**IN THE EQUAL OPPORTUNITY TRIBUNAL OF WESTERN AUSTRALIA**

No. 2 of 1989
IN THE MATTER of a complaint by:
DAVID FORT
Complainant

against

RALPH M LEE (WA) PTY LTD
First Respondent

and

JGC CORPORATION LTD
Second Respondent

and

KELLOGGS OVERSEAS CORPORATION
Third Respondent

and

KAISER ENGINEERS AUSTRALIA PTY LTD
Fourth Respondent

and

THE CONFEDERATION OF WESTERN AUSTRALIAN INDUSTRY INC.
Party

and

TRADES AND LABOR COUNCIL OF W.A.
Party

## RULING

At the conclusion of the Complainant's case the Respondents submitted that the Complainant had not made out a case which needed to be answered.

The submission was made that the Complainant had not established that at the time when he applied for a position there was a base group of a different political conviction to himself - a base group which would satisfy the requirements of Section 53.

It was said that there was no evidence whatsoever of the political convictions of anybody other than Mr Fort and that he had kept his political convictions fairly quiet. There was no basis on which the Tribunal could find that there was a relevant base group with an identifiable conviction who were treated differently to Mr Fort.

The Respondents submitted that the Complainant would have to show that he had a political conviction and that there was a base group with a different political conviction. The Respondent submitted that all the requirements of Section 53(2) needed to be satisfied.

I hold that Section 53(1) and Section 53(2) are each self-contained. The Complainant would need to establish discrimination under either Section 53(1) or Section 53(2) before it could be held that the Respondents or any of them had acted in an unlawful manner under Section 54.

The Respondents submitted that because it had to be established that there were a group of persons of a different political conviction, it had to be known what this political conviction was.

It was submitted that Mr Fort had to establish that he had a political conviction - not that he had engaged in certain conduct, industrial or political, as a Unionist. Also that the Respondents had knowledge of the particular conviction - because without knowledge there could be no discrimination. It had not been established that there was knowledge of such a conviction and therefore Section 53(1) could not apply.

It was said that Mr Fort had not expressed a political conviction and that in any event, if he had, it had not been shown that the Respondents, or any of them, knew of it. It was submitted that it had to be shown that a Respondent had knowledge of the political conviction and an intent to discriminate - that a political conviction was known to a Respondent at a stage prior to, or during, the relevant period, namely January through to April 1987.

The Respondents relied on the Victorian decisions of Duse v State of Victoria (1987) EOC 92-208, and Hein v Jacques Ltd (1987) EOC 92-188. They also said that it had not been shown that others who had been hired had a different political conviction to Mr Fort.

It was submitted that the Union activities in which Mr Fort had been engaged in 1984 were "purely and simply industrial conduct involving the relationship of employer and employee" - it did not amount to "political conviction" within the Act. There was no evidence that Mr Fort expressed to any person a political belief in 1984. It had to be demonstrated that Mr Fort's activities were a manifestation of a belief or conviction held. There had been no such manifestation. He could have engaged in such activities as he did for some other reason than "political conviction". Union activities did not in this case demonstrate "political conviction".

It was submitted that the other workers hired were members of the ETU. There was no different political conviction shown. The ETU element was an irrelevant consideration. Unless it could be demonstrated that the "union activities" were a

manifestation of a political belief the proof fell short of the mark. There was no basis in this case for linking a political conviction of any description to Mr Fort's activities. The activities were purely of an industrial nature, all of which came within the ambit of the Industrial Relations Commission.

The Respondent submitted that Mr Fort had to satisfy the Tribunal that the conduct of an industrial nature "was a manifestation of a belief of a different kind and that this employer had knowledge of that belief, and it was on the basis of that knowledge and that belief that this employer discriminated and ... there is no way that the Complainant can make good that case."

The Respondents pointed to the various union activities of Mr Fort including those relating to "pie warmers, payslips, safety issues, buses running late, retrenchments and so on". These matters were generally described as industrial matters. "There was no political flavour to them at all." There was nothing in Mr Fort's conduct to link it to a political conviction or any political element and it could not therefore amount to a political conviction. For that reason Section 53(1) did not apply.

It was submitted that knowledge on the part of the KJR would also be an essential element in respect of Section 53(1) and that had not been made good. The Respondents should not be put to the cost and inconvenience of calling evidence to rebut the allegations.

