

EQUAL OPPORTUNITY TRIBUNAL OF WA

No 19 of 1992

BETWEEN:

HELEN LAWRENCE and Ors

Complainants

against

ABORIGINAL LEGAL SERVICE OF WA (INC)

Respondent

REASONS FOR DECISION

BEFORE: Mr N P Hasluck QC President

Counsel for the Complainants - Appearing in person

Counsel for the Respondent - Mr T Shelley

HEARD: 21 May 1992, 29 April 1993, 12 November 1993, 18 February 1994, 12 April 1994.

REASONS DELIVERED: 13 July 1994

Judgment

At all material times the Complainants were members of the then Governing Committee of the Aboriginal and Island Women's Congress ("the Women's Congress"). They allege that the Respondent, the Aboriginal Legal Service (WA) Inc ("the ALS"), discriminated against them on the ground of sex in the provision of goods and services. The complaint arises out of a refusal of legal aid in response to an application lodged by the Complainants and alleged neglect in its handling of the application. Various attempts were made by the Tribunal to resolve the dispute by negotiation, but to no avail.

The Respondent has now applied to the Tribunal for an order that the complaint be dismissed pursuant to Section 125 of the Act on the grounds that it is frivolous, vexatious, misconceived, lacking in substance or should not be entertained. That application comes before the Tribunal as a preliminary issue and will be resolved on the basis of materials submitted to the Tribunal in the course of a preliminary hearing. The relevant materials include pleadings filed on behalf of the respective parties as a consequence of directions given at an earlier stage of the matter, materials forming part of the Commissioner's Report and some additional documents tendered during the course of argument.

The Aboriginal Legal Service was incorporated pursuant to the Associations Incorporation Act 1895. Its objects include the provision of legal assistance to Aboriginals in Western Australia. At the time the present dispute arose the ordinary membership of the ALS was said to consist of "all adult Aboriginal persons, normally resident in Western Australia." It follows that various people would notionally be "members" of the Association even though they had not specifically applied to join the Association.

The constitution contained various provisions of a kind often utilised by voluntary associations including a provision that upon dissolution any surplus property is not to be distributed amongst members but is to be transferred to another association with similar objects. Certain clauses of the constitution presume that applications for legal assistance would be in

writing signed by the applicant. It was common ground at the hearing, however, that legal assistance would be provided in response to informal applications.

The assistance would not take the form of monetary grants or advances, but would usually be in the form of legal advice or advocacy provided by legal practitioners employed by or acting under instruction from the Aboriginal Legal Service. It appears, however, that the assistance would be dictated by financial considerations in that fees would be determined by reference to conditions fixed at the time assistance was granted, and those conditions might often include provision for any costs recovered by an Aboriginal litigant to be transferred to the Aboriginal Legal Service. It was common ground at the hearing that most of the income of the Aboriginal Legal Service was provided by the Federal Government through the agency of the Aboriginal and Torres Strait Islander Commission, commonly known as ATSIC.

It followed from the funding situation just described that the ALS was subject to a degree of control by the Federal Minister for Aboriginal Affairs and by ATSIC. The pleadings filed on behalf of the parties indicated that on 10 March 1988 the Minister for Aboriginal Affairs issued a directive to all Aboriginal organisations that the Department of Aboriginal Affairs would not provide funds to cover legal costs resulting from internal disputes within such organisations unless there were exceptional circumstances affecting individual rights. In such cases the prior approval of the State Director was required. This directive was in force in 1989 when a group of Aboriginal plaintiffs, consisting principally of members of the Bropho family, sought assistance from the ALS in regard to Supreme Court Action No 1583 of 1989. The group of plaintiffs included some females. The Minister for Aboriginal Affairs approved a grant of legal assistance to the plaintiffs in that case and the litigation proceeded.

During 1989 and 1990, the Principal Legal Officer of the ALS, Mr G McIntyre, had been developing a set of guidelines to assist the ALS in dealing with applications for legal aid which had a bearing upon applications referable to internal disputes within Aboriginal organisations. According to those guidelines the ALS could refuse aid to persons otherwise eligible where the ALS considered that the matter involved a family feud or terrorist

activities or that the matter involved an internal dispute within an Aboriginal organisation. Aid was not to be granted in the second category of case except with prior approval of the Minister or his delegate. The policy of the Service was also to endeavour to conciliate or arbitrate such matters or to encourage the parties to pursue solutions other than by way of legal proceedings.

In April 1990 a dispute arose concerning the management of the Women's Congress. On 26 April 1990 there was a change in control and the incoming Governing Committee, according to the Complainants, dismissed the former Chairperson, Laurel Winder, from the various offices she held in the organisation and required that she return keys and documents in her possession belonging to the Congress. When a dispute arose as to the validity of steps taken by the principal protagonists the incoming leadership group, which was supported by the Complainants, applied to the ALS for the provisions of legal aid in regard to the various issues that had arisen. One of the Complainants, Helen Corbett, was informed that because the application related to an internal dispute a grant of aid could not proceed without the permission of the Federal Minister. By letter dated 2 May 1990 she therefore wrote to the Principal Legal Officer requesting him to apply for the necessary permission.

