

**EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA**

No. 27 of 1992

**WILFRED RUSSELL
Complainant**

- against -

**THE ORDER OF SERVANTS OF
MARY (INC)
Respondent**

BEFORE: Ms C. O'Brien - Deputy President
Mrs B. Buick - Member
Mrs K. French - Deputy Member

Counsel for the Complainant - Mr M. Rinaldi
Counsel for the Respondent - Mr D. Mossenson

HEARD: 16 and 17 August 1993, 8 and 10 September 1993

REASONS FOR DECISION

(Delivered: Thursday 21 October 1993)

INTRODUCTION

Mr Wilfred Russell ("the Complainant") is a 51 year old man who had been employed by Servite College as a Manual Arts Teacher from 1983 until the end of 1989.

The Order of Servants of Mary (Inc), ("the Respondent"), is the incorporated name of a religious order which administers Servite College.

Both the Complainant and his wife worked as teachers at Servite College at the relevant time. Mrs Russell was employed as an English Teacher.

In mid 1989 the couple were experiencing difficulties in their marriage which culminated on the night of Sunday 6 August 1989 with Mrs Russell telling the Complainant that she no longer loved him and wanted to separate from him. The couple talked at some length about their difficulties. The Complainant then left the house and went into the city where he walked around for a time before ending up in a fast food shop. He ate some breakfast and returned home.

Either before he left the house late on Sunday 6 August or in the early hours of the morning of Monday 7 August, the Complainant decided to resign from his job at Servite College and wrote out a letter of resignation. There is some inconsistency in his evidence as to exactly when he wrote the letter of resignation but nothing turns on that.

On the morning of Monday 7 August, the Complainant telephoned Mr Barrie Harvie, the Principal of Servite College, and told him of his decision to resign. The Complainant

was in a distressed state. Mr Harvie in effect told him that he should take some time to think about his position and advised him to take a few days off work to consider it. It is undisputed that Mr Harvie did not accept the Complainant's resignation.

On Wednesday 9 August, the Complainant went to Servite College to see Mr Harvie. It is here that the versions of events differ. The Complainant testified that he told Mr Harvie that he had thought the matter over and realised that life was worth living and that he wanted to return to work the next day. However, he said that Mr Harvie's response was that if he did not resign he would be dismissed.

Mr Harvie testified that the Complainant was clear in his mind that he wanted to resign. This was accepted verbally by Mr Harvie who asked that the Complainant put his resignation in writing which the Complainant agreed to do. Mr Harvie convinced the Complainant not to leave the school immediately but to stay until the end of the school year as this would be in the interests of everyone, including the school.

The main conflict in the two accounts relates to whether the Complainant resigned on this day or whether Mr Harvie gave him the ultimatum to resign or be dismissed. The context of other topics of discussion at the meeting are also in dispute.

On Friday 11 August, Mr Harvie wrote to the Complainant in effect accepting his resignation. The letter advised the Complainant that his job would be advertised and offered any support to find alternative employment. The Complainant did not reply to that letter nor did he approach Mr Harvie with a view to discussing the matter. On

Friday 18 August, the Complainant wrote a letter to Mr Harvie setting out his memory of the events to that time. The next day he visited a colleague who tidied up the grammar and spelling in the letter. This colleague also showed the Complainant an advertisement for his job in that morning's paper. The Complainant said that he was shocked at seeing the advertisement. He then resolved not to send the letter that he was preparing. He went home, typed up the letter, dated and signed it. He testified that he kept the letter as an accurate record of what had happened.

On Monday 21 August, the Complainant spoke to Mr Egmont Melton, the Deputy Principal at Servite College, who told him that he had been given the job of interviewing applicants for the Complainant's position. The Complainant said that he told Mr Melton that he had not resigned. He said that Mr Melton advised him that he should immediately write to Mr Harvie and tell him. Mr Melton was not called to give evidence but a letter written by him to the Complainant in 1992 wherein he recounted their conversation on 21 August was tendered. This will be examined in more detail later.

The Complainant said that he then wrote a letter to Mr Harvie telling him that he had not resigned. He said that he placed this letter in Mr Harvie's pigeonhole. Mr Harvie testified that he did not receive the letter. The Complainant did not discuss the matter further with Mr Harvie nor particularly did he discuss the letter he claims to have written on 21 August.

On 24 August, the Complainant applied for a job at Prendiville College. This application was unsuccessful. Later he obtained employment in the finance industry selling

insurance. From 23 to 26 October he was permitted to take time off school to attend a training course for this work.

On 4 December the Complainant wrote a letter of resignation which Mr Harvie did receive. Before then, it is undisputed that Mr Harvie requested the Complainant on several occasions to write a letter of resignation.

