

**EQUAL OPPORTUNITY TRIBUNAL  
OF WESTERN AUSTRALIA**

**Matter Number: 17 of 1993**

**IN THE MATTER OF A COMPLAINT BY:**

JAN PICKERING

**Complainant**

- against -

KEVRON PTY LTD

**Respondent**

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**JUDGMENT**

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**BEFORE:** Ms C. O'Brien - Deputy President  
Mrs R. Kean - Member  
Ms H. Cattalini - Deputy Member

Counsel for the Complainant - Ms H. Andrews  
Counsel for the Respondent - Mr S. Kenner

**HEARD:** 23, 24, 25, 29, 30 May 1995; 1, 2, 8 and 23 June 1995

**REASONS FOR DECISION:** (Delivered: 6 July 1995)

The complainant, Ms Jan Pickering, has suffered from rheumatoid arthritis since she was a young girl. Ms Pickering, alleges that the respondent, her former employer, Kevron Pty Ltd ("Kevron") discriminated against her in her employment on the ground of her impairment in that she was dismissed from her job after only three days.

Ms Pickering is and was at the relevant time a qualified chartered accountant. She was employed by Kevron as an Accounts Assistant/Supervisor. The founder and Managing Director of Kevron, Mr Kevin Radford, whose decision it was that Ms Pickering be dismissed, testified that in his view she was not able to do the job she was hired to do, basically because she was slow moving around the office, particularly on the stairs, and was slow and awkward in her use of the computer keyboard.

Ms Pickering was first diagnosed with rheumatoid arthritis when she was 11 years old. At the time she and her family were living in New Zealand. The arthritis started in one knee and rapidly progressed throughout most of the joints of her body. When she was 16 years old, Ms Pickering had her hips replaced. She also had both her knees replaced in May 1990 and October 1991 respectively.

Ms Pickering and her family came to Perth in July 1981 when she was 16 years old. Ms Pickering attended school in Perth and completed her high schooling at the end of 1982 and gained

admission to University. From 1983 until 1985 she attended the University of Western Australia and was awarded a Bachelor of Commerce degree in 1986. During her studies she worked part time with a bank doing data processing. She completed her professional year for her chartered accountant membership in 1990.

After completing University, Ms Pickering worked as a volunteer with the America's Cup challenge. In July 1987 she joined a firm of chartered accountants, first working as a graduate accountant and finally as a senior accountant. This was Ms Pickering's first full time job. Initially she lived at home with her parents and then in early 1988 she moved into a unit, sharing with a girlfriend.

After three years working with the firm of accountants, Ms Pickering decided that she would like to move into a more commercial field, running the accounting function of a company. She had just finished her professional year and as her knee joints had degenerated and needed to be replaced she thought it would be a good time to resign. For about a year after her knee operation Ms Pickering had to use crutches, which she stopped using in about November 1991.

Thereafter Ms Pickering was offered a job through an employment agency and was placed in a firm, completing that job just before Christmas 1991. From January 1992 until August 1992 Ms Pickering applied for numerous jobs and made numerous telephonic inquiries with firms attempting to obtain full time employment. During that

time she also did tax work for family and friends and did some voluntary part time work with the Arthritis Foundation.

Ms Pickering applied for a job with Kevron in August 1992 and was successful. The Tribunal will return to a more detailed examination of that application and her employment with Kevron later in this decision.

After leaving Kevron Ms Pickering did not work full time until she obtained employment as an accountant with Transfield Shipping of WA ("Transfield") in mid 1994. She is still employed in that position.

It is not in dispute that Ms Pickering suffered an impairment within the meaning of section 4 of the Equal Opportunity Act (as amended) ("the Act"). Nor is it in dispute that she was dismissed from her job at Kevron on Monday 24 August 1992 and that it was Mr Radford's decision to dismiss her. The Tribunal so finds on each of these issues.

#### **APPLICATION FOR THE JOB AT KEVRON**

Kevron was founded 49 years ago by Mr Radford. In 1992 its business included conducting aerial surveys and mapping, granite quarrying, lot farming for sheep, aircraft maintenance and operation and airborne geophysical operations.

The position with Kevron was advertised in the newspaper on 8 August 1992. The position was described as an Accounts

Assistant/Supervisor and the "main duties" included basic accounting functions. The job was advertised as Ms Patricia Harris who had been in the position since April 1991 was resigning to take up other employment. Kevron need someone to replace Ms Harris quite quickly as she had given Kevron two weeks notice on 6 August and there was a concern that her knowledge and experience would be lost if she did not have the opportunity of training her replacement.

Ms Pickering was interviewed twice by Mr Paul Taylor, who was, and still is, the financial controller with Kevron. Mr Taylor had been employed in that capacity since December 1988. He is a chartered accountant and has Bachelor of Arts and Economics degree. His position at Kevron was to oversee the financial control and the financial record keeping of Kevron, to supervise staff and to perform other duties as directed by Mr Radford.

The first interview was on 13 August 1992. At this interview there was a general discussion about what the job entailed. Mr Taylor explained to Ms Pickering that her duties would include the maintenance of the general ledger to trial balance, month-end reconciliations and journal entries and maintenance of creditors, debtors, payroll and the cash book. Mr Taylor testified that the person in the job had to be "very much an all-rounder", having to send facsimiles ("faxes"), deal with telegraphic transfers and the bank and do some photocopying. However, it is not clear if the extent of this aspect of the job was emphasised at the interview.

There was also a discussion about Ms Pickering's computer literacy. Ms Pickering said that she raised the issue of her arthritis with Mr Taylor and said that she had not worked for about 18 months because she had had two knee replacements. She said that she showed Mr Taylor her hands and told him that her arthritis was in her hands and fingers but was no longer active and would not cause a problem. She said that she wanted to be "up front about it". She also said that Mr Taylor asked her how her arthritis affected her and she responded that her movement was stiff and it might appear that she was in pain but that was not the case.

