**EQUAL OPPORTUNITY TRIBUNAL**
**OF WESTERN AUSTRALIA**

**No. 1 of 1994**

IN THE MATTER OF A COMPLAINT BY:

MERRILEE WRIGHT

**Complainant**

- against -

DEREK HARRISON & TRACEY HARRISON
t/as AUSMIC ENVIRONMENTAL INDUSTRIES (BUNBURY)

**Respondents**

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**JUDGMENT**

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

Counsel for the Complainant - Ms H. Andrews
Agent for the Respondents - Mr D. Jones

HEARD: 24 November 1994

REASONS FOR DECISION: (Delivered: 23 MARCH 1995 )

The Complainant, Merrilee Wright, claims that the Respondents discriminated against her on the ground of pregnancy. The complaint arises out of her employment with the Respondents which commenced in June 1992.

## Ausmic Environmental Industries

The Respondents were engaged in the industry of pest control under the name of Ausmic Environmental Industries (Bunbury). They carried on business at 86 Spencer Street, Bunbury. The administration of the office was principally controlled by the Second Respondent, Tracey Harrison, but her husband shared the responsibility for hiring staff. Evidence given at the hearing established that as at mid-1992 the business had six employees some of whom were working outside the office, canvassing for customers or attending to the needs of customers. There were only two full-time members of staff situated at the business premises in Spencer Street.

The Respondents said in evidence that a good deal of business was transacted on the telephone. Grano workers and others in the building industry contacted Ausmic from time to time, bringing business to the firm. It was therefore important that the telephone lines be kept open throughout the day. Evidence given at the hearing showed that there were two lines available for business. The nature of the switchboard permitted a staff member who was taking a call to observe whether another caller was waiting. The Respondents had adopted a policy of not permitting staff members to use the telephones for private calls unless approval had been obtained in advance.

## The Complainant

In June 1992 the Respondents wished to employ a full-time member of staff to carry out secretarial duties. The Complainant applied for the position. She was 20 years of age, having left school in 1986 after Year 10. She obtained a Certificate in Office and Secretarial Studies from Carine College in 1987 and was then employed by a firm of accountants, at that time known as Hampton Partners. Evidence was received from her principal employer, Donald McNeil that he employed the Complainant in his accountancy practice from 16 March 1988 to 11 July 1989. According to Mr McNeil, she was one of four or five persons attending to secretarial duties and, in spite of her young age, she had outstanding keying skills. He also stated that she had good interpersonal skills both with fellow employees and customers and he considered her ability to get on well with people one of her strongest points. He went on to say that the Complainant left his employment because she wished to move to other employment but generally he was satisfied with her performance and regarded her as an enthusiastic and diligent worker.

She moved to Bunbury and worked at various other jobs requiring secretarial qualifications and considered herself to be reasonably experienced in office work at the time she applied for the job with Ausmic in mid-1992.

She was interviewed by the First Respondent, Derek Harrison and was employed as from 8 June 1992 on the basis that there would be a one month trial period on probation. At that time those working for Ausmic included the Respondents themselves, Roy Vlahov, who was a salesman, and two pest controllers being Dale Stevenson and David Potts. The Complainant's duties included computer work, typing up invoices and sending them out, attending to the mail, banking, filing and general secretarial duties. She said in evidence that her previous

experience had equipped her to perform the various duties assigned to her and she was also familiar with computer work.

The Tribunal pauses to note that she was employed as a clerk/typist being a position covered by the Clerks (Commercial Social and Professional Services) Award - an Award made pursuant to Section 93(6) of the Industrial Relations Act 1979 (WA). Clause 12(1) of that Award provides for a period of four consecutive weeks leave with payment at the ordinary rate of wage to be allowed annually to a worker after a period of twelve months continuous service with the employer. During the period of annual leave a worker shall be paid a loading of 17% calculated on the ordinary rate of wage. The loading prescribed shall not apply to proportionate leave on termination.