The Complainant said that the letter of resignation on 4 December was written because he had no choice. He felt that if he did not resign he would be dismissed.

For a variety of reasons, the Complainant's employment as an insurance salesman was not successful. In April 1990, the Complainant approached the Association for Professional Industrial Employee Organisations ("the union") which made representations on his behalf to the Respondent and the Catholic Education Office.

The Complainant also brought an action in the Industrial Commission for wrongful dismissal. He withdrew this application on legal advice. The Tribunal does not consider it necessary to examine this action in any more detail save to mention that it was made.

In 1991, the Complainant was advised by the Department of Social Security to seek legal advice about his employment with the school. He did so and on 30 August 1991 he made a complaint to the Equal Opportunity Commission. The Commissioner for Equal Opportunity investigated the complaint and on 18 June 1992 found it to be without substance and pursuant to Section 89(1) of the Equal Opportunity Act ("the Act"),

dismissed it. On 8 July 1992 the Complainant, through his solicitor, required the Commissioner to refer his complaint to the Tribunal.

THE COMPLAINANT'S ALLEGATIONS

For the most part, the Complainant's case was not presented (at least in terms of the evidence) to establish many of his claims

The Tribunal has some difficulty in summarizing the Complainant's allegations as, by the end of the evidence, those pleaded in the Points of Claim had been added to in his Counsel's opening address and again in his closing submissions.

Initially, in his Points of Claim, the Complainant alleged that he had been discriminated against on the grounds of sex and marital status in that he had been "constructively dismissed" or alternatively subjected to detriment. The detriment was not particularised.

In his opening address to the Tribunal, Counsel for the Complainant widened the pleaded grounds of discrimination by alleging indirect discrimination (apparently on the ground of sex). He explained this by submitting that it was Mr Harvie's view that it would be better for a Manual Arts teacher rather than an English teacher to leave the school and because most Manual Arts teachers are male the Complainant was indirectly discriminated against when he was dismissed.

Counsel for the Complainant conceded that there was no evidence that more males are

Manual Arts teachers than are female. However, Counsel asked the Tribunal to take judicial notice of this. The Tribunal declines to do so. Judicial notice may only be taken of fact which are so notorious that they are within the knowledge of ordinary people, with the result that reasonable people would not contest their existence. (see Holland v. Jones (1917) 28 CLR 149). The Tribunal does not consider that the gender of Manual Arts teachers such a notorious fact.

Further, Mr Harvie was not questioned as to the alleged policy. In any event, for reasons which appear later, the Tribunal prefers Mr Harvie's version of events and accordingly finds that there is insufficient evidence to establish this ground of discrimination.

In addition, the Counsel for Complainant submitted in closing that the Respondent indirectly discriminated against the Complainant on the ground of marital status in that he required the Complainant to comply with a requirement or condition due to the Principal's policy in relation to marriage breakups within the school, that condition being not to undergo a marriage breakup in circumstances where the wife was also employed at the school. It was submitted that this requirement or condition was one with which a substantially higher proportion of persons of different marital status to the Complainant could readily comply and was one with which the Complainant did not or was unable to comply and that it was unreasonable in the circumstances because the continued service of both the Complainant and his wife would not have affected their ability to perform their duties.

However, there was no evidence whatsoever on this alleged "policy". We reject this

submission.

The Complainant's Counsel also submitted that the Respondent discriminated against the Complainant pursuant to Section 9(1) of the Act on the ground of his marital status by treating him less favourably than it would treat a person of a different marital status in the same circumstances or circumstances that are not materially different. The marital status of the Complainant was the status or condition of being married but living separately and apart from one's spouse (Section 4(1)). The Complainant's Counsel submitted that the Respondent had constructively dismissed the Complainant and/or subjected him to detriment on the ground that he was separated and would not have been dismissed or subjected to detriment if he had not been of that marital status.

As to sex direct discrimination, the Complainant's Counsel contended that the Respondent had discriminated against the Complainant pursuant to Section 8(1) of the Act on the ground of his sex by treating him less favourably than it would treat a person of the opposite sex in the same circumstances or circumstances that are not materially different. The alleged discrimination was the constructive dismissal of the Complainant and/or the subjecting him to detriment on the ground that he was a male, in circumstances where he was separated from his wife, a teacher also employed at the Respondent's school. It was submitted that the Complainant's wife, except insofar as she was a woman, was a person in exactly the same position and was not dismissed or subjected to any detriment; the Respondent treated the Complainant in a less favourable manner than if he were female; if he were female, he would not have been dismissed in those circumstances.

