

**EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA**

No. 21 of 1993

IN THE MATTER OF A COMPLAINT BY:

DIANE MURFIT

Complainant

- against -

JOINT HOUSE COMMITTEE OF PARLIAMENT

Respondent

JUDGMENT

BEFORE: Mr N.P. Hasluck Q.C. - President
Mr D. Forster - Member
Ms P. Thorley - Deputy Member

Counsel for the Complainant - Mr C. Masarei
Counsel for the Respondent - Ms C. Thatcher

HEARD: 22, 23 and 24 February 1995

REASONS FOR DECISION: (Delivered: 24 March 1995)

The Complainant, Diane Murfit, claims that the Respondent discriminated against her on the ground of sex and/or marital status by dismissing her from her employment and subjecting her to a detriment contrary to Section 11(2) of the Equal Opportunity Act 1984 ("the Act").

The complaint arises out of Ms Murfit's employment by the Joint House Committee of Parliament as an Electorate Officer at Merredin for the local member of the Legislative Assembly, Mr Hendy Cowan. The dismissal complained of was effected by a letter from Mr Cowan to the Complainant dated 30 August 1991. At that time Mr Cowan was Leader of the National Party. Eighteen months later, after the State election in early 1993 and a change of government, Mr Cowan became Deputy Premier. The Complainant is now employed within the State Public Service as Personal Secretary to the Chief Executive Officer of the Industrial Relations Commission.

Joint House Committee

Section 2 of the Constitution Act 1889 provides that the Parliament of Western Australia consists of the Queen and Legislative Council and the Legislative Assembly. By Section 36 it shall be lawful for the legislature to define the privileges, immunities and powers of the two Houses.

Clause 1 of the Joint Standing Rules and Orders of the Legislative Council and Legislative Assembly provides that at the commencement of every session there shall be appointed by each House a number of Standing Committees including a House Committee. It seems that the Joint House Committee for many years has been responsible for ensuring that members of Parliament are assisted in their electorates by support staff, although the Department of Premier and Cabinet

("the Department") attends to the details of the employment including payment of salaries. Members of staff are subject to supervision by the particular member of Parliament in whose office they work.

Industrial Award

An order made by the Industrial Relations Commission on 1 May 1987 in proceedings between the Civil Service Association as Applicant and the Joint House Committee as Respondent formalised the arrangements and gave force to an Award to be known as the Electorate Officers Award 1986 ("the Award").

According to the reasons accompanying the Award, Electorate Officers (at that time known as Electorate Secretaries) work in the electorate offices assigned to each member of the Parliament. They are selected for employment by the individual member in whose office they work and to whom they are answerable on a day to day basis. Their duties vary somewhat depending upon demands of the member but in general include typing, receptionist and general clerical work, researching political and related matters, and attending on behalf of the member, to the needs and demands of constituents.

The Award goes on to say that prior to 1986 the salary and conditions of employment had not been award regulated. Until 1984 the Industrial Arbitration Act 1979 by Section 23(3)(b) expressly prevented the Commission from regulating such matters. However, that section, as amended in 1984, now only excludes the Commission's jurisdiction in respect of matters concerning the suspension from duty in, discipline in, dismissal from, termination of, or reinstatement in, employment of any such person.

The salaries paid to Electorate Officers were originally fixed on the basis of that paid to Clerk/Typists in the State Public Service. Evidence adduced in litigation preceding the Award established that their role was something quite different. They were actually required to carry out tasks which called not merely for typing and clerical skills, but skills in human relations and in diplomacy together with a broad understanding of the working of government and commerce. The evidence showed that the work which one normally associates with a Clerk/Typist formed but a minor part of their duties. For sixty percent of their working day Electorate Officers are required to deal directly with constituents and their problems. That involves them interviewing constituents either face to face or on the telephone and thereafter negotiating directly with people from all walks of life regarding matters of concern to the constituents.

The Electorate Officer frequently has to act as an adviser or confidant for many of the constituents often in stressful circumstances. According to the reasons accompanying the Award this has meant that secretaries are frequently required to act as a "*de facto Member of Parliament*". Some are required to attend meetings in the absence of the member and some prepare draft speeches to be delivered by the member or at least conduct significant research in order to aid the delivery of such speakers. Electorate Officers are frequently in the office alone, particularly while Parliament is sitting, and thus left to make decisions on their own and manage the member's office. Their duties are more akin to those of a Personal Secretary or a Personal Assistant. The Commission found that the Electorate Officers can probably be considered as government officers. In the main their conditions of employment mirror those of government officers and it was obviously desirable that as far as possible government officers be treated alike.

The Tribunal pauses to note that evidence received by the Tribunal in the course of these proceedings was generally consistent with the description given by the Industrial Relations Commission at the time the Award was made. It was apparent, however, that priorities would vary from place to place. Thus, research activities and work on speeches received comparatively little emphasis in the conduct of the Merredin office the subject of these proceedings. An Electorate Officer working for Mr Cowan within his constituency was essentially a Personal Secretary who had to be available on a regular basis, by telephone and in person, to confer with constituents and to keep the local member informed about their concerns.

The Complainant herself accepted that her range of duties was generally consistent with the position described by the Commission. She also seemed to accept that because the position was one requiring skills in human relations and diplomacy, it was important that the electorate office be attended during normal working hours. This was particularly so in the case of a country electorate such as Merredin. According to Mr Dexter Davies - a lay member of the National Party - it was important for a farmer such as himself to get a personal response the first time he rang the electorate office at Merredin (and not just a message on an answering machine) because it was not like sitting in an office waiting for someone to ring back. A farmer was generally moving round his property and had to make a special effort to get to the phone.

The Merredin Office

Mr Hendy Cowan was first elected to Parliament in 1974 and has served continuously as a member of the Legislative Assembly since that time. His first Electorate Officer was a widow with three children. She was succeeded in 1983

by the Complainant. The amount of time Mr Cowan spent at the electorate office in Merredin would vary depending upon the time of year and upon whether Parliament was sitting. He usually made himself available to constituents on Fridays, subject to the pressure of parliamentary commitments.

