

JUDGEMENT

**EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA**

No. 1 of 1992

**PENELOPE BRIFFA
Complainant**

- against -

**SEVILLE PTY LTD TRADING AS
ICE BOUTIQUE
Respondent**

BEFORE: Mr L. Roberts-Smith Q.C. - (Deputy President)
Ms P. Harris - (Member)
Mr K. Wyatt - (Deputy Member)

Counsel for the Complainant - Ms P. Hogan
Agent for the Respondent - Mr G. Bull

HEARD: 14th and 15th December, 1992.

REASONS FOR DECISION

(Delivered: 25th January, 1993.)

The Respondent is a body corporate registered in Western Australia. The two Directors are Mr Robert Pierucci and Mrs Geraldine Pierucci. The Respondent is a manufacturer and retailer of fashion garments and at the relevant times, operated several womens fashion boutiques known as "Ice" and "Suffragette". There were Ice Boutiques in Claremont, South Perth and Carillon in the City and a Suffragette store in City Arcade. Since then stores have been opened in Subiaco and Brisbane. The manufacturing is done in a factory at Leederville. The Respondent's total staff is presently 33, all of whom (other than Mr Pierucci) are women.

In her Points of Claim dated 13 March 1992, the Complainant asserted that she was employed as Manager of the Respondents Ice Boutique in Claremont on 11 December 1989 and on 14 May 1990 was transferred as Manager of its City Arcade store.

On 2 August 1990 the Complainant's Gynaecologist confirmed that she was then 3 months pregnant and later the same day she informed Mr Pierucci of that, advising him that she intended to work up to the birth of the child.

On 12 September 1990 Mrs Pierucci terminated the Complainant's employment.

The Complainant pleads that this termination was an act of unlawful discrimination on the ground of pregnancy contrary to Section 11(2) of the Equal Opportunity Act 1984 ("the Act").

In its Points of Defence dated 10 April 1991 the Respondent pleaded that (inter alia) Mr

Pierucci went to the Respondents City Arcade store on 2 August 1990 with the intention of dismissing the Complainant then on the ground of "inadequate performance" but that before he had an opportunity to do that she informed him she was pregnant. The Respondent pleads further that on 12 September 1990 Mrs Pierucci, acting on instructions from Mr Pierucci, terminated the Complainant's employment on the ground of gross misconduct and inadequate performance.

The Respondent denies that the Complainant was discriminated against on the ground of pregnancy.

Following her dismissal, the Complainant lodged a complaint with the Equal Opportunity Commission on 27 September 1990.

On 6 January 1992 the complaint was referred to this Tribunal by the Commissioner pursuant to Section 93(1)(b) of the Act. A preliminary hearing was held on 20 February 1992. The Points of Claim were filed on 16 March and the Points of Defence were filed on 19 April 1992. The matter was heard on 14 and 15 December 1992.

Witnesses were therefore testifying about events which had occurred up to September 1990 that is, more than 2 years before the hearing. The accuracy and reliability of witnesses memories of events and conversations - especially those which there was no particular reason to consider important or noteworthy at the time - is notoriously suspect in these circumstances. It is also necessary for a Tribunal such as this to be conscious of the ordinary human tendency to rationalise about past events where a dispute later arises

in relation to them and to unconsciously or otherwise exaggerate those aspects which favour them and minimise those aspects which might reflect adversely upon them.

All of these considerations were present in this case and were of marked effect in relation to the evidence of the main protagonists, namely Ms Briffa and Mr and Mrs Pierucci.

It is important that we make several observations at the outset.

First, although this Tribunal is required by the Act to conduct an inquiry into matters referred to it [Section 107(3)] and to that inquiry the rules of evidence do not apply (Section 120) it has nonetheless been established that the Complainant bears the onus of proving that he or she has been the victim of unlawful discrimination. The Complainant must prove that on the balance of probabilities, applying that standard in the way explained by Dixon J (as he then was) in Briginshaw v Briginshaw (1938) 60 CLR 336, 354.

In the absence of direct evidence of unlawful discrimination a Complainant may rely on circumstantial evidence or inferences drawn from primary facts (in the sense described in Chamberlain v R (2) (1984) 153 CLR 521 as explained in Shepherd v R 97 ALR 161. Discrimination cannot be inferred when a more probable and innocent explanation is open on the evidence (Fenwick v Beveridge Building Products Pty Ltd (1986) EOC 92-147; Allegretta v Prime Holdings Pty Ltd (1991) EOC 92-364 at 78504.

There is frequently some inherent tension between the inquisitorial role of this Tribunal

and the social purpose of the legislation (that being to prohibit unlawful discrimination and to provide a remedy to those who suffer from it) on the one hand and the above principles relating to the onus and burden of proof. By its very nature, unlawful discrimination is often not directly evidenced nor readily demonstrable. The problem is one of long standing. It was expressed by Einfeld J in Erbs v Overseas Corporation Pty Ltd (1986) EOC 92-181 (itself a case of discrimination on the ground of pregnancy) and reiterated by his Honour in Bennett and Anor. v Everett and Anor. (1988) EOC 92-244 where at page 77271 he said -

"Positive proof of discrimination on at least some of the grounds covered by the Act will often be difficult for Complainants. Erbs, a case of dismissal on the grounds of pregnancy, was itself a case of this kind. Decisions made in the secrecy of boardrooms or the minds of employers will rarely, if ever, be written down or find expression to the employee in directly discriminatory terms. Still less will they be exposed to the potentially corroborative eye of a witness, especially as the most likely witnesses, fellow employees, may well entertain the fear of losing their own jobs at the hands of the same employer if they come forward to testify. A possible witness may also stand to gain personally by the dismissal of the complaint even on discriminatory grounds. This means that many discrimination cases (other than sexual harassment) have to be proved by comparatively weak circumstantial evidence, without direct or perhaps any witnesses and based only on an intuition or a deeply held if correct belief that there has been discrimination. It will, as in Erbs, often be met by a wall of denial from the people who made the decision to discriminate. In other words, the facts are primarily known by Respondents, not Complainants - and Complainants will, more often than not, have few means of being able to establish them."

Nor has the problem been confined to Australia.

