

**Between: Donna Cook  
Complainant**

**and**

**Lancet Pty Ltd & Others  
Respondent**

**JUDGEMENT**

Mrs Donna Cook complained against four Respondents being Lancet Pty Ltd., Mr Brian Beacham, Mr Denis Weir and Mr John Halls. In the complaint it was alleged that at the relevant times Lancet Pty Ltd was Mrs Cook's employer and that the Second and Third Respondents were Directors of the Company. As it transpired Mrs Cook was employed by the Second and Third Respondents. The Company had not at the relevant times been incorporated.

At the hearing by consent the complaint against Lancet was discontinued. Mrs Cook proceeded against the other three Respondents.

The complaint alleged that in early November 1986 Mrs Cook had notified the Second and Third Respondents who were her employers that she was pregnant. Shortly after this Mrs Cook alleged that she was advised by the Sales Manager Mr Halls that her employers were experiencing financial difficulties and that as a result it was necessary to dismiss one of the sales representatives. Mrs Cook alleged that Mr Halls had advised her that her employment was to be terminated in view of her pregnancy.

The Points of Claim stated that Mrs Cook had been intending to work until just prior to the birth of her baby and then to return to her employment approximately 6 weeks after the baby was born. She complained that after her dismissal she had been unable to find suitable employment prior to the birth of the baby. She claimed damages and other relief.

In the Points of Defence the Respondents said that the Complainant was first employed by them on the 7th April 1986. The Respondents agreed that at the material times the Complainant was employed by Mr Denis Weir and Mr Brian Beacham trading as "Lancet - O.M.S.". This was common ground at the

trial.

The Respondents denied that they had discriminated against the Complainant because of her pregnancy and pleaded that a firm of Accountants namely Messrs Coopers and Lybrand had recommended to the firm that it decrease its workforce. The Respondents said that this was the reason for the termination of the Complainant's employment and not the fact that she was pregnant.

It is pleaded in the Points of Defence that Mr Halls advised the Complainant that her employment was to be terminated due to her sales performance, her unwillingness to co-operate with the Sales Manager, and her unwillingness to also be involved in sales meetings. The Respondents denied that they had committed any breach of the Equal Opportunity Act and denied that the Complainant was entitled to any relief.

At the hearing Mrs Cook gave evidence that she had been employed by Mr Weir and Mr Beacham as a Sales Representative. Her nett weekly salary was \$250.00 a week at the time of the termination of her employment. She also had the use of a company car during the week and at weekends. She provided the petrol for the running of the vehicle at the weekends. Prior to her employment with the Respondents she had been employed as a Nursing Sister at different hospitals.

Mrs Cook testified that in her employment she was selling surgical products to general medical practitioners and hospitals and selling radiology products to radiologists. A former employee had resigned about 6 weeks after Mrs Cook had commenced working with the firm and Mrs Cook had been the only Sales Representative in the relevant section for 8 weeks until a second representative Mrs Helen Ellis was employed. Mrs Ellis had not had any previous sales experience prior to joining the partnership.

Mrs Cook said she had introduced Mrs Ellis to the clients

North of the river. Mrs Ellis had then serviced those clients. Mrs Cook then concentrated on clients South of the river. However, for sometime Mrs Cook had continued to sell to some of the clients North of the river.

Mrs Cook said that Mr Weir had been the person who would tell herself and Mrs Ellis which hospitals to call on. Usually the sales persons would come into the office on Friday afternoons from 3 o'clock onwards to hand in their time sheets and to discuss the products. It was Mr Weir's function to co-ordinate the clients whom Mrs Cook was seeing. Mrs Cook said that at none of the meetings which she had attended was she ever advised that there were any problems with her sales figures.

Mrs Cook explained why the sales figures on Exhibit 2, which represent her sales as approximately \$3,000.00 behind the sales figures for Mrs Ellis, were incorrect. She said that some of her sales had been credited to Mrs Ellis.

As the evidence eventuated this did not become important because from the evidence given on behalf of the Respondents it appeared it was not the sales figures that were the important thing from their point of view but rather Mrs Cook's relationship with some of the staff at the firm and her potential as a sales person. It was explained by the Respondents that "sales performance" in paragraph 7 of the Points of Defence did not mean sales figures.

In her evidence Mrs Cook said that when she was dismissed she had been spoken to by Mr Halls who had said, when she asked him why they had chosen her instead of another sales person: "Donna, we just feel that you may have complications in your pregnancy and it would be in your interests as well as the company's if you were to be dismissed."

When she had objected to this Mr Halls had said "Well, you may

say that Donna, but unforeseen circumstances may arise and you may not be able to fulfil your duties." He had said: "The future of Lancet is the most important thing and, under the circumstances, we feel it would be best if you were to leave," He had then handed her a reference which became Exhibit 4. Exhibit 4 sets out that "We found Donna to be a keen and diligent worker. She always displayed a willingness to learn and improve her abilities."

Mrs Cook said that during the same interview Mr Halls told her that her work performance was good and in no way did the dismissal reflect upon her abilities.