In a comparatively small business it was perhaps inevitable that the domestic circumstances of the relevant parties should have a bearing upon the dispute that developed later. Accordingly, the Tribunal heard evidence that at the time she commenced her employment the Complainant was living with a boyfriend called Daniel who at that time was not in continuous employment. It seems that the relationship between the Complainant and her companion was rather unsettled. Indeed, the Complainant herself gave evidence that on one occasion during the course of the employment she came to work feeling rather shaken because she had been physically abused by Daniel the previous night.

The Respondents had difficulties on the home front also, but of a different kind. The Tribunal heard evidence from Mrs Harrison that in mid-1992 she was subjected to a good deal of stress because her brother had been charged with a serious criminal offence. The charge was destined to come before a jury in October. Accordingly, she was obliged to devote time and effort to organising legal representation for her brother and generally being available to support him.

She inevitably had to leave the office from time to time in order to attend to such matters and it was therefore important, in her view, that the Complainant be able to look after the office in a capable manner while she was absent. It was common ground at the hearing that the Complainant was employed on the basis that it was to be a long term engagement provided the probationary period proved satisfactory. In the event, the month in question went by without any further discussion occurring concerning the probationary period.

## Preliminary Events

The Complainant said in evidence that during the early period of employment in the months of June and July there was no criticism of her work performance. She agreed under cross examination that on two occasions she came into the office on a Saturday morning to do some work on the computer but she denied that this was due to her lack of capacity in that regard, or that it was in the nature of a training session. She contended that the Saturday morning work was due to some reconstitution of the computer programme. The Respondents' wages book confirmed that she did work on two Saturday mornings during the period of her employment and she was paid for her duties on those respective days.

The Complainant agreed that she received some telephone calls at work from her boyfriend Daniel and this matter was raised with her by Mrs Harrison. She said that as a consequence of the exchange she advised her boyfriend not to call her at work and thereafter she did not receive calls which had the effect of interrupting her duties. In a letter to the Commissioner dated 20 January 1993, written after the termination of her employment, she said that *"When I was chatted about personal phone calls I advised my boyfriend not to call me at*

*work. He only did so if it were an important matter. I often rang my boyfriend but only in my lunch break and from a public phone box down the road. One day on my lunch break I advised Derek that I was going to ring my boyfriend. It was only myself and him in the office and that he needed to go out, that he didn't mind me calling him once in a while, in my lunch hour, as it helped him out"*

The Respondents presented a different picture. According to them, in evidence given at the hearing, the Complainant was not an entirely satisfactory employee. She had to be given further training on the computer and it was for that reason that she was brought into the office on two Saturday mornings. Mrs Harrison also said that she was distressed by the fact the Complainant's boyfriend often came to the business premises and hung about outside. He had *"a surfie look"* which was not likely to be good for business. In addition, the fact that the Complainant used the telephones for private calls to and from her boyfriend proved to be a matter of continuing concern and the Complainant was left in no doubt that the Respondents wished to enforce the policy of their business that the telephone was not to be used for private calls.

At the hearing, however, the Respondents acknowledged that towards the end of July the Complainant raised with them the possibility that she might apply for a position in the Navy and asked if a reference could be given to her for that purpose. The reference signed by Mrs Harrison speaks of the Complainant being *"A very mature young lady who presents herself well at all times. I've found her to be punctual and helpful to our clients. She has picked up the contents of her job very well and always carries out her tasks in a prompt and efficient manner. I would be very sad to lose Merrilee as a member of our staff, however, I wish her well if she took on a new endeavour."*

## Circumstances of Dismissal

The Complainant discovered she was pregnant on or about 18 August 1992 and informed Mr Derek Harrison at the office the next afternoon. She said that she wanted to keep the job until the baby was born. On her evidence he reacted favourably to the news. Under cross examination she said that she asked whether or not she should resign from her employment he said that such resignation was not necessary and that she would be able to work up to one month prior to the expected birth of her child. *"If I wanted to take maternity leave I could and I could come back again"*. On her evidence Mrs Harrison came in the next day and said congratulations and it seemed that everything was going to be fine. Nothing further was said about her future with the firm until the conversation she had with Mrs Harrison a week or so later which the Tribunal will come to in a moment.