He also kept an office in Perth in Harvest Terrace, near Parliament, and it was therefore important that the line of communication between the two offices should be kept open. After he became leader of the National Party his commitments increased. From 1986 onwards his Perth office was staffed by his Personal Secretary, Joy Shadbolt, and his Policy Officer, Barry Calderbank. These two staff members were expected to keep track of Mr Cowan's movements. It follows that they were frequently in contact with the Electorate Officer in Merredin. The Tribunal pauses to note that Merredin is 235 kilometres from Perth and involves approximately 3 to 4 hours travelling time in a motor vehicle.

The Complainant

The Complainant was born in England on 12 June 1966. She came to Australia with her parents a few years later. In 1983, while still a teenager, she applied for and obtained the position of Electorate Officer with Mr Cowan on the basis that she would be in charge of the Merredin office. She became accustomed to running the office on her own. She got to know a local resident, Mr Mick Murfit, and in due course in April 1988 they married. There were some living quarters attached to the electorate office, so the young couple moved in. Shortly before their marriage they had contracted to buy a block of land at Armadale on the outskirts of Perth.

In the meantime, the Complainant had been carrying out her duties as Electorate Officer to her employer's satisfaction. Mr Cowan said in evidence that she learnt quickly and performed her duties reasonably well. By Clause 6(3) of the Award, subject to good conduct, diligence and efficiency, an employee could proceed by annual increments to the maximum of the salary range. Thus, by letter dated 21 August 1987, Mr Cowan advised the Department that, in his view, she possessed the qualities required to make her eligible for the maximum salary range. He wrote similar letters to the Department on 25 October 1988 and on 18 August 1989. The Tribunal understands that as a consequence of the last letter she reached the maximum salary available with the result that after August 1989 no further testimonial concerning her ability was required. These letters suggest that in the five years of employment preceding her move to the maximum salary Mr Cowan was satisfied with her performance and in evidence he confirmed that this was so.

At about this time, however, there was change in the Complainant's circumstances. She acquired an interest in a hairdressing business situated close to the electorate office in Merredin. In December 1989 she became the sole proprietor of the business. She said in evidence that she was not a hairdresser herself and employed a manager to run the business. It was necessary for her to play some part in the affairs of the business, however, particularly in regard to maintaining financial records and in ordering supplies. In a letter to the Commissioner for Equal Opportunity dated 18 March 1992 she said that "*On occasions when I may have been called to attend to business matters, I would use my own lunch break or work in the evenings*". The evidence she gave at the hearing was to a similar effect.

The Complainant also said, in the same letter, and in her evidence, that as a consequence of acquiring the hairdressing business she became involved in the affairs of the local Chamber of Commerce. According to the Complainant, the contacts she made in the course of the association were of advantage to Mr Cowan as the local member of Parliament.

In reviewing her eight years of employment at the Merredin office the Complainant generally spoke well of Mr Cowan as her employer, describing him as "*the perfect boss*". There were virtually no disagreements between them and the only unpleasantness which arose concerned the circumstances of her dismissal. According to the Complainant, Mr Cowan did not call attention to any inadequacy in the performance of her duties as Electorate Officer and did not admonish her for spending time away from the office during normal office hours, this being a matter which became an area of disputation at the hearing. She said that she had total respect for him as an employer.

Complainant's personal circumstances

When the Complainant began working for Mr Cowan her parents were also resident in Merredin. In 1987 they moved to Perth. In December 1989, when the Complainant decided to acquire the hairdressing business as sole proprietor, they assisted with the purchase of the premises by providing collateral security. Not long afterwards, however, in March 1990, they separated. Thereafter, it seems, the Complainant felt a responsibility to visit her mother in Perth from time to time. The Complainant had previously travelled to Perth in order to attend seminars, and for other reasons, but the evidence presented to the Tribunal showed that from early 1990 onwards, the Complainant and her husband travelled to Perth with increasing frequency. At a later stage the

Complainant was obliged to consult a medical specialist in Perth and this too, it seems, had a bearing on a number of trips undertaken.

The Complainant and her husband found it convenient to leave Merredin on a Friday afternoon, and spend the weekend in Perth. On some occasions they returned to Merredin early on Monday morning so as to reach the town before the commencement of normal working hours. It was common ground at the hearing that on some occasions the Complainant left early on Friday afternoons with the express permission of Mr Cowan on the basis that she would make up the hours elsewhere. There was a degree of controversy, which the Tribunal will come to later, as to whether some of the journeys gave rise to periods of unauthorised absenteeism from the electorate office.

When the Complainant became pregnant, she and her husband decided in early 1991 that she should have the baby in Perth. The Complainant's husband said in evidence that he obtained leave of absence from his employer and then undertook casual maintenance work in Perth. Under cross-examination he agreed that he and his wife sold their block of land at Armadale about two years ago and subsequently acquired a house at Gwelup.

They are now living in Perth on a permanent basis, but this is largely because of the events the subject of the present proceedings. Both he and his wife said that originally their plan was to remain in Merredin.

Maternity Leave

The Complainant raised the matter of her pregnancy with Mr Cowan, the person who was effectively her employer. By letter dated 18 February 1991 she asked

the Department for twelve months maternity leave commencing Friday 24 May 1991 and enclosed a medical certificate showing that the expected date of delivery was 7 July 1991. The letter was endorsed by Mr Cowan. It seems that the Complainant was entitled to some accumulated leave and this had the effect, in practical terms, of increasing the total period of leave. The Complainant and her husband transferred to Perth in the circumstances mentioned earlier and Mr Cowan set about obtaining someone to act as Electorate Officer at the Merredin office while the Complainant was away. In due course he engaged Ms Lee Makin who had previously worked as an Electorate Officer for the Member for Roe. Ms Makin commenced work at Merredin on 27 May 1991. She was a separated woman with a young child, and therefore found it convenient to occupy the living quarters attached to the office.

An entry in Mr Cowan's diary indicates that on the day after Lee Makin commenced work in Merredin the Complainant visited Mr Cowan at his office in Perth. She had already been in Perth on leave for a number of weeks. According to the Complainant she wished to obtain an assurance from Mr Cowan that when she returned to work in due course her position would still be available to her.