Mrs Cook said that when her husband attended at her place of employment on the same day he and Mrs Cook went into the office where Mr Halls and Mr Beacham were. Mrs Cook said that Mr Beacham had told them that ". . . if he had had to make this decision 6 months ago he would not have known who to have chosen, it would have been a terrible dilemma - but when we found out that Donna was pregnant we were genuinely delighted for her and for Lancet as it seemed the obvious choice for everyone that Donna should leave."

Mrs Cook gave evidence that at the time she had been dismissed her husband's and her own nett income per month totalled \$2,200.00, of which their mortgage and loan commitments were \$1,400.00 per month. They were very dependent on both their wage packets to enable them to continue purchasing their house and meeting their commitments. Mrs Cook said that her sister was a family day care giver and had offered to take the baby during the day. Mrs Cook had intended working right up until she had the baby or until approximately about 6 weeks before she had the baby. She had had a trouble free pregnancy.

A certificate was produced by consent by Dr Mazzucchelli (Exhibit 6) dated 6 December 1988 which said that as far as he could recollect Mrs Cook was physically fit and able to work

during the time he had looked after her which was up until 39 weeks gestation at which time he had handed over Mrs Cook's care to the King Edward Memorial Hospital.

Following her dismissal Mrs Cook received legal advice. Ultimately she attended at the Equal Opportunity Commission. In evidence she said she had been unable to look for work after her dismissal because in the early stages she was hopeful that she would be reinstated with Lancet. Her husband had then lost his employment as well.

The Bank was then threatening to sell their home. In April 1987 her husband had managed to get a job in Pinjarra. He had to travel from Kelmscott to Pinjarra and back every day. They only had the one vehicle between them.

Mrs Cook did not obtain employment before the birth of her baby because she did not know where they would be living, whether it would be Pinjarra or Kelmscott, and she did not feel it would be fair to start employment in one place and then move on. She said she could not work in Pinjarra because she did not have transport to do shift work. Her husband was doing shift work. She also thought that if she had gone back to nursing heavy lifting would have been involved. She did not think it would be very good for her. She did not think it would be easy to obtain employment being pregnant. The baby was delivered on 3rd July 1987.

Mrs Cook said that in December 1987 the couple had ultimately sold their house. They then moved to a farm in Serpentine of which they were caretakers. Mrs Cook could not obtain employment there. However in April 1988 after they had moved to Fremantle Mrs Cook had commenced work with a nursing agency and eventually with Fremantle Hospital.

Mrs Cook said that when she had first been dismissed it had been quite devastating. She had never been dismissed from

employment before. On top of that she found it very frustrating because her employers had told her that it was for reasons of pregnancy.

After Mrs Cook had commenced her action against Lancet there were a lot of comments which really distressed her. Things that she found were very unnecessary and very hurtful. Compounded on that was the fact that the couple's financial situation had got very bad. During her pregnancy she was either worried about the house being sold or else the comments that Lancet were making about her.

Under cross examination Mrs Cook said that during her discussion with Mr Halls it was Mr Halls who had brought up the issue of the pregnancy. He was the first one to bring it up. He had said that she might have complications in her pregnancy and he felt it would be in her own interests as well as the company's if she were to leave. That was brought up straight away. He had told her that there was advice from Coopers and Lybrand that they should lay off two sales persons. When she had said, "Why have you chosen me?" he went on to say "You may have complications in your pregnancy."

Mrs Cook had said that she had read the reference that she was leaving for personal reasons and had then cried. She said she thought what they were doing was wrong. She had had to leave the room because she became upset. Mrs Cook was cross examined about a week off she had earlier had away from her employment due to stress and also about some early difficulties she had had with Mr Halls after he had been appointed Sales Manager.

Mrs Cook was also cross examined about whether she had started looking for employment after she was dismissed. She said that she was very hopeful when she went to the Commission that she would be reinstated. Words were said to the effect that "Maybe by January things might be resolved and she would be

back working with Lancet. She said she had not sought employment during the period from December until the birth of the baby.

Mrs Cook was cross examined about alleged appointments with Miss Lane. Her answer was "I don't even know who Miss Lane is." She was asked whether she had ever been informed that appointments had been made for her to see Miss Lane to gain information with regard to radiology products. Mrs Cook said she did not know where Miss Lane worked or who she was. She said she was never given any indication of an appointment to see Miss Lane. She had never heard of Miss Lane before. Mrs Cook said her sales figures were never inferior to Helen Ellis' because that would have stuck out in her mind. They were always equal to or better than Mrs Ellis'. She said that until the time she had brought the claim against Lancet she had no indication that her employers felt the way they did about her. She was given to believe that they thought she was a good worker. As far as she was concerned she had been a good worker when she worked for them.

Mrs Cook was again asked about the conversation when she was told she was to be dismissed. She said she had been informed about Coopers and Lybrand and the fact that it was a financial company. She said "Why am I being chosen?" and Mr Halls had said it was "Due to complications you may have in your pregnancy." She said she only became upset after she had been given the reference. She became upset then because the reference said she was choosing to leave for personal reasons and she was not choosing to leave. She did not want to leave.

