

JUDGMENT

EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

No. 16 of 1991

TONI FAYE McCARTHY
Complainant

- against -

METROPOLITAN (PERTH)
PASSENGER TRANSPORT
TRUST (TRANSPERTH)
Respondent

BEFORE:

Mr L W Roberts-Smith, Q.C.
Ms B Buick
Ms K French

Deputy President
Member
Deputy Member

HEARD:

18 and 19 November 1992

Ms H Andrews
Ms L Romeo

Counsel for Complainant
Counsel for the Respondent

REASONS FOR DECISION

(Delivered: 23 December 1992)

The Complainant, Mrs Toni McCarthy, and her husband, Mr David McCarthy, came to Western Australia in February 1989.

Mrs McCarthy was then 30 years of age. She and her husband had both been bus-operators in New South Wales. She became a qualified bus operator in Sydney in 1979 (when she was aged 19) after complying with all the requisite testing procedures and medical examinations, and then drove buses for some 2 years before the family moved to Queensland. They returned to Sydney about 1984, where she again took up employment as a bus operator. She had to pass another medical examination on that occasion, which she did. She continued in that employment until the family left Sydney to come to Perth in early 1989.

Her employment in Sydney was with the State Government, driving public buses.

After their arrival in Perth, Mrs McCarthy applied for various jobs. She began driving with the Activ Foundation and doing home-help work for Silver Chain. The work for the Activ Foundation involved driving 19 to 30-seat buses carrying disabled people.

At some stage apparently quite early on, Mrs McCarthy and her husband both applied to the Metropolitan (Perth) Passenger Transport Trust, the Respondent. That organization is a body corporate established by section 15(1)(b) of the Metropolitan (Perth) Passenger Transport Trust Act 1957 and at all material times traded under the name "Transperth".

At this point it is helpful to refer to the recruitment procedure then being followed by Transperth. A diagrammatic representation of the presently current procedure was admitted in evidence as attachment A to an affidavit by Mr Brett Butler sworn 6/8/92 (exhibit #2). That diagram is attached to and forms part of these Reasons.

According to Ms Pascale Le Meur, a personnel officer with Transperth, the "Biographical Questionnaire" and "Muscular and Skeletal Test" were not part of the procedure when Mrs McCarthy applied.

In fact Mrs McCarthy twice applied for employment as a bus operator with Transperth. The first time was probably about February 1989. She failed the Road Code test by one point. She wrote to Transperth and asked if she could appeal. She was told she could not; she would have to re-apply and re-sit the test in the next group of candidates, 6 months later.

Transperth advertises for applicants for employment approximately every 6 months. Mr Butler, then Senior Personnel Officer and at the time of the hearing Organisation Development Consultant with Transperth, testified that there are usually some 2000 applicants each time.

So it was that when Transperth advertised for applicants in mid-1989, Mrs McCarthy applied again. Her husband also applied, and they progressed through the recruitment procedure together.

They both passed the Aptitude and Road Code Tests, the driving appraisal and all other requirements up to the medical examination stage.

Ms Le Meur was the personnel officer with whom they were dealing and when they successfully reached that point she arranged for them to attend a medical examination to be conducted by a private medical practitioner, Dr J B Walsh, at his consulting rooms in the City. The appointment was arranged for 15/11/89.

In the meantime, in October 1989, after she had passed the Transperth qualifying tests, Mrs McCarthy received medical advice that she was pregnant. She did not notify Transperth of that having received advice from the union that it was of no relevance and need not be disclosed to anyone other than the doctor.

When Mr and Mrs McCarthy attended Dr Walsh's rooms on 15/11/89, she went in to be examined first. One of the first things she told him was that she was three months pregnant.

None of the facts so far recited are in dispute. There was, however, some significant conflict about various aspects of the events which occurred from this point on.

According to Mrs McCarthy, when she told Dr Walsh that she was three months pregnant, his immediate response was to make some comment to the effect that she would be too big to fit behind the wheel. She did not take that as a joke; it "put (her) right off". When he said it, she felt that she was not going to pass the medical.

She was weighed towards the end of the examination. Her weight as recorded was 86 kilos. (She said in evidence that whilst she had been driving buses in Sydney her weight had ranged between 92 and 95 kilos, that subsequently in Perth she had lost 10 kilos with "Weight Watchers" but had then increased from 81 to 86 kilos with her

pregnancy). As at 15/11/89 she was 156 cm tall. She said Dr Walsh told her she was "overweight".

There was some discussion about that. She told the Tribunal she explained to the Doctor about her usual weight and recent weight loss until the pregnancy and gave him information about her family history.

In Section 2 "Family History" of the Medical Examination Report (tab 10 of exhibit #1, the Report of the Commissioner of Equal Opportunity), Mrs McCarthy had written that her mother had died of a cerebral haemorrhage at 39 years of age. She testified that she explained to Dr Walsh that when she died, her Mother weighed only 8 stone, had been a barmaid for 20 years, was an alcoholic and a heavy smoker and had suffered very high blood pressure for years.

The Complainant herself was then trying to give up smoking and had cut down from 15 to 10 low-tar cigarettes a day. Her own blood pressure was good and she had no particular health problems.

In evidence, she said she explained to Dr Walsh that her father is nearly 20 stone, and is still alive at 62, still shearing and sleeper-cutting and fencing. She told him that she came from a family of large people, the majority on her father's side being 17-20 stone, even the women.

She said Dr Walsh seemed not to be interested and she knew she had failed.

On the other hand, he did mention that she was in excellent health and her blood pressure was "perfect".

In fact Dr Walsh's notes at section 3 of the Medical Examination Report ("the Medical Report") indicate she had a pulse rate of 70 and a blood pressure of 120/80.

Mrs McCarthy said that at the conclusion of the examination, as she was leaving, Dr Walsh patted her on the shoulder and told her "when you have the bubby and lose the weight, come back and see me". In cross-examination by Ms Romeo, Counsel for Transperth, she

“definitely” interpreted this remark as patronising and was humiliated by it. The gesture “was just the final, little patronising pat on the back”.

When Mrs McCarthy came out from the consulting room, Mr McCarthy went in for his own examination.

In his evidence he said that virtually as soon as he entered Dr Walsh’s room, the Doctor made a comment about Mrs McCarthy. Mr McCarthy could not recall exactly what it was, but it had something to do with her pregnancy and being overweight. He said he was shocked by the comment because

“...it’s against all the ethics of a doctor to discuss anyone else’s medical problem with me, whether it be my wife or anyone, and it just struck me as ... like, the Hippocratic Oath just went straight out the window and I was shocked.”

He said the remark was extremely detrimental. In cross-examination he said he then formed the opinion that his wife had failed the medical; that was the way the doctor said it.

After his own examination, Mr McCarthy left the consulting room and rejoined his Wife. She was very upset. In fact, he said, he had never seen her so upset and in such an intense mood. As soon as they walked out she said to him that she had failed the medical. He testified that he had the same impression, but he tried to calm her down because she was so upset.

At that stage neither Mr nor Mrs McCarthy actually knew what the results of their medical examinations had been. In each instance the Medical Report completed by the Doctor had been placed in a sealed envelope and given to them to hand to Ms Le Meur.

As it happened, Mrs McCarthy had failed.

The form requires the examining doctor to complete two certifications, each actually headed “medical Practitioner’s Certificate”. The first is for use on application for admission to the Government Employees’ Superannuation Fund (“the Superannuation Certification”). The second relates to the applicant’s capacity to carry out the duties of his or her employment (“the Fitness Certification”).

In Mrs McCarthy's case Dr Walsh completed the portion "Lump Sum Scheme Certificate B" of the Superannuation Certification, which read that she

"is not acceptable on medical grounds as a contributor to the Government Employees Superannuation Fund for full benefits. However, because of the nature of her medical condition I recommend that she is acceptable as a contributor to the Fund for limited benefits. My reasons are as follows:-"

under which Dr Walsh had handwritten the words

"Body Mass Index 35. Needs to lose 25 kg."

