that time was a sedentary one.
- 32 Mr Laauwen firmly denied the suggestion that he had made up his claim of sex discrimination because he did not get his way in relation to the control room operator position, retrenchment and transfer, stating he would not have gone through all the hardship he had gone through if it was not true.

## **RESPONDENT'S CASE**

- 33 The following witnesses gave sworn evidence for the Respondent, Wilson Security:
- Mr Joe Lo Giudice
  - Ms Danielle Caruana
  - Mr Yakup ("Jake") Kaya
  - Ms Abbey Hampson
  - Mr David McFadden

*Mr Lo Giudice*

- 34 Mr Lo Giudice told the Tribunal that as the Melbourne Security Manager, he was responsible for managing the day to day running of security at the Commonwealth Law Courts, including the assessment of the performance of security officers. He noted that Mr Laauwen had been unreliable at times, calling in sick for night shift at short notice.
- 35 He said that in June 2008, it became clear that, as a result of new contractual arrangements, there would be a reduction of manning levels and hours at the Commonwealth Law Courts site and that it would be his responsibility to consider who to short list for transfer. In July 2008, he advised the employees at the site of the impending changes. Mr Laauwen and another control room operator expressed interest in being transferred. When subsequently determining who to transfer, Mr Lo Giudice conferred with the client whose expressed preference was for Mr Laauwen to be the one transferred. Mr Lo Giudice said that, from his own point of view, he would have chosen who was to be transferred at random as he knew all of them and enjoyed working with them all. However, given that Mr Laauwen had previously expressed a wish to transfer, it made sense to put forward his name and Mr Lo Giudice suggested this to his supervisor, Mr Wilcher, who agreed. Mr Lo Giudice said that Mr Kaya had no involvement with the decision to put Mr Laauwen's name forward. Mr Lo Giudice recalled having a telephone conversation with Ms Hare, and he also recalled talking to her and Mr Laauwen on site after that conversation, but he could not recall them discussing what Mr Kaya has alleged to have said.
- 36 On about 8 September, a meeting was held between Mr Lo Giudice and Mr Wilcher, and Mr Laauwen, to advise of the decision in relation to the transfer. Mr Laauwen was given various options, including transfer to other positions within the Commonwealth Law Courts as well as to other sites. Mr Laauwen raised the possibility of a redundancy package. In a subsequent meeting, Mr Laauwen was offered a transfer to the Department of Treasury and Finance with a possible return to the control room operator position in the near future but, after some consideration, Mr Laauwen advised that he wanted to be made redundant. When he was advised that redundancy was not available, he was angry and annoyed. Given the level of stress he was experiencing, Mr Lo Giudice decided to give him the remainder of the day off with pay.
- 37 Mr Lo Giudice noted that given that his contract was with Wilson Security and not with the Commonwealth Law Courts, he could not understand why Mr Laauwen objected to the company's decision to transfer him.

*Ms Danielle Caruana*

- 38 Ms Caruana explained that she was employed by Wilson Security as a Human Resources Business Partner and was responsible for management of the human resources function for the business. She well aware of the

company's legal obligation as employer to ensure that discrimination did not occur at the workplace. She confirmed that Wilson Security had appropriate equal opportunity policies in place and that employees were made aware of these.

- 39 Ms Caruana confirmed that the transfer of the company's security officers is very common and therefore, their employment contracts specifically provide that they may be required to work at various sites. She noted that clause 9(b) of Mr Laauwen's contract was an example of such a clause. However, the company did its best to avoid unnecessary transfers and to ensure that transfers were, as far as possible, compatible with employee preferences.
- 40 She became involved in the dispute relating to Mr Laauwen's transfer from the Commonwealth Law Courts site in December 2008 when his application for an injunction was heard at the Tribunal. After his application was dismissed, she attempted to work with Mr Laauwen and Ms Hare as his nominated representative, to identify a transfer which would best meet his preferences. She said they were unwilling to participate meaningfully in such discussions.
- 41 Ms Caruana retained oversight of the management of the dispute. She said that the company treated his complaint seriously and wanted to resolve it. Efforts were made to find a suitable transfer for Mr Laauwen; for example, the reception position at Melbourne University, which was offered to him in December 2008, would have enabled him to avoid prolonged walking and standing, but he refused to accept it.
- 42 Ms Caruana noted that Mr Laauwen had allowed his security licence to lapse despite the company reminding him of the need to have a valid licence if he was to return to work for Wilson Security, or indeed to work as a security guard elsewhere. Employers who allow persons who do not hold a valid security licence to work as security guards are at risk of significant penalties. Ms Caruana concluded that Mr Laauwen had no intention of actually returning to work for Wilson Security.