Ms Pickering said that Mr Taylor mentioned that there would be filing to do as part of the job and that she would have to go upstairs to collect a fax every day. She said she questioned Mr Taylor on the possibility of advancement in the company because she was concerned that the job sounded a little repetitive. Mr Taylor responded that there was definitely room for him to pass her some of his work to her - work that was outside the job description. Indeed, Mr Taylor had "a slight reservation" that some of the tasks required to be done in the job might be a "little bit menial" for Ms Pickering and that she might get a little bored and lose interest after a while. He explained to the Tribunal that it was not a pure accounting job - there would be filing to be done and "just general assisting around an office".

Ms Pickering said she considered that everything in the office looked very accessible - something she noticed because of her arthritis.

Ms Pickering testified that there was no mention at this interview that her engagement would be on a trial basis. Initially Mr Taylor agreed that this was the case but as his evidence progressed the position became less clear.

The interview lasted for about 45 minutes. Ms Pickering testified that Mr Taylor did not raise any concerns about her mobility. She was not shown around the premises.

Mr Taylor said that he had not really had any experience of anyone with rheumatoid arthritis. He knew a man at his tennis club who was 60 years old and had arthritis and he seemed to be able to run around with just a little pain every now and then. Mr Taylor said that Ms Pickering was obviously trustworthy and he took her word that her condition would not present any problems. He said that salary was discussed and Ms Pickering indicated that she expected a salary of around \$26-27,000.00 per year. He said that things were not discussed in any great detail as the interview was just a screening process. He made a short list of about 5 applicants, reviewed his notes, checked out referees and then invited those short listed back for a second interview a couple of days later. Mr Taylor's impression of Ms Pickering was that she was intelligent, sensible, could do the work and was a person that he could enjoy working with.

Ms Pickering was invited back for a second interview on Tuesday 18 August. Mr Taylor said at that interview he gave her a little more detail about the terms and conditions of the job and mentioned that the job would be for a trial period. Ms Pickering denied that there was ever mention of a trial period.

Mr Taylor and Mr Radford both testified at that time it was the invariable practice of Kevron to give all new employees a trial period of between one and three months. Mr John Lazarus and Mr Peter Radford, both of whom worked at Kevron at the relevant time (the latter being the son of the managing director) confirmed that Kevron had a standard practice of offering employment on a trial basis. The higher the position, the longer the trial period. This practice was introduced following industrial proceedings commenced by a previous employee about 18 months prior to Ms Pickering's appointment.

Mr Radford testified he instructed Mr Taylor that Ms Pickering should be offered the job on a trial basis. He said that he would not offer a job to a person on a trial basis if that person was leaving a job to take up employment with Kevron. However, under cross-examination he said that whatever the circumstances, any new employee at Kevron would be employed on a trial basis. This was confirmed by Mr Taylor. Although he did not specifically articulate it, we think that given the urgency of employing someone in the position, Mr Radford was prepared to give Ms Pickering a chance on



the basis that she had nothing to lose as she was not in any full time employment at the time.

Two letters of appointment were tendered through Mr Taylor (exhibits 13A and 13B). They were expressed as offers of employment. The letters contained a paragraph which read:

*"The offer of the position is subject to the satisfactory completion of a trial period of 1 month. During this time your employment may be terminated without notice."*

Ms Pickering was not given such a letter as Mr Taylor had been busy with other matters. However, the two tendered letters had been written after the employees concerned commenced employment with Kevron and we are prepared to accept Mr Taylor's evidence that Ms Pickering would have received a similar letter in due course. Mr Taylor testified that he briefly went over the terms of the letter with Ms Pickering, mentioning the "probationary period".

Mr Taylor impressed as a truthful and careful witness. As well, he appeared to be a meticulous sort of person - one who did his job well, took his responsibilities seriously and someone who would apply the policies of his employer. We have no doubt that Mr Taylor told Ms Pickering that she would be employed on a trial basis. However, there was no evidence as to whether he explained to her what that meant in the detail that was contained in the two letters of

appointment that were tendered. Had he done so, it is likely that Ms Pickering would have least remembered that the trial period was mentioned. Accordingly, we find that it is unlikely that Mr Taylor explained in detail the implications of the trial period to Ms Pickering. We think that in the excitement of being offered the job, it was something that she heard but to which she did not attach any significance. Further, it was important for Kevron that the new employee started quickly and it may be that Mr Taylor was more concerned with finding the right person rather than explaining in detail the terms of the offer of employment. The issue of the trial period is not relevant to the issue of whether there was in fact any discrimination but rather to the issue of the quantum of loss of income if discrimination is found. We examine that in more detail later.

Of the 66 or so applicants for the job, Ms Pickering was selected. Although the ultimate decision to appoint her was Mr Radford's it appears that he relied heavily on Mr Taylor's assessment. Mr Taylor had made a note on his interview "check list" that Ms Pickering had "a slight disability with artificial knees/arthritis". Mr Taylor discussed the short list with Mr Radford and advised him that Ms Pickering seemed to be suitable in terms of the technical requirements of the job. He also told Mr Radford that she suffered from arthritis and could be slow moving around the office but that she had advised him that it would not affect her ability to do the job. Mr Radford said that when Mr Taylor spoke to him about Ms Pickering he got the impression that she suffered from "little bit of a

disability" and that this was described to him as a limp. Mr Radford's response was to the effect that "if she says she can do it, then let's see what she can do."

Mr Taylor then telephoned Ms Pickering and asked if she could start the next day. Ms Pickering said she was able to do that. Accordingly, Ms Pickering commenced her employment with Kevron on Wednesday 19 August 1992. She was dismissed on Monday 24 August. This is not in dispute.

