

**JUDGEMENT**

**EQUAL OPPORTUNITY TRIBUNAL  
OF WESTERN AUSTRALIA**

**No. 13 of 1992**

**BRENDA CHURCHILL  
Complainant**

- against -

**TOWN OF COTTESLOE  
Respondent**

**BEFORE:** Mr N.P. Hasluck Q.C. - President  
Ms B. Buick - Member  
Ms D. Potter - Deputy Member

Counsel for the Complainant - Ms P. Hogan  
Counsel for the Respondent - Mr D.G. Moss

**HEARD:**

**REASONS FOR DECISION**

(Delivered: 23 APRIL 1993 )

27

The Complainant, Brenda Churchill, claims that the Respondent discriminated against her on the ground of impairment. The complaint arises out of events leading to the dismissal of the Complainant as an employee of the Town of Cottesloe on 8 May 1991.

### **Town of Cottesloe**

The Town of Cottesloe is a municipality constituted pursuant to provisions of the Local Government Act 1960. The affairs of the municipality are controlled by an elected council which meets periodically at regular intervals with administrative support being provided by employees of the Council. At all material times the Town Clerk was Mr Robin Peddie. The Deputy Town Clerk was Mr Malcolm Doig.

The Council chamber and administrative offices of the municipality are situated at 109 Broome Street, Cottesloe and consist of a structure on three levels. The basement area of the building contained archives, records and files and that area was connected to the ground floor by an internal spiral staircase. The ground floor was principally occupied by administrative office space including a public counter. Access to the upper level was obtained by an internal stairway. The upper level of the building contained the Council chamber which was used for meetings of the Council and for social functions. The kitchen facilities including a fridge were situated on the upper level. Access could be obtained to the upper level by an external doorway. The sloping nature of the land meant that deliveries of food and drink could be made direct to the doorway providing access to the upper level. The presence of an external ramp meant that an employee could obtain access to the various levels without necessarily having to use the internal stairways.

### **The Complainant**

From about 1978 to 1983 the Respondent employed the Complainant on a casual basis to carry out duties of a clerical nature. Towards the end of this period the Complainant began experiencing some pain and discomfort and sought medical advice. As appears from the report of her medical practitioner, Dr G. Rozsa, dated 20 December 1989 an operation was performed for the removal of a fibrous non-malignant growth from the region of the symphysis pupa. Because of further pain in that region a further operation was eventually performed for a fusion of the joint in September 1985, this operation being described in the Complainant's Points of Claim as bone graft surgery.

On 29 March 1986 the Respondent employed the Complainant on a permanent full-time basis as a Receptionist/cashier. She said in evidence that at the time of applying for this position she had a discussion with the Deputy Town Clerk, Mr Doig, during the course of which she referred to her previous operation and the need to avoid jolting and jarring. She was told that the position did not involve work of a physical nature as the job consisted essentially of general office duties.

Dr Rozsa's report indicates that at that time the Complainant was in fact improving quite well from her operation and seemed to be mobilising freely. It was then, unfortunately, that she was involved in a motor vehicle accident on 2 April 1986. The accident occurred during the course of her employment at a time when she was driving a Council vehicle. As a result of the accident the Complainant suffered injury to her back and aggravated her hip which had not fully recovered from the previous surgery. Nonetheless, she was able to continue working.

In August 1987 the Complainant was offered a promotion to the position of Cashier/clerk. Mr Doig said in evidence that at the time she was offered the position he was aware she had some physical limitations in regard to work of a physical nature but did not think there would be any problem in that respect because any heavy physical work would be done by the caretaker. He cannot recall whether he actually said words to that effect but agreed during the course of cross-examination that at the time this was his sentiment.

It was common ground at the hearing that the duty statement concerning the position of Cashier/clerk was as follows:

*" Purpose of position*

*Bookings of Civic Centre  
Relief receptionist, telephonist and cashier*

*Organisation relationships*

*Reports to the Deputy Town Clerk  
Functionally reports to the Senior Accounts Clerk  
Liaises and co-ordinates duties for the Cashier/receptionist*

*Key Responsibilities*

- 1. Takes bookings for the Civic Centre, liaising with the Civic Centre lessee as required, and raises necessary charges.*
- 2. Preparation of the Civic Centre news.*
- 3. Computer input of rates and parking receipts and other information as required.*
- 4. Relieves Cashier/receptionist on receptionist's desk, cash register and switchboard as required.*
- 5. Produces parking correspondence on computer.*
- 6. Preparation of Civic Centre caretaker's roster.*
- 7. Arranging refreshments for Council and committee meetings.*