Further, the Complainant's Counsel contended that the Respondent imputed a characteristic to the Complainant that the Complainant would, as a man, cope with a marriage breakup and the task of seeking alternative employment, better than his wife would as a woman, and that as a woman it would be more upsetting to the Complainant's wife if she had to leave the school.

Further, the Complainant's Counsel contended that the Respondent dismissed the Complainant and/or subjected him to detriment on the grounds that it imputed a generalised characteristic to the Complainant that a person of his marital status would disrupt the school. If the Complainant had not been separated he would not have been dismissed. This, contended Counsel for the Complainant, constituted less favourable treatment of the Complainant than of someone who has a different marital status.

Further, it was submitted that the Respondent imputed a characteristic to the Complainant that is generally imputed to persons of his marital status, and that a separated couple cannot work together.

The Tribunal must make certain findings of fact. It is essential to decide whether the Complainant was "constructively dismissed". It is not necessary for the Tribunal to consider what this term means. The Tribunal will consider whether Mr Harvie gave the Complainant an ultimatum to resign or be dismissed. That appears to be the primary allegation of discrimination either on the ground of sex or marital status. The acts which the Complainant alleges constitutes a detriment cannot, in the Tribunal's view, be

classified as such unless the Tribunal finds that the ultimatum was delivered by Mr Harvie.

BACKGROUND

Some background facts are necessary to put the facts in issue in context.

In July 1984, the Complainant commenced "going out" with Mrs Russell. The couple were living together and it was decided that they would tell the then headmaster of Servite College of their relationship. This man later died. The caretaker principal was also told about the relationship in about March 1985. In September 1985, Mr Harvie was appointed principal. The couple also told him that they were living together, had bought a house and were intending to marry in December 1985. The Complainant agreed that Mr Harvie was positive, helpful and supportive. As far as he was concerned, as long as the couple were discreet, there was no objection to them maintaining this relationship.

It is undisputed that the teaching staff at Servite College was very close. The Complainant and his wife developed a social relationship with Mr Harvie and on one occasion invited Mr Harvie and his wife to dinner at their place.

Overall, it is undisputed that the Complainant's relationship with Mr Harvie was friendly, cordial and based on mutual respect.

On 7 August 1989, it is clear that the Complainant wanted to resign. He was hurt, bewildered and distraught. He felt that he could not face everyone at school. This was

the condition he was in when he telephoned Mr Harvie on 7 August. He wanted to collect his things and leave immediately.

Mr Harvie talked him out of immediate action because of the state he was in. He told the Complainant to take some time off and to think about his position. Certainly there was no suggestion that he would accept the resignation or that he felt that in the circumstances it would be better for the couple and/or the school that he resign. The Complainant reflected on his position. He testified that he thought about his three children and he concluded that after all life was worth living. He said that he telephoned Mr Harvie after lunch on Wednesday 9 August and said that he was ready to start work on Thursday 10 August. He said that Mr Harvie asked him to come to the school and talk about it at about 5.00 p.m. that day.

Mr Harvie on the other hand said that the Complainant turned up unannounced at the school at around lunchtime for the purpose of "confirm(ing) his resignation of the earlier Monday". Mr Harvie said that the Complainant came to the school to finish up immediately and to collect his goods.

Each man has a fundamentally different version of the conversation which occurred. There can be no room for one man being mistaken about the conversation. Each is adamant about his version. It is important to examine this conversation in some detail as the events which follow will be assessed by reference to which version the Tribunal accepts.

THE COMPLAINANT'S EVIDENCE

The Complainant was unable to be precise about the conversation on 9 August. This is not unusual given the effluxion of time and the state he was in at the time. Both men agree that the Complainant was crying and was distressed.

The Complainant said that Mr Harvie suggested that *"it would be a good idea if I resigned or I would be ... could be dismissed"*. He suggested that it would be better if he resigned as otherwise people would be asking why he was dismissed. Further, Mr Harvie said it would be easier for the Complainant as a Manual Arts teacher to find employment than it would be for an English teacher. The Complainant said that Mr Harvie went on to say that Mrs Russell would not be able to cope with the Complainant working at the school and that it would upset the school community. Mr Harvie said that as Mrs Russell was involved in remedial teaching he did not want to lose her as a teacher. The Complainant said that Mr Harvie was adamant. He wanted his resignation or else he would be dismissed. The Complainant said that Mr Harvie commented that he hoped the Complainant did not think he was being "harsh and blunt". The Complainant said his response was that Mr Harvie was being harsh and blunt because it was not the Complainant who wanted to end the relationship. The Complainant testified that he told Mr Harvie that he was not resigning. However, the Complainant said that Mr Harvie told him in his office that his position would be kept open for him until the end of the school year on 31 December 1989. Under cross-examination, the Complainant agreed that the substance of what Mr Harvie was suggesting was that he stay on until the end of the school year as that would be best for all concerned and that if he resigned rather than being dismissed he could leave the school with some dignity. He agreed that Mr Harvie

offered him "all sorts of assistance" in finding other employment.