The Complainant also said in evidence that during the course of the next few days no reference was made to any shortcomings in her work performance and nor did she participate in any long telephone conversation with her boyfriend which might offend the rule concerning private calls previously described. She could not recall anything arising during this period which might have had a bearing upon her subsequent dismissal.

The Complainant went on to say in evidence that on 27 August she was approached by Mrs Harrison. The employer said: *"I think you should leave because when you get pregnant you get sick and it's our busy season coming up soon, and I think you should leave before the busy season starts."* According to the Complainant, that was the only matter mentioned and no reference was made to any dissatisfaction with her about lengthy telephone calls, or other matters.

She was given a week's notice which meant that she would leave the following Wednesday.

The Complainant's understanding was that she was being dismissed because she was pregnant and was likely to get sick.

It is material to note that on the Complainant's account of what took place, even though, in dealing with Mr Harrison, she had actually raised the possibility of leaving because she was pregnant, that tentative suggestion was quickly negated by him, and never acted on.

On 27 August 1992 Mrs Harrison did not purport to be accepting an offer to leave made by the Complainant. She told the Complainant she had to go. The Complainant left the firm after the period of notice had expired.

At that time she was given a social security separation certificate signed on behalf of her employers which stated that she was being put off because of "shortage of work". Under cross examination the Complainant vigorously denied that Mrs Harrison made any reference to being upset about the Complainant's telephone usage and bringing her personal problems to work, or to mistakes that she was making while at work. The only other factor in the situation was a suggestion by Mrs Harrison that she needed time to train someone before the busy season started.

The Complainant went on to say that she did not ask for a reference and did not receive one (although, of course, she still had the reference previously supplied in regard to the Navy application). According to the Complainant, she felt that she had been *"lied to and betrayed"* in that initially she had been told that she could work up until close to the date of birth but was then told she had to go.

This was done without any reference being made to dissatisfaction with her performance. She proceeded to look for other employment but did not get any interviews. She went to two places to look for night-time work but there were no jobs around. She was healthy and energetic during pregnancy although she did have a touch of morning sickness not long after she found that she was pregnant. On her evidence she would have been able to carry out secretarial duties up until a month before the baby was born. Her baby was born on 14 February 1993.

The Complainant said that following the birth of the child she decided that she would not seek work because her boyfriend had gained full-time employment and she therefore decided to stay at home. She subsequently became pregnant to her boyfriend again. She submitted to the Tribunal a schedule of loss of wages which brought to account the fact that she turned 21 years of age on 26 November 1992 and therefore became entitled under the award to remuneration at a higher rate. She claimed loss of wages of $6,427.50 in respect of the period 3 September 1992 to 15 January 1993 and also sought to bring to account $580.97 in respect of accrued holiday pay and leave loading. She conceded that she had received social security payments in the sum of $2,396.62 which should be off set against the amount claimed. It follows that the special damages finally claimed by the Complainant amounted to $4,611.85.

The Tribunal pauses to note that the Respondents by counsel did not dispute the figures the subject of the calculation but they did question the entitlement to leave loading in view of the fact that twelve months' service had not been completed. The Complainant's entitlement to relief by way of damages was disputed, of course, having regard to the general denial of liability reflected in the Points of Defence which the Tribunal will come to later.

## Respondents' Case

The Respondents in their evidence disputed the circumstances of dismissal described by the complainant. The Respondents said that the Complainant was not entirely satisfactory as a computer operator. They believed that from time to time the Complainant was diverted from her work by personal calls and other interruptions to the detriment of the business. They were aware that it was not permissible to dismiss an employee on the grounds of pregnancy but that was not the ground upon which the dismissal was effected. Reference was made to the fact that a previous employee had worked with them until close to the end of the term of her pregnancy. According to Mr Harrison the crucial factor was that his wife was undergoing a stressful period due to the problems facing her brother and his forthcoming trial with the result that she could not always be present to look after the day to day running of the office.