8. *Assisting Town Clerk with arrangements for social and community activities.*"

The Tribunal pauses to note that while employed in the new position the Complainant was subject to the Local Government Officers (Western Australia) Award 1988 being a Federal Award made pursuant to provisions of the Conciliation and Arbitration Act 1904. That Act was subsequently superseded by the Industrial Relations Act 1988. At all material times the Award included a provision concerning unfair dismissals which was in these terms:

*" Termination of employment by an employer shall not be harsh, unjust or unreasonable.*

*For the purpose of this clause, termination of employment shall include terminations with or without notice.*

*Without limiting the above, except where a distinction, exclusion or preference is based on the inherent requirements of a particular position, termination on the ground of race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction and social origin shall constitute a harsh, unjust or unreasonable termination of employment."*

The Tribunal notes that the provision concerning unfair dismissals does not deal expressly with dismissal on the ground of disability or impairment.

#### **Civic Centre Clerk**

As appears from the duty statement the Cashier/clerk was actively involved in the administration of the Civic Centre, being a function centre administered by the Respondent, and the Cashier/clerk was therefore sometimes referred to as the Civic Centre Clerk. The Complainant's predecessor in the position, Yvette Thompson, gave evidence at the hearing and said that in the course of fulfilling the duties associated with

the position and receiving bookings from members of the public who wished to hire the social centre she was often obliged to show people around the premises, both indoors and outdoors, in addition to her other duties. She said that the position involved a considerable degree of physical activity. The Clerk was responsible for keeping the fridge on the upper level stocked with drinks and for setting up the room for Council meetings. If a function in the Council chamber was planned then the Clerk would often have to go up and down the internal staircase on various occasions during the day and there would be a good deal of lifting and bending in the course of clerical duties and keeping the fridge stocked.

The Complainant confirmed this evidence. She agreed that one did have to show the premises to intending hirers and during the course of the working day move from one level to another in the course of performing the various duties. During the early part of her employment as Civic Centre Clerk she was able to attend to the various duties without discomfort. She made use of the external ramp. At that time, in regard to stocking the fridge, she was able to obtain assistance from two caretakers who were available for physical work including the lifting and positioning of furniture in the Council chamber in preparation for social occasions. She also arranged for caterers to deliver drinks to the storage facilities on the upper level, thereby avoiding having to do the bending and lifting involved herself. As time passed, however, she began to experience discomfort. The Complainant's case was that she increasingly was obliged to do physical work that had not initially been encompassed by the position owing to a lack of support from the caretaking staff. It seems that her physical condition gradually deteriorated.

By August 1989 she was obliged to seek assistance from an occupational therapist. After a site visit on 1 August 1989, the occupational therapist, Zena Hanna, made various recommendations with a view to reducing the Complainant's chronic pain symptoms related to the activities she undertook during the course of her work. According to the report the Complainant's symptoms were being aggravated by moving from sitting to standing repetitively during her duties, descending and ascending stairs repetitively. The recommendations were aimed at eliminating the need for the Complainant to move from ground floor to basement using the spiral staircase, decreased need to move from the ground level to the upper level and elimination of packing/unpacking of items requiring a need to move from standing to crouching. Recommendations were also made concerning the use of an adjustable chair and footstool.

These recommendations did not solve the problem. Various medical certificates from this period of the Complainant's employment were put in evidence. According to a certificate dated 8 December 1989 the Complainant was still suffering from chronic back, neck and hip pain and was no longer able to cope with full-time work due to ongoing problems arising from the original injury. It was suggested by the medical practitioner advising her, Dr Rozsa, that she work mornings only for a time in the hope that she would recover.

The Respondent would have been inconvenienced by part-time work of the kind proposed. By letter dated 16 January 1990 the Town Clerk advised the Complainant that the current arrangement whereby she could only attend to her duties for four hours per day was not satisfactory. He said that the Council had no current intention of terminating her

employment but if she was deemed to be unfit for work then the appropriate sick leave provision of the Local Government Officers Award or Employers Liability Insurance would apply. In February 1990 the Complainant was certified as unfit for work and took leave with compensation.