Counsel for the Respondents drew a distinction between a belief held by an individual and conduct engaged in by that individual. There was no evidence, he said, that conduct engaged in by the Complainant was engaged in, or in pursuit of, or as a manifestation of, a political belief - no inferences could be drawn to that effect from the evidence given. There was no evidence to support any link between the

Complainant's activities and whatever views he may have held. There was no nexus whatsoever between the conduct of the Complainant and his ALP membership or any other political party membership, or that it was in support of Electrical Trade Union political activity. There was an essential distinction between activities engaged in for political motives or aims and activities engaged in for industrial purposes.

It was submitted that there had been no suggestion that the Complainant's activities in 1984 could in any way be said to be in furtherance of political activities engaged in by his union. All the persons against whom the political conviction, or discrimination, must be tested were members of the Union.

It was submitted that it was essential for the Complainant to establish that the Respondents had knowledge of the fact that the conduct which the Complainant was engaged in was in furtherance of or as a political conviction - it was suggested that the decisions in Jamal v Secretary, Department of Health & Anor (1988) EOC 92-234; Hein v Jacques Ltd (1987) EOC 92-188, and Duggan v South Yarra Constructions Pty Ltd (1988) EOC 92-220 all supported that proposition. The Tribunal had to be able to say that objectively speaking it was clear that the conduct was in pursuance of a political conviction and "if you did not know it, you ought to have known it, and therefore it is established". It was submitted that in this case the Complainant's activities had been aimed at industrial matters and generally accepted industrial matters. It was also said that on the face of the activities of the Respondents it could not be said that they were directed at any particular political conviction. Also that the Complainant had to establish that his conduct resulted from his political, as opposed to, for example, religious conviction or just plain industrial action. It could not possibly be said in this case that the Complainant's activity which was purely of an industrial nature, with other people engaging in it as well, was a manifestation of the Complainant's political conviction.

There was no nexus. It was said that the Victorian legislation distinguished between political activities and political belief. The Tribunal was referred to Hein v Jacques Ltd. It was submitted that the Tribunal there held that the refusal by Mr Hein to join a Trade Union was not in pursuance of a political belief. It was recognised that a person might engage in political activity without holding a political belief - it could be done for a religious or other motive.

It was submitted that the Tribunal had to objectively decide that the conduct was of a political nature and therefore it could be in pursuance of a political conviction. It was submitted that there had been a post factum attempt to bring the Complainant's activity within the ambit of the Act.

It was said that there had been a complete failure by Mr Fort to demonstrate to the Tribunal that he had expressed a Socialist view to anybody and that his activity had been engaged in pursuant to that. He had been engaged in industrial matters as a shop steward. There was "just no evidence to suggest ... that this activity was engaged in pursuance of a political belief."

The Respondent drew a distinction between possible activity of a Trade Union which could perhaps try to bring down a Government and action taken by a Union to remedy Award and Industrial matters.

The Respondent asked the question - where is the evidence that the Complainant was treated less favourably than someone of a different political conviction - on the grounds of his political conviction?

It was pointed out that Mr Watt who had engaged in similar activities had obtained employment. Further that it was not up to the Respondents to prove their "innocence". In the industrial area the Complainant had to make out a case which needed to be answered. It was the same in this jurisdiction.

It was agreed that pursuant to Section 105 of the Act that the President of the Tribunal had to rule at this stage of the hearing on whether the Complainant had to make out a prima facie case and whether the Complainant had in fact done so, if that was necessary.

Counsel for the Confederation of Western Australian Industry Inc then made submissions on the interpretation to be given to the phrase "political conviction" within the meaning of the Act in the light of the evidence for the Complainant.

It was said that the presence of a political conviction was within the Complainant's own knowledge. It was something only he could tell the Tribunal about.

Paragraphs 1, 2 and 10 of the Points of Claim were referred to and then paragraphs 7 and 8 of the Respondents' Written Outline of Submissions. It was pointed out that there was no definition of political conviction in the Act. Sections 18 and 19 of the Interpretation Act were referred to as were the general principles of statutory construction including the desirability of interpreting language in Acts of Parliament according to its ordinary and natural meaning. It was submitted that the best evidence of the ordinary and natural meanings of words was to be found in language dictionaries and that these should be the starting point. Various dictionaries were referred to including the Oxford English Dictionary. It was said that the consistent theme from these dictionaries was that "political" was a concept relating to the State or the study, the structure or affairs of the Government, the body politic and public administration and policy making generally. It was not a question of distribution of power in society generally.

It was pointed out that the more traditional kind of strike is a form of industrial dispute "confined to the power domain of enterprise or industry" and to the extent that it involves consideration of power in an industrial context alone, is not

conventionally a political action. It was said that a political conviction is a strongly held opinion or belief in connection with the relationship between the State and/or the Government and its citizens.

