

JUDGEMENT

**EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA**

No. 2 of 1991

ELISABETH FRIEDAUER
Complainant

- against -

LAURALEE MARKETING PTY LTD
trading as
BED CENTRE & FURNITURE
Respondent

BEFORE: Mr N.P. Hasluck Q.C. (President)
Ms K. French (Deputy Member)
Mr K. Wyatt (Deputy Member)

Counsel for the Complainant - G. Innes
Counsel for the Respondents - A. Quahe

HEARD: 21 and 22 October 1991.

REASONS FOR DECISION

(Delivered: 18 December 1991)

JUDGEMENT

The Complainant, Elisabeth Friedauer, complains that she was discriminated against on the ground of her pregnancy, contrary to Section 11(2)(c) of the Equal Opportunity Act 1984 ("the Act"). The Respondent company denies liability.

As at January 1990 the Respondent company was the proprietor of a furniture business known as Bed Centre & Furniture at Rockingham. The Managing Director of the Respondent company was Ms Sandra Breeze. She devoted her working hours to administration of the Rockingham store and a number of other business premises in the metropolitan area of Perth. She attended at the Rockingham premises intermittently. Ms Deborah Sellers was also a director of the Respondent company. She devoted her time exclusively to the management of the Rockingham premises. She worked at the Rockingham store six days a week and at that time was being assisted by a salesman named David Tarbin. The months of December and January were a busy period for retail premises such as this and consequently Deborah Sellers and David Tarbin took their annual holidays in the months of October and November.

Sandra Breeze said in evidence that her colleague, Deborah Sellers, drew attention to the fact that she and David Tarbin were scheduled to take holidays in October and November. This would leave the business without sufficient staff. Deborah Sellers also wished to take off at least one day a week because at that stage she had no relief and a six day working week was too demanding. As a result of that discussion the two directors of the Respondent company decided to contact the Commonwealth Employment Service with a

view to recruiting a part-time local person to work two days a week. The part-time employee would be able to fill in if anyone associated with the business was off sick and could also be trained so as to be available on a full-time basis when the two permanent employees of the business took their annual holidays in October and November. Deborah Sellers gave evidence to the same effect and confirmed that as a consequence of that discussion she contacted the Commonwealth Employment Service, or CES.

Steven Anthony from the CES gave evidence and confirmed that in February 1990 he received instructions from the Respondent company to obtain a part-time employee. In response to that approach he contacted the Complainant and, in accordance with his usual practice, acquainted her with the terms and conditions of the proposed employment. He explained that the position was a part-time position selling furniture. It encompassed filling in if staff were off sick and holiday relief work. The vacancy was to be part-time until October but then, as the other staff had already booked their holidays, the position was to be full time in October and November. This was due to the fact that the retail trade normally picked up in December, moving into the Christmas period, and was often brisk in January owing to the influx of tourists into Rockingham. He tendered a copy of the CES Job Vacancy Form on which the position is described as follows:

*" Casual Sales Assistant in a furniture store selling beds and other furniture.
Two days per week and sick and holiday relief"*

In late February Deborah Sellers interviewed the Complainant at the store. The Complainant had migrated to Australia from Holland five years earlier. She was a married woman and had two children who were born in 1977 and 1980 respectively. She had worked as a Sales Assistant in Holland but had no direct experience in the furniture

business. At the time of the interview she was working at a boutique owned by Suzanne Grae on Thursdays and Fridays and was therefore in a position to take on additional part-time work. Deborah Sellers wanted her for Tuesdays and Wednesdays. It followed that she could fill the two part-time positions simultaneously.

The evidence showed that other matters bearing on the terms and conditions of employment were also discussed at the initial interview. The Complainant recalled Deborah Sellers stating that the Complainant would have to work in October, two weeks full-time, when David Tarbin went on holidays. She was told also that she would probably have to work full-time in November when Deborah Sellers went on holidays. She agreed that this *"wouldn't be any problem"*. The interview closed on the basis that the Complainant should come back a few days later to meet Sandra Breeze as the other person involved in the running of the business.

The Complainant agrees that she met Sandra Breeze at the store subsequently. They spoke briefly. The Complainant was inclined to doubt that she talked to Sandra Breeze about working full-time in October and November. She agreed that following upon this second interview she commenced work at the Rockingham premises and to begin with got on well with Deborah Sellers and with the other employee David Tarbin.

The Complainant's recollection of the two interviews preceding her employment differ slightly from the evidence given to the Tribunal on behalf of the Respondent company. Deborah Sellers said that she explained to the Complainant that they were looking for someone two days a week but that the person in question must be available in October

and November on a full-time basis, this being consistent with the instructions she had already given to the Commonwealth Employment Service, and to Steven Anthony in particular. She regarded the two days a week on a part-time basis as a training period which was important in regard to a person such as the Complainant who had no previous experience in the furniture and bedding industry. She told the Complainant that she was personally happy with the Complainant but wanted her to meet her partner, Sandra Breeze before arrangements were finalised.

Sandra Breeze said that when she met the Complainant her main concern was for her partner, Deborah Sellers, who needed one day off a week and also needed to have an annual holiday. She told the Complainant that both Deborah Sellers and David Tarbin would be on holiday in October and November and the company needed someone to stand in for them during that period. The Complainant said *"it's okay, not a problem, it'll be alright"*. As far as Sandra Breeze was concerned the Complainant commenced work on that basis.

David Tarbin gave evidence for the Respondent. He said that his desk at the furniture store was adjacent to the desk occupied by Deborah Sellers and that he was at his desk when Deborah Sellers first interviewed the Complainant. He overheard Deborah Sellers explain to the Complainant that the Respondent company wanted someone to work two days a week and then to work on a full-time basis during the holiday periods of October and November.

At the end of March 1990, the Complainant discovered she was pregnant. She informed

Deborah Sellers soon afterwards. The Tribunal received in evidence a medical certificate from Doctor Leopold Foong stating that the Complainant was confirmed as being pregnant on 29 March 1990, having first been seen for suspected pregnancy on 26 March 1990. The Certificate says that the Complainant's husband was "*sterilised*" years ago and she had no reason to worry about pregnancy. This was consistent with evidence given by the Complainant that she was surprised to discover that she was pregnant because her husband had had a vasectomy some years earlier. She mentioned the fact of her pregnancy to Deborah Sellers, explaining that it was something of a shock. She said further that, owing to the irregularity of her periods, she was not able to say precisely when the baby would be born, although it seemed likely that it would be in November.

The Complainant said in evidence that she was congratulated by Deborah Sellers. The Manager of the store seemed pleased about the pregnancy in view of the fact that she herself had been unable to have children. The Complainant recalls having raised the matter of the full-time work in October and November and recalls Deborah Sellers saying "*Well, you know, just wait and see how you go. You can work as long as you can*". She then went on to say that if the Complainant felt up to it she could come back to work when the baby was born.

Deborah Sellers agreed that she had been pleased to hear of the news given to her by the Complainant, but at a personal level only. It became apparent in regard to this issue that there were other differences between the parties. According to Deborah Sellers the Complainant seemed to be extremely surprised by the news of her pregnancy and did not seem entirely sure how she and her husband would cope with this unexpected

development. Thus, Deborah Sellers decided to adopt a "*wait and see*" attitude. She did not tell her partner, Sandra Breeze, what she had learnt at that stage so as not to create an issue. During April Sandra Breeze had to go to hospital for an operation and, during the same month, Deborah Sellers went to New Zealand to visit relatives. Thus, the two proprietors of the business did not turn their minds to the consequences of the information conveyed to Deborah Sellers by the Complainant until several weeks after the Complainant's pregnancy had been confirmed.

In the meantime, it seems, the work situation at the Rockingham store was no longer running smoothly. The Complainant said in evidence that on a number of occasions David Tarbin made derogatory remarks about her. Deborah Sellers took the view that the Complainant ought not to be involved in moving furniture because of her pregnancy even though the Complainant herself was willing to lend a hand in that regard. Both Deborah Sellers and Sandra Breeze said in evidence that they were not altogether satisfied with the work being carried out by the Complainant. This was nothing to do with her pregnancy. She was amiable and reasonably diligent as a worker but seemed to lack the kind of motivation and drive which is required of a good salesperson, and they were beginning to have some reservations about her.

On Sunday 13 May Deborah Sellers went to Sandra Breeze's home to talk about future directions. The store's figures were low in certain areas and this gave rise to a general discussion including a review of the Complainant's sales figures and overall performance. Deborah Sellers voiced her reservations concerning the Complainant's lack of drive and motivation, and went on to tell Sandra Breeze that the Complainant was pregnant. The

Store Manager told her partner also that the baby was due in November and consequently the Complainant would not be able to work in October and November. The directors of the company then decided to dismiss the Complainant. They agreed that Deborah Sellers should speak to the Complainant about the matter. Deborah Sellers said in evidence that the Complainant was dismissed *"because she could not work in October and November"*.

Deborah Sellers spoke to the Complainant the following day, that is to say, on Monday 14 May 1990. According to Deborah Sellers she telephoned the Complainant mid afternoon and said *"I'm going to have to let you go because you can't work the October/November that we require you for"*. To the best of her recollection, the Complainant said she understood and advised that the baby was due on 7 November. Deborah Sellers went on to say that they might look at the position again once the Complainant had the baby, but she denies having said that there would definitely be a job available.

The Complainant's recollection of the relevant phone call was as follows:

" ...you're not going to like what I'm going to tell you" she says "but I have to sack you, because since you're pregnant you can't do the job I've taken you on for" and she says "you can't work in October and November when we are going on holidays" so she says you know "I don't want you to come in".

The Complainant's case was that two distinct matters were being relied upon by Deborah Sellers as a basis for dismissal, first, that she couldn't do the job that she was employed for and, second, that she couldn't work in October and November. The Complainant contended that when these two matters were considered in combination an inference can

be drawn that the Complainant was being dismissed on the grounds of her pregnancy because of an alleged inability to carry out her duties at work referable to her condition. It was also argued on her behalf that the alleged inability to carry out her duties, if not the main reason, was at least a substantial reason for the dismissal.

The Tribunal will return to this telephone conversation later. However, in order to complete the narrative, the Tribunal notes that the Respondent paid the Complainant her entitlements including pay in lieu of notice. The Respondent company subsequently employed another part-time employee who went on to work on a full-time basis during the months of October and November while Debra Sellers and David Tarbin were away on holiday. That employee is still with the Respondent.

The Complainant formed the view that she would not be able to obtain any further employment because she was now visibly pregnant, she didn't take any steps to obtain alternative employment. Her baby was born on 16 November 1990. In January she went back to the Commonwealth Employment Service in search of work. She discovered that Steven Anthony had by then been transferred to Medina and, as he was the person she knew at the Commonwealth Employment Service, she was discouraged by his absence and did not return to the Service. She subsequently applied for a job at a cinema but did not get a reply. She was still unemployed as at the date of the hearing on 21 October 1991.

Against this background, the Tribunal now turns to the relevant provisions of the Act. Section 10 provides that a person discriminates against another person on the ground of

the pregnancy of the aggrieved person if, by reason of the pregnancy, 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 the less favourable treatment is not reasonable in the circumstances. By Section 11 it is unlawful for an employer to discriminate against a person on the ground of pregnancy by dismissing the employee or by subjecting the employee to any other detriment. Provisions concerning vicarious liability contained in Sections 160 and 162 of the Act permit liability to be attached to an employer where an employee or agent does an act that would otherwise be unlawful if done by a person.

It should be noted that by Section 5, the doing of an act by reason of a particular matter includes a reference to the doing of an 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.

A number of cases establish that the Complainant bears the onus of proof of establishing that he or she has been the victim of unlawful discrimination. The case must be proven on the balance of probabilities, but, 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 more innocent explanations are available on the evidence. See Fenwick v Beveridge Building Products Pty Ltd (1986) EOC 92-147; Department of Health v Arumugam (1988) VR 319.

In Bear v Norwood Private Nursing Home (1984) EOC 92-019, the complaint of a

nursing assistant was dismissed. During the course of its judgement the board said:

" The complainant in this case must prove on the balance of probabilities that she was dismissed because she was with child or because of the signs and symptoms of pregnancy. However, that is not to say that if the signs and symptoms of the pregnancy have the secondary effect of resulting in inability to perform work, the dismissal for inability to perform work which in turn may have been caused by the symptoms of the pregnancy, means that the dismissal has been on the basis of pregnancy. On the contrary, a dismissal for inability to do work which inability or incapacity was due to pregnancy is a dismissal for incapacity for work and not a dismissal for pregnancy. Unless, the dismissal is for the signs and symptoms of pregnancy regardless of their affect on the capacity to work, it could not be said that the dismissal was on the basis of pregnancy".

In the present case, the Respondent pleads that the Complainant was dismissed not because she was pregnant but because she was unable to fulfil her conditions of employment, in particular the requirement that the Complainant be available for full-time work throughout the period from late October until the end of November 1990. Her inability to work on that basis was said to be contrary to the conditions to the contract of employment between the parties.

Did the contract of employment include a condition that the Complainant would be available for full-time work in October and November of 1990? Steven Anthony confirmed that such an instruction was conveyed to him and that he explained the matter in that way to the Complainant. Both Deborah Sellers and Sandra Breeze said that the matter was dealt with expressly in the two interviews giving rise to the contract of employment and that the contract was not finalised until after the second interview. They said that the Complainant agreed to these conditions. Their evidence in that regard was corroborated by David Tarbin. The Complainant herself appeared to accept that mention was made of this matter although it was suggested on her behalf at the hearing that it was

not made a specific term of the contract. She pointed to the fact that at a later stage, when she gave news of her pregnancy to Deborah Sellers, no immediate reference was made to the special condition even though it must have been obvious that if the baby was to be born in November the condition could not be fulfilled. Balanced against this is the evidence of Deborah Sellers that, owing to the unusual circumstances of the pregnancy, she simply decided to adopt a "*wait and see*" attitude, and therefore did not comment or take any immediate steps to terminate the employment.

The Tribunal is satisfied that the requirement of full-time work in October and November was agreed to by the Complainant and became a term of the contract. The Tribunal accepts that Deborah Sellers did not immediately refer to this term when the news of the Complainant's pregnancy was conveyed to her but considers this was due to a sense of tact and consideration for the Complainant's position and not because the Respondent did not regard the requirement as operative or because the Respondent was minded to waive the condition. It was a condition which continued to apply to the contract of employment between the parties.

The Tribunal now turns to the circumstances of the dismissal. There is a difference between the parties as to what was said in the telephone conversation on 14 May effecting the dismissal but it appears to be common ground, on either view of the matter, that Deborah Sellers did refer to the Complainant's inability to work on a full-time basis during the months of October and November. It is also material to note that Susan Westlake, a former employee, had been permitted to work at a store managed by Sandra Breeze throughout her pregnancy (up until two weeks before the date of delivery) and that

the Complainant cannot identify any specific incidents involving either Sandra Breeze or Deborah Sellers which suggest an adverse attitude towards her pregnancy. Indeed, in many respects, it seems that Deborah Sellers was helpful and sympathetic in a number of small ways prior to the dismissal. The Complainant gave evidence of unsympathetic and derisory remarks made by David Tarbin but the Tribunal does not accept that any such conduct was condoned by the Respondent company, acting through the persona of Sandra Breeze and Deborah Sellers, and does not regard this conduct as being a matter from which any inferences can be drawn as to the basis on which the dismissal was effected.

It is also material to note that in her handwritten complaint to the Equal Opportunity Commission dated 24 May 1990, the Complainant described the crucial telephone conversation in these terms:

" Then on the 14th May 1990 one day before I was due for work Debbie rang me up at 4 pm and said the following:

Hi Else, you won't like what I'm going to say but I have to give you one week in lieu. I'm sorry but now you are pregnant you can't do the job I have taken you on for. You can't work in October and November when David and I are going on our holiday there. Your last working week will be the last week in September (6 weeks before the baby) is due and there are certain jobs you can't do since your pregnancy.

I was very surprised and shocked by all this, she never indicated any of all this. I could come in the next two days if I wanted. She'd left that up to me but I was so upset that even though I liked to work in the shop I could not face Debbie or David."

The evidence as a whole clearly indicates that from the outset the Respondent as the employer company wanted an employee who would be able to work on a full time basis

in October and November. This became a condition of the contract. After the dismissal of the Complainant another employee was obtained who was able to and did carry out that requirement.

It emerges from the evidence that the proprietors of the business were not altogether satisfied with the performance of their employee. The Tribunal considers, however, that the essential reason why the Respondent by its two directors finally resolved to dismiss the employee was because she was unable to comply with the conditions of the contract. As appears from Bear's case, referred to above, a dismissal for inability to do work or to comply with the conditions of contract should be characterised as a dismissal for incapacity for work and not as a dismissal for pregnancy even though the particular employee may be pregnant at the time of the dismissal, as was the Complainant in the present case. Accordingly, the Tribunal considers that the complaint in the present case has not been substantiated and the claim will be dismissed.

N.P. Hasluck
18. 12. 91.