By letter dated 14 May 1990 the Respondent wrote to its insurer, the State Government Insurance Office, saying:

*" More recently Brenda proposed that she would like to work on a "job share" basis involving 5 half days per week. Unfortunately this proposition had to be declined as Council needs continuity of service to the public and it was obvious that such an arrangement would prove extremely difficult.*

*Brenda has been employed as a Clerk/receptionist which is considered to be less physically demanding than either Cashier/receptionist (her former position) or Secretary/receptionist.*

*I have enclosed a copy of her current responsibilities together with an organisation chart which may be of interest to you.*

*As I recall, the following activities have caused most discomfort:*

- 1. Getting up and down from a sitting position. Posture has been of particular importance with selection of chair and footrest.*
- 2. Carrying any object more than a few kilos.*
- 3. Climbing stairs.*
- 4. Typing and even writing seems to have become increasingly difficult.*

*I believe that Brenda would be well able to operate a switchboard and act as a Receptionist/information officer from a sitting position.*

*Unfortunately, no such position exists in this small organisation. Beyond that, I can really make no further suggestion. "*

**Return to Work**



In due course the Complainant considered that she was ready to return to work. She had been following a program of physical exercise for 12 months or so and was now much improved. Further, on 14 March 1991, a settlement had been negotiated on her behalf of a claim for compensation in respect of personal injuries and her understanding was that she was at liberty to return to work.

By letter dated 19 March 1991 she wrote to the Respondent saying:

*" Enclosed is a letter from Dr Rozsa advising that I will be able to resume my employment with the Town of Cottesloe in approximately one month's time (i.e. Monday 5 or 22 April 1991) with the constraints set out in his letter.*

*As you are aware the compensation matter in relation to the motor vehicle accident was resolved at a pre-trial conference on 14 March 1991.*

*I look forward to returning to my previous job as Civic Centre Clerk, working with staff and councillors and should there be any problems in regard to my return to work I would appreciate hearing from you in the very near future."*

The certificate from Dr Rozsa accompanying this letter was dated 18 March 1991 and said that the Complainant was in his opinion fit to return to work in approximately one month's time. *"However, she should avoid heavy lifting and any repetitive bending or lifting"*.

By letter dated 15 April 1991 the Town Clerk advised the Complainant:

*" Your position of future employment with Council is still unclear as with a small office staff, we could not accept any employee with any physical or medical constraint that could affect performance. We also do not have details of the pre-trial conference which awarded the settlement, which*

*shows reasons, conditions and any permanent physical disability.*

*It would assist if you would provide us with a copy of the order, if you have it, as, depending on content, may affect other items such as eligibility for sick leave. We have requested a copy from the S.G.I.O. but, to date it is not to hand.*

*I would be pleased to discussed the matter with you personally and suggest that you telephone for an appointment. "*

As a consequence of that exchange of correspondence a meeting was held on 18 April 1991 at the Council offices attended by the Complainant and an Industrial Research Officer named Ruth Ellis who was supporting her, and by the Town Clerk and a representative from the State Government Insurance Office named Susan Courthope.

There was a conflict of evidence at the hearing as to what took place at this meeting. In her Points of Claim the Complainant pleaded that at the meeting she was advised by the Town Clerk that the duties of her position had changed and that she would now be required to lift trestles, lift cartons of drink and move furniture. She supported that plea in evidence and suggested that as the parties worked through the typewritten duty statement the Town Clerk tended to emphasise the physical activity associated with the position and doubted that she was in a position to perform those duties, especially duties associated with social functions such as stocking the fridge, shifting furniture, and going up and down stairs.

The Town Clerk agreed in his evidence that the duty statement was under discussion. However, according to his recollection, although a considerable degree of discussion was focussed upon the physical activities associated with social functions, this was largely because the Complainant and her supporter were insisting that the Complainant was able

to perform those tasks provided a reasonable degree of assistance was available. The Town Clerk suggested that his principal concern was in regard to the repetitive standing and bending that was necessarily associated with the clerical duties forming part of the position under discussion. At the meeting he accepted the Complainant was not obliged to perform heavy physical duties because these did not fall within the purview of the duty statement but nonetheless, on the basis of the certificate of Dr Rozsa dated 18 March 1991 which had been submitted to him, he doubted that she had truly been certified as fit for work. The medical certificate appeared to introduce constraints against repetitive bending and lifting which to his way of thinking were activities necessarily involved in the Civic Centre Clerk's position.