Mrs Cook's husband gave evidence. He said that he had met both Mr Halls and Mr Beacham when he came to pick up his wife after she had telephoned him on the day she was dismissed. He had been offered the Coopers and Lybrand report to read. He had declined to read it. He had no doubt about the authenticity of it. He said that Mr Beacham told him he was



distressed that this had ever come about. They had been really forced into the situation of standing down one of the sales staff. Mr Beacham said he had been truly delighted when the news of Donna's pregnancy had come through, "If he had had to make that decision six months previous to that he would not have known who to choose."

Mr Cook said there was never any mention of Mrs Cook's work performance and her not being up to scratch so far as her work performance was concerned. He said it was "to the contrary actually". Mr Beacham had said that he did not want Donna to leave feeling that in any way this reflected on her work performance. Mr Beacham had not indicated any problems with the Sales Manager Mr Halls. He had not indicated that Mrs Cook had been in any way unco-operative whilst she had been employed there. Mr Cook said Mr Beacham was very distressed that this should ever have had to happen. He was very praising and said that Mrs Cook had been a good worker for them.

Mr Cook also said that Mr Halls had said it was kind of more unlikely that he would be run over by a bus than the complications that might arise from Donna's pregnancy. This comment was relative to something Mrs Cook had said about the likelihood of Mr Halls being run over by a bus when comparing that to the possibility of Mrs Cook having complications in her pregnancy.

Mr Cook gave evidence that shortly after Mrs Cook's dismissal he had lost his employment. He had been in receipt of unemployment relief for a while. Then he had obtained employment at Pinjarra. He was at that time travelling from Kelmscott to Pinjarra daily using the family car. The couple finally lost their house because they were unable to keep up the repayments. Mrs Cook had been "fine" during her pregnancy.

Mrs Helen Ellis gave evidence that initially she had been assigned to work North of the river. During some of that period Mrs Cook had continued to look after the Charles Gairdner and Princess Margaret Hospital. Mrs Ellis thought she might have taken over the Royal Perth Hospital after a little time, but not immediately, from Mrs Cook. She also thought that Mrs Cook had covered a lot of the radiology clinics initially. There had also been a company called Zera which she said she had not had anything to do with until after Mrs Cook left. It was certainly in about July that there were still customers in her area which Mrs Cook had retained. Mrs Ellis was asked did she ever recall Mrs Cook being asked to attend meetings which she had failed to attend and she answered "No". She had not been aware prior to Mrs Cook's dismissal that there was any likelihood of someone being put off work.

Mrs Ellis was not cross examined in detail about any meetings she had had with Miss Del Lane or of any necessity for both herself and Mrs Cook to be there.

Mr Halls was the first witness called by the Respondents. He gave evidence that Mrs Cook's husband had telephoned and said he thought that some sort of sales training for the sales staff would be useful. Mr Weir had told him that he had always meant to institute some sales training. Because they were very busy men they had not really had a chance to get down to it. That was how the sales training came into being.

Mr Halls gave evidence that Mrs Cook's first reaction to him visiting the clients with her had been ". . . just absolute defiance. There was no way she was going to be involved in that."

Mr Halls told of a second meeting with Mrs Cook which was conducted with Mr Denis Weir in the room. He said Mrs Cook would not flex and would not talk about it. She reckoned she

was going to be embarrassed. She had some other objections. Mr Halls gave evidence in detail about the dispute he had had with Mrs Cook. He also gave some evidence about Mrs Cook not co-operating during the "John Cleese" sales films which the firm had arranged to show. He said Mrs Cook had never brought paper or pencil with her and that she had generally not co-operated in these sessions. Mr Halls said that after the initial dispute he had gone out on sales interviews with Mrs Cook. The relationship between them both had improved after that.

Mr Halls did not give any evidence concerning Mrs Cook having refused to co-operate with Miss Del Lane or of having ever discussed that matter with her. He was not then Sales Manager.

Mr Halls was asked whether he actually participated in the decision concerning Mrs Cook's termination of employment. He said "Only from the point of view that I discussed it with them."

Because there is no evidence at all against Mr Halls of having actually made the decision or having been a party to it, in our view there is no evidence against him of any discrimination under the Act. The complaint against him is not sustained and will be dismissed.

Mr Halls said that Mr Beacham and Mr Weir had made the decision. He had given his opinion to them. He had given the opinion that Mrs Ellis was a far more co-operative person and he felt that Mrs Ellis had the better potential to develop as a sales person.

Mr Halls said that during his discussions with Mr Weir and Mr Beacham, Mrs Cook's pregnancy was never an issue at all. It was never discussed between himself and Mr Weir and Mr Beacham. "It never even occurred to me that it would be an issue until such time as Donna first introduced the subject at

her dismissal."