The Respondents both confirmed that they had heard in advance that the Complainant was pregnant before the Complainant announced the news herself. The matter which actually precipitated the decision to dismiss the Complainant was the fact that on the day prior to her dismissal, namely, 26 August 1992, the Respondents both observed the Complainant participating in a long telephone call, apparently to her boyfriend, and the extra consideration that she was not performing her secretarial duties in a satisfactory way. They discussed the matter on the evening of that day and concluded that the Complainant was allowing her personal life into the office and it was affecting her work.

The Second Respondent agreed that she approached the Complainant on 27 August 1992 but she gave an entirely different account of what transpired on that occasion. According to Mrs Harrison, she told the Complainant that she needed the Complainant to work for her so that she could attend to the matter of her

brother's trial and the main point that she conveyed to the Complainant was that *"this situation isn't working out and I'm going to have to put you off"*. She went on to say that she told the Complainant she would write on the separation certificate that the termination was due to shortage of work so that the Complainant would not have any problems getting into unemployment benefits. It was not intended to be an accurate summary of the position. Mrs Harrison accepted that she may have made some reference to the need to train someone up to do the job because the firm was getting into the busy season. Mrs Harrison emphasised, however, that the Complainant was not dismissed because of her pregnancy:

> *"I told her that her personal problems were coming into the office too much ... and I thought she needed to go and sort her personal life out."*

Mrs Harrison's prime concern was that she wanted to be able to leave the office in safe hands and attend to matters concerning her brother's trial. In that respect she wanted the Complainant to be *"the perfect secretary and it just wasn't happening."*

## Formal Complaint

On 14 October 1992 the Complainant lodged a written complaint of discrimination on the ground of pregnancy in the area of employment with the Commissioner for Equal Opportunity. The details forming part of a statement accompanying the complaint were consistent with the evidence she gave at the hearing. The Respondents were asked to respond to the matters she had raised. In a written document dated 13 January 1993 headed "Response", they set out their position. They said in evidence that this document was prepared with legal

assistance and the words used were those chosen by their legal adviser. The fact remains, however, that both Respondents were prepared to and did sign the document in question which, in some respects, was not entirely consistent with the case they presented at the hearing.

The Response dated 13 January 1993 stated that the Complainant was capable of performing her duties but appeared to be constantly distracted by her personal problems. She sometimes made small errors. It was said that she did not fit in with the other members of staff and at times antagonised customers. The only direct criticism that was made by the Respondents of the Complainant was her use of company time to make and receive personal telephone calls from her boyfriend. These were received or made on a daily basis and were prolonged. They were always of a trivial nature. The Complainant was spoken to about this on three occasions and advised it was company policy that personal phone calls be only received or made in an emergency. According to the Response document, matters came to a head on 26 August when she was observed having an in-depth conversation with her boyfriend on the phone during company time. It was then obvious that warnings concerning private conversations would be ignored as had the previous ones. The document went on to say:

> *"We believed the kindest thing to do was not further compound her problems by dismissing her for misconduct or inability to cope with the work load, but to appear to accept her earlier offer to leave because of her pregnancy. Consistent with this, we gave her a good reference as we believed that Ms Wright remains a capable person but unfortunately her capabilities are presently masked by her ongoing personal problems and immaturity."*

The Tribunal pauses to note that at the hearing both parties seemed to accept that the only reference given to the Complainant was provided prior to the dismissal in the context of her proposed approach to the Navy and the evidence was

generally not consistent with the notion reflected in the Response document that the Complainant's tentative offer to leave voluntarily was taken up by the Respondents.

The complaint could not be conciliated and was eventually referred to the Tribunal by the Commissioner in the manner provided for by the Equal Opportunity Act 1984 ("the Act").