The meeting finished on an inconclusive note. According to the Complainant the understanding was that she was to get her doctor to specify exactly what she could not do so that the matter could then be taken further. This was the understanding of Ruth Ellis also.

By letter dated 29 April 1991 the Town Clerk wrote to the State Government Insurance Office in these terms:

*" At the meeting we had on 18 April 1991 Mrs Churchill stated that she had accepted the lump sum settlement on the basis that she could return to work. We have no documentation on this or of any permanent injury she may have. Her own doctor's certificate states that she is fit to return to work on approximately 18 April 1991 with the proviso that she should avoid heavy lifting or repetitive bending or lifting. This proviso is not acceptable and I could not accept her into the workforce with these disabilities. You would also be aware that the Municipal Officers Association is pressing me to accept her back into the workforce or dismiss her. If dismissed, Council is likely to receive a claim for unfair dismissal. I must therefore request*

*some written documentation on the actual position concerning her disabilities and position as regards workers compensation for the period beyond 14 March 1991."*

It is not clear from the evidence whether the Town Clerk received documentation in response to his request. He was not able to point to any such documentation and did not recall receiving the same.

In the meantime, however, the Complainant had gone back to her doctor and made available to him a copy of the duty statement that was under discussion at the meeting of 18 April 1991. Dr Rozsa then prepared a letter to the Town Clerk dated 1 May 1991 in these terms:

*" I have read the job description as presented to me by Mrs Churchill and I feel that she would be able to manage the duties as listed thereon.*

*Despite this there are items of a specific nature, listed hereunder, which I feel Mrs Churchill should not be required to do.*

- 1. Carry trays of drinks or savouries.*
- 2. Move furniture.*
- 3. Stock the fridge.*
- 4. Carrying heavy bundles of paper (one light box e.g. copying paper would be alright)*
- 5. Carrying heavy files.*
- 6. Any duty that would involve repeated bending, lifting or straining.*

*In summary, I feel that Mrs Churchill would be capable of managing a sedentary type job which involved typing, operating the computer and light clerical duties."*

There was a degree of controversy at the hearing as to what meaning should be attached to this letter. It is not entirely clear whether Dr Rozsa meant that the Complainant was able to perform all the duties set out in the duty statement as properly construed but should not be obliged to perform certain incidental duties which had been required of her as a matter of practice, even though they did not necessarily fall within the ambit of the duty statement. Or did the Complainant's doctor mean that the Complainant was not really able to perform duties of the kind described by the duty statement and could only manage a less demanding, sedentary type of job involving typing, operation of the computer and light clerical duties?

The Complainant said in evidence that she delivered the further letter from Dr Rozsa dated 1 May 1991 to the Council. Shortly afterwards, she received a letter from the Town Clerk which prompted her to respond by letter dated 5 May 1991 in these terms:

*" Thank you for your letter of 29 April which I received on the same day as I came into the office to leave the doctor's letter as requested by yourself.*

*As you can see from his letter he has said I am fit to return to work with the six exceptions as listed. Therefore he is unable to provide me with a doctor's certificate saying I am unable to attend work.*

*It would be unethical for him to do so, and he is not prepared to issue a certificate which is totally in opposition to the letter he provided at your request.*

*Therefore, it is obvious from both Council's and my point of view that Council reach a decision in the very near future with regard to my employment with the Town of Cottesloe."*

The Complainant's evidence was that the Town Clerk was pressing her to obtain a medical certificate that she was unfit to return to work but, as the letter she wrote

indicated, this was not possible because her doctor in fact considered that she was fit to return to work in the position of Civic Centre Clerk as indicated by his letter of 1 May 1991.