By letter dated 9 May 1990 the Principal Legal Officer wrote to the Minister setting out the background to the matter and describing the nature of the dispute. In that letter he said that the decision of the Minister was whether he should approve the granting of aid to each side to seek legal advice, limited to \$288 each (ie 3 hours advice), with the possibility of further aid if litigation was required to obtain declarations as to rights of office and custody of property. The alternatives were said to include that no aid be provided and the parties be left to resolve the dispute by mechanisms set out in their constitution or, alternatively, no aid be granted pending the parties accepting advice from the ALS, acting as arbitrator, concerning the legal position, as a preliminary to the holding of a general meeting. Reference was made to the fact that Laurel Winder was also seeking aid to take action against Helen Corbett for defamation.

The Complainants by their spokesperson at the preliminary hearing raised a query as to whether this letter was actually sent. The Tribunal is satisfied,

however, having regard to other contemporaneous documents, including a facsimile from McIntyre to the head of ATSIC in this State, Neil Westbury, that the substance of the request for a direction pursuant to the relevant policy guideline referred to above was placed before the Minister and that in due course the Federal agency instructed the ALS to try and resolve the dispute by mediation. The Tribunal notes that the letter of 6 May 1990 and the related documents do not in their terms refer to or make any comment upon the fact that the applicants for legal aid were women, although that fact was apparent, of course, from the existence of a dispute between rival factions of a Congress set up to improve the circumstances of Aboriginal women. The Tribunal also accepts that an attempt was made to resolve the dispute by mediation, without success. Unfortunately, however, it seems that the Principal Legal Officer did not explain that, in effect, the application for legal aid made by the Complainants and those friendly to them had been refused and that the mediation procedure represented an alternative response to the situation. The Principal Legal Officer left the ALS soon afterwards and the Complainants were therefore left with the impression that their application for legal aid had been disregarded.

By letter dated 3 June 1990 the Complainants lodged a complaint of discrimination in the provision of services on the ground of sex with the Commissioner of Equal Opportunity in this State, relying upon provisions of the Sex Discrimination Act 1984 (Commonwealth) and on Section 8, 20 and 161 of the Equal Opportunity Act 1984 (WA). The Commissioner carried out her duties as agent for the Human Rights and Equal Opportunity Commission and, at a later stage, the dispute was referred to Commissioner Kevin O'Connor. On 4 August 1992 he handed down Reasons for Decision relating to the matter.

Commissioner O'Connor accepted that there was a discrepancy between the treatment of a similar application for legal aid about a year earlier in the Bropho matter. He was satisfied, however, that the difference in the treatment of the request was explicable by reference to a change in the relevant policy and tighter financial constraints resulting in the requirement of Ministerial direction being strictly pursued. The decision taken by Mr Westbury as spokesperson for ATSIC was consistent with the policy concerning Ministerial direction which was not discriminatory in its terms as to gender. Accordingly, Commissioner O'Connor concluded that the

decision made on behalf of the Federal agency was not affected by any consideration of the gender of the applicants for legal aid with the result the complaint against ATSIC should be dismissed.

In regard to the complaint against the ALS the Commissioner of Equal Opportunity declined the complaint pursuant to Section 89 of the Act on the grounds that it was lacking in substance. She was then required to refer the dispute to this Tribunal together with the report of her investigation pursuant to Section 90(2) of the Act. It is against this background that the matter comes before the Tribunal. As indicated earlier, the immediate issue is whether, in response to an application made by the Respondent, the Tribunal should dismiss the complaint pursuant to Section 125 of the Act.

The principles governing the exercise of the power vested in the Tribunal by Section 125 of the Act were reviewed at length in the recent case of *Yarran & Anor v Westpac Banking Corporation* (1992) EOC 92-440. The Tribunal noted that courts and tribunals within the legal system are generally allowed to control proceedings to ensure that the legal process is not abused by the institution of groundless proceedings. The Tribunal considers that Section 125 should be regarded as a means whereby this Tribunal can control and if necessary terminate summarily proceedings which do not have any reasonable prospects of success or are otherwise lacking in substance or merit, having regard to the criteria enunciated in Section 125.

Before turning to the matters relied on by the Respondent in support of its application for dismissal, the Tribunal pauses to note that in the present case the initial complaint was constituted by the letter to the Commissioner dated 3 June 1990 which refers principally to the unsuccessful application for legal aid in respect of the dispute concerning control of the Congress. During the course of argument at the preliminary hearing reference was made to events subsequent to June 1990 and documents brought into existence at a later stage. There was also some suggestion that the laying of the complaint may have resulted in adverse repercussions tantamount to victimisation of the Complainants. In the circumstances of the present case, however, the Tribunal considers that the jurisdiction of the Tribunal is confined to the matters of complaint set out in the letter of 3 June 1990. Subsequent events and documents are only relevant in so far as they may

play some part in determining what inferences should be drawn concerning the allegation of discriminatory conduct.

