

EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

No. 5 of 1990

BATOUL SIMA OSET
Complainant

- against -

MINISTRY OF THE CABINET
AND
PUBLIC SECTOR MANAGEMENT
Respondent

BEFORE: Mr N P Hasluck QC (President)
P Harris and B Buick (Members)

HEARD: 9, 10 and 25 July 1990

REASON FOR JUDGEMENT

(Delivered: 30 October 1990)

JUDGEMENT

OSET VS. MINISTRY OF THE CABINET

The Complainant, Batoul Sima Oset, lodged Points of Claim with the Tribunal which alleged discrimination contrary to the Equal Opportunity Act 1984 ("The Act") arising from her employment with the Respondent, the Ministry of the Cabinet and Public Sector Management, in mid 1989. The Points of Claim were directed at discrimination on the ground of race pursuant to Sections 36 and 37 of the Act but as the Points of Claim were in a general form and did not refer to specific provisions it is necessary to set out the history of the matter at some length before turning to the pleadings and the relevant statutory provisions.

The Commissioner's Report was received in evidence as Exhibit 1 and contains a number of documents bearing on the terms and conditions of the employment and the matters in issue between the parties. The Tribunal heard evidence from the Complainant herself, and a number of senior public servants. These materials permit the Tribunal to describe the nature of the employment and the events giving rise to the complaint.

The Complainant was born at Teheran in Iran on 4 December 1943 and migrated to Australia in 1970. She had been employed as a clerk with the Ministry of Post Telegraph and Telephone in Iran from 1961 to 1970. In Australia, following the breakdown of

her marriage, from 1987 onwards she attended various institutions in Perth and obtained secretarial qualifications.

In November 1988 she was employed as a clerk/typist for four months by the R.A.C. Insurance Limited in Perth.

As a result of information given to her by the Women's Information and Referral Exchange early in 1989 she applied for a temporary position as a Level 1 officer with the Respondent. She was interviewed for the position and conceded in evidence that nothing was said at the interview to suggest that the temporary job would lead to a permanent position. A memo dated 2nd May 1989 signed by Dr R Field as Chief Executive of the Department of the Cabinet (Exhibit 2) states that "Ms Oset will start in the Women's Interests Branch, replacing Jenny Emblem, from 3rd May 1989. She will be on trial for six weeks, as a temporary officer, at Level 1 standard starting rates." Other documents show that her employment in a temporary capacity was extended and it appears to be common ground that on the 12th July her employment was extended for a further two month period until 12th September 1989.

Before turning to matters directly relevant to the complaint it will be useful to describe the organisational structure of the employer. As at 2nd May 1989 Dr Field was Chief Executive of the Department of the Cabinet. The Department of the Cabinet formed part of the Ministry of the Premier and Cabinet. At about that time a new body was constituted known as the

Ministry of the Cabinet and Public Sector Management, being the Respondent to this complaint. The new Ministry included a Women's Interests Branch which was responsible for developing and monitoring Government policy to do with issues that affect women. Dr Field was in charge of the policy side of the Ministry from which it followed that the head of the Women's Interests Branch reported to Dr Field.

As at 2nd May 1989 the Women's Interests Branch consisted of a Director, a Senior Policy Officer (at Level 6), a Policy Officer at (Level 4) and a Secretarial position at Level 1. Another Level 4 Officer had also been employed as a Project Officer. A replacement had not yet been found for the former Director and the existing Level 1 Secretarial position was about to become vacant owing to Jenny Emblem's forthcoming transfer to the Office of the Minister for Justice. It was this transfer which led to the Complainant's recruitment as a temporary Level 1 officer.

In the absence of a Director Naomi Brown was seconded to the Respondent Ministry from the Department for Community Services. She was to act as Director for a period of four months. Ms Brown had worked as Women's Adviser at the Teachers' Union for two and a half years and was familiar with Equal Opportunity Legislation as a result of her work with the Department for Community Service where she had held the position of Equal Employment Opportunity Co-ordinator. She had been associated with Affirmative Action programs and by virtue of her

background was well-equipped to notice signs of discrimination in the workplace.

The Women's Interests Branch was situated in the Capita building and was physically proximate to the Office of Dr Field and his long-standing and experienced secretary Ms Dunstan. The evidence showed that although there was no formal orientation manual or introductory procedure for a new Level 1 officer, whether permanent or temporary, the normal practice was for the outgoing officer to instruct the newcomer in office procedures. Secretarial staff in other sections of the department would also be available to provide guidance. If the burden of work so required, then assistance, on an ad-hoc basis, was available to the Women's Interests Branch from other secretarial staff in the building. However, in essence, the Branch was largely dependant upon the secretarial skills and service provided by the secretarial/clerk Level 1 officer.

It emerges, then, that at the time the Complainant joined the Women's Interests Branch of the Respondent Ministry the structure of the organisation was somewhat unsettled. The Ministry had just obtained a new title and the Women's Interests Branch was at that time without a permanent head although it is clear to the Tribunal that Ms Brown was suitably qualified to fill the Director's position on secondment in the interim.

A letter dated 23rd May 1989 (Exhibit 3) from the Public Service Commission to the Complainant formally confirmed her appointment as a Temporary Officer under the provisions of the Public Service Act to the position of Officer, Level 1, Women's Interests Division of the Office of the Cabinet from the 3rd May 1989 to 14th June 1989. Mr Chinnery, who is presently employed by the Office of Merit Protection Section of the Public Service Board gave evidence as to the nature of the Level 1 recruitment program. He said that at any one time there are approximately four to four and a half thousand applications for employment through the Level 1 recruitment entry which deals with all Level 1 positions in the Public Service. The position covers keyboard, clerical, and some technical jobs. Applications are kept for six months and then destroyed and people are at liberty to apply again. Recruitment depends on agencies having the need for an officer. It could be either a permanent position, or a temporary position. To the best of his calculations, for the year 1989, the Public Service Commission took on over 1,100 Level 1 officers. He couldn't say precisely how many of those were taken on as temporary but considered that most were probably temporary. He estimated that of those who were taken on as temporary Level 1 officers only six went on to be made permanent officers. Ms Brown said during the course of her evidence that she was not aware of any Governmental policy, regulation, convention, practice or otherwise which would have stood in the way of Ms Oset moving into a permanent Level 1 position had the performance been satisfactory. This was

corroborated by evidence from another senior officer in the department. However, the figures given by Mr Chinnery showed that movement from temporary to permanent appointment in 1989 was distinctly an exception to the usual practice.

The Tribunal finds that as at the commencement of the Complainant's employment on 3rd May 1989 there was no written duty statement defining the nature of the work to be performed by her. A duty statement dated 25th October 1989 (part of Exhibit 1) prepared and signed by Ms Brown subsequently defines the work to be performed by a Level 1 officer in the Women's Interests Branch. The Complainant accepted that this was a fair description of the work she was asked to do. It therefore appears that the work required of her was to use a Wordplex word processor and typewriter in preparing letters to and for the Premier and senior departmental officers and for confidential Cabinet documents, reports, minutes of meetings, policy documents, memos and general correspondence. She also had telephone reception duties including receiving calls from the Premier's office, the Minister's office, government departments and the general public. She was expected to make calls for the Director or policy officers in regard to making or changing appointments. In addition, she had responsibilities in respect of filing, photo copying/faxing and general clerical duties. Other evidence establishes that the Branch was actively involved in the preparation of letters and paperwork going to important policy issues including the preparation of reports and documents known as "blues" being

advice to the Premier prior to each Cabinet meeting once a week. It is clear that typing and communication skills of a high order were required of a Level 1 officer occupying the position in question together with the normal requirements of punctuality and confidentiality in respect of the employer's business and administrative concerns. The Complainant's Points of Claim confirm that the duties associated with her position were as just described.

Upon commencing employment the complainant received some instruction from the transferring officer Ms Emblem, but she was then largely obliged to find her own way, although the assumption was, of course, that she had been employed as a fully qualified secretary. It seems that initially she had some difficulty mastering the word processing software which was unfamiliar to her but the evidence shows that in seeking to perform the various duties associated with the position she applied herself to the work in hand diligently and enthusiastically.

On the 15th May 1989, a comparatively short time after the employment had commenced, Ms Brown sought a meeting with the Complainant so as to get to know her and to review progress. During the course of her evidence the Complainant suggested that information obtained during the course of this meeting was misused and that the meeting was not entirely friendly. However, the Tribunal was impressed by Ms Brown as a fair minded and competent departmental officer and accepts that in

an entirely responsible way she initiated the meeting with a view to improving the performance of a member of her staff. Her tone was sympathetic but she felt obliged to draw the Complainant's attention to a number of shortcomings in her work. She later prepared a memo summarising the discussion and the Tribunal considers that this was consistent with good administrative practice bearing in mind that Ms Brown was on secondment. It was desirable that there be some written record of what had been discussed. The Tribunal finds that the file note dated 15th May 1989 signed by Ms Brown and prepared shortly after the meeting represents an accurate account of what took place.

According to the file note the Complainant was reminded that her contract was for a temporary or trial period of six weeks. Reference was made to "language difficulties" and difficulties in reading some of the hand written work submitted to her for typing. The requirements in taking phone messages was discussed with her. She was given "positive feedback" as to her enthusiasm and quickness to learn.

A few days later a copy of this memo (part of Exhibit 1) was handed to the Complainant on the basis that it was a record of the discussion that had occurred and as a minute that would be placed on her personal file. She was being given an opportunity to comment on what had been written. The Tribunal considers that this was an appropriate and desirable procedure. Presentation of the memo does not establish that the

Complainant had become the subject of any unusual or untoward attention. Indeed, the Tribunal considers that generally to this point the atmosphere within which the Complainant was working was helpful and encouraging and this is borne out by the fact that her first temporary six week period of employment was extended and later, on the 12th July 1989, was further extended to 12th September 1989.

It seems that the Complainant was disconcerted by the criticisms of her work expressed at the 15th May meeting and by the fact that such criticisms were then incorporated in a written document which was to be placed upon her personal file. As she saw it, she had been working diligently and had performed well in learning a new word processing system without any specific introductory or supervisory assistance being made available to her. After receiving the memo she prepared an answering note (part of Exhibit 1). The note is generally positive in its tone but contains a denial of any "difficulty with my accent". She also gave her note and made representations to Mr Heron, who, at that time, was Manager of the Human Resources Branch of the Department. He was available to management and staff for advisory purposes. He said in evidence that it was consistent with departmental practice for a record such as the memo of the 15th May to be prepared and referred to an officer's personal file. He did not have jurisdiction to enquire into the matter and additionally he also had responsibilities to provide guidance to Ms Brown. Accordingly, he didn't take the matter further. The Tribunal

notes that Mr Heron also said that it would be unusual to release a personal file held by one department to another department or agency, but a file would be released to the Public Service Commission as a matter of course in the event of there being some dispute or litigation which the Public Service Commission as the controlling agency had to investigate.

Dr Field and Ms Brown were aware that the Complainant's temporary employment, which had been extended twice would come to an end on the 12th September. Towards the end of August they reviewed the situation with a view to making a decision about her future. Their evidence suggests that they came to the conclusion that her work was not of a sufficiently high standard and it would therefore be inappropriate to extend the employment for a further period. On the 28th August this decision was communicated to the Complainant and a portion of Ms Brown's evidence bearing on that point is as follows:

"the purpose of the meeting was to inform Ms Oset that we were not going to renew the contract, that the contract was to terminate on the 12th September. Dr Field, as my supervisor, and I had discussed the matter. In fact, we had discussed it on a number of occasions and in our opinion it had come to the point where we had to make a decision as to whether we would keep Ms Oset's services permanently because it was not appropriate to extend again on a temporary contract; it was not fair ... we discussed the matter in some depth and decided that her performance was not of a standard that we would want to confirm her as a Permanent Level 1 officer and so together we met with her on that date to inform her that her contract would cease as indicated in the letter to her letter on that date."

In answer to a question as to what factors had a bearing on this decision the answer given was:

"the only factor was her performance and her ability to carry out the duties as they are documented there. It was, I guess, our assessment as to whether we felt that they were of a standard to actually confirm that permanency. We came to the conclusion that while there actually had been some improvement in areas which we had acknowledged on the way through, that the difficulties were such that we chose not to make her a permanent officer, or in fact not to extend the contract ... the presentation of the written work had improved but we still felt that there were difficulties with communicating, definitely with oral communication, with listening, with giving directions and taking directions, and there was still an issue with us with her telephone skills."

Dr Field's recollection of the meeting was as follows:

"I cannot recall exactly what I said but it would be in keeping with the general conclusions that we had reached that language was a problem ... I don't believe we elaborated on that really Ms Brown took the discussion up as I recall."

Both Dr Field and Ms Brown declined to commit the reasons for their decision to writing even though the Complainant requested that reasons be given. Ms Brown said in evidence that if the reasons were documented this would go on the Complainant's file and might prejudice her prospects of re-employment within the Public Service. The Complainant was told that she would be paid until the 12th September but there would be no objection if she devoted time to seeking other employment. If she could get herself an interview for another job within the remaining period of the contract then she would be free to attend any such interview. A letter dated the 29th August 1989 (part of Exhibit 1) signed by Dr Field confirms that the Complainant would not be offered employment after 12th September 1989 and states that:

"In order to assist you seek alternative employment, I am prepared to forgo the required one week's notice and to

pay you for the remainder of your contract, which expires on 12th September 1989."

The stance adopted by Ms Brown and Dr Field, in their view, was a reflection of earlier correspondence, and in particular of a letter of 6th July 1989 (part of Exhibit 1) from Ms Brown to the Acting Chief Executive of the Department of the Premier advising that the Complainant's employment would be extended.

The letter reads in part:

"Ms Oset's performance has been discussed with her and improvements in speed and telephone skills have been noted. She has also been commended for her keenness and quickness in learning the Wordplex system. It is felt that there are still some difficulties with language resulting in inaccuracies in typed work. Strategies for helping with this have been discussed with Ms Oset and assistance will continue to be given."

By a letter dated 28th July 1989 (part of Exhibit 1) the Chief Executive advised the Complainant that approval had been given to extend her employment to the 12th September 1989 and that:

"a review of the situation will be completed prior to the expiry of this period and I will advise you accordingly."

The Complainant made it clear in her evidence that she saw the situation in an entirely different light. In the period between the meeting of the 15th May and the meeting of the 28th August there had been no direct criticism of her work. She had done her best to overcome and respond to the criticisms previously mentioned. She had been invited to and did attend a training course to improve her skills. She had attended a support staff meeting on 23rd August 1989 the minutes of which (part of Exhibit 1) appear to recognise that all support staff were facing difficulties which had to be addressed and

proposing rationalisation of workloads. She tendered (Exhibit 5) samples of the handwritten work given to her to show that any inadequacies in her typed work was at least partly due to the way in which the work was submitted to her. Against this background she concluded that the decision not to extend her employment conveyed to her at the meeting on 28th August was due to discrimination on the ground of her race. In her Points of Claim (being a document she prepared and typed herself) she puts the matter in this way;

"I was advised by Mr Field that my employment would not be extended after the 12th September. Mr Field's explanation to his decision was the language difficulties and my accent. Mr Field added, that I was not fitting in his office, and has refused my request, by transferring me to an area, which he would think I would be fitted, or to keeping me till I would find other employment. In order to assist me in seeking an alternative employment, a cheque was presented for the remainder of my contract. I have requested, that I was preferred to continue working for the remainder of contract 12th September. That was agreed to. I have stated, that I was not going to tolerate their inappropriate conduction, and discrimination of my race "accent".

In describing the meeting in her evidence, the Complainant referred to her surprise at the decision, especially in view of the fact that a few days earlier on 23rd August there had been a meeting at which plans were canvassed to recruit more receptionists, a proposal which would relieve her, as one of the secretaries, of some of the burden of telephone answering. It seemed to her that things were going reasonably well. In referring to the reasons for the decision not to extend her employment she said:

"when I asked Mr Field why you're not extending my services after the 12th he said "it's your language difficulties ..." I said "could you explain it to me,

Ross, more clearly what is my language difficulties are" and Ms Brown interrupted and said "well, Sima, we talk about it before". I said "yes and I'd like Mr Field tell me". Mr Field said it was my accent too. I said "what do you mean Mr Field; what do you mean, Ross my accent? There are lots of other employees in the Ministry that have accents. This country is full of accents."

Dr Field and Ms Brown denied that any particular emphasis was placed upon accent as a reason underlying the decision but on either view of the crucial meeting it appears that at least some reference was made to language difficulties. In attempting to define the nature of the difficulties Ms Brown said elsewhere in her evidence in regard to the Complainant's typing skills and generally:

"for the work to be done it really had to be spelt out very clearly, and there were occasions where I actually sort of wrote it down in point form, ... I didn't have the confidence that Ms Oset would have the understanding and interpret what I was saying in the way I wanted it, and so I found it did have to be very explicit."

Having formed the view that she was being discriminated against, the Complainant immediately set about contacting various persons in authority including Cabinet Ministers, and officers attached to the Public Service Commission. The position then became untenable as far as Dr Field and Ms Brown were concerned. The Complainant had refused their offer that she could devote time to seeking interviews for other employment and had become an active Complainant in a way which was likely to prove disruptive. Accordingly, on the 30th August 1989, the Complainant was summoned to a further meeting and handed a letter requiring her to leave the premises and enclosing a cheque.

There is an issue between the parties as to what took place at this meeting and that in turn gives rise to a legal issue which the Tribunal will come to in a moment as to whether the Complainant was dismissed from her employment. In considering the differences between the parties as to this factual issue the Tribunal prefers to rely on the contemporary documentation and finds that the meeting was brief and to the point and that the substance of what was conveyed to the Complainant verbally is contained in a letter dated the 30th August 1989 which reads as follows:

"Further to my letter of 29 August in which I advised that there would not be a position available to you in the Ministry of the Cabinet and Public Sector Management beyond the 12 September 1989, I now advise that I do not wish to continue with your temporary employment and do not require your services after the close of business (4.30 p.m.) today. I have arranged for you to be paid all outstanding entitlements for the period to 12 September 1989. I wish to make it very clear to you that you should return all the Ministry's property in your possession, including the Mill key and any payments and documents to Naomi Brown before close of business today."

The Complainant left the premises and in following days and weeks petitioned various persons in authority to take up her case. She was eventually directed to the Commissioner for Equal Opportunity who commenced an enquiry into the matter. The correspondence relating to such enquiry and the answers given by the various governmental agencies form part of Exhibit 1. During the course of pressing her complaint the Complainant ascertained that a copy of her personal file had found its way to the Public Service Commission and she also formed the view that information might have found its way to other governmental agencies and into the records of the Public Service Commission.

She considered that the presence of such information would act to her disadvantage and prejudice her prospects of re-employment.

The Tribunal does not intend to review all the evidence that was given as to this aspect of the matter other than to say that the Complainant's belief does not appear to be well-founded. Further, it appeared from the evidence that it lies within the domain of the Public Service Commission to obtain information bearing on an incipient dispute and the Tribunal does not consider that there is any basis for a finding that the procedures of the governmental agencies seeking information about the matter have been irregular or unorthodox. The Tribunal also notes that none of the persons having cause to look at the Complainant's case identified any material revealing any overt signs of discrimination on the ground of her race or suggesting that there were reasons for not extending her contract other than the reasons given at the time which are reflected primarily in the memo of 15th May, the letters of 6th and 28th July, the letters of the 28th and 30th August 1989, referred to earlier and the account of what transpired at the crucial meeting on the 28th August 1989 given in evidence by Dr Field and Ms Brown as reflected in the passages of testimony set out above.

The Commissioner for Equal Opportunity was unable to resolve the dispute with the result that the Complainant lodged a complaint with the Tribunal in the manner allowed for by the

Act and in due course, pursuant to directions given by the Tribunal, filed Points of Claim. Throughout the proceedings the Complainant has represented herself and it is probably for this reason that the Points of Claim and her argument in opening were not specific as to the statutory provisions relied on. The Respondent by the Crown Solicitors Office filed Points of Defence addressing the various factual allegations and denying that the provisions of the Act have been infringed. In the course of argument at the Hearing Counsel for the Respondent submitted that in his apprehension the case of the Applicant was essentially an allegation of unlawful dismissal on the ground of race under Section 37(2)(c). However, recognising that the Complainant was unrepresented, both parties accepted in the course of argument that the issues raised by the Points of Claim should be described more generally: have any of the provisions of the Act concerning discrimination on the ground of race been infringed? The Tribunal proposes to deal with the matter on this basis.

The Complainant was adamant that she did not seek damages and indicated that she sought relief pursuant to Section 127(b)(iii) whereby the Tribunal may order the Respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the Complainant. The specific relief sought was an order for re-instatement to the position of Level 1 temporary officer although it would be open to the Tribunal to award damages in lieu pursuant to Section 127 (b)

(i) if that was thought to be the appropriate avenue of redress.

Section 36 of the Act is as follows:

- (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 race if, on the ground of-
 - (a) the race of the aggrieved person;
 - (b) a characteristic that appertains generally to persons of the race of the aggrieved person; or
 - (c) a characteristic that is generally imputed to persons of the race of the aggrieved person,
the discriminator-
 - (d) 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 race; or
 - (e) segregates the aggrieved person from persons of a different race.
- (2) 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 race if the discriminator requires the aggrieved person to comply with a requirement or condition-
 - (a) with which a substantially higher proportion of persons not of the same race as the aggrieved person comply or are able to comply;
 - (b) which is not reasonable having regard to the circumstances of the case; and
 - (c) with which the aggrieved person does not or is not able to comply.

Section 37 of the Act is as follows:

- (1) It is unlawful for an employer to discriminate against a person on the ground of the race of that person-
 - (a) in the arrangements made for the purpose of determining who should be offered employment;
 - (b) in determining who should be offered employment; or
 - (c) in the terms or conditions on which employment is offered.

- (2) It is unlawful for an employer to discriminate against an employee on the ground of the race of the employee-
 - (a) in the terms or conditions of employment that the employer affords the employee;
 - (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;
 - (c) by dismissing the employee; or
 - (d) by subjecting the employee to any other detriment.

The Tribunal notes that by Section 4 "Race" includes colour, descent, ethnic or national origin or nationality. By Section 5 a reference to discrimination on the grounds of Race includes a reference to the doing of the act by reason of two 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. By Section 6 the Act binds the Crown. By Section 161 an employer can be vicariously liable for the acts of its servants and agents.

The Tribunal turns first to Section 37(2)(c) which provides that it is unlawful for an employer to discriminate against an

employee on the ground of the race of the employee by dismissing the employee. Counsel for the Respondent submitted that in the present case there had been no discrimination on the ground of race and, in any event, there was no dismissal of the Complainant because on the 30th August 1989 she was merely relieved of active duty. She was paid all her monetary entitlements and the Contract then expired by an effluxion of time. The question of what constitutes a "dismissal" usually arises in the context of an alleged breach of contract by an employer. Dismissal will be wrongful and in breach of contract where the employee is not given notice of sufficient length to lawfully terminate the contract or has been dismissed for misconduct in circumstances which do not warrant summary dismissal. Macken : The Law of Employment (3rd Ed) page 298. At common law there was never recognised any general duty reposing in the employer to provide work. Collier v. Sunday Referee Publishing Co. Ltd. (1940) 2KB 647. The terms of some contracts may impose this duty on the employers, particularly in respect of skilled professionals and workers whose livelihood is dependent on the kind of publicity and exposure which accompanies employment in theatrical or other forms of modern media. White v. Australian and New Zealand Theatres Ltd. (1943) 67 CLR 266. In the absence of special circumstances of the kind just mentioned, however, it follows from the general rule of common law that the employer has a right to give an employee payment in lieu of allowing the servant to work out the period of notice under the contract. Macken (supra) p.118. Accordingly, putting the provisions of

the Equal Opportunity Act to one side for the moment, the Tribunal concludes that in the present case the Respondent was not in breach of the contract of employment because it was not obliged to let the Complainant work out the contracted period of employment so long as she was paid her full entitlement. It is common ground between the parties that she was paid her full entitlement.

The Tribunal considers, however, that Section 37(2)(c) of the Act is not limited to a wrongful dismissal or a dismissal amounting to a breach of the contract of employment. The Tribunal will not attempt an exhaustive definition of what is meant by the concept "dismissing the employee" referred to in Section 37(2)(c) but considers that it extends to the circumstances of the present case where an employee has been required to leave her place of employment against her will before the time prescribed by the contract has expired, even though this requirement may not amount to a breach of the contract of employment. The Act does not expressly qualify the phrase "dismissing the employee" by words such as "wrongful" or "unjustifiable" or "summary" and the context within which the phrase appears suggests that if an employer terminated the employment in accordance with the contract by giving the prescribed period of notice or reasonable notice but did so as a result of a clear and demonstrable racial bias against an employee who wished to continue working then this would fall within the statutory prohibition contained in Section 37(2)(c). Accordingly, the Tribunal finds that the Complainant was

dismissed and now moves to the crucial question of whether the dismissal amounted to discrimination on the ground of the Complainant's race.

The Tribunal considers that the evidence does not support a finding in favour of the Complainant that she was discriminated against on the ground of race. The evidence generally shows no overt signs of hostility towards the Complainant or to any persons of other races. The Tribunal was impressed by Ms Brown as an experienced Public Servant who, by reason of her background, had reason to be sensitive to issues of discrimination. Her behaviour generally during the three or four month period under consideration appeared to represent a fair minded and objective approach to the administration of the staff under her control including the Complainant. The Tribunal has already indicated that in respect to the meeting of the 15th May the steps taken by Ms Brown as the Senior Officer in the Branch were appropriate and regular and there appears to be nothing sinister or unorthodox in having brought into existence a memorandum reviewing the performance of the Complainant as a temporary officer at that point in time. As foreshadowed by the letters of 6th July and 28th July it was appropriate, two extensions of the temporary employment having already been allowed, that towards the end of August there should be a review as to whether the temporary employment should be continued. The Tribunal has reached the conclusion that the decision not to extend the employment as communicated to the Complainant at the meeting of the 28th August was based

upon a perception that she lacked the skills to occupy the position in a satisfactory manner and this was a judgement which could have been made in similar terms and for similar reasons about employees generally. Where the accounts of the participants differ as to matters of detail the Tribunal prefers the evidence of Ms Brown.

The Tribunal formed the view that the Complainant was a hard working and diligent employee who was eager to do her best. The Tribunal also noted that in the presentation of her case and supporting arguments she displayed considerable debating skills. The Tribunal was conscious, however, that she displayed shortcomings in listening to the questions put to her and that the written materials prepared by her, and especially the Points of Claim, revealed imperfections in the use of grammar and the formulation of sentences. It is not for the Tribunal to make any final assessment of the Complainant's secretarial skills but such matters do tend to suggest that Dr Field and Ms Brown fairly concluded that the Complainant lacked the secretarial skills required of an officer servicing a policy unit which had to submit its written work to sophisticated readers within various governmental agencies. In short, the Tribunal concludes that no discrimination on the ground of race occurred in respect of the Complainant on the 28th August or in the days and weeks preceding that crucial meeting and that the decision not to extend was arrived at having regard only to the secretarial skills of the Complainant as manifested in her day to day work. She was not treated less

favourably than the Respondent treated persons of a different race.

The decision to dismiss was not taken at that meeting but effected two days later on the 30th August. The Tribunal considers that the decision to take this further step was prompted, once again, not by any adverse judgement on the Complainant's race but due to the fact that the extremity of her reaction to the decision not to extend communicated to her on 28th August had produced a situation which made her continued presence at the workplace unworkable. She spent a considerable amount of time contacting a variety of agencies and persons claiming that she had been discriminated against. Ms Brown received a number of approaches from officers employed in the Ministry and people from outside the Ministry who had been contacted by the Complainant. Additionally, the Complainant shouted at another Level 1 officer that it was because of her and a Senior Policy Officer, Ms S Wilkins, that she had lost her job and she also rang the office of the Minister Assisting the Minister for Women's Interests. The decision to terminate forthwith on the 30th August, rather than allowing a cooling off period, may or may not have been precipitate, but, in the Tribunal's view, so long as the decision was not based on the grounds of race it cannot be said that Section 37(2)(d) of the Act has been infringed.

Section 37(2)(a) provides that it is unlawful for an employer to discriminate on the ground of race of the employee in the

terms or conditions of employment that the employer affords the employee. Section 37(2)(b) prohibits the denying of the employee access to opportunities or to any other benefits associated with the employment. Section 37(2)(d) prohibits the subjection of the employee to any other detriment. Generally in regard to these issues the stance adopted by the Respondent was that it was not open to the Complainant to rely upon these provisions. Counsel for the Respondent submitted that the employee was not denied any right because all that happened was that her contract of employment was not extended. However, it follows from the Tribunal's earlier finding that she was dismissed that her employment was curtailed and this might be described as the denial of a benefit under the Contract, particularly in view of the fact that there was a general recognition that her employment was probationary. The greater opportunity allowed to her to prove herself the better the chance that her employment would continue. By bringing the Contract to an end in the circumstances described the Complainant may arguably have been deprived of certain benefits.

The Respondent contended that the Applicant must demonstrate to the Tribunal that the Respondent had an obligation to provide her with a benefit associated with employment of which it deprived her or had an obligation to continue to employ her. In other words, she must establish that she had legal rights to either (a) the benefits of which she was deprived or (b) employment.

The Tribunal does not accept this view of the matter. The Tribunal considers that the provisions under notice can apply to reasonable expectations in addition to specific legal rights. It was open to the Complainant to argue that when senior officers in the Department terminated her employment in the circumstances previously described she was deprived of reasonable expectation in the nature of a benefit that she would be allowed every opportunity to prove herself and thereby qualify for permanent employment.

On that view of the matter, two questions arise. Did the Complainant have a reasonable expectation?. If so, was that expectation defeated as a consequence of discrimination on the ground of race? As to the first question, having regard to the evidence referred to earlier concerning the very limited number of temporary officers moving upwards to permanent positions in 1989, the Tribunal does not accept that the Complainant was deprived of a reasonable expectation or benefit. In any event, as to the second question it follows from the conclusion and finding made earlier that the Tribunal considers that there was no discrimination on the ground of race so that even in regard to these alternative provisions the complaint is not made out.

Finally, for the sake of completeness, the Tribunal briefly addresses the question of indirect discrimination. The Act expressly makes provision for indirect discrimination to cover those instances when less favourable treatment results not so much from overt prejudice as from apparently neutral conditions

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or standards, which put the members of the designated minority groups at a disadvantage. The elements necessary to constitute indirect discrimination are found in Section 36(2) of the Act. The discriminator must require the aggrieved person to comply with a standard or condition with which a substantially higher proportion of persons not of the same race are able to comply, it is not reasonable given the circumstances of the case, and the aggrieved person does not or is not able to meet.

An issue is open in the circumstances of the present case as to whether the language proficiency requirement asked of the Complainant was reasonable. There may well be circumstances in which a mere lack of full proficiency in using the English language may not be a sufficient basis for denying an opportunity to a Complainant. Accordingly, the circumstances of this case should not be taken as decisive. However, on balance, bearing in mind a need for a high level of secretarial skills in a centrally placed governmental policy unit, the Tribunal considers that there was no indirect discrimination and therefore, for the various reasons expressed above, it does not grant the Complainant the relief sought.

The complaint is dismissed.