Concerning Mrs Cook's actual dismissal Mr Halls said he had started off by explaining the situation the company was in. He said he had produced a copy of the Coopers and Lybrand Report. He had told Mrs Cook that someone had to go and that unfortunately she had been chosen as the one to go.

Mr Halls had said that Mrs Cook had first brought up the pregnancy. She had said to him, "You are only firing me because I am pregnant" and he had said "No Donna, it is not because you are pregnant." He had told her he did not know that was a consideration in her dismissal from Mr Weir or Mr Beacham at all. He had made a statement later on on that occasion when he had said something to the effect of, "Maybe this is for the best for you anyway considering you have had problems with a pregnancy before and maybe that would be beneficial to you on that." He said those comments were made in an effort to placate Mrs Cook.

Mr Halls said the decision to terminate Mrs Cook's services had been basically because he had felt that of the two people available Mrs Ellis was far more co-operative and easy to get on with. She was more open around the place and generally all of the staff got on better with her. He thought that Mrs Ellis had the better potential of being a better sales person for the company. Mr Halls said that Mrs Cook was "Basically fairly unco-operative in a lot of areas." He repeated that the first mention relating to the pregnancy and her retrenchment on that day had come from Mrs Cook herself.

Mr Halls said that so far as sales were concerned, the sales figures between Mrs Cook and Mrs Ellis were very similar. There was very little difference in the sales. He said the partners had only considered the sales to a minor degree before making the decision. The fact was that he had felt that Mrs Ellis had the best potential. There was very little

difference between Mrs Cook and Mrs Ellis in their actual end of the week performances.

Mr Halls said that Mrs Cook's whole attitude at the training meetings was one of very little co-operation in the films at all. He said he felt she had not been participating at all. He said he thought there was an occasion when he might have had something to say about it but he really could not remember whether he had spoken to her several times on it. He did not specifically remember an occasion when he would have taken her aside and said something about the meetings. Mr Halls said that Mrs Cook never even brought a note pad into the sales training meetings. He specifically noted that. She was sitting there with her hands folded in her lap.

Mr Halls said that he had not considered the question of Mrs Cook's pregnancy until the time that she brought it into issue at the meeting when he told Mrs Cook that her employment would be terminated.

Mr Halls said that when Mr Cook had phoned in at the time Mrs Cook was having a problem early in her pregnancy, Mr Halls did not know Mrs Cook was having trouble with her pregnancy. He knew she was pregnant. Mr Halls said he wrote the reference with the hope it would perhaps help Mrs Cook get another position in the future and somehow get herself reestablished.

Mr Beacham gave evidence that he was a Director of the Company and that in about September/October 1986 he had had a discussion with the bank concerning the financial difficulties of the company. Mr Beacham said that Mr Weir was in charge of the sales side and purchasing. Mr Beacham was in charge of the office administration. The sales people were under Mr Halls.

Mr Beacham said that Mr Grey of Coopers and Lybrand had told the company that they should really look at dismissing one

person within the administration and one person in the sales area. Both he and Mr Weir had taken less money so that they could keep the young man in the store on as they felt that that was a fairly vital position.

Mr Beacham said that they had had two difficulties with Mrs Cook. The first time when she contacted the office stating she was finding coping with the job a little difficult. That was when she had had her first time off. The second occasion was the meeting between Mr Halls, Mr Weir and Mrs Cook when there had been the discussion about the field trip.

Mr Beacham said Mr Halls' opinion as to which person was the best to keep on had been a consideration. Mr Halls' opinion had confirmed the decision that he and Mr Weir had already come to.

Mr Beacham mentioned that there was a third incident concerning nursing homes which was very unfortunate. There had been a personality clash between Mrs Cook and a particular Matron. However, he said that had been resolved. There had been a 4th incident, "when they had their training, things like that - the remark was made about "I feel like being back in school." "He said Mr Halls must have thought it was quite a big issue and quite a big thing to bring it to Mr Beacham's attention.

Mr Beacham was then asked "Right, and was there another occasion when appointments had been made for Mrs Cook to attend a sales or a product information?" He said "Yes . . . this particular lady was extremely experienced in the sales of the field products and we actually, Dennis and I, have known her for sometime and actually organised her to come to Perth to help our sales people out." Mr Beacham said he was referring to Ms Del Lane.

It was then that a letter was produced (Exhibit 9) dated 21st

August 1987 from Miss Del Lane, Field Manager, of a company in Queensland. Counsel advised the Tribunal that the letter was not in the discovery of documents. Counsel had only just ascertained that her clients had it themselves.

Counsel for the Complainant advised the Tribunal that the letter was not a matter which had come to her attention "before today." She pointed out that Mrs Cook had been asked about the matter and simply did not know who Mrs Lane was. She advised the Tribunal she would wish to recall Mrs Cook to give evidence about the matter as Mrs Cook had not had an opportunity to consider this letter and give evidence concerning it.

The letter was admitted as Exhibit 9 and permission was given to recall the Complainant.