In 1968 one Canadian Commentator remarked that -

"It must not be forgotten that human rights legislation prohibits acts which depend upon the fact of the existence of a certain motive. This is a matter particularly

within the mind of the Respondent...(he) can give many different reasons why he denied a certain person an hotel, an apartment or a job. The person who has been denied access is faced with an almost impossible task of disproving the reasons given to him" (Walter S Tarnopolski "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" 1968 46 Canadian Bar Review 565 at 574)

Beatrice Vizkelety (Legal Counsel to the Quebec Human Rights Commission) in her book "Proving Discrimination in Canada" (Carswell 1987) observes (at page 7 and following) that whilst it is true administrative Tribunals are not bound by the ordinary rules of evidence this flexibility usually goes only to the admissibility of evidence not to its weight. She goes on to point out that -

"Indeed, in addition to the rules of natural justice which require boards to decide without bias (nemo iudex in causa sua) and to give parties an opportunity to be heard (audi alteram partem), it is also recognised that they cannot base their decisions on an absence of evidence, on completely irrelevant evidence, or other "illegal" evidence, such as hearsay. There is a balancing act between two competing values: the desirability of preserving an informal approach on the one hand, and the duty to ensure that all parties are treated fairly on the other.

In other words, the powers of human rights boards are not unfettered, they are limited by considerations of fairness towards the parties. The informality which characterises board procedures may allow greater flexibility in the rules of evidence followed at hearings, but it does not lessen the standard of proof required of the parties when making out their case. This standard, in sum, is consistent with that which would be applied by the courts."

A similar view has previously been expressed by this Tribunal in DL (Representing the members of People living with A.I.D.S. (W.A.) Inc. and Others against Perth City Council and Others (1992) EOC 92-422 at page 79011-2; and see also Gaze "Problems of Proof in Equal Opportunity Cases", Law Institute Journal, Aug. 1989, page 731.

It is also essential to bear steadily in mind in a case such as the present, precisely what it is that this Tribunal is to determine.

The only question ultimately is whether we are satisfied on the evidence that it is more likely than not that the Complainant was dismissed from her employment on the ground of her pregnancy. That need not have been the only reason for her dismissal nor even the principal one; it will be sufficient if it is shown to be one of them (Section 5). To put it another way these proceedings are not to decide whether Ms Briffa's dismissal was unfair, unjust nor in any way unlawful. This Tribunal has no jurisdiction to decide those questions; they are relevant - if at all - only to the extent they may throw light on the issue we do have to determine which is whether the Complainant's pregnancy was a ground of her dismissal.

Prior to her employment by the Respondent in December 1989, Ms Briffa had 4 years managing retail fashion clothing outlets, with previous experience in the industry before that.

She was interviewed by Mrs Pierucci and had further telephone discussions with Mr Pierucci as a result of which she was employed to manage the boutique known as "Ice" at Claremont. She was to work 9 to 5. It was common ground she was paid over the award rate.

At the end of January 1990 she received a pay increase of \$10.00 per week, that flowing from a State wage case increase. Her next pay increase of \$16.00 per week was in

March 1990.

Some time later Mr Pierucci asked her to take over the management of the Respondents store in the City Arcade. That was then trading under the name "Suffragette". As an inducement he offered her a further pay rise plus a clothing allowance of \$20.00 per fortnight. She agreed to that proposition and commenced at the City Arcade store on 14 May 1990, receiving her first pay at the increased rate and with the clothing allowance on 16 May.

The Suffragette store had been doing badly and the Pierucci's were anxious to make a number of changes to improve its performance.

The Respondent's divisional daily sales sheets for 1990 (Exhibit 7B) confirmed this. Sales for every month to and including May 1990 were appreciably below target.

The situation did not improve.

In June, sales were 24% below target (as they were in the Respondents Carillon shop. They were also significantly below target in the Claremont shop).

In July, sales were approximately 8% below target in the City Arcade shop; in August they were slightly above target but in September they were 55% below target and in each of October and November 1990 they were 30% below target.

During August 1990 the Suffragette shop was renovated. That work was done on Monday and Tuesday 27 and 28 August. The shop was effectively closed down for those 2 days. On the Monday the Complainant managed the Claremont store and on the Tuesday she managed the South Perth store.

In the days up to the renovation, the Respondent conducted a "closing down" sale in the Suffragette store. Clothing sold then included very old stock moved up from the Carillon "Ice" store which was being closed down. Much of the stock was sold at greatly reduced prices.

After the renovation, the City Arcade store was renamed as an "Ice" Boutique and operated under that name from Wednesday 29 August 1990.

The Complainant also relieved at the South Perth store on 31 August and 11 September.

On Thursday 2 August 1990 the Complainant had an appointment with her Gynaecologist at 10.30 a.m. She had arranged it for that time because she did not start work until 1.00 p.m. on Thursdays. The Doctor confirmed that she was then 3 months pregnant.

According to the Complainant she then went into the store. The first person she told about her pregnancy was a fellow employee Ms Maria Duffy. She also told Ms Duffy that she intended to tell Mr Pierucci about it after she had completed work at 9.00 p.m. when she rang through to him the figures for the days trading. She told the Tribunal that Ms Duffy and another employee, Ms Geraldine Pitcher, made some remark to the effect

that Mr Pierucci would "let her go" once her pregnancy began to show. She said she did not take the remark seriously because she did not think the Pieruccis "were like that". She said in evidence that she did not see Mr Pierucci at all that day and did tell him about her pregnancy on the telephone that night. She told him she intended to work up until the end of December which would have been six weeks before her delivery date. She told the Tribunal he did not say much; just congratulated her and said that was good news.

The Complainant said Mrs Pierucci telephoned her the following day (as she usually did to discuss stock and other business matters) congratulated her again and told her that Mr Pierucci had told her the news when he returned home the previous night. The Complainant asked what Mr Pierucci's feelings were about a pregnant lady working in the shop to which Mrs Pierucci replied -

"Well Penny, Robert and I discussed it last night and we'll just have to see how things go".

The Complainant said in evidence she was confused by this reply and after giving it some thought, decided to discuss her situation with Mr Pierucci at a general staff meeting to be held on 13 August. She did raise it with him on that occasion, reiterating that she wanted to continue to work full time and saying that if the Pierucci's had any feelings about retrenching her, she would like to know. She asked him to be frank with her.

As the Complainant explained it in her evidence, Mr Pierucci then said that he had not given the matter a great deal of thought but perhaps she might later work in a part time capacity because she would inevitably be tired but not to worry about it at that stage.

Wednesday 12 September 1990 was one of the Complainant's rostered days off. She was at home when she received a telephone call from Mrs Pierucci who told her she had bad news. She explained that she and her husband had been very worried about the City Arcade store. She said -

"It has been very quiet, I'm sorry but we'll have to let you go. Robert will now work in the shop."

The Complainant asked when they would like her to leave. Mrs Pierucci said from that day; they would pay her out. That was the end of the discussion.