#### **THE LAY OUT OF KEVRON'S PREMISES**

The offices and laboratory of Kevron were relevantly located in two old houses at 121-123 Hill Street. The Tribunal had the opportunity of viewing the premises. We did so in order to better understand the evidence as to their layout. Mr Radford estimates that houses were built around the time of the first world war. Although the premises were virtually empty at the time as Kevron was relocating, the physical location of the offices and the layout were the same as in 1992. Three plans were also tendered, two of which accurately depicted the layout of the premises. (exhibits 9A and 9B)

Ms Pickering worked in the accounts section which was in 123 Hill Street. Her office was the main office and was adjacent to the office where Mr Taylor worked (the accountant's office). Behind the main office was an area where archived files were stored and which is

described as the "Warehouse" on the plan. Ms Pickering did not go into that area during the time she worked at Kevron.

The administration section was located in 121 Hill Street. In order to move from No. 123 to No. 121, it was necessary to exit a side door, travel down an uncovered path and climb three steps into No. 121. The administration section housed Mr Radford's office ("the board room") and the reception area - these were at the front of the building. Visitors entered Kevron from the entrance to No. 121 and went immediately into reception. Behind reception there was a kitchen which is described as the "lunch room" on the plan. The three steps referred to lead directly into the lunch room. The toilets were located off a passageway which led from the lunch room. At the end of the passageway is a flight of stairs which leads to what was called the "aerial section" where the laboratory was located. That area is relevant as the fax machine was located upstairs. There was no lift and it was obviously necessary to climb the stairs to get to the fax machine. Another reception area was located at the top of the stairs immediately adjacent to the fax machine.

The printer from which hard copies of computer data were collected was located in a room at the rear of the lunch room. This room was accessed by a passageway which ran along the northern side of the lunch room.

Thus if Ms Pickering wished to use the toilet, the lunch room, collect print outs or faxes or otherwise attend to duties in the

administration section she would have to move from the building at No. 123 to the building at No. 121.

There was a car park at the rear of the premises and Ms Pickering was allocated a car park there. However, the car park is not relevant in this case.

### **MS PICKERING'S EMPLOYMENT WITH KEVRON**

It was a busy time for Kevron when Ms Pickering started her job. Mr Taylor was "frantically busy" with the end of year financial statements and tax returns for the Kevron companies. He virtually left Ms Pickering with Ms Harris for the first two days so that Ms Harris could train her in the job. On the Friday he spoke with Ms Pickering about a problem with the computer software but otherwise left Ms Pickering to her own devices. Mr Radford was involved with negotiating overseas contracts with a Japanese client.

Strangely, Ms Pickering was never formally introduced to Mr Radford during the time she worked at Kevron. Mr Radford had been busy with his client for the first two days of Ms Pickering's employment (Wednesday and Thursday). However, he saw her around the office and spoke to her from time to time but not about her work. Mr Radford did not think it was his place to introduce himself - he thought that was for Mr Taylor's to do. One thing is clear - Mr Radford never discussed Ms Pickering's condition with

her and never raised the concerns he had about her ability to perform her job.

Mr Taylor had explained to Ms Pickering when she started that a formal letter would be forthcoming but for the first two days it was important for her to spend time with Ms Harris so that Ms Harris could tell Ms Pickering as much about the job as she could in the last two days of her employment with Kevron.

### **WHY MR RADFORD CONSIDERED MS PICKERING WAS UNSUITABLE FOR THE JOB**

Mr Radford testified that he had observed Ms Pickering around the office and considered that she was unsuitable for the job. He said that he was tied up on the Tuesday, Wednesday and Thursday with his overseas clients but was moving around the office on the Thursday obtaining various financial information for his visitors. Friday was more or less a normal office day for him.

Mr Radford said that he believed that the job was the wrong one for Ms Pickering, that the position did not suit her abilities. In particular "the physical aspect" of the job caused him concern. He said that she had extreme difficulty in moving around. This was evident in her moving between the two buildings and having to negotiate the steps and climbing the stairs to the fax machine. He also said that there was an awkward step between the original building and the new building. However, there was no evidence that anyone saw Ms

Pickering having difficulty with this step. In all he considered that she was unable to move around the premises satisfactorily. He said that he had seen her on the steps between the two buildings and that she was moving up the steps very slowly, hanging onto the metal hand rail and "going sideways", one step at a time. He only saw her going up half the flight of stairs to the fax machine and observed her to be travelling very slowly.

Other witnesses called by the respondent also testified to seeing Ms Pickering going up steps and stairs and moving slowly. One described her manner of walking as "shuffling". However, it is Mr Radford's account which is particularly relevant in this case.

Mr Radford also said that he saw Ms Pickering use the keyboard in the main office and in reception and that she was very slow and awkward in that regard. He said that on one occasion he paused and observed Ms Pickering use the keyboard for about 20 or 30 seconds but he did not know what task she was undertaking at the time. Mr Taylor testified that he did not have the opportunity of assessing Ms Pickering's keyboard skills as he was preoccupied with his own work. Otherwise Mr Radford saw her moving around the office very slowly - taking about four times longer than others to use the stairs. Mr Taylor said she took about 20 to 30 seconds to climb the steps between the two buildings. If she was indeed that slow, it is remarkable that Mr Taylor did not notice her pace when he interviewed her on the two occasions before she started work. A

person walking so slowly would certainly have alerted him at least to the possibility that her assurance that her condition would not affect her work deserved further inquiry.

Mr Radford testified that he had two main concerns about Ms Pickering. One was her speed of moving around the office and the other was her safety. As to safety he said that on one occasion about 5 or 6 years ago a person had slipped on the steps between the two buildings, as a result a non-slip tread had been applied. There was also evidence that one of Mr Radford's sons had fallen down the stairs leading to the aerial section. However, there was no evidence as to the circumstances in which these accidents occurred. Mr Radford did not otherwise expand upon his concerns for Ms Pickering's safety.