Mr Beacham was asked about the conversation which had allegedly occurred between the parties when Mr Cook had attended the office after Mrs Cook's dismissal. He was asked about a remark he was said to have made concerning "if the decision had had to have been made 6 months earlier then it would have been a difficult decision to make" and he said he could not recall making that comment at all. He did not even know what it referred to. Mr Beacham said that at no time when they were trying to decide between Mrs Cook and Mrs Ellis did Mrs Cook's pregnancy ever come into issue. Mr Beacham said that Mrs Cook's position had not since been filled by anybody else.

Under cross examination Mr Beacham said he had not been present when the appointments with Miss Lane were agreed with Mrs Cook. He was to be at those meetings. He said he had been included because of his knowledge of the West Australian market. The meetings had been arranged by Mr Weir. Meetings with Miss Lane had taken place but Mrs Cook was not present.

Mr Beacham said in cross examination that they had asked Mr Halls for his opinion concerning which person to dismiss. He had confirmed the decision which had been reached between Mr Beacham and Mr Weir. When asked, "In your discussions with either you and Mr Weir or the discussion with Mr Halls, was the issue of Mrs Cook's pregnancy ever raised at any stage?" He said "No never raised." He said the question of pregnancy was "a minute factor." "It played no part in our decision whatsoever."

Mr Beacham said that if Mrs Cook had been the right person for that job she would have been kept on. She would have been given the time off over her maternity and that is all there would have been to it. When asked again concerning the pregnancy in the discussions he said "No. We didn't mention it. It was not one of our considerations at all." He was asked about his alleged comment that "Six months ago it would have been a difficult decision but now, you know, its the best for everyone?" He said "I can't remember that comment whatsoever. I can't recall that." He said to his recollection there had been no questions from Mr Cook concerning "Why choose Donna?"

Mr Beacham said there had not been to his recollection any question in that discussion about why she was being dismissed.

Mr Beacham said that Miss Del Lane had been actually at the office with himself waiting for Mrs Cook to turn up to the meetings. She was quite annoyed after the second time of Mrs Cook failing to turn up. When asked had he ever raised that with Mrs Cook he said "Yes, we did. Just on one occasion I said I was not very happy about that. We had brought someone here to teach them about it and she hadn't shown up." This had been "Not long after she was actually there." When asked did Mrs Cook give any explanation for not turning up Mr Beacham said "No". When asked whether Miss Del Lane had had a meeting with Mrs Ellis Mr Beacham said "Yes. It was only a



brief meeting but it was a meeting because Mrs Lane was actually going back to Brisbane."

Mr Beacham said that he was not aware that Mr Halls had ever raised the question of Mrs Cook's failure to keep the appointments with Miss Del Lane, with Mrs Cook.

Mr Denis Weir gave evidence that he was a co-director of the Company. He said that they had chosen between Mrs Cook and Mrs Ellis only from the performance of both people. It was not "in dollar value but in the way that they co-operated within the establishment."

When asked what instances that he could recall or that came to mind when he had to make the decision between Mrs Cook and Mrs Ellis the first one he mentioned was the altercation that Mr Halls and Mrs Cook had had over Mr Halls going out with her to visit clients. The one that he recollected most was concerning Miss Del Lane because they had "gone to some expense to bring this person to Perth to help them with their sales figures and it just did not happen." It was his recollection that Mrs Ellis did see Miss Lane.

Mr Weir said that Mrs Cook and Miss Lane had both been in his office when they were discussing the times and the day that Mrs Cook would see Miss Lane and they would discuss the radiology business. He said that Mrs Cook had failed to attend on two occasions. He said he had not ever discussed her failure to attend with her but he thought Mr Beacham "may have done".

When asked about the film training sessions Mr Weir said that Mrs Cook on one occasion had stared out the window into the car park the whole time the sales meeting was on and had taken no participation in it whatsoever. He said that in reaching the decision that Mrs Cook was to be the one to be dismissed he had discussed it with Mr Beacham. He said they had brought

Mr Halls into the conversation at the very end of their discussion. He said Mrs Cook's pregnancy had never been discussed at any time during their discussion.

Under cross examination Mr Weir was asked whether he was suggesting that Miss Lane had come over solely from Brisbane to have an appointment with Mrs Cook. He answered "Yes, I am". He elaborated that Miss Lane had come to Perth for a week to help with the sales. He repeated that he had been actually there when arrangements were made with Mrs Cook. When asked "Did you speak to Donna about it at all, when you discovered that apparently these appointments were not kept?", he said he had not. He said somebody else had already spoken to her about it. "Brian had spoken to her about it." When asked "Not John Halls?" he said "No, not at all.

Mr Weir was referred to the letter dated 30th January 1987 from the Confederation of Western Australian Industry (Exhibit 7) which in paragraph 5 had referred to Mrs Cook's ". . . sales performance in comparison with the other sales representative in the surgical area" and later "The consultant's report and the sales figures referred to above can be made available to the Commission, on a confidential basis, if required." He said that ". . . when it comes to sales performance it is just not dollar value. Sales performance means their co-operativeness within the establishment and outside the establishment, and the dollar value."