## Statutory Provisions

By Section 10 of the Act discrimination occurs if, on the ground of the pregnancy of the aggrieved person, the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who was not pregnant and the less favourable treatment is not reasonable in the circumstances. By Section 11(2) it is unlawful for an employer to discriminate against an employee on the ground of the employee's pregnancy in the terms or conditions of employment or 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 doing the act complained of. A reference to the doing of an act by reason of a particular matter includes a reference to the doing of the act by reason of two or more matters that include the particular matter.

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.

## Principles

The Complainant bears the onus of establishing that she has been the victim of unlawful discrimination. The case must be proved on the balance of probabilities but, in the absence of direct evidence the Complainant may use in support inferences drawn from the primary facts, although discrimination cannot be inferred when more probably innocent explanations are available on the evidence. See Fenwick v Beveridge Building Products Pty Ltd (1986) EOC 92-147.

It has been held that the state of being pregnant, as well as the state of having the capacity to be pregnant, are distinctive qualities of women. It has also been held that the characteristics of pregnancy cover the signs and symptoms of that condition. It would therefore be unlawful to dismiss a woman because she has a large stomach and this is to be considered unsightly or because an employer assumes that all pregnant women become sick and incapable of performing their job competently. A comparison can be drawn between the situation of the Complainant and the situation of a notional person in the same or a not materially different set of circumstances. See Bear v Norwood Private Nursing Home (1984) EOC 92-019.

Further, it is not necessary to establish deliberate discriminatory conduct for an act of discrimination to take place. 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. See Waters v Public Transport Corporation (1991) 1773 CLR 349.

This Tribunal has had occasion to apply the relevant statutory provisions and related principles to cases involving the dismissal of a pregnant woman.

For example, in Cook v Lancet Pty Ltd (1989) EOC 92-257. The Tribunal found the main reason for the dismissal of the Complainant in that case was the fact that she was pregnant. The pregnancy was seen by the employer as a convenient reason to decide which of the two sales representatives in question was to remain after the company was given financial advice to cut costs.

In Allegretta v Prime Holdings Pty Ltd (1991) EOC 92-364 the Complainant advised the manager of a hotel that she was pregnant saying that she wished to keep working and was able to continue her duties as a barmaid. She was later dismissed with the reason for the dismissal being given as the management's concern that she might be injured owing to the slippery conditions behind the bar. The Tribunal held, however, that while as the employer was concerned for the Complainant's welfare, this was due to her pregnancy and the dismissal was causally connected to the fact of her pregnancy. The Respondent's submission that the dismissal was reasonable was also rejected because the obligation of the employer was to take all reasonable precautions to prevent disability on behalf of the employees generally. In the present case all those working behind the bar were at risk, not just the Complainant.

In McCarthy v Metropolitan (Perth) Passenger Transport Trust (1993) EOC 92-247 the Complainant applied for the position of bus operator but was eventually rejected in circumstances involving a comment apparently associated with her pregnancy that she would not fit behind the steering wheel. The Tribunal held that the Complainant's pregnancy was a significant if not major factor in the doctor's assessment of her as unfit to perform the duties of a bus operator. The other significant factor was her weight. The evidence suggested, however, that had the Complainant not been pregnant, the doctor would have passed her medically fit. In the circumstances, then, the doctor treated her less favourably

than, in circumstances that were the same or not materially different, he would have treated a person who was not pregnant. In view of the Complainant's good health there was no proper basis on which the doctor could conclude that the Complainant's pregnancy would affect her capacity to do the work. It was therefore not reasonable for the Complainant to be treated less favourably for that reason. It was clear that the Complainant was refused employment because the doctor certified her unfit, and the necessary causal connection between the pregnancy and the refusal of employment was therefore established.