Mr Radford said that on the Friday his office day had more or less returned to normal and he had the opportunity of observing Ms Pickering around the office. He had seen her in the main office, in the reception area, on the steps between the two buildings and then on the stairs going up to the fax machine. He said that he had seen her folding and enveloping the remittances advices and cheques and considered that it was not at a satisfactory speed for that type of manual job.

The task of processing cheques to pay creditors was one which was mainly done at the end of each month. There was some dispute as to how many cheques were involved at months end but it would seem



that it could vary between 30 and about 70. In his written response to the letter from the Equal Opportunity Commission advising him of Ms Pickering's complaint, Mr Radford said that the process of folding and enveloping 66 cheques and filing the remittance advices took approximately 6 hours when it would usually take about 3/4 to one hour in total. However, the evidence establishes that Ms Pickering did not start the task until 2 pm on Friday and that the office closed at 5 pm. Although Mr Taylor said that Ms Pickering was completing the task on the Monday morning, she denies this. In any event it is clear that the task did not take 6 hours.

There was a deal of evidence called as to the number of times it was necessary for the person occupying Ms Pickering's position to go upstairs to send or collect faxes. This varied from once or twice a day (Ms Harris) to as much as 20 times a day. The respondent's witnesses on this point included Mr Radford, Mr Taylor, Mr Peter Radford and two other employees of Kevron. It is noteworthy that one employee, Mr Zygmunt Pasznicki, who worked upstairs near the fax machine estimated that the people from accounts would come upstairs about maybe once or twice a day and on some occasions up to half a dozen or more times.

However, the Tribunal prefers the evidence of Ms Harris as to the day to day requirements of the job. She had been in the job for some 15 months and gave detailed evidence as to what the job involved. Her evidence was not damaged in cross-examination and she impressed as a careful and reliable witness. She also suffered from

two sore knees and said that she negotiated the stairs "gingerly" because of that. If she had been required to climb the stairs up to 20 times a day or even 8 times a day, we have no doubt that it would have been something she would not forget.

Mr Radford said that he communicated his concerns to Mr Taylor on Thursday and again on Friday afternoon. He said that he believed that Mr Taylor should have spoken to Ms Pickering and told her that she could not handle the position from the point of view of moving around the office. As far as Mr Radford was concerned, he had no doubts about his assessment of Ms Pickering. By Friday afternoon, he was convinced that Ms Pickering was unsuitable for the job and would have to be dismissed. Mr Taylor testified that there was no room for negotiation - Mr Radford was adamant that Ms Pickering had to go.

Mr Radford said that he spoke to Mr Taylor again on the Monday and asked him why Ms Pickering was still at Kevron. Mr Taylor replied that he did not get around to speaking to Ms Pickering on the Friday. Mr Radford suggested to Mr Taylor that he did not see much point in further training her because he did not think that she was capable of carrying out the duties and that she would have to finish up.

On the morning of Monday 24 August, Mr Taylor called Ms Pickering into his office. Ms Pickering said that he looked uncomfortable. He began by asking her some questions about her arthritis and Ms Pickering re-iterated her explanations she had given him at the

interviews. Mr Taylor said that he asked these questions to ease into telling her that she was dismissed. Mr Taylor then said that both he and Mr Radford had concerns about her ability to do the job. Mr Taylor said that Ms Pickering was astonished. There was some discussion about whether she could work out the trial period. Ms Pickering said that this was the first time that a trial period had been mentioned. However, we have already found that this was not the case. She also offered to stay on until a replacement was found. Mr Taylor said that he would think about it. Ms Pickering attempted to carry on with her work but she was very upset and started to cry. It was then that Mr Taylor said it would be best if she finished up then and there. She packed her things, said goodbye to other staff and left.

It is clear from Mr Radford's evidence that he had made his decision to dismiss Ms Pickering on the Friday afternoon and expected Mr Taylor to tell Ms Pickering then. However, it would seem that Mr Taylor did not have the heart to tell her on Friday and decided to wait until after the weekend.

### **THE COMPLAINANT'S ABILITY**

Despite her condition, Ms Pickering has led a relatively normal life. The Tribunal finds her to be a determined and self-sufficient person. She obviously enjoys the loving support and admiration of her family which must have been of great assistance to her as she coped with her condition, especially in the early years when the disease was active. She drives a car and enjoyed an active social life apparently

unimpeded by her condition. During the time she gave evidence the Tribunal had ample opportunity to observe her demeanour and her response to the lengthy questioning. At times she was in tears - it was clear that she found the recollection and retelling of her experience distressing. However, overall she impressed as a woman who is not prone to self pity or despondency. Her determination and courage are illustrated by the fact that she only had 8 days off school when she had each hip replaced and went on an extensive overseas holiday after losing her job at Kevron. However, it is likely that others might perceive her impairment as being more serious than she does. She has adapted to her diminished mobility over the years and has managed to do everything that an average young woman with her education and experience could do. She might have appeared to be in pain as she moved around Kevron offices although no-one testified to that impression.

We pause to consider the medical evidence about rheumatoid arthritis and its effect on Ms Pickering.

Since 1982 Ms Pickering has been treated by Dr Evan Owen a specialist rheumatologist. Dr Owen has been specialising in this field since 1964. He testified that he has seen Ms Pickering about every 6 months since 1982. Ms Pickering estimates it to be about 3 or 4 times each year. However, whatever the frequency of consultations, it is clear that Dr Owen not only has the medical expertise to speak about rheumatoid arthritis but also has a very good knowledge of the disease as it affected Ms Pickering.