On the following page, the Fitness Certification as completed by Dr Walsh, read as follows -

MEDICAL PRACTITIONER'S CERTIFICATE

Founding my opinion on the above results and on the applicant's statement of family and personal history, I HEREBY state that I have examined Mrs Toni Faye McCarthy and I consider that she is not physically and mentally capable of carrying out the duties of Bus Operator.

Date 15.11.89 Signature J B Walsh Qualifications MBBS FRACGP."

(The parts underlined are those completed by Dr Walsh.)

The Medical Report is divided into three sections. Section 1 contains questions relating to the applicant's personal history. Section 2 sets out questions concerning her family history. Section 3 is headed "Confidential Medical Report" and contains questions relating to the results of the medical examination itself. The applicant completes sections 1 and 2; the doctor completes Section 3.

In the body of that last section Dr Walsh made the notation "3 months pregnant" on 5 separate occasions.

The first 4 notations were in response to these questions -

1. "A.1 Is there anything unfavourable in the examinee's appearance or development? If so, give details."
2. "I. Do you consider the genito-urinary system to be normal and healthy?"
3. "J.(3) Is there any evidence of abnormality of the reproductive organs?"
4. "K.(2) Do you consider the examinee to be predisposed to any particular ailment or likely to require surgical operation?"

The fifth reference appeared in item K.(3), which asked the doctor to “comment fully on any unfavourable features” in the personal statement in section 1, in response to which Dr Walsh wrote -

“3 months pregnant. Mother died cerebral haemorrhage. Smokes. Body mass index 35.”

Before the Tribunal Dr Walsh frankly acknowledged that he had no recollection of this particular examination. It was difficult because it had occurred in 1989 and he had conducted a lot of medical examinations since then. He was relying on what was noted on the Medical Report. He could not recall Mrs McCarthy giving an explanation of the circumstances in which her mother died of a cerebral haemorrhage, although the mother’s weight and the facts that she was an alcoholic and had high blood pressure were certainly significant factors. (These were not noted on the Medical Report, nor apparently, anywhere else). He could not recall Mr McCarthy at all.

In evidence in chief, Dr Walsh said the result of his examination of Mrs McCarthy was that he felt she was overweight and he could not pass her for that reason. Specifically, she had a Body Mass Index (“BMI”) of 35.8 at the time. He said that the BMI is a method of ascertaining body fat mass in contra-distinction to just height and weight. It is calculated by dividing the person’s weight by the square of his or her height in metres. The formula accommodates variations in frame and bone structure. It is internationally accepted as the most practical means of ascertaining body fat mass. It is called an index because it does take into account the structure of the individual person. The BMI formula does not allow for pregnancy. That was why in Mrs McCarthy’s case he had worked on a figure of 35, whereas the actual figure as calculated was 35.8. A “normal” BMI is 20-25; “overweight” is 25-30; “obesity” is 30-35 or more. The Doctor said that a BMI of 35.8 considerably increases the risk of a cardiovascular incident occurring and also increases other risk factors. He described the major cardiovascular incidents concerned as myocardial ischaemia, heart attacks and heart failure, strokes, deep vein thrombosis, embolic phenomena and sudden death. He said the additional risk factors in Mrs McCarthy’s case were that she smoked and she had a family history of a mother who had a cerebrovascular accident at 39 years of age.

Asked about the implications of these matters insofar as a bus operator was concerned, Dr Walsh said the mortality and morbidity risk increased significantly with an increase in the BMI, particularly when associated with other risk factors, and that meant in turn there was an increased risk to the particular person and the public that a "sudden catastrophe" could occur.

Still in examination in chief Dr Walsh confirmed that on 15/11/89 Mrs McCarthy's heart rate and blood pressure were normal and that "the only evident abnormality was overweight".

As to his notations on the Medical Report, he said the first reference to "3 months pregnant" was

"just to make a statement she was pregnant".

The second reference (item 5: genito-urinary system) was noted

"because you do have some complications pertaining specifically to pregnancy. Her mother had died of cerebral haemorrhage, and that the candidate smoked. At the medical examination she had a body mass index of 35."

Other than the cardio-risk factors Mrs McCarthy's state of health was good. Dr Walsh said pregnancy was not a ground on which he failed her and if her BMI had been closer to 30 he would have passed her. He did not feel that the fact of her pregnancy was his domain. He assumed Transperth knew about it and intended to employ her notwithstanding, subject only to the outcome of the medical examination.

When asked whether he had made any comment to Mrs McCarthy about her not being able to fit behind the wheel of a bus, he said

"No, not to my knowledge."

When Mr McCarthy's evidence about what was said to him by Dr Walsh after his Wife's examination was put to him, the Doctor said:

"I would not have made any comment in respect to the pregnancy at all. The pregnancy is the jurisdiction of whoever's looking after the pregnancy. There's no reason why I would make any comment on pregnancy, and to make it to somebody else, that just doesn't seem reasonable, but I can't remember Mr McCarthy, so ... without the papers, I would have difficulty remembering Mrs McCarthy."

And in re-examination on the same point, he was asked -

“... is it your practice to make comments about one patient to another patient?”

he answered

“I should hope not. It’s unethical.”

In cross-examination by Ms Andrews, Counsel for the Complainant, Dr Walsh made it clear there was a distinction between a situation in which he is asked for a clinical opinion in relation to treating a patient and one in which he is asked for an opinion as a medical examiner for a company. The effect of his evidence here was that he would be more likely to classify a person strictly according to a “norm” in the second situation, whereas if he were treating a patient he would be more inclined to be flexible in his classification of them and more prepared to make some allowance for motivation and encouragement. We formed the impression that in this way he would be readier to accept a person whose BMI exceeded the “norm” and who, eg was a smoker, who indicated he or she was trying to stop smoking and had in fact reduced the number of cigarettes smoked, where that person was a patient than where he or she was merely the subject of a qualifying medical examination.

Dr Walsh did say that in completing the fitness certification as he did he was intending to convey that in his view Mrs McCarthy was physically unfit to carry out the duties of Bus Operator. The words “and mentally” were printed on the form and there was no provision for them to be struck out when they were inappropriate - so it was his practice never to strike them out.

In substance, it was Dr Walsh’s evidence that he considered Mrs McCarthy physically incapable of carrying out the duties of a Bus Operator because she was overweight, combined with the other risk factors of her smoking, her mother’s death of a cerebral haemorrhage, and her pregnancy.

Apart from the notations of Mrs McCarthy’s BMI and the Superannuation Certification already referred to, there were only two specific references to her weight in the Medical Report. The word “overweight” (without more), was noted in response to two questions

"E.(1). Is there any abnormality or evidence of disease of any abdominal organ, including liver and spleen? If so, give details."

and

"K.(4). In your opinion do you consider there is a significantly increased risk of disability or death prior to age 60 in persons with impairments of the type disclosed in this Medical Report?"

In cross-examination Dr Walsh was asked whether the condition of being overweight was an impairment or a disability. His response was that

"It depends on the degree of overweight, but it is an impairment, yes, even moderate overweight."

He was then asked whether he would put Mrs McCarthy into that category. He said:

"At risk of possible problems, yes."

He was asked to elaborate. He gave the following answer -

"...Well, the New England Journal of Medicine - - I can get you the latest - - I think it was 1990 publication, on March the 29th - did a survey on this and they state that even moderately overweight women in the middle age grouping, which I think they took from something like 28 years through to 65 years of age, have increased cardiovascular risk, and that was quite a big survey. The Farmingham study also did the same thing where they studied 2818 patients and I think over 26 years and they came to the same conclusion."