It was submitted that the Tribunal should be slow to impute to Parliament an intent to encompass in the Equal Opportunity Act issues which had for a long time been covered by the Industrial Relations Act unless there was a good reason to do so on the evidence.

Reference was made to Jolly v Director-General of Corrections & Anor (1985) EOC 92-124 and Oldham v Women's Information and Referral Exchange (1986) EOC 92-158. It was pointed out that in the Oldham decision the Complainant's views related to legislation relating to the rights of women. That was an issue of interest to all political parties and within political parties. It was the subject of debate in the community and it clearly pertained to Government policy and administration, again reflecting the persistent theme in the dictionaries - that when one talks about the concept of "political" one must be talking about a relationship or issue or problem or association with the State.

Reference was made to Thorne v R (1986) EOC 92-182. The views in that case were said to be that the situation constituted an unfair enforcement of laws against a section of the community only. It was submitted that the Tribunal held that Government reaction to the Complainant's views, and her expression of those views, supported the contention that the views were of a political nature - 76735.

It was submitted that one of the dominant features or elements or criteria which the Victorian Tribunal had taken into account in its decisions when considering whether something was political or not, was its relationship with the State. In Thorne's decision the views were political because they were made with the view to influencing public opinion and

Government policies. It was submitted that this was a critical criterion which the complainant had failed to make out in this case. Generally speaking Mr Fort's views, activities or convictions could not be said to have been expressed or carried out with a view to influencing public opinion of Government policies. The best which could be said were that they were activities designed to bring about a better position for workers within an organisation so they had nothing to do with the relationship between the Union and the Employer and the Government but only went to achieving a better position or a position of advantage for himself and his fellow workers vis a vis the employer of the day - nothing more, nothing less. There was no relationship whatsoever with that and the Government.

I interrupt at this time to point out that Section 53 refers to treating a person less favourably on the ground of theperson's political conviction, or a characteristic that appertains generally to persons of that political conviction, than the discriminator treats or would treat a person of a different political conviction.

It is not only the actions of the allegedly "aggrieved person" which are referred to in the Section.

If it were the case that an employer or employers discriminated against active members of unions or representatives of the workers employed by the employer, it might be inferred in some circumstances that the employer was acting from a "political conviction" against workers of a different "political conviction" if those workers held a political belief that they were entitled to protect their rights (such as their standard of living in the community or their work conditions) by action in the work place. In some circumstances the employer could then be seen to be treating the "aggrieved person" less favourably than in the same circumstances the employer "treats or would treat" an employee of a different political conviction, for example an employee

who did not have a political conviction that he ought to belong to a union or to take active steps in the work place to protect or advance his rights.

Mr Longo submitted that all the evidence before the Tribunal led by the Complainant related to terms and conditions of employment which Mr Fort fought for in 1984. It related purely to the internal operations of an employer and its employees. The terms and conditions of employment had no relationshp with the State and it was straining the concept of political conviction to suggest that they did.

Counsel referred to pages 76785, 6, 7 of the report of Hein's decision and submitted that the evidence led by Mr Hein and other witnesses in that case clearly pointed to the political activities of the union in that particular case. In this case it was said to be different - mere union activities without more were not enough. He referred to the dicta on page 76794 of the report concerning trade unions and political activities.

Mr Longo pointed out that in Duse v State of Victoria (1987) EOC 92-208 the Victorian Board had distinguished Hein's case and held that the Complainant's refusal to resign from a union did not amount to engaging in or refusing to engage in political activities.

I note that in that case at page 76968 it was said that "there was no evidence that membership of the BLF had involved Mr Duse in any political activity or that membership of the BWIU would involve him in any political activity in the future".

Mr Longo submitted that it was the Employee's political conviction in this case which was relevant, not the Employers'. It was not really relevant what the Employer thought. The question was did the Employer discriminate against Mr Fort on the ground of Mr Fort's political conviction. He said Mr Fort had failed to establish that his

beliefs or conduct or activities bore some relationship with the State - it was that crucial element amongst others, in the concept of political conviction which Mr Fort had failed to make good.

Mr Longo submitted that Mr Fort had given evidence concerning a very specific relationship - workers and the employer on a particular site in the North West of the State - that was all it was.