*Mr Yakup ("Jake") Kaya*

- 43 Mr Kaya told the Tribunal that he was employed by Wilson Security as the Team Leader at the Commonwealth Law Courts and was responsible for the general management of the staff at that site. He said that in about the middle of 2008, he became aware that the number of positions in the control room was to be reduced as a consequence of a change in arrangements at the site.
- 44 Mr Kaya confirmed that in September 2008, his supervisor, Mr Lo Giudice, advised Mr Laauwen that he had been chosen to be transferred from the control room. Mr Kaya said he had no input into the decision and did not know that Mr Laauwen had been selected to be the officer transferred until after Mr Laauwen had been told. He noted that Mr Laauwen was very

unhappy about this decision and complained about it. Mr Laauwen asked Mr Kaya why he had been selected and who was responsible for the decision. Mr Kaya responded that he did not know for sure who made the decision and he did not know why Mr Laauwen had been selected. He advised Mr Laauwen to raise his complaint with Mr Lo Giudice. Mr Laauwen continued to be quite upset and agitated and ultimately left his shift early. Mr Kaya has not seen Mr Laauwen at all since that day.

- 45 Mr Kaya was later made aware that Mr Laauwen alleged that Mr Kaya had told him that he was being transferred because he was a male and the company wanted one male and one female in the control room. Mr Kaya completely denied making any such statement. He could not remember hearing anyone else making a statement like this. He had no idea of the allegation having been made until many months later when Ms Hare attended the site to serve him with a witness summons and told him that he was being summonsed because he was a witness to the fact that Mr Laauwen had been transferred because the company wanted one male and one female in the control room. Mr Kaya had no idea how she and Mr Laauwen had come to that conclusion.
- 46 At the hearing, Mr Kaya was cross-examined by Ms Hare. He emphatically denied her suggestion that he had been told by the company to “shut up” as part of its “damage control” response to Mr Laauwen’s complaint of discrimination.

*Ms Abbey Hampson*

- 47 Ms Hampson confirmed that she had been employed by Wilson Security as its Human Resources Advisor from May 2008 to November 2009. She said she became aware that one of the control room operator positions at the Commonwealth Law Courts site was being phased out as part of a restructure of security arrangements at the site, but she had no role in the process of selecting which of the three existing operators was to be transferred. She was told by Mr Wilcher that Mr Laauwen had been chosen and that he had been offered a position as a roving guard at the Department of Treasury, but had rejected it for a number of reasons, none of which were valid in Ms Hampson’s view.
- 48 When she became aware that Mr Wilcher had indicated to Mr Laauwen that he could opt for retrenchment/redundancy, rather than taking a transfer, she advised Mr Wilcher that, under the applicable certified agreement, redundancy was not available because there were other positions at his current classification level which Mr Laauwen could be transferred to.
- 49 Ms Hampson agreed that she had been present, together with Mr McFadden and Ms Hare and Mr Laauwen, at a meeting on 17 October 2008 at which Mr Laauwen’s objection to the decision to transfer him was discussed. Ms Hare and Mr Laauwen disagreed with the decision and asserted that the female control room operator should have been the one selected for

transfer. In their view, the move would not have had as great an impact on her personally as it would for Mr Laauwen, and she had already accepted a transfer. Ms Hampson advised that, due to the lapse of time, the female operator's transfer was no longer current. Ms Hare had then insisted that Mr Kaya must have made the decision. She alleged that he was in an intimate relationship with the female control room operator, and maintained that he had told Mr Laauwen that the reason for the decision was that the company wanted one male and one female in the control room.