In further elaboration of his reason for certifying Mrs McCarthy was physically incapable of carrying out the duties of a Bus Operator, Dr Walsh added that he felt there was a degree of risk to herself and the public at that weight and it was too great for her to operate as a Bus Operator.

He was then referred to the "National Guidelines for Medical Practitioners in Determining Fitness to Drive a Motor Vehicle" ("the National Guidelines") (Chapter 9), which was at tab 11 of the Commissioner's Report, exhibit #1. Paragraph 9.8 of the National Guidelines reads -

"9.8 OBESITY

An extremely obese person may not be able to respond rapidly enough to an emergency situation and may not be able to operate the controls in a smaller car properly. The applicant's ability to drive safely can best be determined by the Driver Licensing Authority during a driving test."

Dr Walsh agreed that he did use the National Guidelines in relation to his work for Transperth, however he did point out that para 9.8 was only a guideline and that when the National Guidelines were issued there was not then the information there is today on obesity. That information, and as we understood his evidence, the correlation between obesity and other risk factors, had become available only in the last five to six years. He pointed out that medical practitioners are expected to use the National Guidelines in conjunction with the latest clinical information.

It appears to be the case that the National Guidelines referred to in evidence were printed by the Commonwealth Government in 1988, although we note from Chapter 4 of the same Guidelines (tendered as part of exhibit #8) the observation that

“The following guidelines are based on the recommendations of the Royal Australasian College of Physicians, May, 1972” (para 4.0).

We return to the narrative.

After their medical examinations on 15/11/89 Mr and Mrs McCarthy returned to the Transperth Office to see Ms Le Meur.

Mrs McCarthy gave evidence that she told Ms Le Meur that she had not passed the medical, even before the latter had looked at the Medical Report. She said Ms Le Meur was “really shocked” and told her she was sorry. Mrs McCarthy’s evidence was that Ms Le Meur told her that if she had the baby and lost 25 kilos she could go back and see Dr Walsh again. There was no mention of getting a second opinion; only that her application would be kept open for as long as it took to go back and see Dr Walsh.

Mr McCarthy had passed his medical examination and was employed by Transperth.

He testified that he could not remember which envelope Ms Le Meur opened first, but

“... she said that I had passed and sort of had a horrified look on her face when she found out that Toni had failed and sort of glanced at it a bit and said “Well, I’m sorry. You haven’t passed your medical but when you have the baby and lose a bit of weight come back and see us”.”

When asked whether there was any mention of his wife obtaining a second medical opinion, he said:

“No. Well, as far as she was concerned, that was ... “Have the baby, lose some weight and come back”; no mention of a second medical at all. It was virtually cut and dried; you failed. Come back later.”

As to Mrs McCarthy’s reaction, her husband said:

“She was devastated. She ... in 12 years I’ve never seen her so upset and so ... just to see ... Her personality was always happy-go-lucky, and have a joke, but it devastated her. She just ... her self-esteem and her self-respect, everything, all of a sudden, just seemed to go straight down the toilet.”

Ms Le Meur gave evidence for Transperth. She explained that the usual procedure was for an applicant to go for a medical examination and return with the Medical Report in a sealed envelope. That was usually given to the receptionist in the Transperth reception area and passed to Ms Le Meur, who would look at it and then invite the applicant in to discuss it. She said initially that from what she recalled, that happened with Mr and Mrs McCarthy. She said later that she did not recall it happening differently in their case.

Ms Le Meur testified that she would usually flick to the back page of the medical report because that is where it indicates whether or not the person has been successful. She said she recalled doing that here and seeing that Mrs McCarthy had been unsuccessful because she was overweight. She said:

“... So I advised Mrs McCarthy that she had been unsuccessful because she was overweight. What happens in those cases, where a problem can be remedied, is that the application is set aside and the file left over for whatever time is needed to fix up the problem. That’s what I would have advised her.”

and a little later she added -

“So I would have advised her that the file would be kept open until such time as she felt she was ready to come back for another medical.”

She said she remembered saying to Mrs McCarthy that “whatever time it took we would leave it open”.

Ms Le Meur told the Tribunal that she had what she described as “a visual memory” of first becoming aware that Mrs McCarthy was pregnant. She recalled looking at the medical report itself and seeing written there the word “pregnant” and thinking at the time “Oh, she’s

pregnant". In her view Mrs McCarthy's pregnancy was irrelevant to the latter's capacity to perform duties as a Bus Operator.

When referred to Mrs McCarthy's evidence that she had told Ms Le Meur at the outset that she had failed the medical because she was pregnant, Ms Le Meur said she did not recall that happening. She repeated that she had a "visual memory" and that that was her first recollection, and she did not recall becoming aware of that fact earlier. Indeed, she said, the report quite clearly stated that Mrs McCarthy had failed because she was overweight and had she indicated to Ms Le Meur that she thought she had failed because of her pregnancy, she (Ms Le Meur) would have pointed out that was not so and would have dealt with the issue.

Mrs McCarthy was in fact the first pregnant applicant with whom Ms Le Meur had dealt. Ms Le Meur acknowledged that in her evidence in chief, and said for that reason, after Mrs McCarthy had left, she went to see the (then) Senior Research Officer, Mr Butler, to speak to him about the Equal Opportunity Act in relation to pregnancy, and just to clarify in her mind what the Transperth policy was on that, even though it had not been an issue with Mrs McCarthy.

She also said that there was no mention of obtaining an alternative medical opinion. It was her impression that Mrs McCarthy accepted her advice that the file would be left open and simply walked away; so it never occurred to her that a second opinion would be required, because as far as Ms Le Meur was concerned, there was no problem. She thought Mrs McCarthy seemed to be accepting of the situation and although naturally not happy with it, did not seem to Ms Le Meur to be upset nor distressed about it.

In any event, as Ms Le Meur conceded in cross-examination, the practice of accepting a second medical opinion (referred to in the diagrammatic procedure in Appendix A to exhibit #2) was not in place at that time.

It is in fact common ground that Ms Le Meur did not advise Mrs McCarthy that she had a right of appeal and could obtain a second medical opinion.

Mr Butler had no personal involvement with Mrs McCarthy but did recall Ms Le Meur raising with him the issue of Transperth policy in relation to pregnant applicants for employment. That was of course, on her evidence, as we have observed, after Mrs McCarthy had left on 15/11/89.

He said he told Ms Le Meur that pregnancy was not an issue. It had no place in the employment criteria, was irrelevant and was therefore not to be considered.

Mr Butler gave a deal of evidence about the implementation of Equal Opportunity principles within Transperth. It was he who was responsible for that in 1989. Although he went to some pains to assure the Tribunal that the relevant principles and guidelines had been made known to all at Transperth by 1989, it is apparent that in November of that year Ms Le Meur at least, was not then aware of the requirements in relation to pregnancy, because she had to make that enquiry of Mr Butler after seeing Mrs McCarthy. This detracts somewhat from the picture of wide knowledge and awareness which Mr Butler was seeking to promote before the Tribunal, particularly given that as a personnel officer dealing daily with applicants for employment, Ms Le Meur of all people could have been expected to have been well aware of the position had the EO programme to that date been as extensive as Mr Butler was asserting.

Whatever the situation may have been subsequently, we formed the very strong impression that Mr Butler's enthusiastic assurances of how widely the requirements of the Equal Opportunity Act 1984 ("the Act") had been made known to Transperth staff up to November 1989, were considerably overstated.

The tendency of this witness to make general assertions both of that nature and of the use of fair and proper recruiting procedures could be seen also in his evidence about the so-called "right of appeal".

He explained that the 2000 or so applications would be held for 6 months just in case there were any problems, that is, in case any of the applicants sought to find out why they had failed. After 6 months, the applications would be destroyed.