In our opinion Mr Weir did not answer the question satisfactorily.

He repeated that the issue of Mrs Cook's pregnancy had not been discussed between him and Mr Beacham and Mr Halls when the question of who would be dismissed was discussed. He said "It was not an issue".

Mr Weir said he was not aware of the explanation if any that Mrs Cook had had for not turning up for the appointments with Miss Del Lane. Mr Weir said that Miss Del Lane had had discussions with Mr Beacham on radiology while she was over in Western Australia. Mr Weir said that the firm had paid Miss Del Lane's fare across from Brisbane and he agreed with the Statement in the letter Exhibit 9 that Miss Del Lane's visit to Western Australia was primarily to lecture both medical representatives to further their radiology knowledge.

The Respondents called Mrs Jennifer Hall who had worked for the firm for 7 years and had left in 1984 when she was six months pregnant. Mrs Hall said there was no pressure put on her to leave because she was pregnant. Her job was offered back to her. She had not returned to work because she had two little children and she wanted to stay home and look after them. She had been the surgical representative.

The Respondents also called Mr Christopher Hudson who is the customer service supervisor at Lancet. He had commenced his employment there in September 1986 and was originally employed as a storeman. He was asked how Mrs Cook received the film training sessions and he said she was not as enthusiastic as everybody else there. She showed a slight disinterest. He said Mrs Cook did not really seem to mix in too well with the rest of the staff.

Before the Respondents had concluded their case and while the Tribunal was waiting for another witness to attend, Mrs Cook was recalled concerning the visit by Miss Del Lane to Western Australia. She was asked did she actually recall the person and she said she did. She was asked whether she recalled at any stage being told that Miss Del Lane was coming to Lancet specifically to talk to herself and Mrs Ellis. She said "Yes I do. Denis Weir said that a Miss Del Lane was coming across from the Eastern States. . . He had said she was coming over primarily to see Mr Weir and Mr Beacham to discuss dental

division because the dental area in Perth hadn't really been explored at that time and Lancet felt that it might be a viable proposition to set up a dental division and if things went well they were going to appoint a storeman called Steve and this storeperson is the one who Mr Halls referred to yesterday who showed a great interest in the sales training videos and eventually he did become a sales person. . . He said that if things went well they would set up a dental division but it wasn't to concern Helen and myself because we were too busy with surgical supplies, even though we did visit dentists but it was only to sell swabs and cotton wool. We went into dental equipment. He also pointed out, that she was very experienced in radiology equipment and at some stage during the week she would be there she would like to discuss radiology equipment with Helen and myself on a separate occasion if we could attend."

Mrs Cook was asked whether she actually had a discussion with Miss Lane and she said yes she did. She went into the office one day and in the presence of Mr Weir was introduced to Miss Del Lane. She could recall the conversation between Miss Del Lane and Mr Weir and herself was very much small talk. They were just discussing Perth and nothing specific or significant came out of that conversation. Mrs Cook said she thought Miss Del Lane would sort of delve into radiology equipment but she did not. She had sat there for a while and then realised that they weren't really getting anywhere and had said to Mr Weir would he mind if she went back out into the field and he had said "Yes, of course you can". She had not attended any other appointments because no appointments had been made.

Mrs Cook also gave evidence concerning the Matron at the Nursing Home which she remembered as being the Gracewood Nursing Home in Como. That Matron had told Mrs Cook that she did not have much faith in Lancet because previous orders had not come through and no explanations had been given. We will not deal further with that matter as we do not think it is very

relevant.

Under cross examination Mrs Cook said the first time she had heard about Miss Lane was the day before. It had never been discussed before. It was the first she had heard of it. She repeated what she had been told by Mr Weir that they were thinking of setting up a dental division within Lancet. She admitted that she knew that one of the purposes of Miss Lane's visit was to speak with herself and Mrs Ellis, but said the impression she got was that Miss Lane was there to talk about managerial things with Mr Beacham and Mr Weir. She disputed that on two occasions she had not attended appointments with Miss Lane. The time she had met Miss Lane was not a prearranged appointment. Mrs Cook had just come into the office. There was no further appointment made.

Mrs Cook said she could not recall Mr Beacham ever talking to her about not turning up to any appointment to see Miss Lane. She said she had not been reprimanded about the matter. She said she was never approached about it. There had been no missed appointments because appointments were not made for her. She said that to her knowledge from Mr Weir's comments to her, Miss Lane was really there to help them set up a dental division because it was a market that was untapped. Mrs Cook said that Mr Halls was not the Sales Manager at the time Miss Del Lane came to Western Australia.

Mr Kenneth Gray was called by the Respondents and confirmed having compiled a report. That report was dated 25th November 1986 and became Exhibit 8 at the hearing. He confirmed that he had made a recommendation that there should be a cut in the sales staff. He said he had no doubts that it was imperative that a reduction occur in the sales staff.

The Respondents were advised that the Tribunal would allow them to call any evidence they wished in rebuttal of the evidence which Mrs Cook had given concerning Miss Lane.