The Complainant said in evidence that at this meeting, in the presence of her husband, Mr Cowan declared that the job was open to her for as long as she wanted. According to her, this meeting occurred at some stage between 6 and 24 May 1991 while she was still on Annual Leave, and before the maternity leave proper had commenced, but the diary entry, which was verified by Mr Cowan's Personal Secretary in Perth, Joy Shadbolt, suggests that the meeting probably took place on 28 May 1991.

The Complainant relied on what was allegedly said at the meeting to support an inference that Mr Cowan had no complaint about the quality of her work. Further, the relevant conversation, she contended, could also be taken as an indication that she had some prospects of further advancement, particularly if the coalition parties formed a government and Mr Cowan became Deputy Premier. It was part of her case that subject to good performance there was an opportunity open to her to move from the position of Electorate Officer in Merredin to a position in Perth equivalent to that occupied by Joy Shadbolt. According to the Complainant there was some prospect that Joy Shadbolt might not continue in her position.

The Tribunal pauses to note that this aspect of the Complainant's case was challenged. Ms Shadbolt denied that she had ever given serious thought to leaving her position or had ever conveyed such a thought to the Complainant. Mr Cowan could not recall a meeting with the Complainant in May and, in any event, denied that a representation as to future service of the kind contended for by the Complainant was made. The effect of his evidence was, as appears later, that he, during the course of the eighteen month period before the Complainant went on leave, had begun to harbour doubts about her capacity to do the job.

The Complainant's baby was delivered on 2 July 1991, and named Alexander. The Complainant said in evidence that some weeks later, in early August 1991, she attended a lunch at Parliament House hosted by Mr Cowan and was disturbed by what took place on that occasion. There seemed to be an assumption by some of those present, including Joy Shadbolt, that the Complainant would not be returning to her position as Electorate Officer at Merredin when in fact she fully intended to do so because she was only on maternity leave.

The Complainant knew that Lee Makin was occupying the living quarters attached to the office at Merredin and was performing the duties of Electorate Officer. According to the Complainant, soon after the lunch, she raised her concerns with Mr Heron, head of the Corporate Development Branch of the Department. She gave thought to returning from leave earlier than she had previously contemplated, and at some stage, it seems, either at the lunch, or after meeting Mr Heron, she advised Mr Cowan that she had in mind to change her plans. It was at about this time, not long after the meeting with Mr Heron, that the Complainant received a personal handwritten letter at her house in Perth from Mr Cowan. When she read the letter, she was shocked to find that her services had been terminated.

According to the Complainant, she had no forewarning that Mr Cowan was dissatisfied with her, or intended to act in this way. She felt betrayed and deeply hurt because, on her case, she had enjoyed an excellent relationship with her employer until that moment. Thereafter she felt "*worthless*" and was not minded to return to Merredin in view of the fact that her employer had decided to terminate her services. She couldn't face the local community. Both her husband and her mother gave evidence that she was deeply affected by the contents of the letter.

Matters of concern

It was common ground at the hearing that Mr Cowan wrote to the Complainant a letter in his own hand dated 30 August 1991 terminating the Complainant's employment as Electorate Officer at Merredin. On his case, however, the position was that subsequent to the Complainant's acquisition of the hairdressing

business at the end of 1989 he had become progressively dissatisfied with one aspect of her work. In his view, she continued to perform her general duties adequately while she was present at the electoral office. It became apparent to him, however, that she was away from the office at various times during the week and this absenteeism meant that overall her duties were not being performed to his satisfaction. He attributed this absenteeism to her greater involvement in the affairs of the hairdressing business and to her wish to travel to Perth more frequently than in previous years.

Mr Cowan said in evidence that he personally observed various matters indicating an unacceptable degree of absenteeism. The answering machine in the office was being used more frequently than before. There were some occasions when he saw the Complainant and her husband in transit on a Friday afternoon or travelling from Perth to Merredin on a Monday morning in circumstances which meant she would be late for the opening of the office. He himself received calls at the electoral office from the suppliers of products relevant to the operation of a hairdressing business.

His evidence was corroborated by various witnesses who referred to the difficulty of getting through to the Complainant at the Merredin office during normal working hours. Joy Shadbolt and Barry Calderbank from the Perth office spoke of their difficulties in communicating with the Merredin office and the increasing frequency with which the answering machine was being used in the eighteen months or so preceding the Complainant's dismissal. They raised the matter with the Complainant, and even reached the stage of leaving an explicit record on the answering machine of the time of each call. Several witnesses, including a Shire Clerk from a nearby municipality, and Mr Davies, a leading figure in the National Party, said that they were sufficiently exasperated

by the frequent presence of the answering machine to cause them to speak to Mr Cowan about the fact that his office often seemed to be unattended.

Mr Cowan said in evidence that he raised his concerns about this matter with the Complainant. Mr Cowan said also that his understanding was that the Complainant's husband was having difficulty finding suitable employment in Merredin and had better prospects in Perth. It was also apparent to him that the electorate office was functioning more efficiently under the control of the person brought in to replace the Complainant, Lee Makin. These various considerations prompted him to look at the possibility of terminating the services of the Complainant but on the basis that she would be redeployed and take up another position at a similar level on her return from maternity leave. His evidence was that he contacted Mr Heron, the Manager of the Corporate Development Branch of the Department, with these thoughts in mind.

That such an approach was made is corroborated by a note dated 26 August 1991 which Mr Heron made on the Complainant's file in these terms:

“Hendy Cowan phoned and enquired re process for termination of Ms Murfit's services in favour of Lee Makin. I advised Mr Cowan that the decision to hire and fire is still currently with the Member though action is in progress to change this to give EO's appeal rights in this area”.

Letter of dismissal

It is against this background that the Tribunal now turns to the letter dated 30 August 1991 written by Mr Cowan in order to effect the dismissal. It was common ground at the hearing that Mr Cowan, as the de facto employer of the

Complainant, wrote the letter as agent of the Respondent and can be regarded as acting for the Joint House Committee in effecting the dismissal. Certain passages in the letter are open to different interpretations and for that reason the letter has to be viewed in its entirety. Mr Cowan's evidence was that in view of his long association with the Complainant he wrote the letter in his own hand and in a personal tone to soften the blow. The letter reads as follows:

"Since the electorate officers luncheon I have given very careful consideration to your stated intention to resume your position as Merredin Electorate Officer in February next year.