Asked about the appeal procedure as it was in 1989 Mr Butler categorically asserted that "all aspects of the selection process are open to appeal" but added that the process would have to be initiated by the individual applicant. He went on to explain that an applicant would not be advised directly of the right of appeal and that Transperth would wait for an applicant to seek to appeal or otherwise express some dissatisfaction about the result before they would be told they could appeal. He was referred to a situation in which perhaps an applicant had failed a test by one mark and asked whether that person should not be advised of the right of appeal, to which he responded -

"... I would suggest that given the numbers of people we're dealing with, that would become a bureaucratic nightmare for Transperth to manage. You're talking about 2000 people."

The same point was raised later in his evidence by the Tribunal, when the following exchange took place -

"In other words, if they don't say "I want to appeal against this", you don't tell them they've got a right to?---If they don't say "I'm concerned about this", or if they don't present that they're visibly upset about it, and they appear to accept it, then that's the end of the matter unless they want to take it further at a later stage.

It might be suggested, Mr Butler, that that's something of a Catch 22 situation, isn't it? "If you don't tell us you want to appeal, you don't get off the ground, but we don't tell you you can appeal unless you tell us you want to." That's essentially what you're saying?---In a nutshell, that's probably how it worked, bearing in mind that was the practice - it still is the practice - in most other agencies I've worked with, to not tell people of their appeal rights."

That last answer reflects a quite extraordinary attitude to rights of appeal and procedural fairness. A "right" which is not made known to those people who are supposedly entitled to it, cannot properly be said to be a right at all. It is totally illusory - and ironically the illusion deceives only those who operate the system, since ex hypothesi, those whom it is intended to benefit, being unaware of it, are under no illusion at all. This would seem to be a striking example of organizational self-deception.

Mr Butler did maintain that when Mrs McCarthy was certified unfit by Dr Walsh Transperth did have a procedure whereby she could have been referred on for a second opinion, albeit at her own expense. Even then, it seems, that would probably only have been suggested (if at all) where the initial medical examination was inconclusive, which

was not so in her case. Be all that as it may, the fact remains she was not told of any entitlement to a second medical opinion on 15/11/89.

After her rejection by Transperth in November 1989, Mrs McCarthy continued her work with the Activ Foundation and Silver Chain.

Her routine was to get up at 5.30 every morning, drive a bus for 2 hours for the Activ Foundation until about 9.30 am, then do domestic house-cleaning for Silver Chain until the afternoon, after which she would then do another 2 hours in the bus for the Activ Foundation. She would get home about 6.30 pm. Although this work was not permanent and was occasionally irregular, Mrs McCarthy worked 5 days a week on average. The Silver Chain work varied. It could have been a 3 hour job cleaning one house or two 1¹/₂ hours jobs cleaning two houses. Generally she was working four hours a day for each of the two organizations.

Mrs McCarthy continued to work in this way throughout her pregnancy up to about 8 months of term. Even then, she was called out by the Activ Foundation to do a 4-hour bus job when she was a week overdue, and she did that. Her state of health was good throughout the pregnancy. In addition to her employment, she still mowed the lawn and did other chores.

Nonetheless, Mrs McCarthy was troubled by what Dr Walsh had told her about her weight. She thought the expectation of losing 25 kg and getting to 61 kg was somewhat ridiculous, considering she had not been that weight since she was 10 years old. So she saw Dr Skellett and also a dietician, Dr Osler. She said Dr Osler told her she could not expect to get below 72 kg because it was not in her build. This is confirmed by Dr Osler's report dated 17/4/90, at tab 7 of exhibit #1.

Mrs McCarthy saw Dr Skellett on 18/1/90 for a medical examination which was necessary to enable her to convert her New South Wales driver's licence to a Western Australian "F" class licence (authorizing her to drive a bus). At that stage she was approximately 5¹/₂ months pregnant. She was passed as medically fit and subsequently obtained her "F" class licence. (Dr Skellett's report is exhibit #5).

The baby was born on 21/5/90. The delivery was normal. There were no complications. According to a report from her obstetrician, Dr S O Lim, dated 13/3/92 (exhibit #3) her general health must have been excellent at the time of delivery.

After the birth it was no longer practicable for Mrs McCarthy to continue her work with the Activ Foundation and Silver Chain. She could not get a baby-sitter at 5.30 in the morning and nor could she have someone looking after her new-born baby for some 12 hours a day. What she did do was arrange for friends to look after him free of charge while she did casual work a couple of days a week at a motel, some housework for friends and she also took in ironing to do at home.

Ms Romeo suggested to Mrs McCarthy that the ironing and the couple of days a week at the motel was not particularly demanding work. Mrs McCarthy disagreed. She retorted (with some asperity) -

“- I don't know if you've ever cleaned a motel room, but you've got to do a room in 15 minutes, and that's make three beds and vacuum and clean the fridge and everything in 15 minutes, and we used to do about 20 rooms each. So in three hours, that's pretty demanding sort of work. It's not as easy as driving a bus.”

When Ms Romeo pursued the point, and suggested she may not have been up to doing full-time work as a bus driver, Mrs McCarthy rejected that suggestion. She pointed out that she had been driving buses for 10 years, that it did not involve much physical exertion, she was in excellent health after she had the baby and she had no physical problems. She still used to mow the lawns after the birth.

According to Mr and Mrs McCarthy, the effects upon them of Transperth's rejection of her, were profound.

Mrs McCarthy's immediate reaction was that she was angry, upset and depressed. Having to talk about it before the Tribunal obviously caused her genuine distress.

She said she blamed herself for being pregnant and thought about having an abortion, but by then it was too late. She said that it was obvious to her that had she not been pregnant she could have gone back and passed the medical. In response to a question whether she

suffered any difficulties as a result of not being able to get that employment, she said -

“Marriage problems and financial problems. I was very depressed during my pregnancy the majority of the time. After I had the baby I just didn’t have enough milk to feed him. I just - - I had about three months of depression after I had the baby.

And what do you relate that to?—Because I didn’t get the job. I just - - my life was down the toilet. And it was supposed to be the happiest time of my life, being pregnant, and it wasn’t.

Have you got over these feelings?—Oh, no, not really. It’s - - this pregnancy I’m a lot happier. I mean, we’re financially working and - - but this has dragged on a very long time. It’s been very hard to last this long.”

As to the suggestion that her being overweight may have been a factor in or the reason for her rejection, she said -

“There’s a lot of fat bus drivers out there that are bigger than I am, a lot bigger than I am. I felt - - it was very - - it’s hard to put into words. I’ve been big all my life, and I’ve driven buses for seven years when they rejected my medical or whatever, and I’ve never had a problem about my weight. I’ve never had doctors say “Oh, dear, you must lose weight or you’ll die” or something. I’ve always been in excellent health. I’ve never had a serious illness, and it was a bit devastating to the marriage. My husband and I had quite a few fights over this. Oh, just, I’ve never had a problem about being overweight. I mean, I’m wearing an outfit that I’ve had for seven years, that I still fit into, and I mean that’s just the way I’ve always been. I’ve never been a small person. It’s never been a problem until this time, with the medical. It lowers your self-esteem quite a bit.”

Mr McCarthy was even more descriptive about his wife’s reaction to the rejection of her application.

He told the Tribunal she was devastated and seemed to completely lose her self-respect and self-esteem. Asked how long that reaction lasted, his evidence was -

“Every time this comes up - - All you have to do is look for yourself. It’s been a very upsetting three years, especially when anything about Transperth and this particular incident is mentioned. She seems to lose all her self-esteem. She just - - she hates the thought of it. She hates talking about it.

How did it affect her in relation to her pregnancy?—Well, I think, any woman when they have their first baby - - it’s a time of joy but she seemed to sort of - - she wasn’t sort of rejecting the pregnancy but she wished that she wasn’t pregnant. I think that if I still would’ve been in my previous job, on Express - - I strongly think that she might have run off somewhere and had an abortion so she could get the job because she said “I’m pregnant. They don’t want a pregnant woman driving a bus”. She said “It’s quite obvious” and it also seemed pretty obvious to me too.”