In examination in chief when asked what her reaction was to being dismissed the Complainant said -

"Shock. It was shock at first because the job -- my job had been taken away with me. I hadn't had any notification, any warning. Rung up at home on my rostered day off and basically told not to come in the next day. I felt humiliation because I then, you know, quickly had to turn around and find employment elsewhere. Whenever I approached a prospective employer, which I did -- I like to do it, you know, on a face to face basis; I had to explain to them that I could only work for a three month period. When asked why I then had to sort of go on with the explanation that, you know, I was going to have a baby, which sort of when they looked, you know, was quite obvious. I was knocked back time and time again of course. It was the end of September going towards the end of the year and not many people want to employ a person in a shop for just a three month period of time. And I'm hurt. I was very hurt at the subsequent stores and things that Mr Pierucci has said about me since which I find they're totally unjustified. I've always prided myself in the manner in which I work - my work history. I've never been retrenched before. I consider myself as an honest, diligent, reliable worker. And it's the way I have operated before. It's the way I will continue to operate. And I always went into work first thing in the morning. I did my work the best way I knew how. I often came to work early. I worked through lunch breaks. I closed that door at 5.30 knowing that I did a good job. That's the way I work. And it did, it hurt and it still hurts."

Did the fact that you were out of employment for a while affect your financial situation? -- Yes, it did. It did. My husband and I had sort of -- you know, we'd made out a budget coming up to the end of the year and before the baby was born. It caused great difficulties. Private health insurance. things that we were going to buy for the baby. Just those normal things that happen toward the end of the year. Bills to pay. Christmas coming up. Yes, it wasn't a very pleasant time at all."

Ms Briffa went into the shop to collect her personal possessions the following day and told Ms Duffy what had happened. She said Ms Duffy's response was to make the comment "see Penny, I told you it would happen".

A few days after her dismissal the Complainant rang up and asked for a reference and an Employment Separation Certificate ("Separation Certificate"). She never did receive the reference but she did get a Separation Certificate dated 24 September 1990 (Exhibit 4). That is an official Department of Social Security form which provides information for eligibility for unemployment benefit. It is an offence under the Social Security Act 1947 (Com) to give false or misleading information on such a certificate. There is a warning to that effect on the form itself.

Under the heading "Cessation of Employment" there is the question "Was employment terminated due to:" and 4 options are then listed. Where the termination was not voluntary the employer is required to indicate which of the 4 applies to the particular employee. The 4 options are -

1. Shortage of work,
2. Unsuitability for this type of work,

3. Unsatisfactory work performance,
4. Misconduct.

On the Complainant's form, Ms Shann Begieneman, the Respondent's Bookkeeper, certified the reason for Ms Briffa's termination was "Shortage of work".

The Complainant began to look for other work the next day. Over the next six weeks she tried about 19 places. She was unsuccessful in all except one. That was in another Claremont boutique where she worked part time from 20 October 1990 to 12 January 1991.

Ms Briffa was adamant throughout that no complaint had ever been made about her by any customer either at the Claremont shop or at the City Arcade shop. She similarly maintained that she was given reason by the Pieruccis' comments to her, by the increases in salary, the clothing allowance and by the offer that she manage the City Arcade shop, that the Pieruccis were pleased with her work and held her in high regard as an employee and Store Manager. She specifically said one reason she had sought employment with the Respondent was because her previous employer insisted on an approach to customers which she thought was too "pushy" and she knew the Pieruccis wanted a less aggressive customer approach in their shops.

As to the pleaded allegations of misconduct, Ms Briffa was able to cite only one occasion on which the question of gossip had been raised with her. She said she received a telephone call from Mrs Pierucci who asked her what remarks were being made about

"Robert". The Complainant did not know what Mrs Pierucci was talking about and said so. The matter was not pursued. She later thought Mrs Pierucci might have been referring to another "Robert" who was then working for the Respondent. She thought this conversation was probably close to the time of her dismissal but could not really recall.

She conceded there had from time to time been some gossip amongst the staff about Mr Pierucci and that she had joined in some of that but she denied initiating it. She said Geraldine Pitcher had insinuated or asked her whether the Manager of another store was having an affair with Mr Pierucci. She said she remembered joining in some laughter about that at the time but certainly did not instigate it nor take it further; it was just idle gossip. This occurred whilst she was in the City Arcade store.

She mentioned one occasion on which she had gone to the ballet with Ms Vicki Stephens the Manager of the Respondents South Perth shop. By reference to her diary the Complainant was able to identify that as having occurred on 6 June 1990. She told the Tribunal that over coffee after the ballet, Ms Stephens asked whether she had heard that Mr Pierucci was having an affair with his secretary. The Complainant said she had heard that. Again that was all that was said about it on that occasion.

Questioned about any involvement of hers in discussions about whether the Respondent was paying in accordance with award rates, the Complainant described one conversation at the City Arcade shop. She had it in mind to ask the Pieruccis if she could work part time after the baby was born and so asked Ms Duffy what the hourly rate was for part

time work. Ms Duffy was unable to tell her because she (Ms Duffy) was sure she was being paid below the award rate. She suggested the Complainant telephone Geraldine Pitcher which she did. Ms Pitcher told her the same thing, namely that she also thought she was being paid below the award rate. Ms Briffa said that she and Ms Duffy decided to find out what the award rate in fact was. She made the call on Ms Duffy's behalf. Apparently that confirmed Ms Duffy was being paid below the award. Given that information both Ms Briffa and Ms Duffy said they thought that was unfair. The Complainant asked if Ms Duffy had raised it with Mrs Pierucci. Ms Duffy said she had not because they were friends. The Complainant suggested that if Ms Duffy did want to pursue it she should contact Shann Begieneman and raise it with her. She understood that Ms Duffy did that. It was not something the Complainant ever raised with anyone else although it was possible she may have mentioned it to Ms Stephens in passing. - What Ms Duffy or Ms Pitcher were being paid was not important to the Complainant.

In cross examination she denied that she had spoken ill of Mr or Mrs Pierucci to other staff, that she had maligned them or suggested that staff would not get a "fair deal" from them nor anything of that nature. She never said Mr Pierucci was not to be trusted and denied that she had ever told another former employee, Mrs Cathy Newton, that she should be careful not to be underpaid by Mr Pierucci. She likewise denied that she had said to any staff member "if you knew what I know about Mr Pierucci you wouldn't think he was so good" or any words to that effect. She said she had never told anyone prior to her dismissal that she thought Mr Pierucci was going to sack her.

The Complainant called no other witnesses.