There were numerous medical reports tendered to the Tribunal including the consultation notes of Dr Owen. As well, the respondent called Dr Robert Will who is also a specialist rheumatologist. However, Dr Will had not examined Ms Pickering and his opinion was based solely on medical reports of other doctors, predominantly of Dr Owen. Although we have no hesitation in accepting Dr Will's testimony in so far as it relates to rheumatoid arthritis generally, we consider that the evidence of Dr Owen as to its effect on Ms Pickering is more reliable because of his close association with her over the years.

Ms Pickering's rheumatoid arthritis started when she was very young. It spread rapidly and there was significant degeneration in most of the points of her body. Typical symptoms of the disease are swelling in the joints and inflammation of the synovial which is the tissue between the joints. Muscular atrophy is a secondary consequence of the condition which results from the reduced mobility. Ms Pickering has been treated with hydrotherapy over the years to strengthen her muscles. However, the disease has not been active for many years and Dr Owen said that any lessening of mobility suffered by Ms Pickering is the result of the degeneration of her joints in the early years of the disease. Presently, Dr Owen reviews Ms Pickering to supervise her medication and to assess her function and ability to be independent. Ms Pickering takes a variety of medication to suppress inflammation, relieve non-specific aches and a particular drug to alter her immune function which might

ultimately suppress the disease. Dr Owen testified that there was no single test which could be undertaken which would allow Ms Pickering to come off the medication and accordingly, she has continued to take it. Dr Owen believes that Ms Pickering's hands will remain basically constant, there will be no change in her feet because they have fused, there has been no change in her shoulder movement over the past 13 years and his main concern would be failure in the replaced joints which might necessitate further replacement.

Dr Owen assesses Ms Pickering's function by asking her what she has been doing and how she has been coping. He and Dr Will agreed that the best way to assess function and mobility in the workplace is to view the person actually doing the work. However, both doctors accepted that if the patient is intelligent and has been treated over a number of years then the doctor can rely on what the patient says about his or her function and mobility. Indeed, Dr Owen apparently had no hesitation in relying on Ms Pickering's account of her ability to function. He said that she did not exaggerate her assessment of her mobility nor did she minimise her symptoms.

Dr Owen was definitely of the view that there was no need to modify the workplace to accommodate Ms Pickering. Further, his opinion was that she could cope with climbing three steps and would not be a safety problem. He did say that because of her somewhat limited shoulder movement, Ms Pickering might have some difficulty in retrieving files which were above shoulder height. She walks slower

than those of her age who do not suffer from rheumatoid arthritis. However, he said she has less mobility but effective mobility.

Overall, Dr Owen's evidence did not contradict in any way Ms Pickering's account of her ability to move or function in the work place. All those who testified that they had seen her walking and moving around the places where she had and does work said that she was slower than others. Ms Pickering herself frankly admitted this. Her description of climbing stairs matched that of the other witnesses - she moved slowly putting one foot on the step and then bringing the other to the same step rather than one foot per step as many people do.

Evidence was called from Ms Pickering's former employer where she worked after completing university. The only relevance of this evidence was that he noticed Ms Pickering moved slowly but that had no effect on her work and he said that he would employ her again. Mr Colin Milmo, who is the industrial safety officer at Transfield and has worked in one capacity or another there for 11 years, testified as to Ms Pickering's ability to do her job as an accountant with that company. There, Ms Pickering must climb up and down stairs and whilst her duties do not include the range of administrative duties required at Kevron (such as filing, sending and collecting faxes etc) there is a significant amount of time spent on the keyboard. As far as he was concerned, accuracy was more important than speed on the key board. Ms Harris did not consider that speed was important on the key board and assessed her own speed as

moderate to medium. Indeed Mr Milmoe (who has worked as an accountant) said that use of the key board was essential for an accountant and that virtually nothing was done manually these days. He seemed to suggest that most accountants typed with two fingers in any event.

#### **ASSESSMENT OF MS PICKERING'S ABILITY**

It is clear that the witnesses who knew most about the job were Mr Taylor and Ms Harris. Mr Radford no doubt knew what was generally required of the person in the job but despite the evidence that he had a hands on approach to his work and was very observant, in his position as managing director we believe that he had only a general idea of the specific day to day tasks and functions performed by the accounts assistant/supervisor. Mr Taylor would have a better idea of what was involved on a day to day basis but as Ms Harris said, she was left to organise her own work load and work priorities and overall we find her evidence as to what was actually done on a daily basis to be the most cogent and reliable.

The Tribunal accepts Ms Harris's evidence that the job was essentially an accounting job. She said that most of the time the accounts assistant would be sitting at the desk. It was necessary to collect and send faxes but not with the frequency expressed by some of the witnesses. Indeed, Ms Harris said that she could not recall any time when she had to go upstairs up to 8 times a day. Similarly it



was necessary to collect print outs from the printer and file them and other documents.

Ms Harris was the person best placed to assess Ms Pickering's ability on the key board as she was with her for two days almost exclusively. She said that Ms Pickering was a little slow and awkward but this slowness related to her unfamiliarity with the processes at Kevron and not to her dexterity. Apart from the preponderance of evidence to the effect that although key boarding is an essential part of an accountant's job and that accuracy is more important than speed, the Tribunal has no doubt that Ms Pickering has had extensive experience on the key board in her previous employment and would have picked up speed as she became more familiar with the practices and procedures at Kevron. Mr Radford's assessment of her skills on the keyboard was fleeting and impressionistic. He testified as to the manner in which she held her hands which appeared unusual to him. That impression no doubt played a significant part in his assessment of her speed on the keyboard. He was unaware of the specific tasks she was performing on the key board and there was no evidence that he examined her work or obtained the opinions of anyone else as to her accuracy.

Mr Radford said that the job required a person to move around usefully and promptly and who would get things done from a physical point of view. We are satisfied that the main duties of the job were accounting duties. However, it was not a "pure" accounting job in that the person in the job was required to attend to

administrative duties which in a larger firm or company might be done by support staff. We do not consider that Mr Radford properly assessed Ms Pickering's ability to do the job. He focused on her manner of walking and her way of holding her hands as she used the key board.