It was submitted that the Equal Opportunity Act was not passed with "equity and harmony in the work place" in mind. Parliament had already dealt with those issues in the Industrial Relations Act. Something more was required than mere union activity. It was not within the jurisdiction of this Tribunal "to become involved in the internecine squabbling of employers and employees and the disgruntled attitudes of a unionist." The concerns expressed by the witnesses for the Complainant were for the worker, safety in the work place and such matters. They were not political convictions. There was no other relationship with Government at all. It was an industrial matter of a classical kind - it was not the intention of Parliament to elevate those kinds of concerns to a political conviction. A belief regarding how employers and employees ought to relate to one another did not constitute a political conviction.

Mr Longo submitted that a political conviction for the purposes of this case was a view which reflects the idea that a political conviction relates to a relationship or identity with the State or the policies or administration of the State as a whole. It was for the Complainant to establish what his political convictions were.

Mr Dixon then submitted that the question of discrimination or victimisation of a unionist was dealt with in Section 96(b) of the Industrial Relations Act. One had to come back to the question whether certain activities were engaged in by reason

of a political conviction - the activities by themselves were not enough. He also referred to Duggan's decision at page 77069.

In reply Counsel for the Complainant submitted that the Equal Opportunity Act was an Act which provided remedial or beneficial provisions. It was therefore preferable for any ambiguity to be resolved in favour of the intended beneficiary. The Tribunal should not be restrained by a restricted definition of "political" but should consider the word in its wider terms.

It was submitted that the Equal Opportunity Act was aimed to protect civil liberties and that the wider interpretations of "political conviction" should be adopted. It was pointed out that an article analysing the Canadian Human Rights Reports said that the Commission had adopted an interpretation which had taken a far broader view of what political conviction is rather than the very strict definition of political conviction which ties it to matters of State or Government.

It was submitted that because of the words in Section 54 it was inevitable that the Act was dealing with the relationship between employers and employees. Some of these matters might also be considered to be industrial matters. It was submitted that an employee might have remedies either in the Industrial Commission or under the Equal Opportunity Act. It could not be said that by virtue of the fact that matters could be dealt with by the Industrial Commission or under that Act, jurisdiction was excluded under the Equal Opportunity Act. It was submitted that in 1987 it was not a question of Mr Fort being prejudiced because he was at that time a union official. It was because of his previous activities. It was submitted that he would not have been able to make a complaint under the Industrial Relations Act because of that fact. It was pointed out that the considerations to be taken into account under the Industrial Relations Act were different to those under the Equal Opportunity Act. There was no difficulty, even though

this might be labelled as an industrial matter, in the Tribunal dealing with it.

It was pointed out that at page 30 of the transcript, when asked what his political convictions were, Mr Fort had stated that he was a Socialist; also as far as the union movement was concerned he believed that there needed to be a balance between the workers within any industry and the management. He said he became concerned when he saw what appeared to be an imbalance - where the actual income from within a company was generated to a major extent by the workers and yet there was only a small number of managerial positions which appeared to reap all the benefits of that work. He went on to say that what he had seen was that in the majority of cases within an industry or within a company, the workers themselves were exploited. He said he sort of felt that there needed to be a balance. There needed to be a union movement for collective bargaining power so that the workers themselves could get together and form a union and have a say in what was taking place and what was affecting their daily lives. He said that for economic and social reasons there needed to be that balance.

It was pointed out that he had been a member of the ALP. In February 1989 he had run as an Independent Candidate in the State Elections for the seat of Ashburton which covered the Karratha region. He said he had been a proxy delegate for the ETU to the State Executive of the ALP. He was also a delegate to the branch Electorate Council for the ETU. He was a delegate to the State Conference of the ALP and an ETU delegate to the State Conference of the ALP in 1984-85 when the State Conference was held in Perth.

Mr Fort was asked whether in contact with the persons with whom he worked, both employers and employees, did he ever give any indications to what his actual political beliefs were. His answer was that "on a number of occasions there were

little barbs made to the Company in his role as a temporary union official and as a shop steward and convenor. There were on a number of occasions little mentions made of the fact that he was left and they were right and so on. He said that this was continually just sort of part of the normal conversation. It was always sort of a little bit of a thing that was going on - a little bit of banter between us." (Transcript page 30-31).

It was submitted that political conviction must or should include and encompass a person giving expression to his political beliefs through activities. In this case Mr Fort's political beliefs as set out in his evidence were expressed and communicated to representatives of KJR, his previous employer, through his activities. It was impossible with regard to his beliefs and the importance of the Trade Union Movement and the necessity for the Trade Union Movement , to balance the social and economic power between employers and employees, to separate his activities in support of that from his beliefs. It was submitted that it was not possible to separate Mr Fort's activities and his beliefs. His activities were the means by which it was communicated to other persons what his beliefs were.