Further, the Complainant agreed that Mr Harvie referred to the physical layout of the campus and that he and his wife could stay on their respective sides of the campus. He agreed that a plan was worked out whereby he could stay on at the school without causing stress to his wife.

The Complainant denied that Mr Harvie said that he would confirm the conversation in writing or that he asked for his written resignation. He also denied that Mr Harvie said that he would advertise his job sooner rather than later because Manual Arts teachers are hard to get. He further denied that Mr Harvie praised his conduct telling him that he had taken the honourable course in order to avoid pressure on his wife.

He said that he told Mr Harvie that the decision was unfair and that *"I was going to do everything within my power at that stage to stay at Servite because I believed that I was being wrongly done by."*

MR HARVIE'S EVIDENCE

Barrie Harvie is an experienced school teacher and has also had substantial experience in school management. He taught at Newman College for 6 years and was Deputy Principal there for 8 years. He had been the Principal at Servite College since September 1985.

Mr Harvie testified that the Complainant came unannounced to the school on 9 August to collect his things then and there and to put into effect his resignation.

Mr Harvie said that he indicated to the Complainant that it was not to the students' advantage to leave immediately. If he left at the end of the school year the students would not be penalised and the Complainant could leave the school with a sense of personal dignity. He said that he was disappointed that the Complainant was leaving the school because he was a good teacher and related well to students and staff.

Mr Harvie said that he attempted to persuade the Complainant to stay at the school until the end of the year. In the course of that he mentioned the physical layout of the campus and that there was no necessity for the couple to run into each other. In the course of affirming the Complainant's decision to leave, Mr Harvie mentioned the relative ease of him being able to obtain another job as a woodwork teacher than for his wife to obtain a job as an English teacher. He also considered that the Complainant had done the "manly" thing by resigning. He said that the Complainant was upset and was crying and that he was comforting him.

Mr Harvie testified that he could see that potentially there might be difficulties with both the Complainant and his wife continuing on at the school. He did not see it as his place to talk the Complainant out of resigning. However, he thought that in the circumstances he had done the right thing.

SUMMARY

In effect, the difference in the versions of the conversation is that the Complainant testified that despite being given time off to think about his position and then deciding not to resign, Mr Harvie told him that he had to resign or be dismissed. In the context of

that, he was told that his wife would not be able to cope, that it would be better for the whole school community if he went, that in the meantime he could stay on one side of the campus and his wife could stay on the other. On the other hand, Mr Harvie testified that he accepted the Complainant's resignation but in the context of persuading him not to leave then and there referred to the disadvantage the students would suffer and that it would be better for the school and the Complainant personally if he stayed until the end of the school year. In the context of affirming his decision he spoke about the relative ease the Complainant would have in finding employment, the separation of the campus and his pledged support in assisting the Complainant to find employment.

LATER EVENTS

It is necessary to examine later events in order to properly make a decision as to which version the Tribunal accepts.

The Complainant said that he approached his wife, who until about mid September, remained in the matrimonial home sleeping on a sofa in the lounge room and asked her to speak to Mr Harvie and tell him that the couple was able to work together at the school. The Complainant said that on 11 August, his wife went to see Mr Harvie and that night they discussed what had transpired. However, there was no specific evidence as to that discussion. Mr Harvie denied that Mrs Russell came to tell him that the two could work together at the school. However, he said that he did call Mrs Russell to his office after 9 August and told her of the agreement he and the Complainant had reached, namely, that the couple remain on their own sides of the campus. He testified that Mrs Russell seemed happy with that arrangement.

On 11 August, Mr Harvie wrote to the Complainant in effect accepting his resignation and confirming his position at the school until the end of the school year. The letter went on to say that the Complainant's job would be advertised later in the term but if he wanted to leave earlier he would be pleased to assist in any way.

The Complainant said he did not immediately respond to the letter. He "brewed over" it for a few days. The Complainant said that he did not seek advice from anyone at the school and despite the opportunity to do so did not speak to Mr Harvie about the letter. He said that he did not speak to Mr Harvie because he was upset and that he is the sort of person who tends to stew over things.