Although Mr Radford had concerns about Ms Pickering as early as her first day on the job and these concerns strengthened to the point when by Friday afternoon he considered that she should be dismissed, he did not at any time seek Ms Harris' or anyone else's views or direct that they be obtained. He did not speak directly to Ms Pickering about her job and it seems that he made only one or two comments in the nature of small talk to her. It seems that he did not seek Mr Taylor's considered view of Ms Pickering or direct him to keep an eye on her progress. He simply watched her from time to time. We find that because of her manner and speed of walking he formed the view that she was unsuitable for the job. Had Mr Radford taken all or at least some of the steps mentioned he might have been properly informed as to Ms Pickering's ability.

However, we find that he was overly concerned with his impression that she could not do the job rather than objectively considering her ability.

It is not strictly necessary for the Tribunal to make a finding that Ms Pickering was or was not capable of performing the job as accounts assistant at Kevron properly. However, on balance it is more likely

than not, given the evidence as to her previous and present employment and her lifestyle generally together with the opinion of Dr Owen as to her ability, that she was not only qualified for the job but would have been able to cope with its physical demands - albeit in a slightly different way to someone without her level of impairment.

Mr Radford said that he was not in a position to assess to her accounting skills but all the evidence points to these being at an acceptable level. Indeed the respondent takes no issue on this point.

#### **WAS THERE DISCRIMINATION?**

The complainant must prove that there was discrimination on the balance of probabilities. The complainant's case is based on a combination of section 66B(2)(c) and section 66A(1) of the Act. Relevantly, section 66B(2)(c) makes it unlawful for an employer to discriminate against an employee by dismissing the employee on the ground of the employee's impairment. Essentially, in the context of employment, under section 66A(1), if the employer treats the employee less favourably than in the same circumstances or in circumstances that are not materially different the employer would treat a person who does not have such an impairment, the employer has discriminated against the employee.

Where for the purposes of the Act it is necessary to establish that a body corporate has done an action on a particular ground it is

sufficient to establish that a person who acted on behalf of the body corporate in the matter so acted on that ground (section 162(1)). It is clear that Mr Radford as Kevron's managing director acted on behalf of Kevron in causing Ms Pickering to be dismissed.

There must be a causal connection between the impairment and the discrimination - in this case the dismissal (Waters and Ors v. Public Transport Corporation (1991) 173 CLR 349; DL and Ors v. City of Perth and Ors 1992 EOC 92-422; 1993 EOC 92-510). The respondent argued that the ground on which the complainant was dismissed was her lack of mobility around the workplace and her inability to do the job and not because she had rheumatoid arthritis. In other words, an assessment was made that she could not perform the job as required. However, for reasons already outlined we find that such an assessment was not properly made. Further, given all the evidence, we are of the view that Ms Pickering could have performed all that was required of her in a satisfactory manner. Moreover, the very reason why she had diminished mobility was because of her impairment. According to the medical evidence, diminished mobility is a characteristic (symptom or consequence) of rheumatoid arthritis (see section 66A(1)(b)). We find that there was a direct causal link between her impairment and her dismissal.

However, was she treated less favourably than someone without such an impairment would have been treated in the same or similar circumstances? The evidence of Mr Taylor is unequivocal on this point. In response to a question from the Tribunal, he testified that

during the trial period, if an employee appeared not be carrying out the work satisfactorily, he would speak to the person, ascertain the problem, if any, advise the person that the work was not up to standard and give the person a chance to prove him or her self.

In the case of a former employee who was responsible for the payroll who had discussed confidential information with others, Mr Taylor dismissed her on the last day of her trial period. He considered in that case that her breach of confidentiality was so serious that he had no alternative. However, Ms Pickering's situation was different. There were no complaints about her accounting skills (which formed the core component of her job). There was a perception based on quite flimsy evidence that she was unsuitable for the job because of her slowness and awkwardness on the key board and her slowness in moving around the workplace. We have already found that Mr Radford could not have formed any realistic assessment of her key boarding capabilities. Ms Pickering admitted that she moved slowly. She was known to have a "disability" but no-one thought to speak to her about Mr Radford's concerns. If safety was his concern, slowness in negotiating steps and stairs would ordinarily mean such negotiation would be safer than running up and down.

No discussion was had with Ms Pickering about any aspect of her work. Indeed, on Friday afternoon when she asked Mr Taylor how she was getting, he said "fine". Mr Taylor said that if he said that it was meant to be non-committal. However, on any sensible

interpretation of the term, it is open to infer that there were no problems from his point of view. That was his chance of discussing the matter with Ms Pickering. He chose to avoid the issue even though Mr Radford had raised his concerns with Mr Taylor on no less than three occasions over the preceding two days. It was particularly remiss of Mr Taylor not to discuss the matter with Ms Pickering because on his evidence, his view about Ms Pickering's ability to do the job was not as firm as that of Mr Radford. In this regard, Ms Pickering was treated less favourably than another person in her position who did not have her impairment would have been treated. Accordingly, we find that she was discriminated against in that she was dismissed because of her impairment.

#### **THE EXCEPTION IN SECTION 66Q**

For the reasons outlined above, we have found that Kevron, through the actions of its agent, Mr Radford, has discriminated against Ms Pickering in dismissing her from her employment on the ground of her impairment.

We must now turn to consider whether the exception outlined in Section 66Q of the Act applies.

Pursuant to section 123 of the Act the burden of proving that the respondent comes within the exception is on the respondent. The standard of proof is on the balance of probabilities.

