JUDGEMENT

EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

No. 5 of 1991

COLIN RYAN
Complainant

- against -

SHIRE OF SHARK BAY
Respondent

BEFORE: Mr N.P. Hasluck Q.C. (President)

Counsel for the Complainant - H. Andrews
Counsel for the Respondents - T. Caspersz

HEARD: 10 October, 1991

REASONS FOR DECISION

(Delivered: 18 December, 1991)

JUDGEMENT

The pleadings in this case establish that the Complainant, Colin Ryan, who is a person of Aboriginal descent, was employed as a Leading Hand by the Respondent, the Shire of Shark Bay in 1988. He claims that the Respondent discriminated against him on the grounds of his race contrary to Section 37 of the Equal Opportunity Act 1984 ("the Act") by treating him less favourably in his employment than it would treat a person not of Aboriginal descent.

The Respondent denies liability and, in the course of doing so, pleads that the complaint is not within the jurisdiction of the Equal Opportunity Tribunal because the Complainant was employed pursuant to the terms of the Municipal Employees (W.A.) Award 1982 and that award, which is an award of the Industrial Relations Commission, covers the matter in question. The Respondent says that by virtue of Section 152 of the Industrial Relations Act 1988 (Commonwealth) the provisions of the award prevail over the Act. This plea raises an important jurisdictional issue and a further question has now arisen as to whether the Commissioner for Equal Opportunity in this State should be heard in regard to that matter.

The objects of the Act include the elimination, so far as is possible, of discrimination against persons on the ground of race. Section 80 defines the functions of the Commissioner of Equal Opportunity. The functions are various ranging from the carrying out of inquiries into various forms of discrimination to the provision of advice concerning policy issues. In the present case, the Complainant comes before the Tribunal

pursuant to a power vested in the Commissioner by Section 93 to refer certain complaints to the Tribunal together with a report relating to any enquiries made by the Commissioner into the complaint. The relevant report noted that the Confederation of W.A. Industry, which is acting on behalf of the Respondent, questioned the Commissioner's jurisdiction on the ground that the Act is inconsistent with a law of the Commonwealth and is therefore invalid to the extent of the inconsistency.

Part VIII of the Act provides for the establishment of an Equal Opportunity Tribunal. By Section 107(3) the Tribunal shall hold an inquiry into complaints referred to it by the Commissioner. It is apparent from the provisions which follow that, by and large, the Tribunal is to conduct that inquiry pursuant to the conventions of the adversarial system with a view to making a determination binding upon the parties as to whether the complaint should be dismissed or as to whether relief of the kind described in Section 127 of the Act should be allowed. By Section 105(3) the President of the Tribunal is to determine questions of law and procedure. By Section 134(1) "a party aggrieved by a decision or an order of the Tribunal may appeal to the Supreme Court on a question of law."

I pause to note that, by Section 93(2) of the Act, where the Commissioner refers a complaint to the Tribunal the Commissioner shall, if the Complainant requests the Commissioner to do so, either personally or by Counsel assist the Complainant in the presentation of the Complainant's case.

In the present case, in accordance with that provision and the usual practice, Counsel

instructed by the Commissioner has appeared on behalf of the Complainant at a preliminary hearing and filed Points of Claim as a consequence of directions given at that hearing. I understand that the same Counsel will represent the Complainant at the hearing of the jurisdictional issue, and at the hearing of the merits of the dispute, should the matter proceed to that point.

It is apparent that the jurisdictional issue, namely, whether the substantive and procedural provisions of the state Act are ineffective having regard to the presence of an award made pursuant to a Federal statute, should be dealt with as a preliminary issue and directions have previously been given in that regard. In the meantime, however, by letter dated 24 June 1991, the Commissioner has applied to be joined as a party to the inquiry or, alternatively, to be granted leave to appear as a party to the inquiry.