However the Complainant said that after his wife spoke to Mr Harvie and before he wrote the letter of 18 August, he went to see Mr Harvie and pleaded with him to be permitted to stay at the school. Mr Harvie denied this.

In answer to questions from the Tribunal, the Complainant agreed that the letter from Mr Harvie on 11 August totally misrepresented the conversation they had on 9 August and that his reaction was one of anger and disbelief. However, his manifested reaction was to ask his wife to speak to Mr Harvie which he says was done on 11 August.

On 18 August, the Complainant hand wrote a letter to Mr Harvie setting out his version of events on 7 and 9 August. The next day, he visited a colleague who helped him with his spelling and grammar. She also pointed out to the Complainant that his job had been advertised in the paper that morning. The Complainant testified that it was then that he

decided not to send the letter to Mr Harvie but to keep it as an accurate record of what had taken place. Nonetheless, he went home, typed up the letter, dated and signed it. The original letter was not produced to the Tribunal.

On 21 August, the Complainant said that he approached Mr Harvie about the advertisement in the paper and expressed his concern that he should have been told that his job was going to be advertised. He said that he felt out of courtesy that he should have been told *"plus the fact that at that stage I hadn't ... I had not resigned anyhow"* ³⁸ He said that Mr Harvie's response was that he had to advertise for a religious education teacher and it was cheaper to put two advertisements in the paper rather than one. Indeed, Mr Harvie testified that was one of the reasons for advertising at that time.

In his testimony, the Complainant emphasised the unfairness of not being told about the advertisement rather than the fact that Mr Harvie was advertising a job from which he had not resigned.

Later that day, he testified that he was speaking with the Deputy Principal, Mr Egmont Melton, who told him that he had been given the role of interviewing applicants for his job. The Complainant told him that he had not resigned and had told Mr Harvie that. Mr Melton suggested that he write to Mr Harvie straight away and tell him. The Complainant said that he did so and placed the letter in Mr Harvie's pigeonhole. Mr Harvie said that he did not receive the letter. No reason was suggested as to how or why the letter could have gone astray. The Complainant apparently took the precaution of photocopying the letter as a photocopy was tendered to the Tribunal.

The Complainant asked Mr Melton to put his recollection of events in writing. It is noteworthy that even though this letter was written on 20 March 1992 (by which time he had left Servite College), about two and a half years after the conversation on 21 August 1989, Mr Melton's recollection makes no reference to the Complainant's assertion that he told Mr Melton that he had not resigned.

That letter claims that the first time Mr Melton became aware that the Complainant was to resign was when Mr Harvie made the announcement during one of the weekly administration meetings. Mr Harvie spent some time explaining that the Complainant and his wife were separating and that the Complainant had spoken to him at length, privately, about his future. Mr Harvie told the administration meeting that he had accepted the Complainant's verbal resignation and would be confirming that in writing. He explained that he would be happy in assisting the Complainant in finding another job and that if he decided on a career change he would also be happy to give him time off work to do any necessary retraining courses. This certainly supports Mr Harvie's version of events.

Mr Melton continued in his letter that on being requested by Mr Harvie to conduct interviews for the Complainant's position he approached the Complainant in the staff room seeking his advice on specific issues pertaining to woodwork that might help him in the conduct of the pending interviews. He said that after the Complainant "*offered some useful points*" he explained that he was "*not happy with the situation*" and that it was not his decision to be leaving Servite.

According to Mr Melton's letter, it was agreed that the Complainant "*should not just*

leave the matter but rather speak to Mr Harvie as soon as possible." Mr Melton went on to say that *"at a later date, ... talking with (the Complainant) it transpired that (the Complainant was) still unhappy with the situation."*

We are of the view that this letter is more supportive of Mr Harvie's version of events than it is of the Complainant's. Mr Melton makes no mention of the Complainant telling him that he had not resigned but refers to the Complainant saying that it was not his decision to leave Servite. The reaction of the Complainant is expressed in terms of not being happy with the situation.

There is no dispute that four or five times between August and December 1989, Mr Harvie asked the Complainant for his written resignation. Mr Harvie said that he thought it was a requirement at the time. The Complainant said that the requests made him tense and upset and when he was asked for his resignation he told Mr Harvie that he had not resigned. On the other hand, Mr Harvie said that whenever asked, the Complainant took to put his resignation in writing. He said that in the last week of term he called the Complainant into his office and asked for his resignation and the Complainant promised to have it in the following day. When it did not arrive, Mr Harvie spoke to the Complainant again and asked again "fairly forcefully" saying that he needed it to be able to confirm the successful applicant in his job. The Complainant said that he would like the holiday period to do so and that was granted. Mr Harvie saying that he took the Complainant at his word.