Mr Beacham was recalled and said that appointments had been made for Mrs Cook to attend with Miss Lane. He said they were made at the beginning of the week with Mr Weir. One was made to start with and then with the failure of Mrs Cook to turn up for that meeting a subsequent meeting was made the following day. Mr Beacham said that primarily Miss Lane had come to discuss radiology because that was her forte. She had discussed other matters with him.

When asked what the other matters were Mr Beacham said "Lancet at that stage was, and still is an Australian distributor for a range of sutures and the reciprocal trade between the two companies was discussed and also the dental division was discussed at the same time."

Under cross examination he was asked whether he was present when the appointment was made at the beginning of the week with Mr Weir and he said he was not.

He said a meeting was to have been between himself, Del Lane and Mrs Cook, but Mr Weir actually handled the organisation of that meeting. No meeting had taken place. Miss Lane and himself had remained in the office. He said that Mrs Cook had phoned in later that day and "We asked why she hadn't . . . Well it was me who actually took the phone call from her and I asked her where she was for the meeting and she said she was at a client and couldn't get back because it was such a distance to travel. .. we asked for a meeting the next day which she agreed to . . . I organised the next meeting."

When asked had Mrs Cook turned up for the second meeting Mr Beacham said no. He said he had been there. When asked if he had contacted Mrs Cook on the phone again he said "No, Mrs Cook actually had to contact us. We could not contact her because she was on the road". When asked did she have a phone at home he said "Yes, but we rarely got in contact with our

people at home." Mr Beacham said he had spoken to Mrs Cook about the matter after that. He was not quite sure how long after, a few days after Miss Lane had actually returned to Brisbane. He said he had made an issue out of it but he did not jump up and down. He said he had not telephoned Mrs Cook at home that night, that they were not in the habit of ringing their staff at home.

That was the conclusion of the evidence.

It was urged on us by Counsel for the Respondents that the problem which was faced concerning the dismissal was the decision as to which person would best be retained in the firm's interests having in mind that the firm was in financial difficulties and needed to make a complete rationalisation.

It was said that at all times, paramount in the company's decision, was what was best for the company. It was pointed out that previously the firm had employed pregnant persons and persons with children. It never entered the Respondent's minds that pregnancy was a negative factor. It was pointed out also that it was Mr Halls opinion that Mrs Ellis was the one who had the most potential for the company and was the one who could develop as an effective sales person. His opinion had merely confirmed Mr Beacham's and Mr Weir's decision which they had already reached.

It was pointed out by Counsel that the decision that Lancel had to face was to put someone off and to keep someone on who would develop their firm in the future. To this day the position has never been refilled. It was submitted that pregnancy was never a consideration which was taken into account by the Respondents.

With respect to damages it was pointed out that Mrs Cook's evidence had been that she would have worked for up to six weeks prior to the birth and perhaps could have worked longer

if required. It was submitted that if an award was made it should be made from the date of dismissal until six weeks prior to the birth. It was pointed out that Mrs Smith had not attempted to find any other employment when she was only 8 weeks, or just over 8 weeks, pregnant at the time.

With respect to the other aspects of damages it was submitted that the only hurt or humiliation suffered at the dismissal was that brought about by Mrs Cook raising her pregnancy in the first place and that any financial difficulties or hardship she was experiencing at the time were brought to a head by the fact that she lost the job at that particular point in time.

Counsel for the Mrs Cook submitted that the complaint was brought under Section 10(1) and Section 11(2)(c) of the Equal Opportunity Act. It was pointed out that Section 5 of the Act was relevant.

It was submitted that Mr Beacham in cross examination had said that no reference was made to Mrs Cook's pregnancy to his recollection when Mr Cook arrived and he did not recollect questions as to why she was dismissed. It was submitted that in view of the evidence it was surprising that the matter was not raised in view of Mr Halls' evidence that Mrs Cook had persisted in alleging that she was being dismissed for reasons of her pregnancy despite Mr Halls protestations. It was suggested "You may then consider it surprising that the subject of pregnancy was never, according to Mr Beacham, raised in the second interview when Mr Cook and Mrs Cook attended."

It was submitted that it was surprising that the question of pregnancy was never discussed at all in the discussions between Mr Beacham and Mr Weir, or between Mr Beacham, Mr Weir and Mr Halls when he was asked for his opinion.



We agree that it is most surprising that the question of pregnancy was never considered in view of the fact that the parties knew that there would be only one sales person in the surgical area after one of them was dismissed and if it was to be Mrs Cook then she would be away for approximately six weeks around the time of the birth. This would have been a relevant consideration because the firm would have needed to either replace Mrs Cook if she was the person who remained, or alternatively gone without the services of a sales person for that period.

The Counsel then suggested that the reasons given in evidence for Mrs Cook's dismissal were inconsistent with the letter from the Confederation of Western Australian Industry dated January 30th 1987 (Exhibit 7) where it is said in paragraph 5 "The choice of Mrs Cook as the sales representative who was to be dismissed was based upon the problems outlined in Point 4 above and her sales performance in comparison with the other sales representative in the surgical area." The letter went on to say in its second last paragraph "The consultant's report and the sales figures referred to above can be made available to the Commission, on a confidential basis, if required."