### The Dismissal

It was against this background that by letter dated 6 May 1991 the Town Clerk wrote to the Complainant as follows:

*" Thank you for your letter dated 5 May 1991 and the previously arranged doctor's letter setting out in more detail the restraints associated with any return to the workforce.*

*In light of the doctor's advice, and advice from the State Government Insurance Office on Council's responsibilities, I regret to advise that Council has no employment position to offer you with the limitations established. I therefore have no option but to terminate your services as Civic Centre Clerk with the Council with effect from the end of the current pay period, Thursday 9 May 1991.*

*Sick pay will be met to 9 May 1991 and then termination pay in accordance with the Award conditions.*

*I wish you well in finding employment suitable to your physical restraints. "*

The Complainant gave evidence that upon receiving this letter she was *"quite devastated because I had sort of got myself to the state where I was really capable of coping with everything and ... having been so sick it was a real body blow to be told that, you know, you haven't got any capabilities that are useable, so to speak, that I had too many limitations ... I became very upset about it ... and had to be put on more medication. "*

The Complainant rang the Town Clerk after she got this letter and asked for a reference.

He provided her with a reference dated 9 May 1991 which reads as follows:

*" This is to certify that the bearer Mrs Brenda Churchill was employed by Council for the period 26 March 1986 until 9 May 1991 in the position of Civic Centre Clerk as per the duty statement attached. During the period of employment, Brenda carried out her duties in an efficient and professional manner and it was most unfortunate when she was involved in a minor motor accident which forced her off work and under Workers Compensation. A settlement to her claim was finally negotiated and Council has no option but to terminate her services due to restrictions on work duties imposed by medical certificates. I wish her well in finding suitable employment."*

The Complainant said that she was "humiliated" because the letter implied that she was unfit to work. Her evidence was that she was advised by employment agencies not to use this reference because it would be detrimental to her in her search for work and in fact she did not do so.

For several months she was unsuccessful in obtaining an alternative position but eventually was able to secure a position in the Accounting and Investment Services Section of the University of Western Australia. She commenced employment in that section on 29 July 1991 and it appears from a written statement provided by the University that her duties included a wide range of clerical tasks which she was able to perform satisfactorily. As part of her case she produced in evidence, without objection, a schedule of loss of earnings calculated by reference to the difference between what she would have received had she continued to be employed by the Town of Cottesloe as Civic Centre Clerk and the position she occupied at the University. The total claim for loss of earnings on the basis of that calculation to 2 February 1993 amounted to \$7,569.00.

### **Statutory Provisions**

The Equal Opportunity Act 1984 ("the Act") contains provisions relating to various forms of discrimination. An amendment to the Act was assented to on 30 November 1988 (commencing on 20 January 1989) concerning impairment.

Section 66A of the Act as amended provides that a person discriminates against another person on the ground of impairment if, on the ground of the impairment of the aggrieved person, the discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person who does not have such an impairment.

Section 66B provides that it is unlawful for an employer to discriminate against a person on the ground of a person's impairment by dismissing the employee or by subjecting the employee to any other detriment.

Section 66Q provides that nothing in Section 66B concerning dismissal renders unlawful discrimination by an employer on the ground of the impairment of that person if it is reasonable for the employer to conclude, on such grounds as having regard to the circumstances of the case and having taken all reasonable steps to obtain relevant and necessary information concerning the impairment it is reasonable for the employer, principal or person to rely on, that the person with the impairment because of that impairment would be unable to carry out the work required to be performed in the course of the employment concerned or would, in order to carry out that work, require services or facilities that are not required by persons who do not have an impairment and the



provision of which impose an unjustifiable hardship on the employer.

Section 66Q was amended by 74/1992. That amendment took effect in early 1993 so as to excuse an employer from liability where the person with the impairment would be unable to carry out work "*reasonably*" required to be performed in the course of the employment concerned. The Tribunal takes the view that the dismissal in the present case must be considered in relation to the statutory provisions as they stood as at 8 May 1991 with the result that the amendment effected in early 1993 should be disregarded. Thus, in regard to that aspect of the matter, the question is whether it is reasonable for the employer to conclude, having regard to the circumstances of the case, and having taken all reasonable steps to obtain relevant and necessary information concerning the impairment, that the person would be unable to carry out the work required to be performed in the course of the employment concerned.

By Section 5 discriminatory conduct need not be the dominant or substantial reason for the act complained of. By Section 161 where an employee or agent of a person does an act that would be unlawful under the Act if it were done by the person then the Act applies in relation to that person as if that person had also done the act. By Section 162 it is sufficient to establish that a person who acted on behalf of the body corporate in the matter acted on the ground relied on by the Complainant.

The Complainant bears the onus of establishing that he or she has been the victim of unlawful discrimination. The case must be proven on the balance of probabilities.