While I appreciate your preparedness to return to Merredin for the remaining year before a general election is due, I feel it is not practical for you to continue in the position on that basis.

Our long association has not made this an easy decision for me. In recent years there were occasions when I felt that your other interests demanded too much of your time during office hours but in the main our relationship has been very cordial.

In reaching my decision I was also conscious of your present circumstances, Mick's future prospects and your proposal to build a new home in Perth. While you may not be pleased I am sure you must acknowledge that any employer must take these factors into account when determining what is best for the Merredin office.

If you would like to discuss my decision personally please feel free to contact me and I will give a priority to setting aside the time to meet with you.

All that is left for me now is to say thank you for your years of service and wish you success with your family and future."

Subsequent events

The Complainant said in evidence that after receiving the letter she decided to act on Mr Cowan's invitation to discuss the decision. She went in and saw him

at his Harvest Terrace office. She asked him why he had dismissed her. Her account of what then happened is as follows:

“Well, basically, Diane, what’s in the letter”. He said he felt I wouldn’t be able to cope with Alexander and also work in the office. I told Hendy I had made arrangements that my mother would be moving up to Merredin to help with that and Hendy’s response to that was “I might have pre-empted all this” I said “I think you have, Hendy” He gave me my reference. He was really nice. There was no harsh words spoken by either party. He wished me well with everything”

It was put to the Complainant a number of times in the course of cross-examination that a meeting of this kind simply did not take place. It was put to her that after receiving the letter of dismissal she asked for a reference which Mr Cowan either sent out to her or left for her to collect. The Complainant, however, contended that the conversation in question did take place.

Mr Cowan said in evidence that in response to the letter of dismissal he received a telephone call from the Complainant accepting the situation and asking for a reference. He complied with the request, providing her with a reference dated 9 September 1991 which, in view of their long association, was generally favourable in its terms. Under cross-examination he said that he was *“quite confident that that meeting did not take place, but my diaries will confirm that”*. He went on to say *“If there was such a meeting, it was not about the discussion of her employment, it would have been purely and simply about the presentation of a reference.”* He denied making any reference to the question of whether she could cope with the baby and her office duties. He could not recall any reference to her mother going back up to Merredin to help with the baby or any reference to his letter having “pre-empted” such a situation.

Mr Cowan's Personal Secretary, Ms Joy Shadbolt, was the person who typed up the Complainant's reference dated 9 September 1991. Her inspection of Mr Cowan's diary for 1991 revealed (as mentioned earlier) that Mr Cowan had a meeting with the Complainant on 28 May 1991, which would have been either in his Harvest Terrace office or at Parliament House, but she was unable to find any meeting with the Complainant recorded after 28 May 1991. She presumed that the reference dated 9 September 1991 was prepared on that date, but she could not say whether the Complainant called in to collect the reference. She recalled the Complainant coming to the Harvest Terrace office at some stage after the baby was born in July, because she was shown a photo of the baby, but she could not recall whether this visit was before or after the Complainant's employment had been terminated.

Mr Heron's Evidence

The Manager of the Corporate Development Branch of the Department of Premier and Cabinet, Mr Heron, was called as a witness. He confirmed that at some stage prior to the dismissal, Mr Cowan had contacted him and sought his guidance as to how the Complainant's services could be terminated in favour of Lee Makin. Mr Heron's understanding was, as revealed by the file note dated 26 August 1991 mentioned earlier, that the decision to hire and fire lay with the member, although caution should be exercised in that regard. Mr Heron said that in his view the interested parties should meet and try and work out the situation before a dismissal was effected and he was sure that he had put that proposition to Mr Cowan. He also recalled a further conversation with Mr Cowan about the matter.

To the best of Mr Heron's recollection, at some stage Mr Cowan did mention that absenteeism on the part of the Complainant had become a cause of some concern, but Mr Heron was unable to recall specifically whether this was mentioned on the first or second occasion that he spoke to Mr Cowan. His second discussion was largely concerned with the procedure concerning redeployment in the public service with Mr Cowan being supportive of the idea of gaining redeployment for the Complainant. It was a "grey" area as to whether Electorate Officers had a right to redeployment in the same manner as public servants, but generally an attempt would be made to try and assist in that regard.

Mr Heron also said in evidence that he had two meetings with the Complainant. His belief was the first meeting occurred prior to the termination of her employment with her concern on that occasion being whether her position as Electorate Officer was safe while she was on maternity leave. The second meeting was after she had received the termination letter at which time she made known to Mr Heron her intention to take the matter further.

Mr Heron produced in evidence a letter dated 25 September 1991 written by him to the Complainant referring to a meeting in his office on Friday 13 September 1991 *"to discuss with me your concerns about Mr Hendy Cowan's decision not to have you continue as his Electorate Officer in Merredin"*. He went on to say that he had agreed to approach the Office of Redeployment to see if they could assist in locating a suitable alternative position for the Complainant in the public sector.

The Meeting in Mr Heron's office

Mr Heron was questioned closely about the meeting in his office on Friday, 13 September 1991. He recalled that the Complainant had the letter of termination with her. She was particularly agitated about the reference to “*..your present circumstances ..*” and to “*..Mick's future prospects..*” in the fourth paragraph. It seemed to her that these references constituted discriminatory conduct because they placed the emphasis upon her personal circumstances.

Mr Heron had no recollection of the Complainant having said during the course of the discussion that she had raised her concerns with Mr Cowan or that she intended to do so. She did not suggest that any meeting had occurred in which Mr Cowan had debated the reasons for the dismissal with her or made any mention of her supposed inability to cope with her duties at Merredin because she was now the mother of a young baby. The Tribunal pauses to note that if the meeting with Mr Cowan relied upon by the Complainant did take place on 9 September 1991, being the date of the reference, and therefore several days prior to the Complainant's meeting with Mr Heron, it seems likely, almost inevitable, that the Complainant would have communicated this fact to Mr Heron. Mr Cowan's alleged statement that the Complainant “*wouldn't be able to cope with Alexander and also with the office*” would clearly have a bearing upon the meaning to be attributed to the letter of dismissal, and as to whether she had a case against her employer based upon discriminatory conduct. Mr Heron could not recall having raised with her the issue of her alleged absenteeism, although, as mentioned earlier, on the Respondent's case, it is a matter which was conveyed to him by Mr Cowan at one of their two discussions about the Complainant.