It was said that when Mr Fort expressed his belief in the Trade Union Movement and the necessity for Trade Unions he did this by becoming an active trade unionist and by allowing himself to be elected as a shop steward. It was impossible in this case to separate the activities and say "these are industrial and these are political".

Counsel referred to Mr Fort's actions in becoming an active unionist and in pursuing the ETU policy and objectives, bearing in mind that the ETU was a union affiliated to the ALP within the National Constitution. The ETU specifically allowed or had as one of its objectives to affiliate with bodies of a like political nature with like beliefs or similar beliefs. It was submitted that Mr Fort's activities were in

pursuit of the objectives of the ETU which may include political objectives.

It was submitted that the activities and situation had to be looked at as a whole and in the light of Mr Fort's evidence about what his political convictions were and that to do anything else was artificial.

Counsel referred to Duggan's case and said that what was decided there was that the reason for dismissal was not because of any activities in relation to support for the BLF but in relation to his behaviour and his apparent lack of respect for Mr Thompson's authority. Counsel referred to the dicta at page 77066 where it is stated "the Board finds that political beliefs in support of the BLF would not have lead to Mr Duggan's dismissal if he had produced a BWIU clear card. Mr Duggan was not dismissed by reason of his political beliefs."

Counsel referred to Duggan's case at page 77066 where it is stated, "In the case of a claim of discrimination by reason of political activities, the Board in Hein v Jacques Limited, considered that neither the Complainant nor the Respondent's perception of the activities as political or otherwise was relevant. The test is whether the activities, on an objective test, are of a political nature. The Board must decide whether the activities which resulted in Mr Duggan's dismissal are political activities within the meaning of the Act."

The decision goes on to say, "The position is different here where it is alleged that the decision to dismiss Mr Duggan was made as a result of a particular activity or activities. The decision was a conscious one made by reason of that activity or those activities. The Board considers that in these circumstances the proper test is whether the activity or activities concerned were political."

On page 77067 in Duggan it is said, "There is no doubt that Mr

Duggan believed in the right to belong to a Trade Union of his choice and that actions of the Government and of the Respondent threatened the independence of the Trade Union Movement. Viewed objectively the Board has no difficulty in categorising activities in support of these beliefs as political activities. This is not based on submissions of Counsel for the Complainant that reactions to Government guidelines, strategy or legislation must be political, but on the understanding that freedom to belong to an association or organisation and freedom to form and join trade unions are recognised rights which have been the subject of various declarations of rights including the International Covenant on Civil and Political Rights of the United Nations. Actions in defence of these freedoms are properly categorised as political activities."

Counsel in this case said "What matters is that they (the Respondents) made the decision not to employ him because of his previous union activities and if the Tribunal decides that the previousunion activities fall within the definition of political conviction then that is the basis on which Ralph M Lee and KJR made certain decisions."

Counsel pointed to the dicta in Duggan where it is said, "In Hein v Jacques Limited the Board decided that there could be no discrimination by reason of the political beliefs of the Complainant where the Respondent was not aware of those beliefs. The only exception to this may be where the Respondent establishes a system which excludes persons holding particular beliefs without need for inquiry as to those beliefs."

It was submitted that "if Ralph M Lee and/or KJR established a system which, even though they do not particularly know of Mr Fort's particular political beliefs, ... excludes people who are active unionists and that your decision is that the union activities of Mr Fort fall within the definition of his political conviction, then that is sufficient; you do not have

to have evidence before you of them being consciously aware of what Mr Fort's political beliefs were."

Counsel submitted that activities are included in political conviction; that Mr Fort had given evidence as to what his political convictions in relation to trade unionism are and what the powers of trade unionism are. He expresses those beliefs through his activities as a trade unionist, and in that way, in effect, it is communicated to his employers, the representatives from KRJ. "What you, Mr President, have to do is to make that decision as to whether what he was doing comes within the definition of political conviction and if it does then, if it is right that what Mr Fort says is right, that persons or that KJR and Ralph M Lee made a decision or set up a system even - because we have heard evidence that everyone who was employed on the Burrup had to register and fill in a very similar form with KJR - which in effect worked to exclude active trade unionists - then in my submission Mr Fort has made out his case."

It was submitted that under Section 5 Mr Fort did not have to satisfy the Tribunal that the discrimination was the only reason for the persons against whom he complained taking the action that they did. It could be one of the reasons. It did not even have to be the majority or the substantial reason.