A further preliminary hearing was convened to deal with this application and, as required by the regulations, the application was supported by an Affidavit sworn by the Commissioner on 15 October 1991. The Affidavit refers to the objects of the Act and to the functions of the Commissioner and says that in Western Australia, approximately 20% of the workforce are employed under the terms and conditions of a Federal award. The Commissioner believes that she has a direct interest in the question of whether the Act is in conflict with the Commonwealth Industrial Relations Act 1988 since the decision may affect her ability to carry out her statutory duties in this State efficiently.

The Commissioner says further that she seeks leave "to be joined as a party to the proceeding and to be heard on the threshold question of whether the Commissioner and

the Equal Opportunity Tribunal have jurisdiction in this complaint. I do not wish to be heard on the merits of the complaint should the Tribunal rule that there is no jurisdiction."

The question of whether the Commissioner should be joined on the basis proposed may properly be characterised as a question of law or procedure to be determined by the President pursuant to Section 105(3). Accordingly, the basis of the determination is set out in these reasons.

Section 109 of the Act provides that where the Tribunal is of the opinion that a person ought to be joined as a party to the inquiry the Tribunal, by notice in writing given to that person, may join that person as a party to the inquiry.

By Section 110 the Tribunal shall give a party to an inquiry, other than a person to whom the Tribunal grants leave to appear as a party to the inquiry, notice of the time and place at which it intends to hold the inquiry. It should give each party reasonable opportunity to call or give evidence, examine or cross-examine witnesses and to make submissions to the Tribunal.

Section 111 provides that the parties to an inquiry shall be the Complainant, the Respondent, any person joined by the Tribunal as a party to the inquiry and any person to whom the Tribunal grants leave to appear as a party to the inquiry.

These provisions indicate that a distinction is to be drawn between a party joined as a

party to the inquiry and any person to whom the Tribunal grants leave to appear as a party to the inquiry. The reason for creating such a distinction is not immediately obvious from the surrounding provisions, nor is it apparent what consideration should be brought to bear upon the exercise of the discretion to join a person as a party to the inquiry or to grant leave to appear. As has already been noted, however, it is clear from these and related provisions, that the Tribunal is generally required to observe the conventions of the adversarial system.

Do the characteristics of that system provide any guidance as to how an application for joinder or for grant of leave should be dealt with?

All developed legal systems have had to face the problem of adjudicating conflicts between two aspects of the public interest - the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interloper to invoke the jurisdiction of the Courts in matters that do not concern him. The common law dealt harshly with those who maintain others to institute legal proceedings in which they themselves have no direct interest. See De Smith: Judicial Review of Administrative Action (Third Ed) p362.

Rules of Court concerning civil litigation generally contemplate that the parties to the action will be those against whom a claim for relief is sought. A claim for relief includes, of course, a claim for declaratory relief as to whether or not a statutory right has been infringed. The Court may of its own motion, or on application, order that any

person who ought to have been joined or whose presence before the Court is necessary to ensure that all matters in dispute in the course or matter is completely determined, be added as a party. See Odgers: Pleading and Practice (Twenty Third Ed) p220; W.A. Supreme Court Rules - Order 18, Rule 6.

Cromwell: Locus Standi at page 10 puts the matter in this way:

> *"The adversary system requires party presentation and party prosecution in a forum presided over by an impartial arbiter. Self interest is seen as the motivating force that will ensure that the parties present their respective positions in the best possible light. The Courts exist to resolve disputes that are presented in this way. If the motivation of self interest is absent, that is, if the dispute is not with respect to contested rights and obligations of the parties themselves, then this important circumstantial guarantee of diligent preparation and argument is lost."*

Implicit in this view is the notion that access to the Courts must be restricted to those who have a personal interest in the litigation. In Baker v Carr (1962) 369US136 the Supreme Court of the United States considered that the gist of the question of standing is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional cases.

Decisions of the High Court in Australia show that this approach is not limited to constitutional cases. In Australian Conservation Foundation Inc. v the Commonwealth of Australia (1979) 54ALJR176 the High Court held that the Foundation had no standing to maintain proceedings challenging the validity of governmental decisions to approve a tourist resort in Queensland which might adversely affect the surrounding environment.