The decided cases also indicate that a comparison can be drawn between the situation of

the Complainant and the situation of a notional person in the same or a not materially different set of circumstances. Further, it is not necessary to establish deliberate discriminatory conduct for an act of discrimination to take place. Statutory provisions include conduct arising from thoughtlessness and neglect, but it must be shown that an act of unlawful discrimination is causally connected to the circumstances of the complaint and the loss complained of.

In regard to the defence available to an employer that the person with the impairment could not reasonably be thought able to perform the work in question it was held in Jamal v Secretary, Department of Health (1988) 14 NSLR 253 that the test is an objective one as to whether the work in question cannot be performed.

### Legal Issues

The Complainant by her Points of Claim contended that she was discriminated against by the Respondent on the ground of her impairment having regard to the following particulars:

- a) The Complainant has an impairment to her back and right hip within the meaning of Section 4 of the Act.
- b) The Complainant was able to carry out the duties of a Cashier/clerk in February 1991.
- c) By requiring the Complainant to carry out additional duties of bending and lifting the Respondent treated the Complainant less favourably than it would a person without her impairment.
- d) By terminating the Complainant's employment the Respondent treated the Complainant less favourably than it would a person without her impairment.

In its Points of Defence the Respondent denied that it had discriminated against the Complainant and said further, and in any event, that it was excused from liability because, in the circumstances of the case, the Respondent could reasonably conclude that the Complainant was unable to perform the duties associated with the employment concerned.

The Respondent also raised a jurisdictional issue by pleading that the provisions of the Federal Award governing the Complainant's employment displaced the provisions of the State legislation concerning discriminatory conduct by virtue of those provisions of the Australian Constitution and the Industrial Relations Act which require that overriding effect be given to Federal law in circumstances where an inconsistency could be identified between the provisions of the Federal law and provisions of State legislation. It will be convenient for the Tribunal to deal with this latter issue before turning to the application of the State legislation to the circumstances of the present case.

### **Jurisdictional Issue**

The Tribunal does not propose to examine the jurisdictional issue in detail in view of the fact that a very similar issue was considered at some length in a recent decision of the Tribunal, namely, Ryan v Shire of Shark Bay (1992) EOC 92-441.

In that case it was pleaded that the Award in question, the Municipal Employee's (Western Australia) Award 1982, dealt with matters submitted to the Industrial Relations Commission and that by virtue of Section 152 of the Industrial Relations Act 1988, (Commonwealth) the provisions of the Award prevailed over the Equal Opportunity Act

1984 (WA). That was a case concerning racial discrimination, being a matter addressed specifically by the relevant Award, and in terms similar to the Award under consideration in the present case, but nonetheless the Tribunal concluded that State legislation was not inconsistent with the Federal Award. The Tribunal held that the area regulated by the Equal Opportunity Act made the provisions of the Act supplementary to and not inconsistent with the Federal Award and the state legislation was therefore not displaced by the Federal Award. The Tribunal considers that the reasoning reflected in the Ryan case applies with equal force to the circumstances of the present case and proposes to follow its prior ruling. The Tribunal notes also that the circumstances of the present case are less favourable to the Respondent as the party challenging the jurisdiction because, in the present case, the Award does not deal expressly with impairment as a form of discriminatory conduct which might give rise to an unfair discrimination within the language of the Award. This also suggests that the State legislation should be regarded as supplementary to the provision of the Federal Award and able to co-exist with the provisions of that Award.

Accordingly, the Tribunal considers that it does have jurisdiction to deal with the complaint presently before it.

### **Findings**

The Tribunal considers that the Complainant had an impairment within the meaning of the Act as at May 1981 as evidenced by the certificates dated 18 March 1991 and 6 May 1991 provided by Dr Rozsa. As a consequence of her hip and back condition there was a defect or disturbance in the normal functioning of her body which prevented her from

performing the full range of physical functions which would otherwise have been available to her.

The Respondent contended that she was dismissed because she was unable to perform the duties associated with the position of Civic Centre Clerk. The Tribunal is satisfied, however, that the Complainant was able to perform the duties specified on the duty statement and that this was apparent to the Town Clerk or ought to have been apparent to him upon receiving the further letter from Dr Rozsa dated 6 May 1991.