Redeployment

Mr Cowan's case was that the Complainant was generally a satisfactory employee. A problem arose concerning absenteeism but this was of comparatively recent origin. In his view, if the Complainant went to a different kind of office, then the problem of absenteeism might abate. It was on this basis that he provided the reference dated 9 September 1991 which said that the Complainant had capably demonstrated the qualities necessary for an Electorate Officer. The reference concludes on the basis that he would supply any further information if requested and his evidence at the hearing was that, if he was approached by a party interested in employing her, it was then, in private conversation, that he would have voiced some of his reservations about her performance in recent times.

The Complainant's case was that the favourable reference demonstrated a general confidence in her abilities which therefore suggested that the reason underlying her dismissal could be linked to her marital status and personal circumstances as the mother of a new-born child.

Mr Heron's evidence showed that Mr Cowan was instrumental in assisting the Complainant to obtain redeployment. It may have seemed to Mr Cowan that his efforts in that regard plus the favourable reference were sufficient to appease the Complainant. It was common ground at the hearing that a position was eventually found for the Complainant as Personal Secretary to the Chief Executive Officer of the Industrial Relations Commission.

Formal complaint

In the period following the dismissal, the Complainant continued to harbour a sense of grievance and decided to take the matter further. She lodged a complaint with the Commissioner for Equal Opportunity on 18 December 1991. The complaint said that on 30 August 1991 she received a letter of dismissal. This was the first time she was told of any concerns Mr Cowan had about her other interests. She went on to say that she believed she had been treated unfavourably on the ground of sex because a male Electorate Officer would not have been dismissed for the reasons outlined in the letter. *“I allege Mr Cowan incorrectly presumed that my husband’s career came before my own, and that my new responsibilities would interfere with my ability to carry out the duties of the job. I allege that the same assumption would not have been made about a male electorate officer”.*

Significantly, the complaint does not contain any reference to a meeting held on or about 9 September 1991 at which Mr Cowan elaborated on the reasons underlying the dismissal. Further, in the exchanges of correspondence which followed (during the course of which Mr Cowan denied the allegation of discrimination and raised the issue of absenteeism) it seems that the Complainant did not instruct those corresponding on her behalf that a meeting had been held in early September 1991 in which he made a number of admissions relevant to the causes of dismissal. Certainly, no mention of such a meeting appears on the face of the relevant letters, and it is not raised in the Points of Claim filed subsequently on behalf of the Complainant.

In due course, the Commissioner not having been able to resolve the dispute, the complaint was referred to this Tribunal.

Statutory provisions

When Sections 8 and 9 of the Act are read together it becomes apparent that discrimination occurs if, on the ground of the sex and/or marital status of the aggrieved person, the discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person of a different sex or marital status.

By Section 11(2), it is unlawful for an employer to discriminate against an employee on the ground of the employee's sex or marital status by dismissing the employee or by subjecting the employee to any other detriment.

By Section 5 of the Act discriminatory conduct need not be the dominant or substantial reason for the doing of the act complained of. It will be sufficient if the doing of any act by reason of two or more matters includes the particular matter complained of. As will become apparent later, the Complainant relied heavily upon this provision, recognising that the letter of termination was somewhat ambiguous and arguably contained several reasons for the dismissal.

The Act also contains provisions concerning vicarious liability. By Section 161 an employer can be held liable for the conduct of its employee or agent. Acts done on behalf of a corporate body can be treated as discriminatory conduct by the corporate body itself. In the present case, it was common ground at the hearing that Mr Cowan wrote the letter of dismissal as agent for the Joint House Committee and that any liability for a statutory tort committed as a consequence of the letter could be attached to the Respondent.

Principles

The decided cases establish that it is not necessary to establish deliberate discrimination because the relevant provisions include and extend to conduct arising from thoughtlessness and neglect. All that must be shown to establish an act of unlawful discrimination is a causal connection between the alleged discriminatory act and the circumstances of the complaint. It is not necessary to show a purpose or wish to discriminate.

The Complainant, who bears the onus of proof, must establish the matters in issue to the satisfaction of the Tribunal on the balance of probabilities but, in certain cases, regard must be had to the gravity of the allegation and the potential seriousness of the consequences. Thus, in Briginshaw v Briginshaw (1938) 60 CLR 336 Latham C.J. said that the standard of proof required by a cautious and responsible Tribunal will naturally vary in accordance with the seriousness or importance of the issue. Dixon J. went on the say at page 361:

“When the law requires the proof of any fact, the Tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.”

This approach was approved in the context of equal opportunity legislation where serious allegations were in issue. Director General of Education v Breen (1984) EOC 92-015 at page 74,440. The Tribunal pauses to note that in the present case such an approach is appropriate because the allegations concern the actions and integrity of an elected official holding high office and arise out of matters involving the conduct of his electoral business. Further, the workings of the Equal Opportunity legislation could be prejudiced in the community at large

if it was thought that the Joint House Committee and those acting on its behalf failed to pay proper regard to the relevant statutory provisions concerning discriminatory conduct.

The decided cases also indicate that in the absence of direct evidence, the Complainant may use in support inferences drawn from the primary facts, but discrimination cannot be inferred when more probable and innocent explanations are available on the evidence. See Fenwick v Beveridge Building Products Pty Ltd (1986) EOC 92-147; Gielis v Sutherland District Trade Union Club (No 1.) (1993) EOC 92-484 at page 79,493. There must be a causal link between a person's characteristic (e.g. sex or marital status) and the discrimination that is alleged so that it appears that the discriminatory conduct complained of occurred by reason of that characteristic.