Mr Dixon then commented that the conclusion of the NSW Board's Report was that the type of activities which Counsel for the Complainant had described, did not amount to political conviction. It was submitted that the thrust of the report was that Trade Union activities as generally described were not included in the term "political conviction". CCH at page 7803 was referred to.

It was submitted that the Report concluded that there were circumstances where political activity might be an expression of political conviction, but the mere engaging in an activity with political flavour did not necessarily reflect the

political opinion. It was submitted that the report came to the conclusion that "political conviction" as generally understood did not include trade union activities.

It was conceded at an earlier stage of the Hearing that Mr Fort's representation at the State ALP Conference and on the Executive of the State ALP was probably not known to the Respondents.

On page 41 of the transcript it appears that Mr Fort said that on the day he left Mr Zorzi from KJR had indicated that he was probably doing the best thing. He said that, "And finally at the airport when I was leaving Karratha to fly back to Perth, while on the way to the airport I was given a piece of paper to sign to say that I was leaving of my own accord and so on." Mr Fort said that he had refused to sign the first document that he had been given. He went on to say that "When we did arrive at the airport I found that there were a number of KJR Representatives and Confederation of Western Australian Representatives at the airport to sort of say goodbye to me and there was reference made to the fact that I may have difficulties at a later date gaining employment." He said that was both from the KJR and the Confederation. He said that Mr Geoff Stockton for the Confederation of Western Australian Industry and Mr Chris Winters for KJR had been involved. That would have been about the 20th/22nd July 1984.

It was submitted by Mr Fort's Counsel that the evidence established knowledge by the representatives of the 2nd, 3rd and 4th Respondents of Mr Fort's activities on Stage I of the project.

It was submitted that Clause 13(d) (aa) where it is pleaded that the 1st Respondent based its decision not to offer employment to the Complainant on information it had obtained to the effect that the complainant: "(1) had previously been employed on the project site; (2) ... (3) had when so employed, engaged in, caused or promoted industrial

action, stoppages and delays to work on the project", was important.

It was submitted that Mr Fort had given evidence that Mr Tugwell who was then employed by the 1st Respondent had told him that indications were that work was available for Electricians. Mr Fort had completed a form for both the 1st Respondent and the 2nd, 3rd and 4th Respondents in February 1987. After he had made his application other electricians were hired. It was submitted that this was also admitted by the Respondents in paragraph 13(d) of the Amended Defence.

Reference was made to page 52 of the transcript where Mr Fort is recorded to have said, "It was not until July that it was actually said that the reason why they did not want to employ me was because I had been a union convenor on Stage 1. That statement was made by Mr Stockton of the Confederation of West Australian Industries."

Mr Fort had said that he understood that the Confederation was a representative of all the Contractors on the project so therefore it was basically acting in the position of being spokesperson for KJR who were overall in control. He said it was his understanding that the Confederation represented all the Contractors on the project in much the same way as all workers were represented by one of the unions on the project.

At page 53 of the transcript Mr Fort is recorded as saying, "I questioned them on whether my work history as an electrician was in question" and they said" "Look we have got no problems at all with your performance as an Electrician. You are well able to perform your work. It is just that you were convenor on Stage 1." Reference was made to Mr Hunt's evidence where he had said, "The Employer group had, as I said, inhibitions about employing Mr Fort in Stage II." (Page 165).

It was submitted that it had not been suggested by the Respondents that Mr Fort was not competent as an electrician

and that if it was right that union activities in this case came within the definition of political conviction then Mr Fort had made out his prima facie case. It was submitted that the Tribunal could infer that a person of a different political conviction would have been treated differently.

Exhibit 8 which was put in by the Complainant and which is the Rules of the Electrical Trades Union of Australia National Council 1989 states as one of the objects on page 11: "(u) to affiliate with, and pay affiliation fees to, any other organisation or political party having objects similar in whole or in part to the objects of this Union. (v) to amalgamate with kindred organisations."

On page 18 of those Rules it is stated, "The members of the Union in each State shall be deemed a Branch." It goes on to state, "Each Branch shall, subject to the direction and control of the National Council and National Executive, where permitted by law, manage the local affairs of the Union in that State ...".

On page 19 it is stated,

"10. National Council

(a) Subject to these Rules, the control of the Union shall be vested in a National Council, which shall consist of the National Secretary and delegates from each Branch of the Union in the following proportions; ...."