And later, he went on to say it put a rift between them. Nothing seemed to be going right. It significantly affected their financial situation -

“...apart from affecting us personally, trying to sort of keep her happy through her pregnancy, financially, if it wouldn't have been for the help of some of our close friends - - I know how bankrupt people feel because we were on the verge of bankruptcy and we could only just afford to pay the house payments and our friends came around and helped us with bits and pieces. Sometimes we were down to \$20 a week to live on after we got the things for the baby and it's amazing how many different ways you can cook mince and sausages.”

The effects continued after the birth of the baby. He described them in this way -

“She wasn't the mother that you would expect to see with a first baby. It was - - it was still a problem that upset her; that if she hadn't have had the baby, she would have had a job. She didn't reject Timothy altogether but it wasn't the mother-baby bond that you normally see and I think it was - - I think that even though she wanted to breastfeed - - I think it was about four or six weeks and she just - - Her milk just dried up and she just couldn't feed the baby if she wanted to.

Did she actually express to you her feelings about the baby in relation to employment?---Well, it was mentioned that if - - “If I wouldn't have been pregnant, I would've had the job” and it's not - - it's very hard to put into words. You can - - after you know someone for so long, you can just sense that there is unease there; that there was upset and rejection. She wasn't really happy with this baby, even though she - - it's very hard to explain. Even though she loved him and that, she still sort of - - she rejected him and she had some post-natal depression for two or three months. It was a pretty hard time.”

Mrs McCarthy made a complaint to the Equal Opportunity Commission on 1/12/89. That alleged discrimination on the ground of her pregnancy. In the course of correspondence between the Commission and Transperth the latter provided a copy of the Medical Report of 15/11/89. That was the first time Mrs McCarthy had seen it. As a result of that, her complainant was broadened to include discrimination on the ground of impairment (obesity).

In the Points of Claim filed on behalf of the Complainant on 29/10/91, a further ground of discrimination on sex was pleaded.

Before dealing with the specific matters pleaded and the relevant legal issues, it is appropriate that we comment upon the evidence and set out certain findings of fact.

As will be appreciated, the evidence given before the Tribunal was considerably more extensive than that recited above. We have, of

course, had regard to all of it and not only to those portions to which we have expressly referred.

We found Mrs McCarthy and her husband to be entirely credible witnesses. They answered questions without hesitation, were responsive to the questions asked of them and spoke with what we accept was genuine feeling. The reactions and actions they described were consistent both with the accounts they gave and with their personalities and character to the extent we were able to assess those. If anything, Mrs McCarthy tended to understate her evidence, rather than exaggerate it. This was illustrated, for example, in cross-examination, when she was describing Ms Le Meur's response. She said Ms Le Meur told her "Once you have the baby and lose the weight, you can come back" and added "It wasn't said nastily, by the way - she was a very understanding person - but that's what she said."

Although occasionally laconic and generally restrained, Mrs McCarthy did become deeply upset at times.

They both had particular reason to have a good recollection of the events about which they testified. Those events were of major importance to them at the time they occurred and of their nature were likely to have made an immediate and lasting impression. Their demeanour in the witness box and the way they gave their evidence, reinforced us in this assessment.

Dr Walsh had no particular recollection of either Mrs McCarthy or her husband. He was, of course, giving his evidence in a context in which he was well aware of the nature of the complaint and that it was ultimately founded in his own actions.

In the circumstances, it is neither unnatural nor surprising that he would not be prepared to accept that he did in fact make a comment that Mrs McCarthy would be too large to fit behind the wheel of a bus, nor pat her on the back and tell her "when you have the bubby and lose the weight, you come back and see me", nor make any comment to Mr McCarthy about Mrs McCarthy's pregnancy. On the whole, and having regard both to the content of the testimony and the way in

which it was given, we accept that of Mr and Mrs McCarthy wherever it conflicts with that of the Doctor.

Although Ms Le Meur asserted she had an actual recollection of particular matters, the overall impression created by her evidence and her presentation in the witness box was that it was doubtful that her recollection in fact extended quite as far as she maintained. Furthermore, she was clearly very conscious of her role as the personnel officer who dealt with Mrs and Mr McCarthy and appeared anxious (at times overly so) to persuade the Tribunal that the issue of pregnancy did not arise at all in her discussion with the McCarthys on 15/11/89. In the end, we were left with strong reservations about the reliability of her testimony in its critical aspects, and again, where her evidence conflicts with that of the McCarthy's, we accept the latter.

We are therefore satisfied on the balance of probabilities (applying that standard in accordance with observations of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336) and we find, that -

- (1) at the very outset of Mrs McCarthy's consultation with him, and immediately after she advised him she was three months pregnant, Dr Walsh did say "you would be too big to fit behind the wheel" or words to that effect;
- (2) she did give him further relevant information about her personal and family history, but he displayed no apparent interest in that;
- (3) at the conclusion of the examination and as she was leaving, Dr Walsh patted Mrs McCarthy on the back and said "When you have the bubby and lose the weight, you come back and see me."
- (4) when Mrs McCarthy had left the room and as Mr McCarthy was entering, Dr Walsh made to him some remark about Mrs McCarthy being pregnant and driving a bus, which remark immediately created in Mr McCarthy's mind the impression that his Wife had failed her medical because of her pregnancy.

- (5) when they saw Ms Le Meur at the Transperth office on 15/11/89, Mrs McCarthy did say to Ms Le Meur that she had failed the medical because she was pregnant.
- (6) Ms Le Meur did then say "Once you have the baby and lose the weight, you can come back."

We further consider it highly likely that the reason Ms Le Meur subsequently queried with Mr Butler what policy Transperth had in relation to pregnant applicants for employment, was because that was the issue in Mrs McCarthy's case, and it was not until she spoke to him that she realized there was a real problem with the way Mrs McCarthy's application had been dealt with.

We are also satisfied to the necessary standard on the whole of the evidence that Mrs McCarthy's pregnancy was a significant - and probably the major - factor in Dr Walsh's assessment of her as unfit to perform the duties of a bus operator. The other significant factor was her weight. Whilst the fact that she was a smoker and her mother had died from a cerebral haemorrhage also featured in the Doctor's assessment, they were not determinative. We are satisfied that had she not been pregnant, Dr Walsh would have passed Mrs McCarthy as medically fit. Further support for this view is to be found in the evidence concerning other applicants (including one DB, who testified before the Tribunal) whose weight and BMI were broadly comparable to those of the Complainant. Whilst it is somewhat indicative, we do not rely upon this evidence to any great extent because the risk and other factors in the individual cases obviously vary.

Mrs McCarthy and her husband were, in our view, accurate in their perception at the time, gleaned from what he said to them, that Dr Walsh would not pass her because of her pregnancy.

The numerous notations of "3 months pregnant" he made on her Medical Report, in themselves in our view demonstrate the Doctor's pre-occupation with her pregnancy and the significance it had in his mind at the time. His explanation of those notations in his evidence before this Tribunal were unpersuasive and we do not accept them.

But these findings by no means resolve the matter.

We must now turn to the law.

Paragraph 7 of the Points of Claim alleges unlawful discrimination on the ground of pregnancy. This is made under sections 10 and 11 of the Act.

Insofar as is relevant here, section 10 provides that a person discriminates against another on the ground of pregnancy if -

“(a) by reason of -

- (i) the pregnancy of the aggrieved person;
- (ii) ---
- (iii) ---

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.”

Section 11 makes it unlawful for an employer to discriminate against a person on the ground of (inter alia) that person’s pregnancy, in determining who should be offered employment.