66Q(1) provides an exception -

Mr Radford's dismissal of the complainant would not be unlawful if it was reasonable for him to conclude that Ms Pickering, because of her impairment

- (a) would be unable to carry out work reasonably required to be performed in the course of her employment; or
- (b) 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 would cause an unjustifiable hardship on Kevron.

However, there are certain prerequisites before the exception can be relied on. The conclusions as to the ability to perform the work and/or the necessity for the relevant services and facilities, must be reasonable. In that regard, the employer must have regard to the circumstances of the case and take all reasonable steps to obtain relevant and necessary information concerning the impairment.

It is clear that Mr Taylor knew little if anything about rheumatoid arthritis apart from what Ms Pickering had told him before she was employed. The only evidence as to his knowledge of arthritis was that a person in his tennis club had it and appeared to be able to run around, sometimes with a little pain. There was no evidence that Mr Radford knew anything about rheumatoid arthritis. Indeed, initially

he was told by Mr Taylor that Ms Pickering suffered from a disability and had a limp. His conclusions that she was unable to carry out work reasonably required to be performed in the course of her employment and that the premises would have to be modified in the way outlined below were based solely on his personal observations of Ms Pickering over a period of a couple of days. These observations were cursory and impressionistic. He made no inquiries of anyone, let alone Ms Pickering, as to the nature of her condition or whether she felt she was having difficulty in doing her work.

We consider that in order to reasonably come to the conclusions outlined in section 66Q (a) or (b), Mr Radford should have least caused inquiries to be made as to whether the slowness in Ms Pickering's gait or her perceived awkwardness in using the key board were, for example, temporary or permanent and more importantly whether they in fact resulted in inefficiency or inability to do her job. It would have been reasonable to speak to Ms Pickering about her condition, to express his concerns to her and ask for her response. He simply formed his own assessment and decided that she would have to be dismissed. That is insufficient to come within the prerequisites for the conclusions.

Even if the prerequisites were fulfilled, his assessment of her as incapable of performing the requirements of the job was not otherwise reasonable. Personal observation in the circumstances as outlined by Mr Radford without more would not as a matter of



common sense be enough to form a view as to a person's capabilities to perform that particular job.

Mr Radford considered that it would be completely impractical to change the building in order to accommodate Ms Pickering. He considered that any changes would mean that everything would have to be centralised and in a fairly confined area, for example, on the one floor. He said that it would not be impossible to install a lift but that would not be a complete answer to the problem as there would still have to be access to areas of the office over three levels.

If Mr Radford is right in his assessment of what needed to be done to the Kevron premises in order to accommodate Ms Pickering, we would agree that it would be unreasonable to expect those to be done. However, as we have already found, the necessary prerequisites for the exception under Section 66Q of the Act to operate have not been made out. Further, we do not accept that such modifications (indeed any) were necessary.

## **REMEDY**

### **General Damages**

The Act allows an award for damages to a maximum of \$40,000 in respect of any complaint (section 127(b)(i)). This award is similar to statutory limits on awards for compensation for criminal injuries in that it is a true maximum and not simply the top of a range.

The principles applicable to the approach to be taken in the assessment of damages have been considered by this Tribunal in Lyon v. Godley (1990) EOC 92-287 and Smith & Anor. v. Sandalwood Motor Inn (1994) EOC 92-577. Those principles are applied in this case.

It is abundantly clear that her dismissal had a profound effect on Ms Pickering. Throughout the years when she has suffered with rheumatoid arthritis she has not let it interfere with her enjoyment of life. As she put it, she always tried to get on with her life and not to make a big issue of things. After being out of work for some 18 months after her knee operations and after so many attempts to obtain work, Ms Pickering was thrilled to be offered the job at Kevron. Her friends organised a celebration for her the night before she started work. She felt extremely embarrassed about telling them that she had lost her job.

Ms Pickering said that on being dismissed she felt terrible that someone could discount her intelligence, her study and her ability to do the job. The fact that her employer considered her to be substandard because of the way she moved or the way she might look in the office was very hurtful. She said that she felt "like a cripple". This was Ms Pickering's perception of her employer's attitude and one that in the circumstances was not unreasonable given the insensitive way in which her dismissal was handled by Mr Radford and to a lesser extent by Mr Taylor. It is clear that Ms

Pickering had not been subjected previously to anything like the disappointment and humiliation she felt on being dismissed.

We do not suggest that either Mr Radford or Mr Taylor were deliberately insensitive. Mr Radford was present for all of the evidence. We hope having listened to the evidence and seen Ms Pickering's distress, that he, with the benefit of hindsight, would deal with a similar situation in a more appropriate manner.

Mr Taylor testified to Ms Pickering's distress at being dismissed. It was not only a complete shock to her but also extremely upsetting so much so that she was unable to continue with her work that day.

Her father testified that Ms Pickering telephoned him the day she was dismissed and that she was devastated, in a state of shock and highly distressed. He said that the effects of the dismissal still have an effect on her. Prior to it she was a bright and bubbly person, attended theatre and football matches with friends. After her dismissal she became distracted, lost her confidence and became concerned about how she appeared to other people. Her parents tried to encourage her to apply for other jobs but her confidence was gone and to date has not fully returned although it was restored somewhat when she gained employment at Transfield.

Ms Pickering made an immediate written complaint to the Equal Opportunity Commission. In it she said that the treatment she received "has been incredibly devastating to me". We consider that

the immediacy of her complaint is an indication of the intensity of her hurt and humiliation.

Ms Pickering said that she could not face applying for jobs after her dismissal because she was "scared". However, she continued to do the tax work for her friends, voluntary work for the Arthritis Foundation and general (unpaid) office work in her parents' business. She left on an overseas holiday with a friend on 25 June 1993 because the opportunity arose and she wanted to leave "pressures behind" her. She explained that by "pressures" she meant that her friends, who had been very supportive of her, had stopped asking her whether she had started looking for work and everyone felt "uncomfortable" about the situation and she did not want to get upset with them and it was easy to leave all that behind. When she returned from overseas, she went to Tasmania with a friend in early 1993 for about 6 weeks.