The Tribunal finds that the Town Clerk decided to dismiss the Complainant because he was unwilling to run the risk that there might be some deterioration in her physical condition even though she was able to perform the duties at the time she sought to resume work with the Council. A notional employee who was fit to resume work would not have been treated in the same manner and therefore an act of discrimination occurred. Because of her impairment, she was treated less favourably than a notional employee in that undue emphasis was given to risks and contingencies thought to be associated with her physical condition most of which were matters of speculation.

The Tribunal is also satisfied on the balance of probabilities that the respondent is not able to rely upon the defence advanced by it under and by virtue of Section 66Q of the Act. It follows from the finding made by the Tribunal that the Complainant was fit to resume work and carry out the specific duties the subject of the duty statement that it was not reasonable for the Respondent to conclude that she was unable to perform the work required to be performed in the course of the employment. She was able to perform the

work provided the duties required of her were those specified in the duty statement. It is true that she was not able to undertake heavy lifting or repetitive lifting and bending but on the evidence available to the Tribunal it seems that some of the work she had been prepared to perform in the past in the absence of anyone to assist her went beyond the requirements of the position to which she was appointed in August 1987.

Even if the Tribunal be wrong in the view just expressed, the Tribunal considers that, in any event, the plea advanced pursuant to Section 66Q is not available to the Respondent because the Respondent did not take all the reasonable steps to obtain relevant and necessary information concerning the impairment before the Town Clerk on behalf of the Respondent took the decision to dismiss the Complainant. As has been noted earlier, the letter provided by Dr Rozsa dated 6 May 1991 was open to misunderstanding and the Respondent ought to have taken steps to clarify any remaining ambiguity concerning the import of the letter before proceeding with a decision to dismiss. The weight of the evidence suggests that in fact the Respondent had decided to proceed with a dismissal in the belief that the Complainant's state of health was suspect even before the Respondent received the further letter from Dr Rozsa dated 6 May 1991. This is apparent from the letter that the Town Clerk wrote to the State Government Insurance Office on 28 April 1991. Before he received the further medical certificate he had asked for the Town Clerk had concluded "*I could not accept her into the workforce with these disabilities.*" For that reason also the Tribunal is satisfied that the Respondent did not take all reasonable steps to obtain the relevant and necessary information as to whether the Complainant could carry out the work the subject of the duty statement.

The Tribunal pauses to deal briefly with one further defence advanced on behalf of the Respondent. It was contended on behalf of the Respondent that the Respondent as an employer would have been acting contrary to Section 19 (Duty of care) of the Occupational Health, Safety and Welfare Act if it had provided work to the Complainant in the knowledge that she was not fit to perform the work. However, the Tribunal considers that the Complainant was fit to perform the work and the Respondent was therefore not able to rely upon the provisions of the legislation just mentioned. The Complainant had devised sensible strategies to avoid unwise strain to her back.

### **Relief**

This brings the Tribunal to the question of relief. The Complainant claims compensation. Section 127(b)(i) of the Acts provides that after holding an inquiry, if the complaint is substantiated, the Tribunal may order the Respondent to pay to the Complainant, damages by way of compensation for any loss or damage suffered by reason of the Respondent's conduct.

In Hall v Sheiban Pty Ltd (1989) EOC 92-250 the Court suggested that the measure of damages in such cases are analogous to claims in tort. One should compare the position in which the Complainant might have been expected to be in the discriminatory conduct had not occurred with the situation which he or she was placed by reason of the conduct complained of. In Alexander v Home Office (1988) 1 WLR 968 the Court suggested that award should not be minimal because this would tend to trivialise or diminish the respect for public policy implicit in the legislation.

In the circumstances of the present case, the Tribunal is satisfied that the Complainant was severely affected by the decision to dismiss her in circumstances in which, on the Tribunal's finding, there had not been sufficient inquiry as to the precise nature of her physical condition. The Tribunal is therefore of the view that she should be awarded some compensation for the stress and humiliation associated with the dismissal. The Tribunal is not persuaded, however, that the reference provided to the Complainant should be regarded as an aggravation of the injury suffered, even though the Complainant herself took strong exception to the way in which the reference provided to her was worded. The Tribunal considers that it is not uncommon for an employer to provide information as to the circumstances associated with the departure of an employee from a place of work so as to negate any inference of misconduct.

The Tribunal will award \$5,000.00 by way of general damages and \$7,569.00 by way of special damages making \$12,569.00 in all.

*N. P. Harluck*

*27.4.93*