## Pleadings

The parties to the present dispute were required to set out their respective positions in Points of Claim and Points of Defence. The Points of Claim filed on behalf of the Complainant reflected the allegations described earlier in this judgment. It is material to note a plea that she was dismissed by the Second Respondent at the direction of the First Respondent because of her pregnancy and that the less favourable treatment she received was not reasonable. This was said to constitute unlawful discrimination.

By its Points of Defence the Respondent pleaded that despite her previous work experience, the Complainant demonstrated her lack of competency in routine clerical work and had to be constantly supervised. Her lack of keyboard skills required the employer to spend extra time in training the Complainant to a satisfactory standard in computer use. Her work performance was sometimes erratic. The Respondents also pleaded that the Complainant regularly breached the firm's policy concerning use of the office telephone on private business. Reference was made to a lengthy telephone call on or about 25 August 1992. It was then pleaded that the Second Respondent dismissed the Complainant on the morning of 26 August 1992 on the grounds that she had continued to breach the

employer's policy regarding private telephone usage and that her standard of work was being affected by personal external problems. The Respondents denied that the condition of pregnancy played any part in the reasons for termination.

It is material to note that the matters emphasised in the Points of Defence are slightly different in emphasis to the matters raised in the Response document dated 13 January 1993. It is also material to note that although the Respondents placed some emphasis at the hearing upon the presence of the Complainant's boyfriend from time to time at the business premises this was not a matter raised either in the Response document dated 13 January 1993 or in the Points of Defence.

In reviewing the Points of Defence the Tribunal notes also that, unlike a number of the decided cases mentioned earlier, there was no suggestion in this case that it was reasonable in the circumstances to dismiss the Complainant having regard to the fact of her pregnancy and the nature of the work she was doing. It follows, then, that the crucial issue to be determined by the Tribunal is the grounds of the dismissal and, if various factors were involved, to determine how the statutory provisions referred to earlier, including Section 5 of the Act, should be applied in such a case.

## Findings

It is immediately apparent from a review of the pleadings and from the evidence given at the hearing that there was a conflict in the testimony, both as to events preceding the dismissal and as to the events leading up to and constituting the termination of the employment on 26 August 1992. The Tribunal is therefore

obliged to give careful consideration to evidence relevant to the credibility of the respective parties.

By their defence the Respondents asserted a degree of dissatisfaction with the Complainant as an employee. It appeared to be common ground at the hearing, however, that the initial probationary period of one month expired without any substantial criticism having been advanced or any question being raised with the Complainant as to whether she was equipped to perform the secretarial duties in question. The Tribunal also takes account of the fact that the Respondents were prepared to give her a favourable reference a month or so before any issue arose concerning termination of her employment. This reference has to be considered in conjunction with evidence received from the Complainant's former employer Donald McNeil, who spoke highly of her. There is a degree of inconsistency between what the Respondents said in the Response document and what they said at the hearing. These are all matters which weigh in favour of the Complainant and against the Respondents.

There was a contest between the parties as to whether the Complainant was brought in for extra training on Saturday mornings but the Tribunal considers the evidence in that regard is equivocal. On any view of the matter the retraining required was not arduous and there are no real indications on the evidence presented to the Tribunal that there were significant shortcomings in the Complainant's work which required her attendance at the premises on Saturday morning. The Respondents did not produce evidence from customers or other staff members in support of their claim that the Complainant was an erratic worker and ran into difficulties with other staff members or with customers. The Complainant herself impressed the Tribunal as a candid and forthright person and the Tribunal is therefore inclined to accept her evidence to

the effect that the only issue which arose between the parties prior to 19 August 1992 was the question of her use of the business telephone for private calls.

The Complainant herself accepted that this issue was raised with her and it is therefore apparent that there was a degree of controversy concerning this matter. The Tribunal has to determine whether the concern of the Respondents was of the magnitude they contended for at the hearing. Having carefully reviewed the evidence, the Tribunal considers that there was a degree of ongoing irritation about this matter, because it does seem that at the relevant time the Complainant was living in unsettled domestic circumstances. The Tribunal does not accept, however, that the Complainant infringed the policy to the extent contended for by the Respondents. The Tribunal considers that had the Complainant not been pregnant the annoyance of the Respondents about the use of the office telephone would not have led to the Complainant being dismissed.