In Oldham's decision the Victorian Board cited the definitions of "political" from the Shorter Oxford Dictionary and the Macquarie Dictionary and stated at p.76, 567: "Affirmative action is currently, and was at the time Mrs Oldham wrote to The Age, the subject of political debate and differing views and the extent of any legislation to enforce affirmative action has led to differing policies among and within political parties accompanied by general debate among community groups and individuals. ...the basis for her

expulsion from WIRE was the letter to The Age which related only to affirmative action in small business. While such a belief is confined to a relatively limited aspect of government policy, it is nevertheless an aspect which has led to differing attitudes across the political spectrum. Mrs Oldham's view as expressed in her letter is consistent with current Federal Government policies which have been widely criticised as not going far enough. The Board finds that the view of the Complainant as set out in her letter to The Age... pertains to government policy and administration and is a political belief or view within the meaning of the Act."

In Thorne's decision at p.76735 the Board said: "... Mrs Oldham was endeavouring to obtain public suport to oppose the extension of affirmative action to small businesses. Mrs Thorne wished to see equal treatment for all members of the community and protection of all people from sexual abuse. Both were concerned to raise public awareness and support for their particular concerns regarding government legislation and administration. Mrs Oldham's views about affirmative action were consistent with the views of Women Who Want to be Women, an organisation of which she was an active member and office bearer. She had developed these views as part of an approach to questions involving the importance of the family unit in society and sought publicity for them with a view to influencing public opinion and government policy. Similarly Mrs Thorne developed the views expressed in the Press Release and interview in the context of her commitment to Trotskyist feminism and released them to the media as part of an ongoing commitment to political activism. It appears to the Board that it is beliefs and activities of this nature which Parliament wished to protect in extending the Equal Opportunity Act to include political belief and activity among the grounds on which complaints of discrimination may be made. The Board finds Mrs Thorne's views as expressed in the Gay Legal Rights Coalition Press Release and her interview with Mike Edmonds including her views regarding the age of consent

laws to be political views and her attempts to bring those views to the attention of the public to amount to engaging in political activities....."

In Hein's decision the Victorian Board said at p.76791: ".....we have also found that during the period 1972-1976, Mr Hein had a number of differences with the AMWU regarding the Union's involvement in political activities. In view of this and evidence given by Mr Hein of his understanding of the policies of the AMWU and the ALP and his objection to these policies and his belief in freedom of association, we would have been prepared to make a finding that Mr Hein holds political beliefs and that these beliefs led to his refusal to join the AMWU. However, it is not necessary to make such a finding. .....It is clear that no member of the staff of Jacques Ltd, other than Mr Hutter, the Shop Steward, had any knowledge of Mr Hein's political beliefs or views. All they knew was that he would not join the AMWU. His refusal to join the union could have been based on his previous dealings with the union, an unsatisfactory personal relationship with officers of the union or on his religious or political views. Mr Vogel who was responsible for dismissing Mr Hein, had no knowledge of which, if any, of these explanations may have been the correct one. If Mr Vogel had no knowledge of Mr Hein's political beliefs or views and indeed no reason to suspect that he held any political beliefs or views relevant to his refusal to join the AMWU, it is difficult to see that he could have dismissed Mr Hein by reason of his political beliefs or views. Mr Hutter did have knowledge of Mr Hein's support for Art. 20(2) of the Universal Declaration of Human Rights, and while this may amount to a political belief or view on Mr Hein's part, we consider it was imparted to Mr Hutter in his capacity as Shop Steward with no intention on Mr Hein's part that it be communicated to Mr Vogel or any other member of the staff of Jacques Ltd. There is no evidence that Mr Hutter did advise Mr Vogel or any other member of staff of Mr Hein's views. We find that Mr Hein was not dismissed by Jacques Ltd because he held or did not hold any political beliefs or views."

Further on in this judgment at p.76792 the Board said: "An activity which is plainly of a political nature may come within the ambit of the paragraph notwithstanding an employer's failure to perceive that political nature, but we do not consider that the paragraph is intended to cover a situation where there is merely a possibility that the activity concerned is political."

In Hein's decision the Board found that an increase in the number of the members of the AMWU resulted in an automatic increase in the affiliation fees paid by the AMWU to the ALP and was taken into account in calculating the number of representatives of the AMWU at State Conferences of the ALP. "We consider that these direct consequences of membership together with the requirement for members to take part, as and when directed, in industrial action related to political objectives (which may not be relevant to promoting industrial objectives of the Union) lead to the conclusion that joining the AMWU amounts to engaging in political activities. We find that a refusal to join the AMWU is a refusal to engage in political activities within the meaning of the Act."