Pleadings

In preparing Points of Claim prior to the hearing the Complainant's advisers related the facts of the matter to the relevant statutory provisions and pleaded that the Respondent, by its agent Mr Cowan, unlawfully discriminated against the Complainant on the ground of her sex and/or marital status by dismissing her from her employment and by subjecting her to a detriment, contrary to Section 11(2) of the Act. Reference was made to the letter dated 30 August 1991 and the statement in the letter that it was not practical for her to resume her position as Electorate Officer in the Merredin office the following year. This letter, in effect, it was alleged, terminated her employment. The letter referred to the Complainant's "*present circumstances*" and her husband's "*future prospects*" as factors taken into account in the decision that she should not be allowed to return to work in the Merredin office.

In providing particulars of the alleged discriminatory conduct the Complainant in her Points of Claim put the matter as follows:

- “(ii) It was a characteristic that generally applies or is imputed to females that they will have the main responsibility for child care and be unable to carry out full-time paid employment. Mr Cowan made this assumption about the Complainant.*
- (iii) It is a characteristic that generally applies or is imputed to females that they will give up their career in favour of their husband’s career. Mr Cowan made this assumption about the Complainant.*
- (iv) It is a characteristic that generally applies or is imputed to married persons that they live and work in a place which will enable them to live together on a full-time basis. Mr Cowan made this assumption about the Complainant.”*

By her Points of Claim the Complainant went on to allege that she had suffered loss and damage. She claimed general damages in the sum of \$15,000.00 to cover hurt and humiliation, emotional stress, embarrassment and loss of opportunity.

At the hearing it became apparent that with the exception of loss of opportunity the other matters relied on were principally related to the distress the Complainant experienced immediately following receipt of the letter of dismissal, and the fact that subsequently she was left with a feeling of worthlessness which impeded the advancement of her career. The loss of opportunity was said to embrace the expectation the Complainant had that if the coalition parties were returned to government and Mr Cowan became Deputy Premier, as eventually happened, the Complainant would have obtained a position in Perth, which would mark an advance upon her former position of Electorate Officer at the constituency office in Merredin.

The Respondent by its Points of Defence admitted that Mr Cowan acted as agent of the Joint House Committee in sending the letter dated 30 August 1991, but denied that the Complainant was discriminated against on the ground of her sex and/or marital status and denied that Mr Cowan or the Respondent made any of the assumptions set out in the Points of Claim. The Respondent pleaded that the Complainant was not required to return to her position as Electorate Officer in Merredin due to her absenteeism from work during office hours. The absenteeism was brought to her attention as an unacceptable practice prior to the commencement of her maternity leave. It was said further that the Complainant had the option of redeployment, and now through that process has a more secure position at an equivalent level. It was therefore denied that the Complainant had suffered loss as a consequence of the alleged discrimination.

Findings

The Complainant alleges that the Respondent by its agent, Mr Cowan, unlawfully discriminated against the Complainant on the ground of her sex and/or marital status by dismissing her from employment and subjecting her to a detriment. The nature of the detriment was not spelt out precisely in the Points of Claim but the case for the Complainant proceeded on the basis that as a consequence of steps taken by Mr Cowan while the Complainant was on maternity leave she was left with a feeling of insecurity about her entitlement to return to the position of Electorate Officer at Merredin and eventually dismissed. She was thereby denied various opportunities of importance to her, even if it be held that as a consequence of her redeployment she was not financially disadvantaged by the dismissal.

The Complainant says that Mr Cowan's actions were prompted by certain assumptions, being those assumptions set out in the Points of Claim, which were, in effect, that she as the mother of a young child would have the main responsibility for child care and would be unable to carry out full-time paid employment. Further, that as a married woman she would subordinate the requirements of her career so that she could live in Perth with her husband on a full-time basis.

The Tribunal pauses to note that counsel for the Complainant placed considerable emphasis on Section 5 of the Act mentioned above which, in the circumstances of this case, arguably permitted the Complainant to contend that if the reasons underlying the dismissal included assumptions of the kind just mentioned then this would amount to discrimination whether or not such matters were the dominant or substantial reason for the dismissal. In other words, even if the alleged absenteeism played some part in the decision to terminate, the discriminatory conduct might nonetheless be found to exist, having regard to the effect of Section 5, if the matters underlying the dismissal included additional factors such as the Complainant's personal circumstances and her responsibilities as the mother of a newly born infant.

The Tribunal is satisfied that the Complainant was dismissed from her employment. The Award establishes that the position of Electorate Officer is a discrete position and has a status of its own. As a consequence of what happened at the end of August 1991 the Complainant was not at liberty to return to that position and was therefore dismissed, even though she was eventually employed at the same level elsewhere. If the relevant events be characterised as a detriment, the Tribunal considers that the detriment or injury did not occur until the letter of dismissal was received. An apprehension on the part of the

Complainant about the security of her position based upon some rather vague exchanges at the parliamentary lunch in early August 1991, several weeks before the letter of dismissal was received, does not amount to a detriment within the meaning of the Act.

The Tribunal is also satisfied that the dismissal was effected by Mr Cowan's letter to the Complainant dated 30 August 1991 which was written by him as the Respondent's agent. The Tribunal formed the view that Mr Cowan was a man who generally dealt with his staff in a straightforward way. The Complainant herself acknowledged this in her evidence. He was an experienced parliamentarian of many years standing and was accustomed to thinking clearly and expressing himself exactly, aware that unwanted consequences can flow saying too much or too little. The Tribunal finds that Mr Cowan wrote the letter of dismissal in his own hand, adopting a personal tone out of concern for the feelings of a staff member who on the whole had given him loyal service over many years. Nonetheless, for the reasons mentioned earlier, the letter should be treated as an accurate reflection of what was in Mr Cowan's mind. It follows that the letter becomes the principal point of reference in seeking to determine what brought about the dismissal.

It is apparent from the opening paragraph of the letter that it was prompted by the Complainant's stated intention to resume her position at the Merredin office earlier than expected. Mr Cowan commences by canvassing the practicality of her return to Merredin for the remaining year before a general election is due, thereby clearly assuming, as was indeed the case, that she was now established in Perth, and concludes that "*It is not practical for you to continue on that basis*". He adds that "*In recent years there were occasions when I felt that your other interests demanded too much of your time during office hours*".