In the absence of special damage or adverse detriment to the Complainant itself, a private body had no standing to bring an action to prevent what was alleged to be a breach of public law as a matter of principle.

In the course of a lengthy judgement Gibbs J said that in the absence of clear words it was impossible to impute to parliament an intent to confer on any private citizen the right to espouse the observance of the proper procedures of administration in the conduct of government activity. A person might have a special interest in the preservation of a particular environment. However, an interest for present purposes does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule unless he is likely to gain some advantage other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if the action succeeds, or to suffer some disadvantage other than a sense of grievance or a debt for costs if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented does not suffice to give its possessor locus standi. The assertion of public rights, and the prevention of public wrongs by means of legal remedies is the responsibility of the Attorney General who may proceed ex officio or on the relation of a private individual with sufficient standing.

Later decisions have reflected a similar approach.

Thus, in Onus v ALCOA of Australia Limited (1981) 55ALJR631 the High Court held that members of an Aboriginal group that had occupied the Portland area in Victoria since prehistoric times, had standing to seek an injunction restraining ALCOA from carrying

out certain works in the area.

Murphy J said that it is sufficient for standing that a plaintiff have an interest exceeding that of members of the public generally in preventing breach of a public right or in securing the performance of a public duty. The interest need not be peculiar to the plaintiff. It is enough that the plaintiff's interest, even if many others also have it, is not the same as members of the public generally. Wilson J and Brennan J considered that the interest of the plaintiffs, described as it was as a cultural and historic interest, was more than the kind of emotional or intellectual interest to which Gibbs J referred to in the Conservation Foundation case.

In the case of In re Bromfield: Ex Part a West Australian Newspapers Limited (1991) Unreported Supreme Court Library 8930 a majority of the full Court in this State ruled that the newspaper in question had standing to be heard before a Magistrate in relation to the suppression of publication of certain Court proceedings. As part of its business the newspaper employed a Court reporting team and it was permitted by law to provide a fair report of what happened in the Courts. Such reports were consistent with and of advantage to the administration of justice. Thus, the nature of the newspaper's business gave it a special interest in the matter and it was a person aggrieved by the Magistrates order.

The notion that the parties to proceedings should be only those who are likely to be adversely affected or have a special interest in the outcome is reflected in various statutory provisions.

For example, Section 27(1) of the Administrative Appeals Tribunal Act 1975 (Commonwealth) provides that an application to the Tribunal may be made by any person (including the Commonwealth or an authority of the Commonwealth) whose interests are affected by the decision. Section 30(1) provides that the parties to a proceeding are any person who, being entitled to do so, has applied for review or any other person whose interests are affected by the decision.

The decided cases concerning these provisions suggest that the approach indicated in the Australian Conservation case will be followed. The phrase "interests are affected" denotes interests which a person has other than as a member of the general public and other than as a person merely holding a belief that a particular type of conduct should be prevented or a particular law observed. See Control Investments Pty Ltd v Australian Broadcasting Tribunal (1980) 50FLR1. The interest affected need not be a legal interest nor does the person seeking joinder need to establish legal ownership of the interest. See McHatton v Collector of Customs (NSW) (1977) 18ALR154.

Although government agencies are often parties to legal proceedings as the entity responsible for a disputed decision or against whom relief is sought, the decided cases reveal very few instances where an agency, or a person such as the Commissioner, having administrative responsibilities, has been joined as a party to legal proceedings on the grounds that a special interest exists and there is a need for joinder.

In Ealing Corporation v Jones (1959) 1QB384 an enforcement notice served by the local planning authority was quashed and the authority sought to appeal pursuant to provisions

which allowed a right of appeal to "any person aggrieved". The Court of Appeal held that assuming the words "any person" were capable of including a local planning authority, the authority in question was not a person aggrieved as no financial or legal burden had been placed upon it as a result of the decision. If parliament had intended the local planning authority to have a right of appeal it would have said so clearly and used words which placed the matter beyond all doubt.

In the course of his judgement, Lord Parker CJ said at page 390:

> *"A person aggrieved is not a person who is disappointed or annoyed at the decision. It is also clear that a person is not aggrieved when that person being a public body has been frustrated in the performance of one of its public duties...Accordingly, I am satisfied that a mere annoyance that what was thought to be a breach of planning control turned out not to be a breach of planning control, and, equally, the mere fact that the authority, charged with certain duties under the Act, is being frustrated in the performance of what it thought was its public duty, are not of themselves sufficient to make the local planning authority an aggrieved person."*

That case is important for present purposes because, having regard to Section 134(1) of the Act which allows a right of appeal to "a party aggrieved by a decision or an order of the Tribunal", the Ealing Corporation case would suggest that even if the Commissioner was joined as a party or granted leave to appear as a party, she would not have a right of appeal against a ruling on the jurisdictional issue which she viewed unfavourably, because, absent any legal or financial burden placed upon the Commissioner as a result of the ruling, she would not be a person aggrieved, notwithstanding that she was frustrated in the performance of what she thought was her public duty, namely, the promotion of the objects enunciated in the Act in regard to all employees in the State, irrespective of

whether some employees are employed pursuant to Federal awards.

The effect of such a ruling, according to this line of reasoning, especially if the ruling was sustained on appeal by the Supreme Court, would simply be to establish, as a matter of statutory interpretation, that the Commissioner's jurisdiction was less extensive than it had previously been thought to be, and there was therefore no real cause of grievance, but rather, a more definitive understanding of the law on that particular subject. If, as a matter of interpretation, the statutory provisions suggest that the prospective party may not have the same right of appeal as is accorded to the other parties, then this raises a doubt as to whether the statutory provisions in question allow for joinder of such a party at all.

The Tribunal notes, however, that although the Ealing Corporation case was approved in R of the Dorset Quarter Sessions (1960) 2QB230, a slightly different view was taken by the Judicial Committee of the Privy Council in Attorney General of Gambia v N'Jie (1961) AC61. In that case a question arose as to whether a Deputy Judge had power to strike a Legal Practitioner off the roll. It was held that the Attorney General, representing the Crown as the guardian of the public interest, was a "person aggrieved" and accordingly had a locus standi to petition for special leave to appeal.

Against this background the conclusion appears to be inescapable that the Tribunal should rule against the Commissioner being joined as a party pursuant to Section 109 of the Act. Previously decided cases indicate that discrimination cases in which a claim for damages is advanced should be characterised as a species of tort. See Allders the International Pty

Ltd v Austec (1986) EOC 92-157. Also see Allegretta v Prime Holdings Pty Ltd (1991) EOC 92-364. In the present case no relief is sought against the Commissioner and she herself does not seek any orders specifically affecting another party. She does not appear to be a person whose presence is necessary for the resolution of the dispute. Although the statutory provisions are silent as to the basis upon which an application for joinder should be allowed the provisions are not sufficiently explicit to override the inference which would otherwise arise from the provisions that, pursuant to common law principles, only a party with a special interest should participate in the proceedings.

Further, as foreshadowed above, the language of the appeal provision weighs against any broader interpretation of the power conferred by Section 109 to allow a joinder. Also, the general structure of the Act presumes that if the Commissioner becomes obliged to refer a dispute to the Tribunal pursuant to Section 93, and arranges for the Complainant to be represented, then, thereafter the Commissioner will cease to play an active role in the inquiry. The hearing will be conducted under the control of the Tribunal as a body with a distinct statutory function.

The Commissioner argues that she only seeks to be joined for the purpose of arguing the jurisdictional question and it might therefore be said that the question of whether relief is sought by or against her thereupon become irrelevant. She is only concerned with an issue of public law, namely, the application of the Act to employees the subject of a Federal award.

Even if it is possible to limit her role as a party to the resolution of that issue, however,

the authorities discussed above including principally the Australian Conservation case and the Ealing Corporation case suggest that a party seeking to obtain relief or espouse a view in respect of a public law issue must nonetheless have a special interest in the outcome of the proceedings in order to have standing and that interest must be more than a wish to see the law upheld or applied in a particular way as a matter of principle. Hence, an argument of the kind just mentioned is not sufficient to permit the Commissioner to be joined as a party pursuant to Section 109 of the Act.

Can the Commissioner obtain standing as a party pursuant to the discrete power contained in Section 111 whereby the parties to an inquiry can include "any person to whom the Tribunal grants leave to appear as a party to the inquiry"?

At first sight this provision does not appear to be sufficiently explicit to override the conclusion reached above that parties to an inquiry, of any kind, should have a special interest. It is important to note, however, that the notion of intervention in legal proceedings is not unknown to the law. It appears to be accepted that the Attorney General in his capacity as the guardian of the public interest has standing to seek a ruling on a matter of public law. See Attorney General of Gambia v N'Jie (supra). Further, statutes may sometimes modify the common law position and provide for intervention or for some particular party to be afforded the opportunity to espouse broader public law concerns. The most obvious example is Section 78(A) of the Judiciary Act 1903 as amended which permits Attorneys General of the State or of the Commonwealth to intervene in matters involving the interpretation of the constitution even though their own domain is not directly affected by the matter in issue. One notices also, by way of

further example, that by Section 54 of the Town Planning and Development Act 1928 (W.A.) the relevant Minister may make submissions to the Town Planning Appeal Tribunal as to planning issues for the future arising out of the particular dispute before the Tribunal.

It is against this background that a case relied on heavily by Counsel for the Commissioner, Elliott v Leeton Soldiers Club Ltd (1984) 92-118, must be considered.

In that case, dealing with identical provisions of the New South Wales legislation, the Tribunal held that a provision corresponding to Section 111 permitted the grant of leave for the President of the Anti-Discrimination Board, being the person equivalent to the Commissioner in the present case, to appear as a party. This was for the purpose of putting submissions on the difficult question of the extent of the law as to sexual discrimination and in what circumstances it included sexual harassment.

The Tribunal in this State is not bound by that decision but it certainly cannot be ignored. In any event the reasoning underlying the decision is influential. The Tribunal in that case referred to the second reading speech in Hansard (as this Tribunal is now permitted to do by provisions of the state Interpretation Act) and to amendments preceding the relevant statutory provision, and in particular to passages in the second reading speech in which it was said that the Counsellor for Equal Opportunity will no longer be an automatic party to a hearing of an inquiry, although she might be joined at the discretion of the Tribunal. The Tribunal also referred to and relied on other cases bearing upon that point.

The second reading speech introducing the Act in this state, as reported in Hansard on 20 September 1984, does not refer specifically to this point, but does refer to the experience in other states and says that the statutory bodies to be established in this state and their models of functioning have been adopted from models functioning in other states. Elliott's case, and the Hansard reports, therefore suggest that a person with administrative responsibilities relevant to the operation of the Act, and knowledge of the policy issues relating thereto, may be granted leave to appear as a party pursuant to a statutory provision which is broad enough to allow a modification of the usual position which would otherwise apply at common law. It will be a matter of discretion in each case as to whether the power to grant leave to appear as a party to such a person should be exercised. In the present case, submissions by a person such as the Commissioner with a detailed knowledge of what persons are likely to be affected by a ruling on the jurisdictional issue suggests that the discretion should be exercised in her favour.

In the present case the ruling made on behalf of the Tribunal will be that pursuant to Section 111 of the Act the Commissioner is granted leave to appear as a party to the inquiry for the purpose of advancing submissions in regard to the jurisdictional issue. The next step in the matter will be for a date to be fixed for the hearing of the jurisdictional issue as a preliminary issue.