When Mr Harvie did receive the written letter of resignation dated 4 December 1989 he

was surprised at the unhappiness expressed by the Complainant. However, there was no opportunity to discuss the situation. A send off for all staff leaving the school was held at the end of the term and a presentation was made to the Complainant.

The letter referred to Mr Harvie's opinion that the Complainant and his wife "could not work successfully at the same school" and expressed disagreement with it. It also referred to "the decision to retain Val as an indispensable member of staff at (his) expense "and expressed the view that it was not a "just decision", that Mr Harvie's "attitude" was "biased" as it was his wife's decision to end the marriage. It also expressed extreme disappointment with the decision to "dismiss" him. Thereafter it referred to and he it being "unfair" to be asked for his resignation.

Before the end of the school year, the Complainant obtained employment in the finance industry selling insurance. Mr Harvie allowed him to take two days paid leave from school in October to attend a training course. The Complainant said that he needed money to pay for a housing loan and it seemed to him that if he could not persuade Mr Harvie to allow him to stay at Servite he should make an effort to find alternative employment. The Complainant testified that he and Barrie Harvie remained on friendly terms throughout the school year. He agreed in cross-examination that he visited Mr Harvie's house one Sunday to let him know about his new job. However, he denied he mentioned that the new job involved a new car or that he wanted to let Mr Harvie know how pleased he was with his new employment. Mr Harvie says that the men shared a beer around his pool and at the time their relationship was "sound, friendly".

Mr Paul Williams was called on behalf of the Respondent. He was also a teacher at Servite College in 1989 having joined the teaching staff in April. Around August/September 1989, he noticed a "relatively frosty" relationship between the Complainant and his wife. Around this time, he became aware that the Complainant was going to leave Servite to take up employment in the insurance industry. He recalled a conversation with the Complainant wherein the Complainant told him that he was looking forward to his new employment and this would make him a comfortable living. Ultimately, the Complainant gave this witness a very positive impression that this was a career move on his part and that he was looking forward to it with "overt enthusiasm". At no time, did the Respondent gain the impression from the Complainant or anyone else that the Complainant was reluctant to leave Servite College. He did not know the reason for the change in career and the first he knew of any problem with the circumstances of the Complainant leaving the school was a couple of weeks prior to the commencement of the hearing.

The Respondent also tendered a letter written by another teacher at the school who would have been called to give evidence if it were not for his hospitalisation at the time of the hearing. The letter was tendered by consent. It referred to the professional support and pastoral care extended by Mr Harvie to staff members and recalled the Complainant's *"warm endorsement of the support which he had received from Barrie Harvie."* He mentioned that the Complainant had suggested that his resignation would be in everybody's interest. He too never heard it suggested that the Complainant had been dismissed. During cross-examination the Complainant denied confiding in this particular teacher.

Other evidence was called by the Complainant from Mr Ivan Sands who was the Executive Officer of the Union. He testified that he was contacted by the Complainant in September 1989. Both Mr Harvie and the Complainant testified that it was in the first half of 1990 that Mr Sands became involved. The Tribunal finds that Mr Sands is mistaken about this time. Although the Tribunal does not doubt that Mr Sands was a truthful witness, it finds that his evidence is unreliable. He was unable to recount specific conversations and he did not keep or could not produce (for reasons unnecessary to recount) any notes of meetings or conversations. The Tribunal is of the view that his testimony was a result of poor recall and it could not be sure that his testimony was his own recollection of events or was based on various conversations and/or documents that he received in connection with the case. Accordingly, we reject his testimony insofar as it relates to the detail of conversations he claims to have had with individuals. It is undisputed, however, that he was contacted by the Complainant who asked him to intercede on his behalf with the school and the Catholic Education Office.

In answer to questions from the Tribunal, Mr Harvie said that he did not speak to anybody from the Catholic Education Office after his initial conversation with the Complainant on 7 August. Further, he said that there was no policy in the Catholic Education Office that Catholic Schools concerning separated couples working at the school.

FINDINGS

Mr Harvie presented as a confident and articulate witness. His memory of events seemed clear and he was prepared to acknowledge lapses in his memory from time to time. The

Complainant was not as articulate. More to the point, his recollection of the conversation on 9 August was not particularly cogent in that he was not able to recount in any logical sequence the conversation. When pressed the Complainant sought to rely on the copy letter he claimed to have written on 19 August as representing an accurate version of events.