For the Respondent, Mr Pierucci testified there was a need to get the City Arcade store to perform better and Ms Briffa was the only employee available to be transferred there at the time. He offered a pay increase and a clothing allowance as an incentive. Her performance at the Claremont store had certainly not been outstanding but they needed a mature person and there was no one else available. He did say to her something like "we need someone who is fairly methodical and able to perform in the store".

There had, he said, been a number of complaints about her whilst at Claremont regarding what he described as her "over eagerness" with customers. He said some people might call it being "pushy". He said there were at least 2 people who made that complaint to him or his wife, saying they would not be back as long as she was serving in the store. He also had a "very strong complaint" from a Mr Broderick who complained that his daughter had been pressured most unnecessarily into the purchase of a particular garment. He said he remembered that phone call very vividly because Mr Broderick was quite abusive and he did not receive many telephone calls like that and the call certainly was based purely and simply on the fact that his daughter was under 18 and had been pressured into purchasing the garment. He said he immediately contacted Ms Briffa on the telephone and "got her side of the story". He said that basically her response was "well you know she was a young girl; she couldn't make up her mind; she needed some encouragement" and he did not pursue it any further beyond that. He did authorise a refund on the garment.

In cross examination Mr Pierucci was able to recall only one specific instance on which he understood his wife had asked for the Complainant to "temper her sales approach

down a bit" as the result of a customer complaint.

Nonetheless he said that in fact he stopped her clothing allowance at the end of August 1990 because he was not happy with Ms Briffa's performance in the City Arcade store. He could not recall whether she had complained about that. Her performance and attitude had initially been good but as time passed he noticed "a marked deterioration in attitude towards the company, towards myself, towards the sales and that was reflected in her performance in the store; it was reflected in the sales that were achieved in that particular store". He thought she had become more despondent about the situation in there and possibly did not enjoy working there as much as at Claremont.

By the end of July 1990, the Pieruccis believed the Complainant's sales performance was poor, they were not happy with her attitude and they believed she was responsible for instigating and spreading false rumours of impropriety by Mr Pierucci with respect to other members of staff.

Mr Pierucci said their dissatisfaction had reached such a stage by 2 August 1990 that he decided to dismiss her then and went to the City Arcade store that day to do so. He said before he even had a chance to say hello she hurried up to him and told him she was pregnant. His immediate thought was that it would be dangerous to dismiss an employee who had just told him she was pregnant and secondly he thought that she would work until the baby was due, after which she would leave and so the problem would resolve itself. On that basis he said nothing about dismissing her but simply congratulated her on her news, had a brief discussion about some other things and then left.

In evidence he said he got the distinct impression that she knew her future with the Respondent was in jeopardy, that she knew her employment was going to be terminated and she got in first so as not to give him a chance to dismiss her.

He was insistent throughout that she did not inform him of her pregnancy on the telephone, he said her evidence that she phoned and told him about it at 9.15 that night was simply incorrect. He went into the office as soon as she started that day and she told him then. He received no phone call from her that night.

Mr Pierucci said the Financial Controller, Ms Shann Begieneman, knew beforehand that he intended to terminate Ms Briffa's employment. When he got back to the office he said to her "you won't believe what's happened" and then related what had occurred. He could not remember if this was the same day or the next morning.

So for the time being Ms Briffa continued in her employment in the Respondent's City Arcade store.

Mr Pierucci agreed that the Complainant approached him some 2 weeks later, raised the matter with him again and asked him to be frank about her employment prospects. He did not understand her questioning. To him there was no issue of her termination being imminent because she had already told him she would work up until she was no longer able. He said the subject of part time work arose when "as a gesture of good faith" he mentioned that if she became too tired to work full time, they would be quite happy to look at a part time situation for her.

According to Mr Pierucci, the next development was in September. He was then in Italy on a business trip. He received a telephone call about 2.00 a.m. from his wife who was very distraught. She told him about more rumours and gossip that were circulating amongst staff. Specifically he said Mrs Pierucci told him that a Mrs Cathy Newton, an employee who had resigned and was in the process of leaving the Respondent's employ, telephoned her very concerned that she would not get her termination pay and that she had been told Mr Pierucci was not to be trusted as an employer and that he would try and underpay her. He said it had been relayed to his wife that Ms Newton, had said it was the Complainant who told her that. Ms Newton's last day was on 31 August 1990.

After the previous abortive decision to dismiss the Complainant, their dissatisfaction with her sales performance, their concern about her "attitude" and her maligning of Mr Pierucci to other staff, the Newton incident was the last straw. Mr Pierucci decided then and there that the Complainant should go. He told his wife to sack her immediately.

The dismissal of staff was not a task normally performed by Mrs Pierucci. When it was necessary it was something which was done by Mr Pierucci.

According to Mr Pierucci, dismissing the Complainant caused them considerable inconvenience. There were no arrangements in place for a replacement. They had insufficient staff as it was. Mrs Pierucci had to go and work full time in the store until other arrangements could be made. Their 2 children were then on school holidays. They did move some juniors around from other stores to do part time work but it was not until Mr Pierucci returned from Italy that he advertised for a Manager and subsequently

employed one.

The Complainant was paid out. She received a weeks pay in lieu of notice. Her entitlements were paid up to 12 September 1990.

Mr Pierucci insisted categorically that her pregnancy was no part of the reason for Ms Briffa's dismissal; it was not even considered.

When pressed in cross examination by Ms Hogan, Counsel for the Complainant, about the reasons for his decision to dismiss Ms Briffa on 2 August 1990 Mr Pierucci said they were the Pierucci's belief that Ms Briffa had told other staff that he was not a fair and proper employer and her unsatisfactory sales performance. The comments the Complainant allegedly made were passed on to Mr Pierucci by Shann Begieneman.

Mrs Pierucci testified that initially Ms Briffa's employment in the Claremont store went well, however as time passed she realised the Complainant was not adapting to the way the Respondent liked staff to deal with customers. She said she did speak to the Complainant about this on a couple of occasions "just to try and calm her down and do it the way we did it. She didn't like that; that was her way of selling".

Mrs Pierucci was able to cite only one specific customer complaint pertinent to the Complainant. This was a lady who told her that she would not come back to the store so long as Ms Briffa was there; she was "just far too pushy".

The only complaint she could recall about Ms Briffa while she was at the City Arcade store was Mr Broderick's. She was not involved with that; her husband told her about it.

There were a few occasions when Ms Begieneman told Mrs Pierucci of things that the Complainant was supposed to have said to other staff about them. One such matter was that concerning Ms Duffy's pay. Ms Duffy had told Ms Begieneman that she was not sure about her pay and had asked her to look into it. Ms Duffy was a long-standing close personal friend of Mrs Pierucci, so when she heard this from the Financial Controller, Mrs Pierucci went in and spoke to Ms Duffy about it. According to Mrs Pierucci, Ms Duffy said to her -

"Look don't worry; you're my friend, I know you wouldn't diddle me or anything like that, it was Penny that made the big deal about it."