Section 161 deals with vicarious liability and is relied upon here by the Complainant. In substance, for present purposes, that section provides that where an agent, in connection with his duties as an agent, does an act which is unlawful under the Act (or would be unlawful if done by the principal), then the principal will be liable as if it had done the act. The Complainant contends here that Dr Walsh was Transperth’s agent within the meaning of this section. Ms Romeo did not argue otherwise, although she did contend it was reasonable for Transperth to act upon Dr Walsh’s report.

It is to be noted that subsection (2) of section 161 affords a principal a defence if it is established that the principal took all reasonable steps to prevent the agent doing unlawful acts of the kind complained of. We shall return to this below.

It is also necessary to mention section 5 of the Act, which makes it clear that a complainant need show only that an unlawful

discriminatory ground was a reason for the doing of an act and that it need not be the dominant or substantial reason.

We note that the onus of proof is on the Complainant and the appropriate standard is the balance of probabilities.

For the reasons given above we are satisfied that by reason of Mrs McCarthy's pregnancy, Dr Walsh treated her less favourably than, in circumstances that were the same or not materially different, he would have treated a person who was not pregnant.

But that would not constitute discrimination within the meaning of section 10 unless it is also established that the less favourable treatment was not reasonable in the circumstances.

The Respondent's case was not really directed to this, being based rather on the proposition that Mrs McCarthy's pregnancy was not a factor at all. However, it was certainly at least implicit in Dr Walsh's evidence that to the extent her pregnancy was a consideration there were sound and proper medical reasons why it was reasonable for him to refuse to certify her fit to perform the duties of a bus operator, having regard to that pregnancy in combination with her weight, her smoking, and the cause of her mother's death. And under section 10(1)(b) of the Act the onus of proving the less favourable treatment was not reasonable, is on the Complainant.

One quite striking feature of the evidence was that at all relevant times - including during the course of her pregnancy - Mrs McCarthy's health and general physical condition were good, if not excellent. There was no particular problem with her pregnancy. Furthermore, had proper consideration been given to her family and personal history, the apparent "risk factors" would have been seen to have been far less significant than Dr Walsh said he took them to be. It was the mere fact of her pregnancy, combined with his view that she was overweight, that preoccupied Dr Walsh and which formed the basis of his conclusion that she was unfit for the proposed employment. There was no proper basis upon which the Doctor could conclude that Mrs McCarthy's pregnancy would affect her capacity to do the work.

We are satisfied that the Complainant has established that it was not reasonable for her to be treated less favourably for that reason.

It is clear that Mrs McCarthy was refused employment because Dr Walsh certified her unfit, and the necessary causal connection between the pregnancy and the refusal of employment is thereby established.

If it was Dr Walsh's decision to certify Mrs McCarthy unfit which was the unlawful act of discrimination, then that was an act for which Transperth was prima facie vicariously liable under section 161(1).

We say "prima facie" because of the potential defence available to Transperth under section 161(2).

That subsection imposes an onus on the Respondent to establish on the balance of probabilities that it took all reasonable steps to prevent the employee or agent from doing acts of the kind complained of.

The only evidence concerning Dr Walsh in that respect came from Mr Butler. That was inconclusive at best. He said he believed Transperth "would have provided" Dr Walsh with information about the requirements of the Act prior to 1989, but he could not be sure of that. He said he could not recall going to see Dr Walsh personally.

"It probably would have been a telephone call to make sure that he was aware of what was going on."

When pressed, he said he did recall speaking to Dr Walsh on the phone about Transperth's Equal Opportunity policy, and although he could not recall the exact date he believed he would have done it before this case. He concluded that if his memory served him correctly, he got the response from Dr Walsh that

"Yes, I'm aware of all that sort of stuff."

In our view the evidence falls far short of establishing on the balance of probabilities, or at all, that Transperth took "all reasonable steps" to prevent Dr Walsh unlawfully discriminating on the ground of pregnancy against applicants for employment with Transperth.

The same applies in relation to Ms Le Meur. She was a personnel officer. It was an important part of her job to be aware of the provisions of the Act relating to discrimination on the ground (inter alia) of pregnancy. She plainly was not so aware and again the evidence falls far short of establishing that (as at November 1989) Transperth had taken all reasonable steps to ensure she was (see *C v Australian Telecommunications Corporation* [1992] EOC 92-437).

If it was Ms Le Meur's decision to formally refuse her employment on the sole basis of the Medical Report from Dr Walsh, (which, as we find, was advertent on Ms Le Meur's part in that she was then aware the ground, or a major ground, of Dr Walsh's conclusion was Mrs McCarthy's pregnancy) then Transperth is liable for that act of unlawful discrimination vicariously under section 161(1) and quite independently, under section 162(1) of the Act.

We consider the latter to be the proper way to view the matter, because it was not for Dr Walsh to make the decision to refuse Mrs McCarthy employment. It would still have been open to Transperth to employ her notwithstanding his Report, or to arrange another medical examination and make a decision on the basis of that. It was Ms Le Meur's acceptance of Dr Walsh's Report and her advice to Mrs McCarthy that she had failed and so could not be employed, which was the operative decision within the meaning of section 11(1)(b) of the Act.

In her Points of Claim the Complainant next alleges (at para 8) that the Respondent unlawfully discriminated against her on the ground of sex (contrary to section 8(1) of the Act), and specifically in that she was pregnant, which is a characteristic that appertains generally to persons of her sex.

Ms Andrews relied upon section 8(1) as an alternative to section 10 (pregnancy) because the former was not subject to any requirement to establish that the less favourable treatment was unreasonable (as in section 10(1)(b)), and so might be established even though the allegation based on pregnancy may not be made out if the unfavourable treatment were thought to be reasonable.

She cited a number of authorities in support of that argument, including *Marshall v Marshall White & Co Pty Ltd* [1990] EOC 92-304. Suffice to say that those authorities all accepted pregnancy as a relevant female characteristic properly demonstrating discrimination on the ground of sex, in statutory contexts in which pregnancy itself was not a specific ground of discrimination.

The WA Act is obviously readily distinguishable. In our view, where the legislation specifies two specific grounds of discrimination, one being sex and the other being pregnancy, and expressly requires proof of an additional element for the latter, the legislative intent clearly is that claims in respect of pregnancy discrimination can be brought only under section 10 and not under section 8.

For that reason the complaint of unlawful discrimination on the ground of sex fails.

The Complainant next alleges unlawful discrimination on the ground of impairment. This is founded on Dr Walsh's finding that she was "overweight".

Discrimination on the ground of impairment is covered by section 66A of the Act.

"Impairment" is defined (so far as is relevant here) in section 4 of the Act, as meaning -

- "(a) any defect or disturbance in the normal structure or functioning of a person's body;**
- (b) ---**
- (c) ---**

whether arising from a condition subsisting at birth or from an illness or injury and includes an impairment which presently exists or existed in the past but has now ceased to exist;"

Discrimination on the ground of impairment in relation to applicants for employment is made unlawful by section 66B. that includes discrimination in determining who should be offered employment (section 66B(1)(b)).

The first question is whether obesity is an "impairment" within the meaning of the Act.

In *Cox v The Public Transport Corporation* [1992] EOC 92-401 obesity was held not to be an impairment within the meaning of the *Equal Opportunity Act* 1984 (Vic). In that case the complainant applied to the Corporation for a job as a tram conductor. He was refused after undergoing a medical examination which found him unfit for the job because he was overweight and consequently at risk of a heart attack. It was accepted that while he had a high BMI (36 at the time of his first examination and 37.1 on a subsequent examination) which indicated he had a significantly increased risk of cardio-vascular malfunction and ultimate heart problems, he was in all other respects healthy.

The Victorian Equal Opportunity Board held that the definition of "impairment" in the Victorian Act was a comprehensive and exclusive one and obesity as such did not come within it.