Mr Harvie had a practice of keeping brief notes of dealings he had with staff especially when they involved discussions about position at the school. He produced notes of conversations he had with the Complainant from 7 August until 4 December when the letter of resignation arrived. He made no reference to personal matters in those notes confining them to a record of the substance of matters relevant to the Complainant's position at the school. These notes were of assistance to him in recalling specific dates but the Tribunal accepts that they were in the nature of an *aide memoire* only and that Mr Harvie's recollection of the detail of conversations he had with the Complainant was not significantly aided by those notes. The notes certainly did not represent a detailed outline of conversations he had with the Complainant but he explained to the Tribunal that he did not expect that the notes would assume any significance.

The Complainant clearly went through a very traumatic and emotionally upsetting time in the last few months of 1989. We are not satisfied on the balance of probabilities that the essential claim by the Complainant that Mr Harvie told him he had to resign or be dismissed is made out. The Tribunal's task has not been an easy one. But there are aspects of the Complainant's evidence which convince us that Mr Harvie's version of events is to be preferred to the Complainant's.

The relationship between the two men has always been friendly and respectful. When the Complainant telephoned Mr Harvie on 7 August saying that he wanted to resign Mr Harvie considerately and properly offered him time to think things over. Even after the conversation on 9 August which is substantially in dispute the two men remained on friendly terms.

An acceptance of the Complainant's version of events involves a finding that in the space of two days, Mr Harvie had a complete change of heart. Gone was his caring professional approach to a staff member embroiled in distressing emotional problems and in its place was a man giving a totally unwarranted ultimatum - resign or be dismissed. Thereafter, the Complainant's version of events would mean that Mr Harvie dishonestly misrepresented the conversation on 9 August to give the appearance that the Complainant had resigned of his own free will and regardless of Mr Russell's assurances that the two could work together at the school and of the Complainant's pleas that he be allowed to stay, advertised the position and virtually hounded the Complainant for his written resignation. Apart from matters mentioned below, we cannot accept that Mr Harvie is the manipulative, dishonest person which the Complainant's version of events would cause us to find. Mr Harvie's demeanour in the witness box, the undisputed friendly relationship that continued between the two men and the endorsement of Mr Harvie's character by another employee negates such a finding.

Even accepting that the Complainant is a person who does not like to make a fuss and who was putting on a brave face as his Counsel suggested, his reaction to Mr Harvie's alleged conduct is not consistent with the person who has been the victim of a callous and

self serving manipulation of the truth as his version of events suggests.

Mrs Russell may have been of assistance to the Complainant by way of support of his story but she was not called. Despite the Complainant's evidence that his wife went to see Mr Harvie on 11 August to tell him she and her husband were able to work together at the school, no evidence was given as to the actual conversation. Mr Harvie testified that he called Mrs Russell into his office to tell of the arrangement the two men had made and that she did not come to his office at the Complainant's request to assure him that the two could work together at the school.

The Complainant said that he brewed over the letter written by Mr Harvie on 11 August. Given the significance of the letter this reaction is unusual to say the least. He did not even discuss it with Mr Harvie when he claims to have pleaded with him to stay at the school between 11 and 18 August. The Complainant said he decided to put the true version of events on record hence the letter he wrote on 19 August. However, we find the Complainant's explanation unconvincing as to why he did not send that letter after going to the trouble of not only drafting it in handwriting but seeking the assistance of a colleague in the spelling and grammar, then typing, dating and signing it. Surely, given the gross manipulation of the truth the Complainant implies that Mr Harvie was guilty of, the hasty advertising of his job and his stated intention to do everything within his power to stay at Servite College, that letter was one way of at least putting his case on the official file. But even after he spoke to Mr Melton who, on his version of events, told him to write to Mr Harvie, he did not send the letter but settled for a short, hastily drafted letter which disappeared without being delivered and without explanation. Even

given that he considered that he should put his views in writing straight away, we would expect that shortly thereafter he would send his letter of 19 August which set out an accurate and comprehensive way what had happened. The Complainant testified that it did not cross his mind to send that letter.

The letter from Mr Melton upon which the Complainant placed reliance makes no mention of a complaint by the Complainant that he had not resigned as Mr Harvie had represented to the staff. Nor did Mr Melton approach Mr Harvie to speak of his conversation with the Complainant. One would expect that if Mr Harvie had told staff in a formal meeting that the Complainant had resigned and thereafter the deputy principal was told by the staff member that he had not, that the deputy would seek to reconcile the two versions by at least speaking to the principal. However, Mr Melton refers only to it not being the Complainant's decision to leave the school and to his being unhappy with the situation. This is equivocal. On balance, the Tribunal finds that Mr Melton's letter is more supportive of Mr Harvie's version of events than it is of the Complainant's version. The Complainant accepts that for the remainder of the term, his relationship with Mr Harvie remained friendly. Mr Harvie supported him, gave him time off work to attend a training course and entertained him at his home on a Sunday when the Complainant visited him. Again, whether the Complainant was trying to "big note" himself, save face or put on a brave face, the Tribunal cannot accept that a man so grievously betrayed by a person in whom he trusted would seek him out on a Sunday in a social context and even then to make no mention of his grievance.