Mrs Pierucci reassured Ms Duffy that she would look into the matter and if they were not paying her properly, she would correct it. Again Ms Duffy said -

"I didn't instigate it, it was Penny."

Mrs Pierucci said she then telephoned the Complainant and told her not to worry about what the other girls were doing but if there were any problems she could ring Mr Pierucci who would look into the wages for her. She said Ms Briffa's response was to say "I don't know what you're talking about Gerry; Maria's totally misunderstood."

Though Mrs Pierucci could not recall specifically what had led to the decision to sack Ms

Briffa on 2 August 1990, she did recall her husband discussing it with her beforehand because that was a job she disliked doing and thought it was a good thing because it would put an end to the problems. She could remember she subsequently received a telephone call from Mr Pierucci who told her that as soon as he had gone in to dismiss the Complainant and before he could do so, she told him she was pregnant.

Mrs Pierucci confirmed having had a conversation with the Complainant the following day, in the course of which she congratulated the Complainant on her pregnancy and said the only problem might be that she might get tired. The Complainant replied that would be all right, she could still sit on a chair to which Mrs Pierucci said she responded -

"Well not really Penny, I can't have my girls in a boutique sitting on a chair."

She explained to the Tribunal that seeing a staff member in a boutique sitting on a chair "is the biggest put off" to customers.

It was mainly through Ms Begieneman that things the Complainant was supposed to have said were relayed to Mrs Pierucci.

Mrs Pierucci was asked in examination in chief whether she had ever telephoned the Complainant to ask her about "stories that were going around about Robert". She said she had but the Complainant told her she had no idea what Mrs Pierucci was talking about so the latter "just let it slide". She went on to say that she was in the factory one day when Ms Begieneman said to her -

"I think you'd better do something about Penny because quite frankly I've had enough."

Ms Begieneman explained that she had been talking to Ms Briffa on the telephone and Ms Begieneman had made the comment "Look Penny, Robert's not that bad. I don't know what on earth you're talking about" to which she said Ms Briffa responded "if you knew what I know about Robert you wouldn't think he was such a wonderful boss".

Mrs Pierucci said she went directly into the City Arcade shop, took the Complainant aside and asked her about this. She said once again Ms Briffa flatly denied it, saying she did not know what Mrs Pierucci was talking about. In evidence Mrs Pierucci told the Tribunal she said "Penny, I'm not happy. I don't know what to do anymore but I'm not happy." She then left it at that and departed the store.

Two days later the problem with Cathy Newton came up.

Ms Begieneman telephoned Mrs Pierucci at home and suggested she talk to Ms Newton because the Complainant had spoken to Ms Newton about the pays and Ms Newton was most upset.

Mrs Pierucci did telephone Ms Newton who told her she went into the City Arcade store to say goodbye to the staff and Ms Briffa warned her to make sure she got paid properly "because the Pieruccis are well known for not paying their staff". Mrs Pierucci reassured Ms Newton but said at the same time she realised no matter what happened she had to do something about the situation. She said she telephoned her husband immediately, even

though it was very early in the morning where he was, and said -

"Robert, I don't know what to do because of the situation with Penny. I know obviously we can't sack her, she'll say we're sacking her because she's pregnant, but I can't go on any more with Shann telling me every day something else about Penny, and the latest thing is that she had said to Shann, 'If you knew what I knew about Robert, you wouldn't think he was so wonderful.' I even said to him, 'What does she know?' and he said 'That's it. Get rid of her, she's not to be put back in the store tomorrow.' So I rang Penny straight away.

And what did you tell her? -- I said, 'Penny, we're not happy with the performance in the store. I'm sorry, I'll have to let you go', which I hate doing. I hate letting people go, it's the worst thing to do. And she was fine, she said, 'Okay, Gerry' and left it at that.

And why did you tell her that? -- I told her that because it was true that we weren't happy with the store, and I thought there's no point in going through all this again, over and over again, about Robert or about we not paying -- What's the point if she's going to say to me again, 'Gerry, I don't know what you're talking about.' There isn't much point."

In cross examination about the reasons for the decision to dismiss the Complainant on 2 August 1990, Mrs Pierucci explained they were Ms Briffa's attitude to work and the lack of sales in the City Arcade store. Various things had been relayed back to the Pieruccis through Ms Begieneman. Kerry Wells had been in one day and found Ms Briffa slouched across the desk and just nothing happening in the store at all. Ms Begieneman had also relayed a comment by Ms Vicki Stephens that the latter did not understand why the Complainant bothered to work for the Respondent. It was said that Ms Briffa was always complaining about Mr Pierucci and "the state of things" and had made the comment she was not going to get very far in the company.

Mrs Pierucci made it clear in cross examination that she told the Complainant on the telephone she was dismissing her because of the Complainant's poor sales performance.

As far as she could remember she said "Penny, I'm sorry I've got to let you go on performance".

Ms Begieneman told the Tribunal she worked for the Respondent for 13 months from about April 1990 as a Secretary/Bookkeeper. In that capacity she was in daily contact with the Managers at the Respondents stores, including the Complainant. She got the "sincere impression" that Ms Briffa disliked Mr Pierucci.

In May 1990 Ms Begieneman took about 10 days off work because her grandmother had died. At that stage she had been working for the Respondents for a month. When she returned to work the Complainant asked her why she had been away and in explaining that Ms Begieneman observed that it was good of Mr Pierucci to give her the time off. She testified the Complainant then warned her not to "get sucked in" like that, Mr Pierucci was not as good as he made out to be and he treated his staff pretty poorly.

Ms Begieneman then referred to other incidents including a complaint about the rate she was to be paid for Saturday morning work. In the course of that conversation Ms Briffa said she knew what Mr Pierucci was like and if he could get out of paying people properly, he would. On a different occasion she made a similar disparaging remark about Mr Pierucci when Ms Begieneman was buying some culottes on her staff account.

Ms Begieneman was asked about the Newton incident. She took that more personally because it was she who was responsible for making up the pays and so regarded any complaint as reflecting upon her. On this particular occasion there was a problem with

the computer as a result of which the pays were in fact late. Ms Newton telephoned her to make sure she was going to receive her termination pay. When Ms Begieneman queried what had prompted that concern, Ms Newton told her she had been speaking to someone else who worked for the Respondent who had suggested she may have trouble getting her final pay. Ms Newton did not tell her who that person was but Ms Begieneman believed at the time it was probably the Complainant and understood that Mrs Pierucci later spoke to the Complainant about it and ascertained it had been her. In fact Ms Begieneman testified she had brought this to Mrs Pierucci's attention. She suggested that Mrs Pierucci contact Ms Newton to find out who it was who had spoken to her, she also volunteered the observation to Mrs Pierucci that she felt Ms Briffa should be sacked.