The evidence showed that the Complainant had another interest, namely, the hairdressing business situated near the electorate office in Merredin, being a business of which she became the sole proprietor at the end of 1989. The Tribunal is satisfied, having regard to the testimony of various witnesses, that the business did make demands on the Complainant during office hours. The qualifying phrase "*In recent years..*" tends to exclude domestic circumstances because the Complainant and her husband had only just moved to Perth and the baby was newly arrived. It follows, then, that this reference to what had happened "*In recent years..*" supports an inference that Mr Cowan harboured a sense of dissatisfaction about his employee's performance which was not related to domestic matters of the kind the Complainant now contends were the matters that actually influenced his decision. In other words, a close examination of the text of the letter does not manifestly support the Complainant's case having regard to the surrounding evidence.

As the letter proceeds, one notices that there is no explicit reference at any stage to assumptions of the kind now attributed to Mr Cowan by the Points of Claim or otherwise to the Complainant being the mother of a young child, or being precluded from carrying out her duties because of family responsibilities referable to her husband's career. It is for this reason, presumably, that the Complainant in her Points of Claim and at the hearing was obliged to rely heavily on Section 5 of the Act and that portion of the letter which says, almost as an afterthought, "*In reaching my decision I was also conscious of your present circumstances, Mick's future prospects and your proposal to build a new home in Perth*".

An inference can be drawn, the Complainant submits, that Mr Cowan had in mind the Complainant's "*present circumstances*" as the mother of a young child who had fixed her place of abode by reference to her husband's prospects. On the opposing side, however, Mr Cowan denied that this is what he meant. He said in evidence "*My concern was the matter of absenteeism. It was caused by two factors. The first was the other interests, the business in Merredin, and the second was a desire, quite a natural desire to return to one's family at any opportunity*". In that regard he referred to the Complainant's mother and husband having moved to Perth, a state of affairs that seemed likely to continue and which would lead to the Complainant making trips between Perth and Merredin on a regular basis. The Complainant herself was not able to point to specific evidence that she intended to return to Merredin on a permanent basis, although she maintained that this was her wish. Against this background, and having regard to the Tribunal's earlier finding the passage in the letter principally relied on by the Complainant is rather equivocal.

Before making a finding about the meaning of these words, the Tribunal is obliged to look at surrounding matters which may have a bearing on the meaning to be attributed to the text, and on the general issue of what factors underlay the decision made by Mr Cowan to dismiss the Complainant.

Various witnesses gave evidence suggesting that from early 1989 onwards the Complainant made increasing use of the answering machine at the Merredin office and was often not in attendance during normal business hours. The allegation of absenteeism was denied by the Complainant but the testimony of the relevant witnesses was virtually unchallenged. Mr Cowan himself referred to various incidents which supported the allegation and the comments he made in the letter of dismissal were consistent with a concern about the matter. The

Tribunal also notes that apart from attending to the office mail and occasional meetings the Complainant had little cause to be away from the office, and therefore the evidence relevant to her absences, including frequent use of the answering machine, carried an additional persuasive force.

After a careful review of the evidence, the Tribunal finds that although relations between Mr Cowan and the Complainant were generally amicable, there had been a pattern of absenteeism on the Complainant's part during the twelve month period preceding the commencement of her leave in 1991 and that this had become a matter of concern to Mr Cowan. He had raised it with her but not in a way which would suggest that he was contemplating termination of her employment on that ground. It follows, having regard to the Complainant's many assertions that she was not remiss in regard to her attendance at the office, that the Tribunal does not regard the Complainant as a reliable witness. This finding has a bearing on a number of the key events that followed the commencement of her leave.

The Tribunal is prepared to hold, because that aspect of the matter is corroborated by an entry in Mr Cowan's diary, that a meeting took place between Mr Cowan and the Complainant at his Perth office on 28 May 1991, soon after the commencement of the Complainant's maternity leave, but the Tribunal does not accept that at the meeting in question Mr Cowan assured the Complainant that she could fill the position of Electorate Officer for as long as she wished. The Complainant relied on this incident to suggest that there was no dissatisfaction with her prior to the dismissal three months later at the end of August 1991 with the result that "*present circumstances*" in the letter of dismissal must be taken to mean her domestic circumstances. The Tribunal's

finding against her on credibility and the contested issue of absenteeism, however, diminishes the weight of such a suggestion.

The Complainant also referred to a meeting with Mr Cowan after she received the letter of dismissal at which he allegedly told her that the reason for her dismissal was set out in the letter, but adding, in effect, that he felt she couldn't cope now that she had the baby. Further, she placed reliance on the personal reference he gave her dated 9 September 1991, it being argued on her behalf that a reference in favourable terms would not have been provided if Mr Cowan truly harboured doubts about her capacity as an Electorate Officer.

Mr Cowan admits giving her the reference but denies that a meeting was held at his office in Perth in early September at which he referred to her newly born son or to her having any difficulty in coping with her duties. His diary contains no entry reflecting a meeting with the Complainant at that time. There was no witness to the conversation. This is an important factual issue because if the words contended for by the Complainant were spoken they would not only constitute direct evidence in support of the Complainant's case but also would lend credence to the notion that "*present circumstances*" in the passage of the letter of dismissal relied on meant domestic circumstances.

The Tribunal has already noted in reviewing the principles concerning burden of proof that, in a civil case involving grave allegations with potentially serious consequences, the Tribunal must feel an actual persuasion of the occurrence. The fact cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. In regard to this crucial meeting, the question of whether the words contended for by the Complainant

were spoken, the Tribunal is not satisfied that a meeting of the kind contended for by the Complainant occurred.

It is significant that the Complainant's original complaint lodged with the Commissioner for Equal Opportunity makes no mention of such a meeting. No reference to it appears in the subsequent exchanges of correspondence or in the Points of Claim. No witness was present and the Complainant herself agrees, even on her own account of what took place, that she did not bring with her to the meeting a copy of the letter of dismissal. Furthermore, as indicated earlier, the Tribunal has reservations about her credibility but was generally satisfied that Mr Cowan's testimony could be relied on. His hesitation about the earlier meeting at the end of May 1991 is explicable having regard to the Tribunal's earlier finding that the assurance sought by the Complainant about her prospects was not in fact given, and thus the meeting was comparatively inconsequential, quite likely to be forgotten. A meeting following the letter of dismissal, however, bearing in mind the long relationship between the parties, was obviously a more significant matter, and the Tribunal therefore attaches some weight to Mr Cowan's denial that the alleged conversation occurred.