For present purposes it is sufficient to note that the definition of "impairment" in the Victorian Act is significantly different from that in section 4 of the WA Act, and *Cox* therefore does not assist to resolve the question in this case.

In cross-examination, Ms Andrews asked Dr Walsh whether he considered (the condition of) being overweight to be an impairment or a disability. His response was

"It depends on the degree of overweight, but it is an impairment, yes, even moderate overweight."

Ms Romeo pursued that issue in re-examination, asking the Doctor in what context he saw obesity as being an impairment. He said it is a definite cardiovascular system risk factor. He explained the actual factor is not certain, but it seems to be related to cardiac overload and cardiac failure under added stress. Apart from obesity itself being a risk factor there is an increased incidence of hypertension, osteoarthritis, myocardial infarction, myocardial ischaemia, gout, lipoidemia and diabetes. The body fats and insulin situation are altered.

To paraphrase Cox, the increased risk or imputation of increased risk of a cardiovascular defect or disturbance is not itself a present impairment nor imputation of a present impairment.

Whether or not the alteration of body fats and insulin situation constitute "a defect or disturbance in the normal structure or functioning" of the person's body is not something we are able to determine on the limited evidence before us in this case.

Dr Walsh's evidence on whether Mrs McCarthy's "overweight" condition amounted to a defect or disturbance in the structure of her body or its functioning was that the matter is controversial at the moment, although there definitely seem to be other factors involved with obesity which are not just purely a matter of over-eating or caloric intake; but he could not be more specific and there is presently no actual proof of that.

On balance therefore, whilst it may be that obesity per se could constitute an "impairment" within the meaning of section 4 of the Act the evidence here is insufficient to enable us to determine that issue one way or the other. The consequence in this instance is that the Complainant has failed to discharge the onus upon her of establishing unlawful discrimination on the ground of impairment.

The complaint, however, alleges only one act of unlawful discrimination in refusing the Complainant's application for employment, albeit raising the three separate grounds of pregnancy, sex and impairment. For the reasons already given, we find the complaint substantiated insofar as it is founded upon unlawful discrimination on the ground of pregnancy.

The Complainant claims compensation for loss of income and generally for hurt and humiliation and seeks such other orders as the Tribunal may deem appropriate.

In considering this it is necessary to return to the evidence.

Had Mrs McCarthy passed the medical on 15/11/89 she would have been employed by Transperth at the same time as her husband.

She would have commenced a 20-day training course on 20/11/89 (see Answer 5(a) of the Respondent's Answers to Complainants Request for Information, attached to exhibit #2). During that period she would have been paid a base wage of \$248.80 per week gross (the original figure of \$415.90 was corrected by Mr Butler in his evidence). That would have amounted to \$4976.

Accepting that she would then have ceased work 6 weeks before the birth and remained off work for 10 weeks after the birth, on the figures provided to us (see exhibit 6) her base rate of pay (gross) with Transperth would thereafter have been

1/08/90 to 19/11/90 16 weeks at \$430.90 (gross)	\$6,894.00
20/11/90 to 30/12/90 6 weeks at \$435.90 (gross)	2,615.00
31/12/90 to 4/03/91 9 weeks at 430.90 (gross)	<u>3,878.00</u>
	<u>\$13,387.00</u>

In fact, after a further independent medical examination by Dr Marsden on 22/10/90, which cleared her as fit for employment (even though her weight was then recorded as 82kg), Mrs McCarthy was employed by Transperth. She commenced her training programme on 5/3/91 and full-time employment as a Bus Operator on 2/4/91.

It was established in the evidence that after their training period bus operators would invariably receive more than the base wage. Initially all operators are located in the Causeway Depot and are not allocated a zone. That placement is apparently known colloquially within Transperth as the "scrap heap". Operators posted there work whatever shifts are available, generally acting as relief drivers.

Even there, however, rostered overtime would be worked. That is built into each operator's shift. Whilst operators are required to work only 8 hours a day or 40 hours a week it often occurs that a particular bus run would not be completed until sometime after the end of the

operator's 8 hours. The balance of the time is termed "rostered overtime" and is payable at the appropriate overtime rate.

In addition, an operator could volunteer to work on his or her day off. That is referred to as "unrostered overtime".

As any other operator, Mrs McCarthy's employment would have included a component of rostered overtime. On the other hand, she told the Tribunal it has not been her practice to work unrostered overtime.

In assessing her loss of income we therefore think it proper to make some allowance for rostered overtime but none for unrostered overtime.

The allocation of bus operators to particular zones would come with increasing seniority. Certain zones would be more attractive than others, depending upon the extent of rostered overtime ordinarily involved and the individual's preference for a specific area, articulated or non-articulated buses and so on.

The greater an operator's seniority the better the prospect of being allocated to the zone of his or her choice.

The basic rate of pay (and hence penalty rates) also increased with seniority. Increases ran in annual increments.

Thus, another woman operator, DB, who was employed by Transperth in late 1989 and went through the training course Mrs McCarthy would have been on had she not then been rejected, by November 1992 had progressed from the starting level 4 through levels 5 and 6 and had just applied for and been given level 7.

It is impossible to make a precise calculation of lost income because the overtime earnings and penalty rates would have varied depending upon the particular zones worked. We think a fair approach is to recognize the basic wage figures as a starting point, and to then make some allowance using as an upper limit her actual earnings with Transperth from 5/3/91 to 30/6/92 (over which period her gross weekly average earnings were \$526).

Mr McCarthy's actual earnings with Transperth from 20/11/89 to 30/6/90 were \$16,106. Over that period he worked 95 hours of unrostered overtime, for which he was paid \$900.86. If the \$900.86 is deducted from his gross earnings for that period, we reach a figure of \$15,205, which gives an average gross weekly income of \$468.

There is no reason Mrs McCarthy's average weekly income over that period would have been any less had she been employed by Transperth.

From 1/7/90 to 30/6/91 Mr McCarthy's gross income was \$31,004. Of that, \$1753 was paid for unrostered overtime. Excluding that, his average gross weekly wage was \$562.

Taking all these figures as indicative of the parameters of Mrs McCarthy's potential earnings over the period 20/11/89 to 4/3/91, and recognizing the uncertainties, we would assess her lost wages as follows -

(a)	20/11/89 to 7/4/90 20 weeks at an average of \$248.80	\$ 4,976.00
(b)	1/8/90 to 4/3/91 31 weeks at an average of \$497 (that being itself the average of \$526 and \$468)	<u>15,407.00</u> <u>\$20,374.00</u>

But there are deductions to be made from this figure. The first is for baby-sitting costs. Mrs McCarthy's evidence was that had she been employed by Transperth in November 1989, she would have had to pay a baby-sitter to look after the child on her return to work after the birth. The only evidence of the likely cost of that was a figure of "\$100 or \$120 a week". That was not a considered response and the amount was mentioned only in passing. Under the circumstances we think \$100 a week should be deducted in respect of the period from 1/8/90, which is \$1300.

The other deduction to be made is the income actually earned by Mrs McCarthy over the relevant period. The evidence was that amounted to \$5471.

We accordingly assess Mrs McCarthy's loss of income at \$13,603 calculated as follows -

Lost wages income for 51 weeks	\$20,374.00
Less baby-sitting costs	<u>1,300.00</u>
	\$19,074.00
Less actual earnings	<u>5,471.00</u>
	<u>\$13,603.00</u> gross

We have referred to gross income throughout because Mrs McCarthy will be required to pay income tax on that component of the award of damages which is intended to compensate her for loss of income (Taxation Ruling No. IT 2424 issued by the Commissioner of Taxation 2/7/87 - see paras 8 and 11).

