

JUDGEMENT

No 3/1989

Hearing 20 February 1990  
Judgement Delivered 12 April 1990

M Williams and L Matthews

Complainants

and

Council of the Shire of Exmouth

Respondent

TRIBUNAL:     Mr N P Hasluck QC  
                  Ms K French  
                  Dr P Deschamp

Ms H Andrews  
Mr A Metaxas

Counsel for Complainant  
Counsel for Respondent

## JUDGEMENT

The Complainants allege that the Respondent has discriminated against them on the grounds of their political convictions contrary to sections 53(1) and 62(a) of the Equal Opportunity Act 1984. In order to resolve the issue the Tribunal must begin by referring to facts and matters which occurred many years prior to the acts complained of.

According to the Complainant Michael Williams, the United States Military Communications Base at North West Cape ("the American Base") was established in 1963 pursuant to a 25 year lease with the Australian Government which was due to expire on the 27th June 1988. Thereafter the right to occupy the American Base could be terminated by 180 days notice by either party to the lease. This evidence was uncontested at the Hearing and the Tribunal is prepared to accept such evidence for the purpose of these proceedings.

It also appeared to be common ground that the livelihood of many ratepayers and residents of the Shire of Exmouth is linked to the American Base. According to the Respondents Shire Clerk, Kerry Graham, about 70% to 80% of local people rely on the American Base. The Shire President, Bob Burkett, said that the Shire of Exmouth was constituted as a Municipality pursuant to provisions of the Local Government Act 1960 about 11 years ago, having been administered by

Civil Commissioners prior to that time. It was not contested at the Hearing, and the Tribunal accepts it as a fact, that at all material times the Exmouth Community Hall was vested in the Shire of Exmouth and may be characterised as a facility which the Shire was accustomed to make available to the public for meetings and social gatherings.

It is common ground between the parties that in 1974 a demonstration took place outside the main gate of the American Base during the course of which those protesting against the American presence burnt the United States flag. There are differences between the parties, however, as to the nature of other activities associated with the demonstration just mentioned and it is therefore necessary to look at the relevant events in more detail.

Peter Quinn, a witness called by the Complainants, was one of the organisers of the 1974 demonstration and witnessed the flag burning incident. The demonstration had been organised by the W.A. Branch of the Campaign against Foreign Military Bases. It was a national campaign drawing much of its support from students on campuses in various states. Those visiting the Cape consisted of about four bus loads of people most of whom were university students from interstate. The demonstrators did not use the Shire hall. Quinn agreed that the local residents appeared to be antagonistic to the protesters and, indeed, he was surprised by the depth of the animosity. The protesters stayed at a local caravan park and it was thought to be necessary for

the visitors to patrol the boundaries of the park at night. He said the demonstration was "over a couple of days", no use was made of the community hall, there was a good deal of debate and argument but there was no significant physical clashes, although attempts were made by local people "to get us going." He said that the flag burning incident became the focal point of the visit and said that the police made indiscriminate arrests immediately following the incident. Additionally, a protester climbed a fence at the American Base one night and attached a Eureka flag to one of the masts. He said that the protesters left behind some graffiti but as far as he was aware no bill for damage to property was ever submitted to the organisers of the 1974 protest visit.

The Shire President, Bob Burkett, who has been a Councillor and Hotel Keeper in Exmouth for many years described the 1974 protest. He said the protesters were mostly from the Eastern States. The flag burning incident gave rise to a real struggle. About 60 people were arrested. There was damage to roads and signs by painted graffiti such as "Yanks go home" and "no nukes".

The Shire Clerk, Kerry Graham, was present at the flag burning incident and was able to identify some of the local people who, to use his words, "started the violence off." He confirmed that some paint damage had been caused to the Shire Hall and office and to walls and roads. The cost of rectifying the damage was probably no more than \$2,000.

Many years later, on the 4th February 1988, the Complainants, Michael Williams and Lindsay Matthews, neither of whom had been involved in the events of 1974, got together with fourteen other like minded people to form the "March on the Cape Committee" ("the Committee"). Williams had a long association with various peace and nuclear disarmament groups. He was a founding member of the W.A. Branch of the Peace Committee and the organiser of the Bi-Centennial Palm Sunday Rally. Matthews had been attending the Palm Sunday Rallies since the late 1970's and had also had an active association with various peace and disarmament groups.

The objects of the Committee were to organise a peaceful protest against the American Base by carrying out a number of activities on the 27th and 28th June 1988 at Exmouth to mark the end of the initial 25 year term under the lease agreement and to highlight the role of the Base in the U.S. Global Satellite Communications Network. The activities were to be a peaceful protest. The aim was to draw the attention of the Australian public to the role of the Base and to bring pressure on the Australian Government to change its attitude to the American Base with a view to bringing the lease to an end. A letter to sympathisers was prepared accompanied by a petition to the Commander of the Base (Exhibits 1 and 2) together with other circulars (Exhibits 3 and 4). These materials emphasise that what was proposed was two days of peaceful, non-violent activities beginning on the 27th June and including the handing over of a petition to the US Base Commander calling for the termination of the lease agreement. The brochure (Exhibit

3) speaks of the proposed activities as a national campaign involving "peace and disarmament groups" from around Australia.

The Tribunal digresses briefly to say that, in our view, the Complainants and their fellow members of the Cape Committee were acting pursuant to a political conviction. In many previously decided cases it has been held that when a person advances opinions or proposes a course of action with a view to changing governmental policy or influencing the administration of governmental institutions then this may be characterised as political activity. See Oldham v Women's Information and Referral Exchange (1986) EOC 92/158 at 76567 and Thorne v R (1986) EOC 92/182 at 76735. Such an approach was not contested in the present case and the Tribunal will therefore not devote further time to that issue. In short, we are satisfied that both the Complainants and the other members of the March on the Cape Committee held opinions concerning the wisdom of allowing the American Base to remain on Australian soil which may be characterised as political convictions.

News of what was proposed became public knowledge, it seems, late in April 1988. It was at about this time that a demonstration by a group of protesters outside the American facility at Pine Gap, near Alice Springs was featured on national television news with pictures of protesters being chased through the bush and arrested. Two members of

Parliament whose constituencies included Exmouth, namely, the Hon Philip Lockyer, of the Liberal Party, and Graeme Campbell MHR, of the Australian Labor Party took steps to arrange a public meeting at which the case in favour of retention of the American Base at Exmouth would be open for discussion. A memo from Lockyer to the Shire President dated 21st April 1988 (Exhibit 13) confirms that the date proposed is the 30th May (i.e some weeks prior to expiry of the lease). The tone of the memo suggests that the Shire President was sympathetic to the course of action proposed by the members of Parliament. He himself confirmed in evidence that he subsequently chaired the meeting. The application to use the community hall for the purpose proposed was approved without reference to a meeting of the Council. A press release put out by the two Parliamentarians dated 5th May 1988 referred to the possibility of a number of demonstrators coming to Exmouth and said that the Parliamentarians would be putting their parties' point of view "on the future of the Communications base" as well as making reference to the future of the town itself. It says that both the Federal Government and the Opposition have pledged their support for the base. It also says "they have had great support from the Shire of Exmouth and had asked Bob Burkett, the Shire President, to chair the meeting". I note that the press release quite clearly sees the issue in terms of political and local commercial issues

and does not advert to any perceived risk of violence, disorderly behaviour or damage to Council property. The Shire President said the hall can accommodate about 200 to 250 people.

On the 16th May 1988 a representative of the Committee spoke to the Shire Clerk about using the Exmouth Community Hall for a public meeting. By letter dated the 17th May 1988 (Exhibit 6) the Committee applied to the Shire Clerk to book the Hall for the evening of Monday 27th June 1988. The letter made it clear that the Committee was opposed to the American Base, but said that the Committee's activities would be "peaceful and non-confrontational". The letter also said that "while we do not expect the Exmouth Community to greet us with open arms our presence in the town and region will help to promote the North West Cape Peninsular nationally through the media ... we recognise the legitimate concerns of the Exmouth community for their economic well being."

The letter dated 17th May 1988 did not say how many protesters would visit Exmouth. The Tribunal finds that the letter did not contain information concerning the nature of the activities to be undertaken by the Committee and its sympathisers which would permit an inference that the protest visit would give rise to a confrontation outside the gate to the American Base and be generally of the same



order as the protest visit of 1974. The letter did set out quite clearly, however, the Committee's basic credo: "We ... believe that the role of the base in USA military strategy is undeserving of Australian Government support."

The Shire Clerk agreed in evidence that it was not customary to refer all applications to use the hall to the Council but cases might arise where he would exercise his discretion and do so. By way of example, he referred to applications by the Arts Council in respect of performances and applications by Commercial Groups. In this case, the application contained in the Committee's letter dated 17th May 1988 was referred to the Council, and, pursuant to the prevailing practice, it seems that each member of the Council received a copy of the letter with his agenda and related papers. The Tribunal accepts the evidence of the Shire Clerk that a letter from Lindsay Matthews dated 26th April (but date stamped 26th May) giving a more detailed description of the Committee's plans had not yet reached the Shire.

The application came before the Council on the 23rd May 1988. The Shire President and the Shire Clerk confirmed that each Councillor at the meeting was fully aware of what the aim of the applicant was, - namely, to hold a public meeting at which opposition to the American Base would be expressed. They both stated in evidence that no one at the meeting expressed disapproval or hostility to the political position of the Committee as previously described. Both

witnesses, however, were aware that such a political position was not popular in Exmouth or with Councillors. This emerges as a matter of inference from the fact that, according to the recollections of those two witnesses, the only view articulated at the Council Meeting was a fear that local residents would be so outraged by the Committee's political position that damage might be caused to the hall in the form of breakages to windows and fittings. The two witnesses for the Council were adamant that the perceived threat was violent behaviour by local people upon hearing unpopular views expressed in their presence. They confirmed that they both had in mind the 1974 events and it may be inferred from the description of the meeting they gave that this is what other Councillors had in mind also. In answer to the question, "So you were basing all your decision on what had happened in 1974, were you?", the Shire President replied: "You can't base them on anything else." No mention was made of other incidents at Pine Gap, he said. A Council minute (Exhibit 12) records a decision by the Council that the March on the Cape Committee request for use of the Shire Hall on Monday 27th June 1988 be refused, and by letter dated 26th May 1988 (Exhibit 7) the Committee was advised of the decision.

The Tribunal notices that no ground of refusal is specified in either the minute or the letter. Both documents are therefore equally consistent with a refusal based on the

grounds of an adverse reaction to the Committee's political convictions or a refusal based on a perceived risk of damage to property. It should, be noted however, that the damage to property that Councillors had in mind appears not to have been damage initiated directly by the Committee and its sympathisers such as spray painting and graffiti as had happened in 1974, but rather damage arising indirectly as a consequence of action taken by local people hostile to the Committee.

In a press release dated 25th May 1988 (Exhibit 5) the Committee said that about 100 people were expected to join in the protest. In their evidence the Complainants said that the logistics of the situation dictated that the visitors be limited to this number. As preparations proceeded, the Committee and its Associates contacted the police and took other steps which evidenced a recognition that no matter how peaceably the protesters acted their mere presence at the American Base and in the town could give rise to physical confrontation. This appears to have been the perception of the authorities also because arrangements were set in motion and eventually implemented for a sizeable body of police to be flown to the area in advance of the planned activities.

The pervasive assumption that trouble was likely to occur indicates that fear of damage to property could well have been a legitimate concern but, in the absence of any

communicated ground of refusal, it remains to be determined whether it was in fact the basis on which the Council resolved to reject the application. The Tribunal notes that the Committee's media release of 25th May 1988 (Exhibit 5) (which refers to a protest outside the American Base and to the handing over of a petition - events which resembled the form of the 1974 protest) and the Matthews letter date stamped the 26th May 1988 (which refers to a gathering of about 100 people and recognises that the gathering might be "a disturbing influence") had not been published to the Council at the time of its meeting. By letter dated 15th May 1988 (Exhibit 10) Matthews had written to the Regional Police Officer at Karratha describing plans for 100 people to assemble at the gate to the American Base but there is no evidence that this letter or similar communications was actually brought to the attention of the Council prior to its making a decision to refuse the application.

In order to complete the narrative the Tribunal notes that by letter dated the 9th June 1988 the Committee by the Complainant Michael Williams lodged a complaint with the Commissioner of Equal Opportunity alleging an infringement of the Act on the grounds of political discrimination. The Shire of Exmouth responded to the complaint by letter dated the 8th July 1988 (Exhibit 14). The letter denied that the refusal was based on political grounds and said: "When the

matter of the hire of the hall was under discussion by the Councillors the thrust of the debate centred around damage which may be done to the hall or its contents should the proposed meeting get out of hand. The Council was mindful of other 'peaceful' demonstrations which have been held in the past around Australia and in Exmouth in 1974 and of the many which ended up being anything but peaceful".

The respective contentions of the parties are reflected in pleadings filed during the course of these proceedings. The Tribunal will return to the pleadings in a moment. For the time being, it is sufficient to note that as a consequence of the refusal, the Committee was obliged to look for alternative venues. At one stage a proposal was put forward by the Council that the local football oval, which can be floodlit, should be used, but this was not acceptable to the Committee. The meeting was held eventually at a hall vested in the Uniting Church. The meeting ran smoothly and without damage to property. Lindsay Matthews said in evidence that the alternative venue was less central and not as satisfactory. When asked to summarise the consequences of being refused access to the Community Hall Matthews said that the Committee was put to inconvenience in finding the alternative venue, the Church Hall was smaller, less accessible, and did not have the same symbolic importance as a Community Hall. Further, the refusal by the Shire had the appearance of a statement by

Community Leaders as to how they thought locals should respond to the political issue which had been raised for consideration by the March on the Cape Committee. He asserted that the refusal prejudiced the Committee's prospects of persuading public opinion to the viewpoint being espoused by the Committee and its supporters. It seems that, in the event, 117 protesters went to Exmouth, and these were mostly people resident in Western Australia.

The Points of Claim filed on behalf of the Complainant refer to the facts and matters set out above and pleads in paragraph 8 that the Respondent has treated the Complainants and members of the Committee less favourably than persons of a different political conviction by refusing to provide a service and/or make facilities available to the Complainant and members of the Committee contrary to Sections 53(1) and 62 of the Act. The pleading does not specifically allege that the request for use of the Hall made by the Committee was the same or not materially different to the earlier request made by the Parliamentarians, but a plea to that effect is implicit in the Points of Claim and the case was fought on that basis at the Hearing. The Tribunal pauses to note that although the Complainants sought compensation and an order enjoining the Respondents from repeating the conduct it was submitted at the hearing that no restraining order was now necessary and no damages would be proved.

By its defence the Respondents denied that the only possible venue for the meeting was the Community Hall or the Uniting Church Hall and pleaded that alternate venues also included the Respondents floodlit football oval. The Respondent denied any act of political discrimination and said that the meeting held on the 30th May was a meeting "to hear addresses from P. Lockyer MLA and G. Campbell MHR on the subject of Joint Australian/American Naval Communications Base at the North West Cape." Although the evidence presented on behalf of the Respondent was to the effect that the application for use of the Hall was based not on any disapproval of the Committee's political views but solely on a fear of damage to property, a case along these lines was not set out in the Points of Defence. In the course of describing the discussion by Councillors at the meeting on the 23rd May, 1988, the Shire President said: "Mainly the discussion was that there could have been trouble in the hall ... we expected the trouble to come from the locals because the local people get very, very hot ... it happened in the 74 protest. We were frightened it was going to happen again." He said that five of the seven Councillors present were resident in Exmouth in 1974. No one at the council meeting raised the question of whether the organisers of the 1974 protest were the same as the organisers of the 1988 protest. He agreed that "the politicians point of view, that is to keep the base, had the support of the Shire Council."

Section 53 of the Act is as follows:

"S.53 (1) For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this subsection referred to as the "aggrieved person") on the ground of religious or political conviction if, on the ground of-

- (a) the religious or political conviction of the aggrieved person;
- (b) a characteristic that appertains generally to persons of the religious or political conviction of the aggrieved person; or
- (c) a characteristic that is generally imputed to persons of the religious or political conviction of the aggrieved person,

The discriminator treats the aggrieved person less favourably than in the same circumstances or in circumstances that are not materially different, the discriminator treats or would treat a person of a different religious or political conviction."

Section 62 provides that it is unlawful for a person who, whether for payment or not, provides services, or makes facilities available, to discriminate against another person on the ground of the other person's political conviction by refusing to provide the other person with the services or to make those facilities available to the other person.

One must also take into account the provisions of Section 5 which provides

"S.5 A reference in Part II, III, IV or IVa to the doing of an act by reason of a particular matter includes a reference to the doing of an act by reason of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act.



A number of decided cases assist an understanding of these provisions.

In Jamal v The Secretary Department of Health (1988) EOC 92/234 The Court of Appeal in New South Wales, in dealing with an allegation of discrimination on the grounds of intellectual impairment, indicated the relevant statutory provisions were aimed at thoughtlessness and neglect and concluded that it was not necessary to establish deliberate conduct in order for an act of discrimination to be made out. The Tribunal notes, however, that there must be a causal connection between the alleged acts of discrimination and the Complainants' political convictions. See Clarkson v Governor of Metropolitan Reception Prison (1986) EOC 92/153. Also see Connaughton v Melbourne High School Staff Association (1986) EOC 92/154.

Against this background, the Tribunal now returns to the facts of the present case. The Tribunal has already determined that the beliefs held by the Complainants may be characterised as political convictions and that the desire to hold a public meeting at the Community Hall on the 27th June was an extension of those convictions and should be characterised as a political activity. The Tribunal is also satisfied that the public meeting held by the Parliamentarians on the 27th May was a political activity of the same kind. In other words, the Tribunal finds that the Council dealt with the Committee's request for use of the

Hall in circumstances that were the same as or not materially different to the circumstances created by the Parliamentarians' earlier request for use of the hall in that both requests concerned the holding of a public meeting with a view to debating a current political issue, namely, whether the American Base should be allowed to remain at Exmouth.

Thus, in the event of it being held that there was a causal connection between the Complainants' political convictions and the refusal of the Complainants' application a finding could be made that the Complainants and the Committee considered as one group had been treated less favourably than the Parliamentarians and their supporters considered as another group, having regard to the fact that the application made by the latter group was allowed. It was conceded at the Hearing that when the Council offered the Committee the use of the floodlit football oval this offer could not be regarded as equally favourable treatment and, in any event, the offer was not made until after the complaint was laid.

Accordingly, the issue to be resolved has been reduced to this: was there a sufficient causal connection between the act of discrimination complained of, namely, the refusal of permission to hold a public meeting, and the Complainants' political convictions? Can it be said that the refusal was based on the ground of the Complainant's political convictions?

There is no direct evidence before the Tribunal that the Council refused the application on the ground of the Complainants' political convictions. There is no reference to any such basis of refusal in the relevant Council minute or in the letter of refusal, and no admission to that effect was made by witnesses for the Respondent during the course of the Hearing. The Tribunal finds, however, having considered the evidence as a whole, that within the meaning of Section 53(1) (a) of the Act there was an act of discrimination on the ground of the Complainants' political convictions.

At its meeting on the 23rd May, 1988, the Council had before it a letter which set out the Committee's political convictions (being convictions shared by the complainants). The evidence supports an inference that the Shire President and many of the Councillors present were opposed to those convictions and said that debate about such matters at a public meeting would lead to violence. The letter before the Council, of itself, did not foreshadow or point to such

an outcome. Thus, the conclusion is inescapable, and the Tribunal so finds, that the Council took into account the events of 1974 and decided to refuse the application on the grounds that the Committee's political conviction would lead first to acrimonious debate and then to damage to Council property. These concerns may not have been fully articulated. It appears that discussion in the Council chamber focused on what was thought to be the likely outcome of the protest visit, and the extent of the damage, rather than on the political convictions which lay behind and had prompted the application. The Tribunal is satisfied, however, that the Council's decision to refuse the application was based on a perception by those present that the Committee held the same views as the group which had protested against the presence of the American Base in 1974 and that those views, being strongly held, would be the root cause of the trouble which was thought likely to occur if the meeting proceeded.

A political conviction embraces both ends and means. In the present case, the Council knew that the Committee wished to bring about the removal of the base and sought to achieve that result by a well publicized protest visit to Exmouth. The Tribunal finds that, in refusing the Committee's application, the Council was consciously responding in an adverse way to what was known to be an important aspect of the applicant's political convictions, namely, persuasion by

protest meetings. The Council did not explicitly resolve to discriminate against the Committee by refusing its application for use of the hall shortly after an application made by the Parliamentarians in the same or not materially different circumstances was granted, but that was the effect of the Council's actions.

Further, the Tribunal is satisfied that a finding may also be made in favour of the Complainants pursuant to Section 53 (1)(c). The Council received a letter dated 17th May 1988 applying for permission to use the Community Hall for what was described as a peaceful protest. The Respondent contends that the decision adverse to the Complainants' was not made on the grounds of the Complainants' political beliefs but on the more pragmatic ground that damage could be caused. However, it follows from the findings and reasoning of the Tribunal referred to in the preceding paragraph of this Judgement that when the matter came before the Council on the 23rd May the minds of the Councillors present turned to the events of 1974. An assumption was made that people such as the Complainants, being protesters opposed to the American Base, were, by reason of their political convictions, likely to create circumstances of physical confrontation which might lead to property damage. The characteristic imputed to the protagonists in 1988 was imputed to them as a result of events that occurred 14 years

earlier. It is clear from the evidence that, in making such an assumption, the Councillors believed that they were echoing a widely held view in the Community and therefore, within the language of Section 53(1)(c), it can be said that the characteristic was one which was generally imputed to anti-American base protesters. The Tribunal is satisfied that the assumption was a substantial reason for refusing the application and that an act of discrimination occurred. Accordingly, the Tribunal is satisfied having regard to both limbs of Section 53 referred to above that the complaint is made out.

The Complainants did not press the claim for compensation or a restraining order. Accordingly, pursuant to Section 127, having found the complaint substantiated, the Tribunal must review what action should now be taken. In the circumstances, pursuant to Section 127 (b) (v), the Tribunal declines to take any further action in the matter in the expectation that the ruling made by the Tribunal and the costs incurred by the Respondent in defending the proceedings will be a sufficient and salutary reminder that the provisions of the legislation must be observed.