The Tribunal is satisfied that the substantial reason underlying the decision to dismiss which was taken jointly by the Respondents was an apprehension that the Complainant's pregnancy could lead to her being absent from time to time which would be inconvenient to the Respondents during the busy season. The Tribunal considers that the evidence of the Complainant as to what happened on 26 August 1992 when she was dismissed is to be preferred. The Tribunal finds that the Second Respondent, Mrs Harrison, said to the Complainant on that occasion words to the effect that *"being pregnant she would get sick and it was best that she leave before the busy season starts"*. In the Tribunal's view this is not a matter which would have been raised with an employee in the same circumstances as the Complainant and therefore an act of discrimination occurred on the ground of pregnancy.

## Relief

Section 127 of the Act provides that after holding an inquiry, if the complaint is substantiated, the Tribunal may order the Respondents to pay to the Complainant damages by way of compensation for any loss or damage suffered by reason of the Respondents' conduct. It may also find the complaint substantiated and make an order enjoining the Respondent from continuing or repeating any conduct rendered unlawful by the Act, or, alternatively, decline to take any further action in the matter. Previously decided cases, including Allegretta v Prime Holdings Pty Ltd (1989) (*supra*), established that discrimination cases should be treated as a species of tort and hurt feelings may be a factor in the assessment of damages. The Tribunal subsequently noted in McCarthy v Metropolitan (Perth) Passenger Transport Trust (*supra*) that the scope of awards under anti-discrimination legislation is both different in nature from and much wider than, the scope of damages awards in tort. It is important that awards aimed at compensating for injured feelings should not be minimal because that would tend to trivialise or diminish the respect for public policy. These principles were subsequently affirmed when that decision of the Tribunal was taken on appeal. See McCarthy v Metropolitan (Perth) Passenger Transport Trust (1993) 92-546.

In Allegretta (*supra*) the Tribunal awarded the Complainant the sum of $1,800.00 by way of general damages as compensation for the humiliation associated with the circumstances of the dismissal. As to loss of income, the Tribunal concluded that in that case the Complainant was entitled to be compensated for the period between the dismissal and six weeks prior to the birth. Further, the Tribunal considered that the Complainant was entitled to recover compensation for a period of 26 weeks following the birth of her child before she found full-time employment in an alternative position.

In McCarthy v Metropolitan (Perth) Passenger Transport Trust the Complainant was awarded $15,000.00 by way of damages for non-financial loss or injury and $13,603.00 for loss of income. These figures were challenged as excessive on appeal but in that case the Supreme Court considered that there was sufficient evidence to lay a foundation in law for the award which had been made.

It is important to note, however, that in the McCarthy case, on the Tribunal's finding, a number of derogatory and hurtful statements had been made at the time of the Complainant's medical examination and subsequently. Further, unlike the present case, the Complainant was an applicant for an advertised position and there was no point of friction which could explain or justify the stance adopted by the Respondent in that case. It follows from earlier discussion, concerning the present case, however, that the Complainant herself accepted that there had been some degree of controversy between the parties about her use of the telephone at work and therefore considers that the degree of humiliation experienced by the Complainant in the present case was of a different degree. The Complainant gave evidence that she experienced a sense of hurt but her disappointment in that regard did not seem to be severe.

In regard to special damages, the Tribunal considers that this case should be distinguished from Allegretta v Prime Holdings Pty Ltd (1989) (*supra*), in that no compensation is available in respect of the period following the birth because it seems that the Complainant, on the evidence she gave at the hearing, would not have been in employment in any event. As to the schedule of damages presented, the Tribunal considers that the Complainant is not entitled to the annual leave loading of $86.61 because she would not have qualified for this entitlement under the terms of the Award even if she had worked through until

one month prior to the birth. