

**JUDGEMENT**

**EQUAL OPPORTUNITY TRIBUNAL  
OF WESTERN AUSTRALIA**

No. 13 of 1990

PAULA HYDE  
Complainant

- against -

FLEDSPAC PTY LTD trading as  
BEST FOODS  
Respondent

**BEFORE:** Mr N P Hasluck QC (President)  
Ms B Buick (Member)  
Ms H Cattalini (Deputy Member)

The Complainant appeared in person  
Counsel for the Respondent - Mr C Raymond

**HEARD:** 25 - 27 March 1991

**REASON FOR JUDGEMENT**

(Delivered: 29 May 1991)

The Complainant, Paula Hyde, claims that she was subjected to discrimination by her employer on the ground of pregnancy contrary to Section 10 of the Equal Opportunity Act 1984 (the Act). The matter was referred to the Tribunal pursuant to Section 90(2) of the Act.

The Complainant was born in England on 2 July 1954 and was educated at Gumley House Grammar School in Middlesex. She proceeded to "A Levels" and held various jobs including a three year period as a Sales Representative with KP Foods at Twickenham. In 1986 she migrated to Australia and on 31 January 1987, in response to an advertisement in The West Australian, applied for the position of Sales Representative with Best Foods, commonly known as "Uncle Tobys", a trading company now owned by the Respondent Fledspac Pty Ltd. She submitted a written employment application dated 11 February 1987 in which it was disclosed that she was a married women, aged 32 years and being a person in good health. Her height was said to be 5ft 2" and her weight 9 stone 6lbs.

The manager of the Respondent company at that time was Mr Alistair Young. At the interview she ascertained that the head office of the company was in Melbourne. It had branches in all states. During the course of the interview Mr Young told her "*That the company was progressing and I would be expected to progress with the company*". She was interviewed on a second occasion at the Merlin Hotel, this time by Mr Alistair Young and by the National Sales Manager of the company, Mr Neil Couper. She said in evidence that at the second interview she was asked by Mr Couper if she intended to have any children and she answered in the negative. She told him that she saw herself "*as a*

*career woman*".

An interview record was submitted in evidence, this being dated the 11 February 1987. According to the interview record the Complainant was *"well dressed - small, chunky."* Her speech was said to be *"clear and very articulate"*. It was noted that she was relaxed and confident and in regard to country travel was *"prepared to accept - has no children"*. There was some controversy at the hearing of the complaint as to whether the question of children was discussed at the interview. The Tribunal considers that the matter was raised in the manner indicated on the interview record. The Tribunal finds that the Complainant at that time did not intend to start a family and that the question of maternity leave was not a matter touched upon either at this interview or at any stage in her dealings with the senior management of the company.

By letter dated 9 March 1987, the Respondent agreed to employ the Complainant as a Sales Representative responsible to the State Sales Manager for Western Australia and with the situation of the employment being described as *"South Metropolitan and South-West of Western Australia"*. The employment commenced on 16 March 1987 at the rate of \$21,000 per annum payable monthly. The operative award was the *"Commercial Travellers and Sales Representatives Award"*. Although that award makes provision for holidays and annual leave and other such entitlements, it does not specifically make provision for maternity leave. In that regard, however, the Tribunal heard evidence from the Respondent's Senior Personnel Officer, Elizabeth Sardone, who joined the company in mid 1987. She said that although maternity leave was not prescribed by the operative award the company considered itself to be an equal opportunity employer as at 1987.

The company was prepared to grant maternity leave if a request was made in circumstances justifying a grant of leave. She tendered a schedule setting out maternity leave granted to employees of the company from which it appears that maternity leave had been granted to employees as early as 1985 and is still being granted. The Tribunal notes, however, that there is no instance on that schedule of maternity leave being granted to a Sales Representative. The Tribunal also notes that on any view of the evidence the Complainant was not told that the company was prepared to grant maternity leave. Had she been advised of her employer's position in that regard, either at the commencement of her employment or at a later stage, then the dispute the subject of these proceedings might well have been averted. This notification should be as routine as advice in any induction booklet about sick leave and holiday leave.

The products being marketed by Uncle Tobys included small goods such as muesli bars, cereals, oats, cornflour and rice. As the recently appointed Sales Representative for the South Metropolitan and South-West area, the Complainant was responsible for promoting the company's products and for gaining extra shelf space and extra sales through the major grocery outlets in the south of Western Australia. She had to call on the major stores to make sure that they were fully stocked, to check that the company's products were on the shelf and to see store managers with a view to acquainting them with new products. She was allowed the use of a company car and was equipped with brochures and other marketing materials. She worked in association with a "merchandiser", whose job was to ensure that the products were presented properly.

At that time, in 1987, the West Australian branch of the company was a comparatively

small operation. The State Manager, Alistair Young, had a secretary. There were two Sales Representatives, being, the Complainant, who was responsible for the southern area, and Bernie Genner, who was responsible for the northern area. Each of the representatives was supported by a merchandiser and each representative was equipped with a company car. As from December 1987 the merchandiser for the southern area supporting the Complainant's work as Sales Representative was Cheryl Oxwell.

The Complainant said that she had a good working relationship with Mr Young, but in mid 1987 he resigned and was replaced by Mr John Clark as State Manager. The Complainant soon established a good working relationship with Clark also, and she said in evidence that *"When we went out to stores I actually worked a bit better because he was easy to get along with"*. The relationship between the new State Manager and his two Sales Representatives was cemented on the occasion of the sales team going to a sales conference in Queensland and all the indications are that at this stage the Complainant was not only working well but also was perceived to be working well. In October 1987 she won a major prize for the most creative display of a new product. Further, the company had a system of periodic appraisal of employees and documentation relating to these appraisals reflects favourably upon the Complainant.

A Representative's Appraisal Form dated 9 September 1987 assessed the Complainant's performance by a detailed breakdown of her capability in a variety of areas such as preparation, planning and organisation, sales presentation, the ability to close a sale and various other matters. She scored well in nearly all areas and this was obviously the view of the National Sales Manager, Neil Couper, who acted as reviewer. He endorsed upon

the form in question *"Keep at it Paula - this is an excellent appraisal"*. It is material to note, however, that the comments of the State Manager, John Clark are slightly less enthusiastic. His notation was:

- " 1. Paula needs to plan more and prioritise her calls, set specific objectives for each call and think more about the reasoning behind her objectives.*
  - 2. Paula needs to gain more knowledge of store layouts and why stores are laid out certain ways.*
  - 3. Competitive activity reporting needs to be improved.*
  - 4. Paula needs to improve her attitude to keeping to appointment times.*
- Good potential for account management if she applies herself to the job. "*

As part of the appraisal system the State Manager would accompany the Sales Representative during the course of a day's work. An appraisal form would then be prepared and discussed with the Sales Representative as a means of defining future goals. The appraisal form of 9 September 1987 prepared by John Clark was generally favourable, complimenting the Complainant particularly on her powers of self-expression and standard of overall merchandising, and describing her *"Administration - Compumark, Selling Book"* as *"excellent"*. Comments set out on that form in Mr Clark's handwriting included the following:

- " 1. Excellent reports from managers - all comment how efficient she is.*
- 2. Can do better with more confidence in using selling folder. "*

The objectives agreed with the sales person for next visit are expressed in this way:

- " 1. Plan more than just a week ahead for your territory.*
- 2. Set specific objectives for each call - think more about the reasoning*

*behind your objectives.*

3. *Learn more about store layouts and where Best Food products are located.*
4. *Be more aware of times and keep to appointed times."*

The Tribunal pauses briefly to deal with the subject of administration and "paperwork", being one of the categories for assessment mentioned in the appraisal form. It seems that each Sales Representative was equipped with documentation which would permit an accurate assessment of the position in each of the retail premises visited by the Sales Representative. Having regard to the fact that a Sales Representative would visit a number of premises during the course of the day the company policy was that documentation should be completed on the premises. The Complainant said in her evidence that this was not always possible, and the other Sales Representative Bernie Genner, corroborated her evidence in that regard. The paperwork sometimes had to be attended to subsequently.

The paperwork consisted of a Customer History Card, a Competitive Activity Report and a detailed "Uncle Tobys Call Report", the latter being laid out in a form which could be programmed into a computer, that is to say, pigeon holes and circles on the printed form were designed so that the Sales Representative could convey relevant information with a tick or a cross or some other brief notation. This was the document referred to on the appraisal form just mentioned as the "compumark" form, and it seems that as from about October 1987 the practice was for each Sales Representative to submit the compumark form to the State Manager at the Friday afternoon session held in the State Manager's office to review the week's work and to plan for the coming week. Compumark forms

were sent across to the head office of the company.

Paperwork also included the preparation of a "journey plan" which was to be handed in by each Sales Representative at the Friday afternoon planning session detailing the premises to be visited or "calls" to be made during the coming week. Mr Clark said in evidence that a printed form existed for this purpose, but a sample copy of such a form was not submitted to the Tribunal. Other evidence, which the Tribunal will come to in a moment, suggested that submission of a printed form was not rigorously enforced and it was sufficient for the Sales Representative to submit in writing an account of how the next week was to be spent with particulars of times and places being set out on the relevant document. The journey plan was used as a point of reference should it be necessary to contact the Sales Representative at any time during the week. In addition, a Sales Representative was expected to phone in every day so as to keep the State Manager informed as to his or her whereabouts and as to how matters were progressing. The evidence also showed that the Sales Representative and the Merchandiser for his or her area, would keep in touch by telephone with a view to making sure that in visiting premises they were not duplicating each other's work.

Towards the end of 1987 the National Sales Manager, Neil Couper, came across to Perth for a visit. The State Manager, John Clark, organised a barbecue at his home so that people employed by or associated with the company could get to know the visitor. The Complainant said in evidence that during the course of the afternoon Couper asked her if she intended having any children to which she replied that she had no such intention. She had been married ten years at that time and did not have any children. She said that



Bernie Genner and his wife were at the social function but, even though her fellow representative was a married man, and like her did not have children, no such question was put to him. The Tribunal notes that the atmosphere of this gathering appears to have been entirely casual. It was a social function at which all sorts of matters would have been discussed in an informal way and that is how Mr Clark and Mr Genner characterised the occasion in their evidence.

The Complainant's good standing with the company continued as evidenced by the Work Appraisal Form of 13 January 1988. Once again this form was completed by John Clark after a day observing the Complainant at work. Her powers of self expression and standard of overall merchandising were said to be excellent as was her initiative in obtaining additional displays. Her car and working equipment were described as "*Good*". A note of caution was sounded, however, in respect of competitive activity reporting and "*Administration - Compumark, Selling Book*" had entered opposite it: "*Paperwork still needs to be submitted regularly on time*". The objectives agreed with the sales person were described as follows:

- " 1. *Set objectives based on previous knowledge of stores i.e. suggested type of display and quantity.*
2. *Need to follow up and finish off specific tasks continually and report back on them.*"

The portion of the form which allows for the sales person's own comments was not completed and the Tribunal understood from the evidence that the objectives referred to as being "*agreed with the sales person*" were not specifically agreed between Mr Clark

and the Complainant, but a copy of the form was made available to the Complainant.

Shortly before the completion of the appraisal form just mentioned an event had taken place which was to have an important bearing on the Complainant's future with the company. On 6 January 1988 she was confirmed pregnant by her doctor, Dr Hilary Snell. The following entries appear in her personal diary, namely, on Wednesday 6 January 1988 "*positive*", on Thursday 7 January 1988 "*King Edward. Midwife - Cecilia. Try to keep weight gain to 10kg throughout whole pregnancy.*" As to the latter entry the Complainant said that on the day in question she went to a clinic at King Edward Hospital and received the advice in question concerning her weight. There is also an entry on Monday 18 January 1988 "*King Edward's 6 pm*". King Edward Memorial Hospital is generally known as a maternity hospital although this fact may not be known to a person coming to Perth from another State.

While speaking of these entries the Tribunal pauses to note that the Complainant said in evidence that her normal weight prior to the pregnancy was about 60 kilograms and this appears to be corroborated by her application for employment of the 11th February 1987 referred to earlier. An obstetrics record maintained by her doctor was put in evidence and entries concerning her weight in kilograms are as follows:

" 8 February 1988	-	66
2 March 1988	-	66
21 March 1988	-	66.25
26 April 1988	-	69
24 May 1988	-	70
4 July 1988	-	76.5
20 July 1988	-	78
2 August 1988	-	78
8 August 1988	-	78.5

18 August 1988 - 81  
29 August 1988 - 82.5 "

The Complainant said in evidence that she consciously did not tell John Clark, the State Manager of the company, that she was pregnant. She had formed the view, bearing in mind the references to children in her interview and at the barbecue towards the end of 1987, that it would be unwise to reveal the fact of her pregnancy. The Tribunal accepts that at this time she was not aware that the company's policy made any allowance for maternity leave and that this serves to explain why she decided not to inform the State Manager about this matter. The Complainant conceded during the course of her evidence that she did not tell any of her colleagues at work that she was pregnant and had no discussion touching on pregnancy or maternity leave with either Bernie Genner or Cheryl Oxwell. Her evidence was that there were no medical problems associated with the pregnancy and that she was working well.

Towards the end of January 1988 there was a sales meeting attended by a product manager from the company named Tanya McNeil. The Complainant said in evidence that during the meeting John Clark sent her into his office to get some documents, and in doing so told her in a joking way not to go through his paperwork, indicating at the same time that if he was in her position he would go through it. Her evidence was:

*" I had that (conversation) and I think it was the Thursday I was out with her and on the Friday we had the sales meeting. Prior to the sales meeting that morning I had left my diary on John's desk ... I could not say to you, yes, I saw him (John Clark) with the diary, because I would be lying if I did but from that date on ... my whole working relationship with him changed. ...Everything just changed. It seemed to be argumentative. Everything we did, every point I made, it was always disputed."*

Put shortly, the Complainant's case was that although she did not herself expressly tell John Clark that she was pregnant, in January 1988 he learned of that fact by examining her diary when she inadvertently left it in his office. Her case was that although she did not personally see him examine the diary this could be inferred from the fact that the diary was available to him in circumstances where he was likely to examine it and the likelihood that he did examine it is corroborated by subsequent events. It is therefore necessary to look carefully at the events preceding the Complainant's dismissal.

The evidence of the Complainant was that notwithstanding the change in attitude towards her displayed by John Clark as from late January onwards she continued to work well. It is material to note that Clark completed an appraisal form on 10 March 1988. The appraisal form is generally favourable. The form reads as follows:

*" Effectiveness of presentation - selling folder not used - could use to show market shares/rankings etc.*

*Closing the sale - need to clarify and reiterate to managers exactly on their agreement - otherwise good.*

*Overcoming and identifying objection - still need to identify the true objection and not the manager's perception of his problems.*

*Powers of self expression/use of sales aid - self expression excellent - need to convince manager - that you are the expert and there to help him sell stock.*

*Territory management/sales coverage - need to set objectives prior to each sale and for next call - pass on to sales port and stay with call coverage plan.*

*Standard of overall merchandising - rotation - even though it is the stores job make it your job to make sure it is done.*

*Initiative in obtaining additional displays - excellent - still needs to get her selling story fluent on why you want something.*

*Administration/Compumark Selling Book - great improvement on administration, Compumark good.*

*Competitive Activity Reporting - good.*

*Car and working equipment - car could be tidier/cleaner, tools and equipment good."*

The objectives agreed with sales person for next visit were said to be:

- " 1. Set objectives, each store, for both yourself and sales support prior to calls. Know why you are going into a call.*
- 2. Need to follow up and finish up specific tasks.*
- 3. Practice selling story and presentation.*
- 4. Take full and complete control of Farmer Jacks business and understanding of how they work."*

John Clark in his evidence accepted that as from about February 1988 there was a change for the worse in the relationship between the Complainant and himself. He strongly denied that this had anything to do with having examined the Complainant's diary and strongly denied that he knew of her pregnancy at any stage prior to her dismissal. He said also in evidence that he did not observe any change in her physical appearance and was not conscious that she had put on weight.

The Complainant said that on a number of occasions John Clark put her down and that generally the working relationship deteriorated until a stage was reached at which nearly every point she raised was disputed. Towards the end of March 1988 the company was to launch a new line of products and for that purpose a sales meeting was held at the Superdrome in Perth commencing early in the morning. Evidence was given by both Cheryl Oxwell and Bernie Genner concerning this meeting and the evidence they gave suggested that in their view the Complainant had been more assertive than was necessary

and that John Clark was patient in dealing with her. The Complainant disputed this evidence. It became clear during the cross-examination of Mr Genner that at many meetings the Complainant had to ask questions of the State Manager on behalf of both Sales Representatives because owing to some trouble at a previous job Mr Genner "had learnt to keep his mouth shut". In effect he left it to the Complainant to do the talking, to be the conscientious one, the stickler for detail.

The Complainant said that her pregnancy did not interfere with her ability to perform her job. On one occasion she sought permission to take time off for an appointment at the hospital. She said in evidence that she referred specifically to the hospital when talking to John Clark but agreed that no specific mention was made of the purpose of the visit. Towards the end of March she was off work for four days with a bout of flu. Bernie Genner was also off work at this time. On her evidence, when they returned, John Clark became abusive about the Complainant not supplying sick notes from a doctor. When the Complainant assured him she had already done so he dropped the subject although, according to her, Bernie Genner was not challenged in that way even though he did not have a sick note. She also referred to an occasion when she was unfairly reprimanded as to the state of her dress, and to an occasion in the car park when John Clark drove past her in a dangerous manner.

Matters came to a head in mid April. The Complainant was to make a country trip and, in accordance with the prevailing practice, she submitted a journey plan which contemplated visits to various stores at country towns to the south of Perth. She commenced the journey on Monday 19 April and returned to Perth two days later on

Wednesday 21 April. On the Thursday morning she attended to some outstanding paperwork and then commenced her scheduled round of visits to stores and supermarkets in the metropolitan area. John Clark said in evidence that he had become increasingly dissatisfied with her overall performance and no longer trusted her to give a proper account of what she was doing. He made some telephone calls to premises she was supposed to visit during the course of the country trip and made further telephone calls on the Thursday to premises in the metropolitan area that she was due to visit. He wanted to find out whether she was fulfilling her commitments. Not satisfied by the information he received, on Friday 23 April 1988 he went to premises in South Perth and waited for her to arrive. When she arrived at 9.20 a.m. he accosted her. There was a difference between the parties in evidence as to what was said at this meeting and as to whether the Complainant gave an adequate explanation of her late arrival. It is common ground, however, that shortly after the encounter John Clark told the Complainant to return to the company's premises and a further discussion then took place at those premises which led to the Complainant's dismissal.

According to the Complainant she went into his office whereupon he said he would have to let her go. When she asked what it was all about, he said that she had too much time off sick. She then said *"I have a medical condition that I can prove. I have not had time off sick."* He said *"Its got nothing to do with that, you have an attitude problem"*. He went on to say that he had spoken to Neil Couper. He had authority to dismiss her and he was letting her go. He invited her to resign, in which event she would obtain a reference, but when she refused to do so he told her that she was dismissed. He told her to take the company car straight home. Bernie Genner arrived at her home shortly

afterwards to collect the car and her files.

John Clark gave a different version of this meeting. He said the discussion probably took 15 to 20 minutes. He said he referred to various causes of dissatisfaction and then dismissed her. In a letter dated 13 July 1989, being a letter written after the complaint giving rise to these proceedings had been lodged, the Respondent said that the Complainant was dismissed for the following reasons:

" 1. *Failure to complete assigned tasks*

- (a) Set up of merchandiser's folders. This had still not been completed after three months;*
- (b) Review of promotions with R. Burgess - Farmer Jacks;*
- (c) Setting up appointment with D. Farrow - Farmer Jacks;*
- (d) Journey plans not completed each week;*
- (e) Car stock control forms not completed each week;*
- (f) Failure to keep in contact and control of her assigned merchandises;*
- (g) Excessive amounts of sick days;*
- (h) Failure to follow up, complete and report back on results;*
- (i) Completion of Compumark Store reports in store."*

Although he was not the signatory to this letter, John Clark agreed that he had assisted in the preparation of the letter and he accepted responsibility for it. The letter went on to say that the reasons referred to above could be supported by appraisal forms and work reports. The letter also says that the Complainant was spoken to and told of the above problem areas on at least three occasions. John Clark in his evidence before the Tribunal



suggested that these matters were mentioned during the course of the interview in which her dismissal was effected, and the Respondent by its Points of Defence pleads that the Complainant "was dismissed on Friday 22 April 1988 due to her inadequate performance". It is also pleaded that the management had no knowledge of the Complainant's pregnancy at all relevant times. There is therefore an inconsistency between the two accounts of what occurred. It is important to note, however, that on any view of the final encounter the Complainant's pregnancy was not mentioned explicitly, and it is possible that during the course of a heated exchange the participants may not have been fully alert to the nuances of what was said. Any suggestion that oblique references to 'a medical condition' should be regarded as admissions concerning the Complainant's pregnancy must be approached with caution.

In dealing with inconsistencies between the evidence of the Complainant and John Clark, the Tribunal is obliged to say that generally it preferred the evidence of the Complainant. She impressed the Tribunal as an open, frank and straightforward witness with a grasp of detail and a specific recollection of various events. John Clark, on the other hand, was vague in regard to matters of detail and the letter of 13 July 1989 which he prepared, does not sit comfortably with the sequence of events detailed above. It emerges from the narrative that the matter principally weighing on his mind, according to his version of the events, was a growing distrust of the Complainant and a belief that she was not completing her calls in the required manner. However, in setting out the catalogue of her shortcomings in the letter just referred to, he did not place any emphasis upon what seems to have been the principal matter of concern to him, and the various appraisal forms, which present a favourable picture of the Complainant, do not suggest that the matters

touched on in the letter were real points of dissatisfaction. The Tribunal finds that the Complainant was generally performing her work to a satisfactory standard throughout March and April and completed the country trip and the calls the subject of her journey plan immediately preceding her dismissal on Friday 22 April in a satisfactory way. The evidence did not show that the Complainant had taken an 'excessive amount of sick days'. It follows that her dismissal was not due to any failure or inability to perform her duties, but was prompted by considerations other than those detailed in the letter of 13 July 1989. The Tribunal will return to this aspect of the matter in a moment.

The Complainant gave evidence that in the period following her dismissal she gradually became convinced that there must have been some hidden reason for her dismissal because her work had been of a suitable standard throughout. She reflected upon the fact that there had been a change in the relationship at about the time that John Clark may have examined her diary and concluded that her dismissal was prompted by knowledge of the fact that she was pregnant and a concern that she might cause difficulties for the company. She gave evidence as to the anguish and feeling of humiliation she suffered as a consequence of arriving at this conclusion. She also gave evidence that on or about 20 June 1988, John Clark came to her residence with a cheque for \$312.06 in respect of the termination of her employment at a time when she was visibly pregnant. This evidence was corroborated by a photograph of her on or about that date which suggests that by then she was noticeably pregnant. Photographs taken in August showed that she was unmistakably pregnant. In April of the following year, almost twelve months after her dismissal, a complaint was lodged with the Equal Opportunity Commission, but the enquiries undertaken by the Commissioner failed to effect any resolution of the dispute.

In her Points of Claim the Complainant pleads financial loss arising from the forced sale of her recently renovated home, loss of career prospects, and injury arising from the shame and humiliation of being dismissed.

In order to complete the narrative the Tribunal must turn briefly to evidence given by other witnesses. Both Bernie Genner and Cheryl Oxwell said that they were completely unaware that the Complainant was pregnant and only learned of this fact many months after her departure. Bernie Genner said that he was not conscious of any change in her physical appearance. Cheryl Oxwell said that the Complainant tended to wear loose fitting garments and she was not aware that the Complainant was pregnant and nor did she notice any weight gain suggesting the Complainant was pregnant. Cheryl Oxwell has two adopted children and said in evidence that she was familiar with the signs of pregnancy in women including principally a distended abdomen. Both of these witnesses confirmed that the subject was never raised with them. Witnesses called by the Complainant, namely, Lorna Brooke and the Complainant's stepson, both said in evidence that by Easter of 1988 the Complainant was visibly pregnant.

As to this issue - the evidentiary issue concerning the Complainant's appearance during the early stages of her pregnancy - the Tribunal prefers the evidence of Cheryl Oxwell and Bernie Genner and therefore finds that other employees at the workplace of the Complainant were not told and did not conclude that the Complainant was pregnant by reference to her physical appearance. The Tribunal notes that the Complainant's child was born on 15 September 1988, suggesting that she was only four and a half months pregnant at the time of her dismissal, from which it follows that the fact of her pregnancy

may not have been evident to untrained eyes. Further, the evidence concerning her weight gain is equivocal and does not permit the Tribunal to draw any inference that her employer must have been aware that she was pregnant by reason of her appearance.

The Complainant relies on provisions of the act dealing with discrimination on the ground of pregnancy.

Section 10 provides:

*(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 the pregnancy of the aggrieved person if -*

*(a) by reason of -*

*(i) the pregnancy of the aggrieved person;*

*(ii) a characteristic that appertains generally to persons who are pregnant; or*

*(iii) a characteristic that is generally imputed to persons who are pregnant,*

*the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who was not pregnant; and*

*(b) the less favourable treatment is not reasonable in the circumstances.*

*(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 the pregnancy of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition -*

*(a) with which a substantially higher proportion of persons who are not pregnant 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 11 provides:

- (1) *It is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status or pregnancy -*
  - (a) *in the arrangements made for the purpose of determining who should be offered employment;*
  - (b) *in determining who should be offered employment.*
  - (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 employee's sex, marital status or pregnancy -*
  - (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.*
- (3) *Nothing in subsection (1) (a) and (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's sex, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.*

Section 162 provides:

- (1) *Where, for the purposes of this Act, it is necessary to establish that a body corporate has done an act on a particular ground, it is sufficient to establish that a person who acted on behalf of the body corporate in the matter so acted on that ground.*
- (2) *Where a person attends a conference under Division or Part VII, or appears before the Tribunal on behalf of a body or persons, whether corporate or*

*unincorporate, any conduct by that person when so attending or appearing shall be deemed, for the purposes of this Act, to be conduct of the body.*

It is now generally accepted that in regard to a claim of this kind the burden of proof is upon the Complainant to establish her claim to the satisfaction of the Tribunal on the balance of probabilities. O'Callaghan v Loder (1984) EOC 92-204. In the absence of direct evidence the Complainant may use in support inferences drawn from the primary facts, although discrimination cannot be inferred when more probable and innocent explanations are available on the evidence. Fenwick v Beveridge Building Product Pty Ltd (1985) 62 ALR 275; Erbs v Overseas Corporation Pty Ltd (1986) EOC 92-181; Department of Health v Arumugam (1988) VR 319. Accordingly, the Complainant must satisfy the Tribunal in the circumstances of this case that her dismissal, and the consequential denial of benefits under her contract of employment, were by reason of her pregnancy.

The Tribunal is satisfied that the Complainant was not dealt with fairly and that she was dismissed for reasons other than the purported grounds of dismissal referred to the letter of 13 July 1989. The Complainant impressed the Tribunal as a good and competent worker and as an open and straightforward witness. However, the Tribunal must be satisfied that the Complainant was dismissed or discriminated against on the ground of her pregnancy and the difficulty is that there is a lack of evidence that the Respondent company, as represented by its State Manager, Mr John Clark, was aware of her pregnancy at the time the dismissal was effected. Generally, the facts and matters relied upon by the Complainant are equivocal. John Clark did not proceed in a direct manner, and did not give the Complainant any reasonable forewarning that she was under threat of

dismissal. It is conceivable that he knew the Complainant was pregnant, and decided to dismiss her in the belief that this would become a source of trouble and embarrassment at some later stage, but the weight of the evidence does not support such a conclusion. The Complainant agrees that she did not inform Clark explicitly that she was pregnant, and there is no clear evidence of any admission on his part that he was aware of her condition. Further, much of the evidence, including the demeanour of the principal protagonists at the hearing, suggests that the antipathy which Clark showed towards the Complainant was due to a clash of personalities. The Complainant spoke crisply and was obviously accustomed to going straight to the point in a 'no nonsense' way. She looked to the State Manager for guidance and expected him to provide answers and directions without prevarication. John Clark, on the other hand, as appears from his evidence, was inclined to gloss over hard points and difficulties in the manner of an experienced salesman, which by training he was. He spoke of 'counselling sessions' to create a 'team atmosphere' but could not pinpoint what was discussed. It is likely that the Complainant's queries at sales meetings, often on behalf of both Sales Representatives, seemed unduly assertive and were increasingly irksome to the newly appointed State Manager, and eventually caused him to cast a cold eye upon his articulate employee. At the hearing, when asked to summarise his reason for terminating her employment, he said: *"general lack of performance and my lack of trust in her ability to do the job for me"*. He conceded, however, that there was no document of any kind in which it was recorded prior to her dismissal that her performance was not of the expected standard.

The other employees, principally, Cheryl Oxwell and Bernie Genner noticed some deterioration in the Complainant's performance, but this was probably due to the fact that

she was not receiving sufficient encouragement from the State Manager. She may well have become disheartened by her supervisor's evasive habits. The evidence shows however, that she did not tell Clark she was pregnant, and the fact of her pregnancy was not conveyed to or deduced by her fellow employees. It is true that information revealing her pregnancy was recorded in her diary, but there is no direct evidence that John Clark inspected the diary. It seems unlikely, had he known that she was pregnant, that he would keep this information to himself. It also seems unlikely, if he intended to act on the information, that he would have completed an appraisal in the terms of the form dated 10 March 1988 as set out above. Accordingly, having regard to these difficulties, on the balance of probabilities, the Tribunal is not satisfied that the Respondent company, by its State Manager, knew of the Complainant's pregnancy prior to her dismissal, or that he dismissed her on that ground. The Tribunal finds that she was not dismissed for the reasons set out in the letter dated 13 July 1989, or for good cause, and that the termination of her employment was effected in an arbitrary manner. The State Manager's unreasonable conduct, including his failure to acquaint his employee's with the existence of the company's maternity leave policy, is largely responsible for the dispute between the parties. Nonetheless, it follows from earlier observations that the Complainant was not discriminated against on the ground of her pregnancy, and the Tribunal is therefore obliged to dismiss the complaint.