By Section 8 of the Act a person discriminates against another person on the ground of the sex of the aggrieved person if by reason of the sex of the aggrieved person the discriminator treats the aggrieved person less favourably than the discriminator treats or would treat a person of the opposite sex. By Section 20 it is unlawful for a person to discriminate against another person on the ground of the other person's sex by refusing to provide goods or services or to make facilities available to the other person. By Section 161 an employer can be vicarious liable for the act of an employee or agent. Importantly, by Section 71, nothing in the Act renders it unlawful for "a voluntary body" to discriminate against a person in connection with the admission of persons as members of the body or the provision of benefits, facilities or services to members of the body. By Section 4 a voluntary body means an association or other body the activities of which are not engaged in for the purpose of making a profit, but does not include a body established by a law of the Commonwealth or of a state or an association "that provides grants, loans, credit or finance to its members."

In support of an argument that the complaint should be dismissed pursuant to Section 125, because it was misconceived or lacking in substance, the Respondent suggested that the ALS is a voluntary body within the meaning of Section 71 of the Act and is therefore exempt from liability. Reference was made to the fact that the ALS is not engaged in profit making activities.

The Tribunal was not persuaded that Section 71 applies to the circumstances of the present case. It is questionable whether an organisation established pursuant to provisions of the Associations Incorporation Act falls within the ambit of Section 71, especially when, at the material time, its members included Aboriginal persons who had not applied to join the association by an act of will but were simply deemed to be members because of their ancestry. More decisively, however, the Tribunal considers that the ALS falls within the description of an association "that provides grants, loans, credit or finance to its members." The provision of legal aid customarily takes the form of the provision of assistance but that assistance, as appears from earlier discussion, is made

available within a framework of financial constraints and therefore should be characterised as a grant. Accordingly, the Tribunal is not prepared to hold that the immunity conferred by Section 71 is available in the circumstances of the present case. It therefore follows that the complaint is not misconceived or lacking in substance in that respect. The real question is whether there is sufficient evidence available to substantiate an allegation of discriminatory conduct on the ground of sex in regard to the provision of goods, services and facilities.

In weighing up the sufficiency of evidence, the Complainants can use in support inferences drawn from the primary facts, although discrimination cannot be inferred when more probable and innocent explanations are available on the evidence. See *Fenwick v Beveridge Building Products Pty Ltd* (1986) EOC 92-147. One must also take account of the view expressed in *Chamberlain v R* (1983) 153 CLR 521 at 536, however, that in determining whether inferences may be drawn the Tribunal was constrained to act on the basis that there can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. Also note the remarks of Anderson J in *Ralph M Lee (WA) Pty Ltd v Fort & Anor* (1991) 4 WAR 176; *KLK Investments Pty Ltd v Riley (No 1)* (1993) EOC 92-525. In the latter case the Supreme Court in this State suggested that caution must be exercised by the Tribunal in relying on inferences in a way which might be thought to reverse the burden of proof which lies upon the Complainants.

In applying these principles to the present case, the Tribunal notes that the Complainants were unable to identify any passage in the contemporaneous documents which expressly or by persuasive implication suggested that the decision by the ALS not to grant relief was influenced by their gender. On the face of the documentation, a key factor in the decision to refuse relief was the presence of a policy which revealed a reluctance on the part of the Federal Minister and the related agency to allow funds to be used in supporting parties involved in internal disputes. Further, the Complainants could not point to any consistent pattern of refusal which might permit an inference to be drawn from facts objectively established that female applicants for legal aid were placed at a disadvantage.

In the final analysis, it seemed that the only matter which the Complainants could point to which might lead to an inference of discrimination on the ground of sex was the success of the earlier Bropho application. The Tribunal considers, however, that this incident is not sufficient in the circumstances of the present case to support an inference that discriminatory conduct occurred. The earlier Bropho application was made on behalf of a group of litigants which included some female members. Further, in the circumstances of the present case, the refusal of aid is open to an innocent explanation, namely, that the policy weighed against the grant of aid in the case of internal disputes. Further, it may have been thought that the instruction to proceed with mediation was sufficient, having regard to the nature of the particular dispute, and therefore it is difficult for the Complainants to assert persuasively that they were discriminated against on the ground of sex.

Accordingly, in the circumstances of the present case, the Tribunal is of the view, as a matter of law, that the present complaint has no real prospect of success, and is therefore lacking in substance or otherwise, within the language of Section 125, is a complaint which should not be entertained. The complaint is therefore dismissed pursuant to Section 125 of the Act.

For the sake of completeness, the Tribunal adds that it is not prepared to hold that the complaint should be dismissed on the grounds that it is frivolous or vexatious. The Complainants felt a genuine sense of grievance and there can be little doubt that their sense of grievance was aggravated by the failure of the Principal Legal Officer to make the fate of their application for legal aid clear to them. The fact that the Complainants failed in their complaint against ATSIC for the reasons expressed by Commissioner O'Connor does not demonstrate that their complaint before this Tribunal was vexatious. Different statutory provisions govern the latter complaint and it was open to them to argue that the ALS had acted in a discriminatory manner in the circumstances of the present case. It follows from earlier observations, however, that upon closer investigation, it appears that a complaint of that kind cannot be sustained in the circumstances of the present case and therefore the complaint must be dismissed. There will be no order as to costs.