Ms Begieneman confirmed that she was aware Mr Pierucci intended to dismiss the Complainant on 2 August 1990 and she recalled he went to tell her in the morning, that he had come back mid morning and said before he could do that she had told him she was pregnant. In re-examination, she conceded it may have been the morning of 3 August that Mr Pierucci told her what had happened with Ms Briffa.

She said it was she who had taken the initial phone call from Mr Broderick. He was angry that his daughter had been pressured into buying an unsatisfactory garment. She referred him to Mr Pierucci.

Cross examined about the clothing allowance, Ms Begieneman initially said that had been stopped by Mr Pierucci. When pressed she said that was something which she had

discussed with Mr and Mrs Pierucci a few days before the hearing and Mr Pierucci had said then that he had stopped the Complainant's clothing allowance. When confronted with the Complainant's pay slips (Exhibit 1) and the staff purchase account (Exhibit 10), she agreed that those records supported Ms Briffa's evidence that her clothing allowance was never stopped prior to her termination but the method of its payment changed about 22 August 1990. From that time instead of the \$20.00 being shown as a separate item on the pay slip, it was credited directly to the Complainant's staff purchase account.

Ms Begieneman agreed in cross examination that she had never told the Pieruccis about the disparaging remarks made by the Complainant when Ms Begieneman was purchasing the culottes, although she did pass on other information to them very close to the time of Ms Briffa's actual dismissal.

It was Shann Begieneman who signed the Separation Certificate (Exhibit 4). Although aware the Complainant's employment had been terminated because of misconduct, she endorsed it to indicate the reason was lack of work because she believed that if she had given the real reason, that would have adversely affected the Complainant's entitlement to unemployment benefit. In this she thought she was doing the right thing for Ms Briffa.

The next witness was Ms Maria Duffy. She had grown up with Mrs Pierucci and was a life-long friend. In 1990 she was working part time for the Respondent, initially in the Carillon store and then in the City Arcade store. She normally worked from 11.00 a.m. to 3.00 p.m. She described the Complainant's customer approach as "a little bit pushy maybe". She gave evidence that before Ms Duffy knew anything about the Complainant

being pregnant, the Complainant told her she had a feeling she was going to lose her job because the Pieruccis were not happy with her. Ms Duffy said the Complainant told her on a few occasions about three months before her actual dismissal that she thought that she was going to get the sack.

Ms Duffy denied that she ever told the Complainant that her employment may be in jeopardy because of her pregnancy nor after the Complainant's employment had been terminated did she say to the Complainant that she told her that would happen.

As to the discrepancy about her own pay, she agreed she did query that. The subject had come up in conversation and it appeared she and Ms Pitcher may not have been receiving the correct rate so Ms Briffa telephoned the Arbitration Commission and found out. They let the Pieruccis know about this and the pays were fixed up.

In chief, when asked by Mr Bull (who although not a lawyer, was given leave under Section 112(1)(b) of the Act to appear as agent of the Respondent) whether she said she thought it unfair, she was initially equivocal in her evidence and then denied having said that.

Ms Duffy was cross examined about her friendship with the Pieruccis. She seemed to be at pains to distance herself from them in the sense of having any knowledge of or input into the management of their business. She made a point of asserting that she would not have told the Pieruccis what the staff were saying, she would rather keep out of it and she had never had any discussions with the Pieruccis about whether or not the Complainant

was going to be sacked, yet she then went on to say that when she was having coffee with Mrs Pierucci about a month before the Complainant was dismissed, Mrs Pierucci had told her she thought they were going to get rid of the Complainant. Ms Duffy said this was because of the poor sales figures, the shop was not doing any business at all - it was going downhill, they were going to have to do something desperate.

Ms Duffy did not present as a very credible witness. By the manner in which she gave her evidence she conveyed the impression that she was more concerned to lend support to the Pieruccis than to give a strictly accurate account of what had transpired. Given her long and close friendship with Mrs Pierucci in particular, it would have been surprising if they had not discussed events at work and other matters relating to other staff as well as had some discussion about these proceedings and the events out of which they arose. We are not prepared to accept Ms Duffy's evidence except to the extent that is supported by other cogent evidence independent of the Pieruccis.

In 1990 Ms Vicki Stephens was the Manager of the Respondent's South Perth store. She is now the Manager of the "Ice" store in Brisbane, Queensland. She was at the South Perth store for 18 months to 2 years, at that time she had occasional contact with Ms Briffa who would sometimes go over from the City Arcade store to relieve Ms Stephens during her lunch break.

Ms Stephens told the Tribunal the Complainant was negative about the Respondent company and was quite personal in her comments about the Pieruccis. She said that right from the beginning of Ms Stephens' employment with the Respondent, the Complainant

claimed that Mr Pierucci was probably having affairs with about 3 different staff members.

She said she did remember going to the ballet with Ms Briffa. They had gone for coffee afterwards, that was when the Complainant began to talk about Mr Pierucci again. She asked Ms Stephens why she worked back late at the South Perth shop and in effect suggested she (Ms Stephens) was having an affair with Mr Pierucci. Ms Stephens said she was highly offended by that. She was in fact in a very strong personal relationship at the time and was offended both for that reason and because the suggestion impugned her professionalism at work. At first she said nothing about this but some time later after Ms Briffa had continued to be negative about her work and the firm, Ms Stephens told Ms Begieneman what the Complainant had said after the ballet. She probably did not mention it to Mr or Mrs Pierucci. Ms Stephens strongly denied that she had asked the Complainant whether the latter had heard Mr Pierucci was having an affair with his Secretary; she could not imagine it happening and she could not imagine her saying it.

The Complainant conveyed the impression to Ms Stephens that she did not like working in the City Arcade store and was very negative about it.

The final witness called by the Respondent was Ms Kerry Wells. She came from Sydney to work for the Respondent in June 1990 as the Designer and Production Coordinator.