It is significant that the figures in Exhibit 2 headed "Sales For Surgical, July 1986 to November 1986" show that Mrs Ellis' figures were \$63,726.34 compared to Mrs Cook's figures of \$60,599.15. Those figures are consistent with the reasons given in Exhibit 7, although as the Tribunal heard, the figures are probably not correct.

It was pointed out by Counsel for Mrs Cook that the only evidence from Miss Lane was the letter dated 21st August 1987 (Exhibit 9) which letter was not produced in discovery and was not a matter which was raised in the Respondent's first response to the Commissioner. It was submitted that on the face of it one might consider that this was a serious matter.

It was pointed out that Mrs Cook's evidence was quite different to the Respondents' evidence on this question.

We agree that the evidence concerning the visit of Miss Del Lane is unsatisfactory. It would seem that if the evidence of Mr Beacham and Mr Weir is accepted, there was a most serious breach on behalf of Mrs Cook. However, apparently there was very little if any real concern shown by the two principals of the firm who had paid to bring Miss Del Lane to Western Australia "primarily to lecture both Medical Representatives, to further their radiology knowledge".

It is said in the letter Exhibit 9 that "On two occasions a time had been agreed upon by Mrs Cook and myself to meet in Lancet's office and on both of these occasions she failed to present at the arranged time."

We accept Mrs Cook's evidence on this subject and do not accept as correct the contents of the letter from Miss Del Lane dated 21st August 1987 being Exhibit 9.

It was pointed out by Counsel that Mrs Cook did not have to satisfy the Tribunal that her pregnancy was the sole ground for the Respondents reaching the decision they did. It did not have to be the dominant ground or the only reason why they reached the decision to dismiss Mrs Cook.

With respect to damages, Counsel submitted Mrs Cook was deprived of 24 weeks wages at \$250.00 nett per week. This totalled \$6,000.00. It was submitted that after she had made the complaint it would have been impractical for her to look for work or to obtain employment, when what she really wanted was to be reinstated. Thereafter as things happened Mr Cook lost his employment and the couple were put into the position were they were unable to keep their house. Mr Cook had then obtained employment at Pinjarra and had travelled there daily. Mrs Cook was without a vehicle. Her only other option then in

reality was nursing work and she was pregnant.

It was submitted that Mrs Cook was not pursuing any award for loss of earnings or financial loss for the period after the baby was born. The claim was limited to the time before the baby was born plus damages for stress, hurt and humiliation. It was submitted that the incident set in motion a train of events which was quite disastrous to Mr and Mrs Cook. Both of the parties were then out of work. Mrs Cook had been confident of being able to carry on her employment until approximately six weeks prior to the delivery and then to be able to return. The couple had needed the employment.

It was submitted that to lose the security of Mrs Cook's employment at the beginning of her pregnancy and in the light of all that followed would have caused a considerable amount of stress. It had been a difficult, stressful and unhappy time.

The Tribunal accepts that the Respondents were advised that one of the Sales Representatives should be dismissed but it does not accept the evidence which was given that the pregnancy was not discussed during the decision making process and was not an issue at that time.

The Tribunal accepts the evidence of Mrs Cook and Mr Cook. The Tribunal is satisfied that the main reason for the Respondents dismissing Mrs Cook rather than Mrs Ellis was that Mrs Cook was pregnant. We find that the pregnancy was seen by the Respondents as a convenient reason to decide which of the two employees was to remain.

The Tribunal finds that the Complaint is established due to the fact that the Complainant was discriminated against contrary to s.10 and s.11 of the Equal Opportunity Act having in mind the provisions in Section 5 of the Act. The dismissal

was not made because of Mrs Cook's pregnancy but when a dismissal was thought to be necessary, Mrs Cook being pregnant was the main reason for deciding between her and her fellow employee.

The Tribunal awards Mrs Cook the \$6,000.00 claimed as damages for loss of earnings. There were no submissions made as to any deductions to be made from this sum in the event of the claim being established.

The Tribunal has in mind the reasoning in Erbs v. Overseas Corporation Pty Ltd (1986) EOC 92-181 and Marett v. Petroleum Refineries (Australia) Pty Ltd (1987) EOC 92-206, and Thompson v. Catholic College, Wodonga (1988) EOC 92-217 and considers that in addition to the \$6,000.00 referred to above for loss of earning capacity, Mrs Cook should be awarded the sum of \$7,500.00 for the other aspects of general damages including compensation for the hurt and distress which followed from the unjust dismissal.

The total award for damages will therefore be \$13,500.00 to be paid to Mrs Cook by the Second and Third Respondents. The Complaint against the Fourth Respondent is dismissed. There will be no order as to costs.

MEMBERS OF TRIBUNAL

Henry Walsh

Beverly Birch

Patricia Harris