There is also another factor to be taken into account. In a letter to the Complainant written not long after the dismissal, Mr Heron, the Manager of the Corporate Development Branch of the Department, referred to a meeting with the Complainant in his office on Friday, 13 September 1991 "*..to discuss with me your concerns about Mr Hendy Cowan's decision not to have you continue as his Electorate Officer in Merredin*". When questioned about this meeting Mr Heron could not recall the Complainant making any reference to having confronted Mr Cowan about the letter of dismissal or proposing to do so, although she was clearly minded to take the matter in controversy further. The

reference she obtained from Mr Cowan is dated 9 September 1991, being a date four days before her meeting with Mr Heron. If at about that time in early September 1991 she did confront Mr Cowan and was told that he was putting her off because of her domestic circumstances including potential difficulties in coping with her office duties and the bringing up of her son, one would have expected her to raise this with Mr Heron, but there is no evidence that she did so.

The Tribunal was impressed by Mr Heron as a forthright witness. He is no longer a public servant and has no axe to grind. In any event, he was clearly of an independent mind. His file note, which contains a reference to Mr Cowan wishing to employ Lee Makin in place of the Complainant, tends to corroborate Mr Cowan's version of the key events, namely, that although Mr Cowan was privately annoyed by the increasing degree of absenteeism, he did not act decisively until a later stage. He took the decision to dismiss after the Complainant had commenced her leave and it became apparent to him that his electorate office was functioning more efficiently under the guidance of Lee Makin. He was conscious that the improvement would be threatened by the Complainant's early return.

Mr Heron clearly cautioned Mr Cowan before the dismissal to proceed judiciously as appeal rights might be brought into play, and he did not shrink from indicating at the hearing that in his view the dismissal had been badly handled. If Mr Cowan had a complaint about the Complainant's capacity, then as her employer in real terms he should have given her an appropriate warning. Nonetheless, Mr Heron's evidence considered as a whole did not support the Complainant's case. He was not aware of any overt reference by Mr Cowan to assumptions constituting discriminatory conduct. The Complainant, according

to Mr Heron, complained about the contents of the letter and did not refer to any meeting or other matters which lent support to the interpretation she had placed upon the letter. Mr Heron also confirmed that Mr Cowan was instrumental in obtaining for the Complainant a suitable redeployment. This suggests that Mr Cowan did not regard the Complainant's domestic circumstances as constituting a bar to the continuance of a career within the public service and is consistent with his case before the Tribunal that the dismissal was effected because in practical terms the Complainant could not carry out her duties in Merredin at the required standard of proficiency.

It emerges from Mr Heron's evidence that the Complainant had grounds for believing she was treated unfairly by Mr Cowan in being dismissed summarily, without any prior counselling or warning. Mr Cowan may have mentioned his dissatisfaction about her absenteeism but he did not clearly convey to her that this might lead to her services being terminated. Having found that his office was working more efficiently under the guidance of a newcomer, he proceeded to dismiss the Complainant, notwithstanding her many years of service, without giving her an opportunity to respond to his concerns, and this at a time when she was on maternity leave. This sequence of events gave rise to a genuine sense of grievance on the Complainant's part which has undoubtedly led to these proceedings. It is not really a sufficient answer to this aspect of the matter that Mr Cowan provided a favourable reference and took steps to ensure that the Complainant was redeployed in the public service. The Tribunal has to keep steadily in mind, however, that the Complainant needs more than a sense of grievance in order to succeed. The Tribunal is concerned with a specific issue: whether the facts and matters complained of amount to discriminatory conduct within the meaning of the Equal Opportunity Act.

After carefully weighing up the evidence, the Tribunal is not satisfied that a meeting did take place in September 1991 at which Mr Cowan said that the reason underlying his decision to dismiss was an awareness that the Complainant would have difficulty coping with her duties now that her son, Alexander, had arrived. The Tribunal finds against the Complainant on this issue. The Tribunal also finds that the passage in the letter of dismissal dated 30 August 1991 relied on by the Complainant in which reference is made to the Complainant's "*present circumstances*" and her husband's "*future prospects*" did not denote an intention to dismiss because she would have the full responsibility for child care and would subordinate the performance of her duties as an Electorate Officer to the requirements of her husband's career.

The Tribunal considers that the preceding paragraphs of the letter have to be given equal weight to the passage relied on by the Complainant and it is satisfied that Mr Cowan proceeded with the decision to dismiss having regard exclusively to matters relevant to the performance of the Complainant's duties. Principal amongst these matters was the pattern of absenteeism arising from the Complainant's proprietorship of a hairdressing business situated near Mr Cowan's electoral office in Merredin and the fact that his office was in due course run more efficiently under the guidance of a newcomer. Mr Cowan's belief that the Complainant was now settled in Perth, in accordance with her own preference, and not as a matter dictated by the requirements of her husband's career, also played a part in convincing him that the pattern of absenteeism would continue, and that her return to the Merredin office was "*impractical*". He proceeded with the decision to dispense with her services after assessing her performance as an individual employee and not because of any general assumptions referable to her role as a wife and mother.

It is questionable whether the Complainant received adequate forewarning of Mr Cowan's concern and therefore an element of unfairness surrounds the summary dismissal which was effected by the crucial letter. The Tribunal is not satisfied, however, that what occurred amounts to discriminatory conduct of the kind contended for by the Complainant and the complaint is therefore dismissed.

For the sake of completeness, the Tribunal also finds that the Complainant did not suffer any loss of opportunity of the kind contended for at the hearing. The Tribunal considers that the Complainant did not have any real prospect of transferring to Perth as a Personal Secretary or at some other higher level in the event of Mr Cowan becoming Deputy Premier following a change of Government. The Complainant did not have the necessary qualifications. The Tribunal finds that no representations were made to her that she would achieve promotion or a more advantageous position on Mr Cowan's staff.

N. P. Harbuck
24.3.1995