Ms Wells contact with Ms Briffa came because of the need for her to deliver stock to the various stores which she did every second or third day. Ms Wells formed the idea that

the Complainant was not particularly happy working for the Respondent. She was quite negative about the work and the job itself. Several times when Ms Wells saw her the Complainant looked bored just standing behind the counter. Most of Ms Wells deliveries were done in the morning. She could not remember going in when there were actually any customers in the store. She also understood the Pieruccis were not happy with the Complainant because of poor sales mainly, and recalled Mr Pierucci attempting to sack Ms Briffa on one occasion. She did not know in advance that he had planned to dismiss the Complainant and she could not remember what day it was, but Mr Pierucci had come into the office and said he had gone into the store to dismiss the Complainant and as soon as he walked through the door she had told him she was pregnant. He definitely said he had been into the store.

The Pieruccis maintained the Respondent had no policy about pregnancy.

There was evidence from a number of the Respondent's witnesses that other staff members had become pregnant and had worked right through their pregnancy. Mr Pierucci identified 3 women in this category. All worked in the factory. Neither Mr nor Mrs Pierucci could recall any example of a member of the sales staff becoming pregnant. Ms Wells gave evidence of an employee in the factory who became pregnant and whose employment nevertheless continued. That caused Ms Wells some personal difficulty because she had to do a lot of the cutting work that employee became unable to perform.

The fact (which we accept) that the staff in the factory who became pregnant were able to continue in the Respondent's employ during their pregnancy is not of great assistance to

the Tribunal in the determination of this case.

It is apparent from the evidence as a whole and of Mrs Pierucci especially that the presentation of the Respondent's shops and staff to potential customers is seen as being very important. That extends to them not being seen to be eating or drinking or even sitting down in the store. In that circumstance there may well have been a quite different view taken of a pregnant employee in one of the boutiques than of a pregnant employee in the garment factory.

Ms Wells was a credible witness.

Although she is still employed by the Respondent, she had only recently come to Western Australia in 1990 and had no prior relationship with those concerned. She gave evidence frankly and directly and was responsive to questions. In our view she was not inclined to exaggerate nor to assume what she did not know. From her evidence we are satisfied that the Pieruccis were not happy with the Complainant, that the Complainant herself had become negative and was not happy in the City Arcade store and that Mr Pierucci did come into the office about a month before the Complainant's actual dismissal saying that he had gone into the City Arcade store to dismiss her but had not done so when she told him she was pregnant.

Shann Begieneman obviously disliked the Complainant and at times conveyed an impression almost of restrained animosity towards her. In our view much of Ms Begieneman's evidence was flavoured by that. We note too that it was she who passed

on to the Pieruccis things which Ms Briffa was supposed to have done or said and that she advised them to sack her. Overall we are satisfied that Ms Begieneman played a catalytic role in the events out of which these proceedings arose and that the Pieruccis apprehensions and concerns about the Complainant were encouraged if not sometimes largely initiated by her. Be that as it may, there no doubt was some foundation in the Complainant's own conduct and comments upon which those apprehensions and concerns were built over time. We do not accept that Ms Briffa's role was as neutral and detached as she sought to convey. She acknowledged being involved in what she described as "gossip" about Mr Pierucci in particular and we are satisfied that her involvement was much more significant than she was prepared to accept.

Credibility is a major issue in this case. We are obliged to observe that we have reservations about the evidence of most of the witnesses in general. We are not satisfied that testimony given before us was wholly true and were left with the positive impression in some instances that witnesses were deliberately overstating matters and in others were rationalising their past actions.

That was so in relation, for example, to Mr Pierucci in his evidence about stopping the Complainant's clothing allowance. We are satisfied that it was not in fact discontinued although the method of its payment was changed. Mr Pierucci's evidence that he had stopped it because of dissatisfaction with Ms Briffa's performance was an attempt by him to bolster up his evidence generally that her performance was not satisfactory and that it was one of the main reasons for his decision to terminate her employment on 2 August 1990. This was an impression he left with Ms Begieneman in discussions before the

hearing and she dutifully gave it as the fact in her evidence - initially at least.

Similarly the evidence by witnesses for the Respondent consistently over-emphasised the Broderick incident and the Complainant's role in that.

In a letter to Ms Briffa (written in reply to a letter from her dated 15 April 1991) Mr Broderick said he was unable to recall the actual words used but he certainly was "very vocal and upset" when talking to Mr Pierucci. He probably did say that the two Shop Assistants who sold the garment to his daughter were quite "pushy" but his main complaint was with the faulty manufacture of the dress. This is in direct conflict with Mr Pierucci's evidence that Mr Broderick certainly made no mention to him that he was unhappy with the construction of the garment. He said he remembered the conversation vividly -

"...and it certainly was based purely and simply on the fact that his daughter was only...was under 18 and was pressured into purchasing this garment."

We do not accept Mr Pierucci's evidence about that nor do we accept his evidence about raising the matter with the Complainant.

We are satisfied that if the Broderick matter was raised with the Complainant, that was done only indirectly and not in terms of Mr Broderick's complaint but amounted to no more than Mrs Pierucci telling the Complainant to "maybe tone it down".

There were conflicts between the evidence of the Complainant and that of Ms Duffy.

Given the close relationship, it might be thought unlikely that Ms Duffy would have said to the Complainant that the Pieruccis would "let her go" once her pregnancy began to show (or that she would have subsequently said she had told the Complainant it would happen). According to the Complainant, Geraldine Pitcher had told her the same thing. Ms Pitcher was not called and so we have not had the benefit of any evidence from her.

As we have already noted, we found Ms Duffy's evidence unsatisfactory.

It is common ground that Ms Duffy did ultimately raise the question of her pay rate with Ms Begieneman. It was apparently below the award and that was subsequently rectified. When Mrs Pierucci spoke to her about it, Ms Duffy (no doubt in the interests of preserving the friendship) was anxious to avoid any suggestion that she was unhappy with the Pieruccis and tried instead to lay the whole responsibility for raising the matter at all with the Complainant. She was less than honest about that to Mrs Pierucci and what she said served unfairly to reinforce the Pieruccis perception that the Complainant was a disruptive influence.

Against that background we are inclined to more readily accept the Complainant's evidence that Ms Duffy did tell her that the Pieruccis would "let her go" once her pregnancy began to show although in all the circumstances we do not find that of very much assistance in determining whether or not the Complainant's pregnancy was in fact a ground of her dismissal by the Pieruccis.

We think that like Mr Pierucci, the Complainant tended to overstate her evidence. In her

case that was probably more subconscious than contrived; nonetheless we are not able to wholly accept it.

On more than one occasion Ms Briffa explained at some length to the Tribunal how her sales approach was temperate and discreet and by no means aggressive. In the end it probably does not matter a great deal but from our own observations of her demeanour in the witness box, the content of her evidence and the evidence as a whole we are prepared to accept that her sales approach was rather more assertive than she seemed to think.