- 50 Ms Hampson said that, given the very serious nature of the allegations Ms Hare had made, Mr McFadden had agreed to speak directly to Mr Kaya about them. After doing so, Mr McFadden advised Ms Hampson that Mr Kaya was adamant that he had not made the remark that had been attributed to him, and had flatly denied the allegation of involvement with the female control operator.
- 51 Ms Hampson went on to confirm that, having been advised by Mr Laauwen that he had suffered a knee injury, a medical clearance was required from him. Wilson Security was legally bound to ensure that its employees were deployed in positions they were physically capable of undertaking and which did not place them at risk of exacerbating any existing injuries.
- 52 She agreed that, following the Tribunal hearing in December 2008, Mr Laauwen's doctor provided a letter stating that he should avoid positions involving excessive walking. She noted that a suitable position at Melbourne University was identified and offered to him but he rejected it for reasons she did not consider to be valid.
- 53 Ms Hampson also agreed that, in March 2009, Ms Hare had advised the company that Mr Laauwen would be pursuing a complaint of discrimination. Ms Hampson was cognisant of the seriousness of the allegation and the legal implications for the company if the complaint of discrimination was substantiated.
- 54 Ms Hampson confirmed that, despite written recommendations and reminders, Mr Laauwen had allowed his security licence to lapse. Given this, and given his rejection of objectively suitable positions, she also concluded that he did not genuinely want to return to work.

*Mr David McFadden*

- 55 Mr McFadden told the Tribunal that he was employed by Wilson Security as Operations Manager. He became aware of impending changes at the Commonwealth Law Courts site arising from the restructure of security arrangements there. Employee numbers and hours were to be reduced and transfers were going to be necessary. From his point of view, this was not an unusual occurrence, and the possibility of transfers was part of every security officer's contract, including Mr Laauwen's.
- 56 Mr McFadden was made aware that Mr Laauwen had been selected as the employee to be transferred. He was advised that the decision had been

made by Mr Wilcher in consultation with Mr Lo Giudice. He was also advised that a transfer to a position at the Department of Treasury had been offered to Mr Laauwen but he had not accepted it. On 17 October 2008, a meeting was convened with Mr Laauwen and Ms Hare. Mr McFadden attended with Ms Hampson. He said their priority during that meeting was to get Mr Laauwen back to work. Mr Laauwen advised that he was unable to accept the position at the Treasury Department because it was for a roving guard and that was not suitable for him due to his leg injury. Mr McFadden confirmed that the company had not known of this injury and required Mr Laauwen to obtain a medical clearance to ensure his safety at work.

- 57 In the ensuing months, Mr Laauwen and Ms Hare refused to provide the medical clearance and ultimately applied, unsuccessfully, for an injunction from the Tribunal. Subsequently, Mr McFadden was advised by Ms Hampson that a medical certificate had finally been provided by Mr Laauwen, that a suitable sedentary position was available at Melbourne University, and that Mr Laauwen had been advised to report for work there on 15 December 2008.
- 58 Mr McFadden telephoned Mr Laauwen a few days before his scheduled commencement at the university site to confirm that he would be in attendance. Mr Laauwen answered the call but then handed it to Ms Hare who stated that he would not be accepting the transfer because it was an “illegal order”.
- 59 Mr McFadden then had little direct involvement with Mr Laauwen and his discrimination claim although he was kept informed about it. He told the Tribunal that as a result of Mr Laauwen’s rejection of suitable transfers, he had formed the view that Mr Laauwen had no genuine intention of returning to work.
- 60 In cross-examination by Ms Hare, Mr McFadden said that he believed he had an open mind when he phoned Mr Kaya after the meeting on 17 October 2008 for his response to the allegations made by Ms Hare and Mr Laauwen.

### **COMPLAINANT’S CLOSING SUBMISSIONS**

- 61 Ms Hare emphasised the fact that, in his evidence, Mr Laauwen had omitted nothing and had never changed his recollection of what Mr Kaya had said, even when he was challenged on it. She noted that there were no witnesses to the statement. She said that she and Mr Laauwen believed that Wilson Security’s investigations into the dispute had many flaws. She said that as a result of his discrimination complaint, he had suffered extreme financial hardship and strains on his relationships with family and friends. She did not agree that he had failed to mitigate his loss. She asserted that he had remained loyal to the company and had valid reasons for rejecting the suggested transfers to the Department of Treasury and to Melbourne

University. She stated that Mr Laauwen would oppose any application by Wilson Security for an order that he pay its costs in this proceeding.

### **RESPONDENT'S CLOSING SUBMISSIONS**

- 62 Ms Seitz submitted that the evidence of all of the witnesses called by Wilson Security was consistent and established beyond doubt that the decision to select Mr Laauwen for transfer out of the control room at the Commonwealth Law Courts was not made by Mr Kaya. She reminded the Tribunal that Mr Kaya had emphatically denied ever making the comment attributed to him by Mr Laauwen. She submitted that even if the Tribunal was satisfied that the comment was made, it could not be causally linked to the decision to transfer Mr Laauwen because Mr Kaya was not the person making that decision. She reiterated that Mr Laauwen's contract of employment, like that of other security officers in the company's employ, specifically contemplated that he could be required to work at various locations and although he had tried to insist in his evidence that his contract was site specific, in cross-examination he had conceded that it was not. She submitted that any loss suffered by Mr Laauwen was a consequence of choices he had made and that he had made no attempt to mitigate. She said the complaint should be dismissed and foreshadowed the making of an application for costs in that event because of the way Mr Laauwen and Ms Hare had chosen to conduct the case.

### **DISCUSSION OF THE EVIDENCE AND FINDINGS**

- 63 As the complainant in this proceeding, Mr Laauwen has the onus of persuading the Tribunal that, on the balance of probabilities, the sex discrimination which he alleges occurred. From the outset however, he and Ms Hare appear to have completely misconceived the nature of the onus upon him as the complainant. They appear to have proceeded on the erroneous belief that there was an onus on the Respondent to prove that its conduct was justified.
- 64 On the evidence before the Tribunal, it is clear that Mr Laauwen's contract of employment specifically contemplated his being transferred as needed from time to time for operational reasons. He reluctantly conceded as much in cross-examination. The Tribunal is satisfied that Wilson Security took reasonable steps to find a suitable transfer for him. Once he had made the company aware of his knee/leg injury and how it restricted his capacity for prolonged standing or walking, they endeavoured to identify an available position at his classification level that would accommodate his needs.
- 65 In support of his complaint, Mr Laauwen relies primarily on the comment he says was made by Mr Kaya; namely, that one male guard and one female guard were chosen. Mr Laauwen sought to buttress his oral evidence as to the making of the comment by referring to the hand-written note which he said he made contemporaneously with the comment being made. The Tribunal considers that little, if any, weight should be given to the note

because it is self-serving and its veracity was challenged. In his sworn evidence, Mr Kaya completely denied making the comment alleged or any statement like it. When asked about the comment by Mr Wilcher in October 2008, Mr Kaya was adamant that he had never said anything of the sort.

- 66 In any event, the evidence before the Tribunal established beyond doubt that Mr Kaya was not the person who had made the decision to transfer Mr Laauwen. The evidence of the witnesses for Wilson Security was entirely consistent on this point.
- 67 The Tribunal has therefore concluded that Mr Laauwen has failed to establish that his gender played any part in the decision to transfer him from the control room of the Commonwealth Law Courts. His version and perception of events was not shared by any other witness.
- 68 The demeanor of Mr Laauwen and Ms Hare at the hearing was consistent with the impression given by the witnesses for the company. Neither of them appear to have the capacity to reflect on or even consider that their views are not shared by others and simply not open on the facts.

## **CONCLUSION**

- 69 For the above reasons, the Tribunal is not persuaded that Mr Laauwen's complaint of sex discrimination in employment is proven. Accordingly the Tribunal's order is that the complaint is dismissed.
- 70 Any application by the Respondent for costs must be filed with the Tribunal and served on the Complainant on or before 20 December 2010.

S Liden  
**Member**