As to the claim for general damages to compensate for non-financial loss or injury, although it has been generally accepted that for the purposes of assessment of damages discrimination cases should be treated as a species of tort, it would be wrong to take too pedantic or technical an approach. It is now well established, for example, that the proper scope of awards under anti-discrimination legislation is both different in nature from, and much wider than, the scope of damages awards in tort. Perhaps the most obvious area in which this is apparent is that of humiliation, emotional distress (falling short of nervous shock), embarrassment, hurt feelings and the like (see *Allders International Pty Ltd v Anstee & Ors* (1986) EOC, 92-157; [1986] 5 NSWLR 47). It is important that awards aimed at compensating for injured feelings should not be minimal because that would tend to trivialise or diminish the respect for public policy (*Hall & Ors v A & A Shieban Pty Ltd & Ors*) (1989) EOC, 92-250 and *Alexander v Home Office* (1988) 1 WLR 968).

As with any other loss of injury, compensation will be recoverable where and to the extent that loss of injury is shown to be caused by the wrongful act and is sufficiently proximate to it. (see *Erbs v Overseas Corporation Pty Ltd* (1986) EOC, 92-181, *Cook v Lancet Pty Ltd & Anor* (1989) EOC, 92-257, *Marshall v Marshall White & Co Pty Ltd* (1990) EOC 92-304 and *Allegretta v Prime Holdings Pty Ltd* (1991) EOC, 92-364).

In the present case it is patently clear the effects upon Mrs McCarthy of the unlawful act of discrimination were immediate, profound and long-lasting.

Quite apart from the actual financial loss as a result of not being employed by Transperth, Mrs McCarthy experienced great anxiety, distress and frustration because of how much the very financial survival of the family had been dependant upon it. The great depth of her emotional reaction was demonstrated by the fact it extended even to wishing she was not pregnant, and even to contemplating the possibility of having an abortion. The effects continued throughout her pregnancy and even beyond. We accept Mr McCarthy's evidence on this and the other aspects of the Complainants humiliation, loss of dignity and self-esteem, stress and general emotional hurt. The quality of her life clearly suffered very greatly. In the circumstances it is really unnecessary to say more.

We consider the circumstances and non-financial consequences of the discrimination here entitle the Complainant to a substantial award under this head.

It is notoriously difficult to assess damages under this head and awards in other cases are useful as only the most general guide. They range from relatively modest amounts compensating for the immediate humiliation occasioned by the discriminatory act (as eg the \$1800 awarded in *Allegretta*, supra) to somewhat larger amounts for more long-term and more significant effects (as eg \$2000 in *Marshall v Marshall White & Co Pty Ltd*, supra and a \$5000 in *Gibbs v Australian Wool Corporation* (1990) EOC 92-327; \$11,000 for injury to feelings in *Erbs v Overseas Corporation Pty Ltd*, supra) to significantly greater awards for more serious effects in both their impact and duration. Examples of awards in the last category include *Murphy v Ramus Pty Ltd* (1990) EOC, 92-308 in which \$12,000 was awarded by way of general damages and *Hill v Water Resources Commission* (1985) EOC, 92-127 in which \$27,500 was awarded for injury to feelings, pain and suffering and loss of enjoyment of life plus \$5000 for disruption to the Complainant's career.

We reiterate that other cases afford only the broadest of guides. The critical factor must always be the nature and extent of the loss or injury in the particular case, and the award which we consider both fair and reasonable here is \$15,000.

There is one further matter. Despite the award we propose to make for compensation for Mrs McCarthy's loss of wages, as things stand she will continue to be detrimentally affected by her non-employment in November 1989. That is because her seniority with Transperth dates from the commencement of her actual employment, on 5/3/91 (as a trainee) and 2/4/91 (as a bus operator). We have already adverted to some of the benefits and advantages which flow from increasing seniority. We therefore propose also to order pursuant to section 127 (b)(iii) of the Act that for the purpose of any entitlement to benefit or advantage depending upon seniority in employment, Transperth accord Mrs McCarthy the same seniority date as her husband (that being the date upon which she would in fact have commenced employment with Transperth).

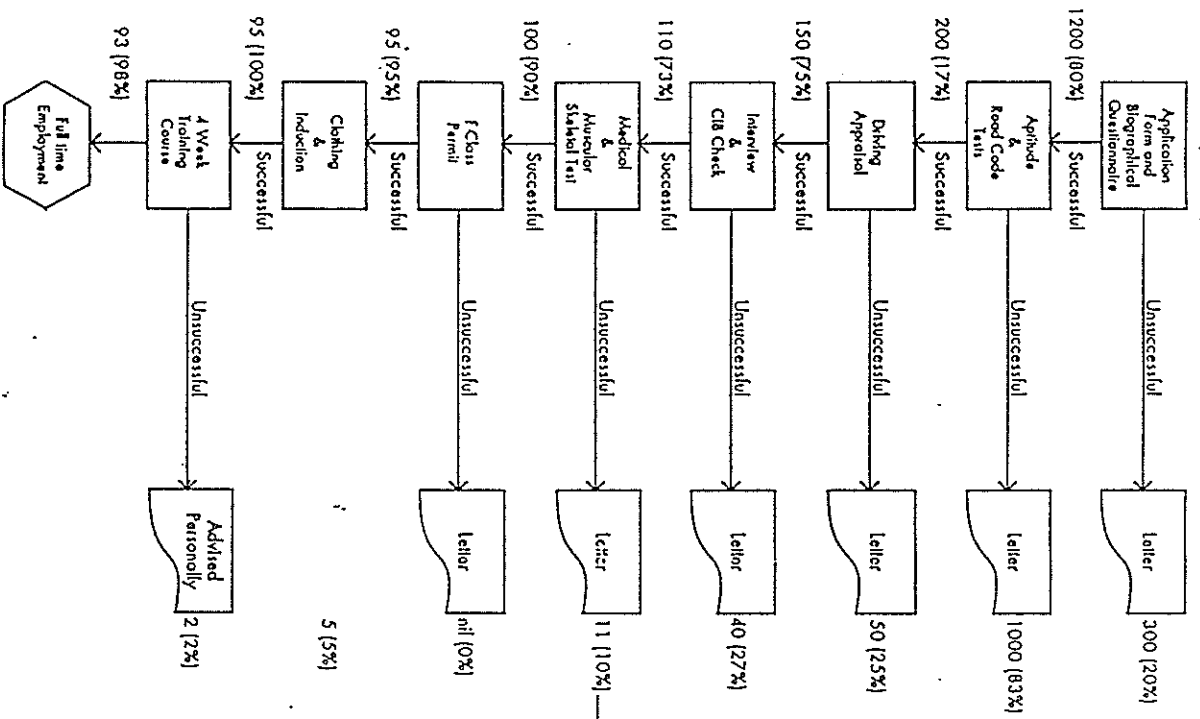
We therefore formally find the complaint substantiated and make the following orders -

- (1) The Respondent pay to the Complainant damages of \$28,603 (comprising \$13,603 for loss of income and \$15,000 (by way of damages for non-financial loss and injury).
- (2) For the purpose of any entitlement to benefit or advantage the Respondent accord the Complainant the same seniority date in employment as that of her husband, Mr David McCarthy.

Bus Operator Recruitment Procedure

Normal Procedure
1500 (100%)

Appeal or Complaint Procedure



Either: a) Second opinion Medical from another Occupational Health Clinic
 or
 b) Second opinion from specialist in the area of the query i.e. If arthritis refer to rheumatologists, in this case Occupational Health Doctor at Centre to organise referral.
 In both cases the 'Job Description for Bus Operators' must be sent to the Doctor concerned.
 Second Opinion Supports → Unsuccessful
 Second Opinion Refusers → Discuss with O.H.C.

Time Frame

From 2 months up to 10 months between applying and being placed in a training school.

Please note: This flow diagram is based on previous recruitment drives - it may alter at future recruitment drives.

Handwritten notes and signatures:
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