In Duse's decision the Board said: "In that case (Hein v Jacques Ltd) the Board examined both paragraphs of the definition of "private life". In relation to paragraph (a) all members of the Board sitting on that case determined that there could not be discrimination by reason of the holding of

a belief by a person if the action complained of was taken without knowledge that the belief was held."

With respect to the question of "political activity" in paragraph (b) of the definition of "private life" in the Victorian Act, the Board said that: "There was no evidence of political activities or of politically related strikes or other actions being taken by either union. There was no evidence that membership of the BLF had involved Mr Duse in any political activity or that membership of the BWIU would involve him in any political activity in the future."

In Duggan's decision the Board said at p.77066: "In Hein v Jacques Ltd the Board decided that there could be no discrimination by reason of the political beliefs of the Complainant where the Respondent was not aware of those beliefs. The only exception to this may be where the Respondent establishes a system which excludes persons holding particular beliefs without need for inquiry as to those beliefs."

In Duggan's case the Board found that: "The reason for Mr Duggan's dismissal was his refusal to show a BWIU clear card or receipt and the events of 1 and 2 October 1986 preceding that refusal. The Board finds that political beliefs in support of the BLF would not have led to Mr Duggan's dismissal if he had produced a BWIU clear card. Mr Duggan was not dismissed by reason of his political beliefs."

The Board went on to say: "In the case of a claim of discrimination by reason of political activities, the Board in Hein v Jacques Ltd considered that neither the Complainant or the Respondent's perception of the activities as political or otherwise was relevant. The test is whether the activities, on an objective test, are of a political nature."

The Board said: "There is no doubt that Mr Duggan believed in the right to belong to a trade union of his choice and that actions of the Government and of the Respondent threatened the independence of the trade union movement. Viewed objectively the Board has no difficulty in categorising activities in support of these beliefs as political activities. .... freedom to belong to an association or organisation and freedom to form and join trade unions are recognised rights which have been the subject of various declarations of rights including the International Covenant on Civil and Political Rights of the United Nations. Actions in defence of these freedoms are properly categorised as political activities."

I would add to the above that a belief in these freedoms and in the right to be an active trade unionist would come within the meaning of the words "political conviction" in Sections 53 and 54 of the WA Equal Opportunity Act.

We have not yet heard from the Respondents as to why Mr Fort was not hired. If the Tribunal accepted Mr Fort's evidence and the evidence called on his behalf, the Tribunal could come to the conclusion that he was not hired because of his "political activities", accepting the meaning of these words as viewed in Duggan's decision.

The Tribunal could further accept that Mr Fort's "political activities" were a manifestation of his "political conviction" within the meaning in Section 53 of the Act.

In the circumstances in this case and having in mind that the word "inquiry" is consistently used in Sections 107 and following sections of the Equal Opportunity Act, I will apply the dicta of Phillips J in Oxford v Department of Health and Social Security (1977) 1 BEQ at pp.112, 113 where His Honour said:

> "The second matter that Mr Oxford raises is, he says that the onus of proof is - or, if it is not, ought to be - upon the Respondent, because the Applicant cannot know all the facts and it is difficult for him to make his case. We recognise the difficulties, but there is no doubt that, although the Act is silent upon the burden of proof, the formal burden of proof lies upon the Applicant. That having been said, it should be recognised that in the course of the case the evidential burden may easily shift to the Respondent, and we draw attention to, and would wish to commend, the attitude adopted by the Industrial Tribunal in this case. In para. 5 they said:
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> 'At the conclusion of the Applicant's case, we were inclined to reject his claim on the basis that no case

against the Respondents had been established. Nevertheless, bearing in mind the difficulties the Applicant faced, we decided to hear evidence from the respondents and to give the Applicant every oportunity to examine their witnesses and question them on matters he considered relevant.'

It seems to us that that was a very proper course to have adopted, and we would recommend it as being the course which in most circumstances is the right course to adopt. It further seems to us that, while the burden of proof lies upon the Applicant, it would only be in exceptional or frivolous cases that it would be right for the Industrial Tribunal to find at the end of the Applicant's case that there was no case to answer and that it was not necessary to hear what the Respondent had to say about it."

I find that Mr Fort's case is not "exceptional or frivolous" within the meaning of His Honour's words quoted above; neither could it be said that Mr Fort's complaint is such that it should be dismissed pursuant to Section 125(1) of the Equal Opportunity Act.

I therefore rule that the Respondents' Submissions that the Complaint should be dismissed at this stage are not upheld. The Respondents should now indicate whether all or any of them intend to call evidence.

.....Henry Wallwork.....

President

13/10/89