It was not until 30 June 1994 that she was offered some part time work through an employment agency with Transfield and thereafter was offered the full time permanent employment which she still has.

Whilst we accept that Ms Pickering's confidence suffered a severe blow when she was dismissed and that she was understandably wary about applying for other jobs, we consider had she not gone overseas, that Ms Pickering would have found the strength to start applying for jobs earlier. However, that is not to discount her loss of

self esteem and confidence which we are prepared to accept was initially very acute.

We also think that Ms Pickering's response to her dismissal was all the more distressing because she has always coped very well with her condition and apparently it has not been a handicap to her in either her professional or social life.

Overall, for the distress, humiliation and injury to her feelings, we award Ms Pickering an amount of \$6,500.

### **Financial Loss**

Ms Pickering is entitled to be reimbursed for lost wages. She claims loss of two years wages less various amounts, for example, her disability pension (see exhibit 5). The respondent's position is that if discrimination were found, the complainant would only be entitled to loss of wages for the trial period of one month. It was submitted that a trial or probationary period of employment is treated for the purposes of the contract of employment as if at the first interview stage. In other words the trial period is still part of the selection process. There is no legal obligation on either party to continue with the contract of employment beyond the expiry of the trial period. In support of these propositions the respondent's counsel cited the case of Westhaefer v. Marriage Guidance Council of WA (1985) 65 WAIG 2311 which adopted the principles applied in Re Alchin v. South Newcastle Leagues Club Limited (1977) AS(NSW) 236.

However, whether this is the situation will depend on the construction of the offer of employment. Unfortunately, this was not well explored during the evidence, especially that of Mr Taylor who engaged Ms Pickering. However, if the employee's services are terminated on an unlawfully discriminatory ground (as we have found in this case) it matters not whether the offer of employment was for a trial period unless there is evidence which would establish that there would not be continuation of the employment on the expiration of the trial period other than for discriminatory reasons.

The respondent's counsel submitted that it was unlikely that the complainant would have stayed with Kevron after the trial period because of her inability to fulfil her employer's requirements. But the only evidence in that regard relates to a discriminatory reason for not keeping her on. There is no evidence that otherwise the complainant was unsuitable for the job.

Accordingly, putting aside the discriminatory reason for her dismissal, the Tribunal must consider how long Ms Pickering's employment would otherwise have lasted at Kevron. Many factors impact on this assessment. One of the most obvious is whether Ms Pickering herself would have found the job too repetitive given her training and experience and left to obtain other employment. Another is that the job might have been expanded to suit her capabilities had Mr Taylor passed some of his work to her and she might have found it very satisfying. However, the Tribunal must

make an estimate of the likely length of her employment had she not been forced to leave her job, by reference to the evidence which was called at the hearing.

Ms Pickering's evidence was to the effect that she applied for the job at Kevron in order to gain experience in a commercial environment and when questioned by Mr Taylor as to whether she might find the job a little mundane she replied that she is a loyal employee and would expect to stay at least 12 months. On balance, as we have found that there was no reliable evidence to establish that Ms Pickering was unable to satisfactorily perform her duties at Kevron and as we are prepared to accept that Ms Pickering would have stayed at least 12 months in the job, we consider that she should be entitled to compensation for loss of 12 months wages.

Accordingly, the appropriate amount for loss of wages is calculated as follows:

52 weeks @ gross weekly wage of \$519.32 per week

say **\$27000.00**

**Less:**

- pay in lieu of notice \$519.32
  
- proportion of time spent overseas  
ie 25.6.93 - 24.8.93  
say 8 weeks @ \$519.32 per week \$4154.56
  
- proportion of disability pension  
\$15,412.90 (24.8.92-30.6.94)  
ie 96 weeks @ \$160.55 per week

Proportion = 52 weeks @ \$160.55	\$8348.60	<u>\$13,022.48</u>
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<b>TOTAL</b>		<b><u>\$13,977.52</u></b>
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These calculations are based on the unchallenged figures outlined in Ms Pickering's schedule of loss of earnings (exhibit 5).

In summary, we fix Ms Pickering's overall award at \$6,500 general damages and \$13,978 (rounded off) for loss of income.

#### COMMENT

The Tribunal has no reason to doubt the evidence that Mr Radford is a firm but fair employer. Further, we do not consider that he dismissed Ms Pickering simply because he considered that her gait or appearance was unsightly or awkward. Rather, we find that Mr Radford is quick thinking, "no nonsense" sort of a man who is used to running his own business the way he thinks it should be run. He saw Ms Pickering over a couple of days moving slowly and perhaps appearing to him, awkwardly, and jumped to the conclusion that she would not be able to cope with the physical requirements of the job, particularly negotiating the steps and stairs. He did not discuss the matter with Ms Pickering, Mr Taylor or anyone else with a view to ascertaining whether in fact Ms Pickering was experiencing difficulty or indeed ascertaining any information about the nature and extent of her impairment.



We also accept that Mr Radford had no intention of unlawfully discriminating against Ms Pickering. But that is no defence. (Waters v Public Transport Corporation *ibid.* at 359).

However, employers must know what their duties and responsibilities are - not only in the context of industrial and personnel relations but also in the context of the Equal Opportunity Act. Notwithstanding a term of an employment contract specifying that a person can be dismissed without notice, that dismissal must be done lawfully. It is unlawful to dismiss someone on the ground of that person's impairment. It is incumbent on all employers to become familiar with and abide by the law. Equal opportunity legislation is not enacted to be a burden to employers or anyone else. In the context of employment it makes for an equal and fair workplace. That benefits all of us.

Kate Owen  
6/7/98