As to whether she was a bright, cheerful and enthusiastic Store Manager or something less than that, we accept that because of the poor sales performance of the store itself, their own observations, and comments made to them by other staff, the Pieruccis certainly believed she was negative, lacking in enthusiasm and disparaging of the Respondent and Mr Pierucci in particular.

Of course it would hardly be surprising that she would become depressed and somewhat negative in the City Arcade store as sales continued to be low. There was a lack of publicity and active marketing of the store, and a low level of sales and customer interest. This could not be all attributed to her. That state of affairs existed before she was moved to the store and it continued in the months after her dismissal. There were long periods in which there were no customers at all. It must have been a depressing situation. It is easy to see why she would have become despondent.

The Pieruccis attributed the poor sales performance to Ms Briffa's "negative attitude". In

reality, her despondency and negative perception of things was more than likely caused by the continuing poor sales performance.

It would have been obvious that something drastic would have to be done.

In that situation the Complainant must have developed a real apprehension that her employment with the Respondent was in jeopardy and we find it was in this context that she did say to Ms Duffy that she thought the Pieruccis might sack her.

There was very significant conflict between the Complainant and Ms Stephens about the conversation they had after the ballet in June 1990.

We accept the evidence of Ms Stephens that it was the Complainant who broached the subject of Mr Pierucci and that she insinuated or suggested that Ms Stephens herself was having an affair with him. We are satisfied that although Ms Stephens was upset by this she made no mention of it to anyone else at the time but later told Ms Begieneman who in turn related it to the Pieruccis probably at the same time as she told them about the comment made to her some considerable time earlier by Ms Briffa to the effect that if she knew as much about Mr Pierucci as Ms Briffa did, she would not think he was such a good employer.

We accept too that in her conversations with Ms Stephens from time to time the Complainant did make negative remarks about her job and things generally and also insinuated or suggested that Mr Pierucci was having romantic affairs with other staff.

We conclude that Ms Stephens did mention these matters too, to Ms Begieneman.

Two critical evidentiary issues were the proposed dismissal on 2 August 1990 and the Newton incident.

Ms Wells knew the Pieruccis were not happy with the Complainant. She was unaware that they had decided to sack her although her evidence does support Mr Pierucci's testimony that he went to the office and told staff there he had gone to the store to dismiss Ms Briffa but had not done so when she announced she was pregnant.

His evidence is also supported in this regard by that of Mrs Pierucci and Ms Begieneman both of whom testified they knew of his intention to dismiss Ms Briffa before 2 August.

There was also Ms Duffy's evidence that she was aware of their intention to dismiss the Complainant about a month before 12 September.

Mr Pierucci was adamant that he went into the store.

The Complainant was just as insistent that she did not see him at all that day but told him of her pregnancy when she telephoned the daily sales figures through at about 9.15 that night.

On the evidence as a whole we are satisfied (and find) that Mr Pierucci had made a decision prior to August 1990 to dismiss the Complainant; that he went to the City

Arcade store when she commenced work at 1.00 p.m. that day to give her notice but that her pregnancy had been confirmed by her gynaecologist that morning and she told Mr Pierucci of it as soon as he arrived. For the reasons he gave in evidence he did not proceed with the termination but congratulated her, had some short conversation and left the store. It was probably the following morning that he told Ms Begieneman and Ms Wells at the factory what had happened.

Quite clearly the Complainant's pregnancy could not have been a factor in the decision to terminate her employment on 2 August 1990 as the Pieruccis were not then aware of it.

The question then arises whether or not it was a factor in the operative decision resulting in Ms Briffa's dismissal on 12 September 1990.

There was not very much effective communication between the Pieruccis and the Complainant. We are satisfied that whatever they may have thought and said between themselves about the Complainant and the reasons for the poor sales performance of the City Arcade store, their concerns were conveyed to her only ambiguously and in the most general way.

That task was apparently left to Mrs Pierucci. She obviously found it unpleasant and probably for that reason, on the few occasions she did actually speak to Ms Briffa about these things, was so tentative and vague about them that the latter was not left with any real appreciation of the Pieruccis' concerns.

She was not made properly aware that they thought her negative, that her sales approach was too "pushy" (although we think this was not a real factor in their minds at the time) and that she was spreading dissatisfaction and rumours amongst the staff.

On the contrary, to her mind there was no reason to think otherwise than that they continued to regard her as a competent, effective and hard-working Store Manager.

As we have already noted, however, it was as obvious to her as to anyone else that the store itself was performing badly, and in that situation her employment must have been at risk.

Thus, when Mrs Pierucci told her on 12 September 1990 that they had to "let her go on performance", Ms Briffa interpreted that to be a reference to the performance of the store, not her personally.

With that understanding, it is not surprising that when she learned that someone else had subsequently been employed to replace her, she realised the poor sales performance of the store itself could not have been the real (or only) reason for her dismissal, and so came to the not unreasonable conclusion that her pregnancy was.

In this way the failure of communication continued to the very end and indeed ultimately gave rise to the complaint of unlawful discrimination.

The way in which the dismissal occurred is instructive.

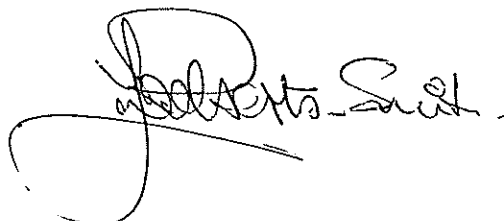
According to the Pieruccis the decision was precipitated by the Newton incident.

Ms Briffa denied warning Ms Newton to be careful about her termination pay. Ms Newton was not called. Ms Begieneman only assumed it was Ms Briffa who had spoken to Ms Newton about her pay. Mrs Pierucci testified that when she telephoned Ms Newton, the latter told her it was Ms Briffa. We make no finding about the fact. We are satisfied however that rightly or wrongly the Pieruccis believed it had been the Complainant and we are likewise satisfied it was this belief combined with their previous dissatisfaction about poor sales performance and perceived rumour-mongering by the Complainant which was the immediate reason for Mr Pierucci's decision to summarily dismiss her.

Support for this conclusion is to be found in the fact that it was left to Mrs Pierucci to effect the dismissal immediately when such a task would normally have been seen as one for Mr Pierucci and that if pregnancy had been a consideration it is most unlikely the matter would have been handled at the time and in the way it was.

We are satisfied therefore that pregnancy was not a reason for the decision to dismiss the Complainant on 12 September 1990 and the claim of unlawful discrimination on that ground has not been made out.

The complaint must accordingly be dismissed.



Robert Sait