It is also of considerable significance that apart from Mr Melton's recollection of his

conversation with the Complainant Mr Williams' testimony is that the Complainant was overtly enthusiastic about his new job and made no mention of leaving the school against his will. This is not behaviour which is consistent with the Complainant's version of events.

Added to these factors is the fact that the original letter dated 19 August was not produced to the Tribunal notwithstanding that it was kept for the express purpose of accurately recording events. Given the haste in which the letter dated 21 August was prepared, it is perhaps unusual that the Complainant took the time to photocopy it for placing it in Mr Harvie's pigeonhole. It is undisputed that the letter disappeared and was never received by Mr Harvie.

Mr Harvie readily conceded that potentially there might be difficulties with a separated couple working at the school. It might have been for that reason that he did not talk the Complainant of resigning on 9 August. Perhaps given the Complainant's distraught state, he should have declined to accept the resignation until the Complainant had reflected on his position in a calmer state. He did think that in the circumstances it was the "manly" action that the Complainant took. However, neither Mr Harvie's judgment in handling staff nor his somewhat quaint views on what was the honourable action to take in the circumstances are the issue in his case.

As the Tribunal finds that it is not satisfied that the ultimatum to resign or be dismissed was given as alleged by the Complainant it is not appropriate nor necessary to consider whether if it were given it constituted discrimination.

DETRIMENT

The Complainant also alleged that on the ground of his sex and marital status the Complainant was subjected to a detriment in his employment. The detriments alleged were the shock of seeing his job advertised so soon, the repeated requests for written resignation and the requirement that he stay on one side of the campus. As to the last, that arrangement was agreed between the parties. It was not a requirement, direction or condition of staying at the school.

Given that the Complainant acknowledges that he was told that his job would be advertised later in the term, which it was, albeit sooner than he expected, the Tribunal doubts that this is a detriment. Even if the shock of seeing his job advertised so soon could be considered to be a detriment, the Tribunal cannot see any connection between gender, his marital status and that detriment.

As the Tribunal rejects the Complainant's version of events as to the ultimatum the request for written resignation on four or five occasions over a period of about four months, although it may have made the Complainant tense and upset, was in the circumstances of his resignation warranted and appropriate. In those circumstance it can hardly be classified as a detriment.

GENERALLY IMPUTED CHARACTERISTICS

In his closing submissions, the Complainant's Counsel submitted that Mr Harvie had discriminated against the Complainant on the ground of sex and marital status in that he treated the Complainant less favourably than he treated or would treat a person of the

opposite sex or different marital status (as the case may be) on the ground of certain characteristics that are generally imputed to person of the Complainant's sex or marital status.

Insofar as sex is concerned it was alleged that the generally imputed characteristic was that a man could cope with marriage breakup and the task of seeking alternative employment.

Insofar as marital status is concerned it was alleged that the generally imputed characteristic was that a separated person would disrupt the school and that a separated couple could not work together.

We reject the submission that Mr Harvie imputed these "characteristics" to the Complainant. Even if Mr Harvie harboured some concern that there could be difficulties if the Complainant and his wife continued to work at the school or that the Complainant would find it easier to find work than his wife and cope better with the marriage break down, that is not the same as imputing a character that it is distinctive or typical or is a distinguishing peculiarity or quality which appertains generally to persons of the Complainant's sex or marital status. It is noteworthy that neither Mr Harvie nor any other witness was questioned by the Complainant's Counsel with a view to establishing these propositions.

CONCLUSION

It is clear that the Complainant felt, if not bitter, then very hurt by his wife's decision to

leave him and his consequent more onerous financial burdens brought about by buying his wife's share of the house. His prime motive in wanting to leave the school was his probably his concern about facing other staff members. We suspect, without so finding, that during the course of the final term, the Complainant had second thoughts about his resignation, but the die was cast. It may be that when his new job did not turn out to be rewarding, that, coupled with his feeling at having left a secure job which he liked, because of his marriage breakdown (his perception being that it was not his fault) that his version of events became, over time distorted to suit his own ends.

The Tribunal's ultimate finding is that the Complainant's claim for discrimination that he has been discriminated against has not been made out. Accordingly, the complaint is dismissed. Accordingly, the issue of Compensation does not arise.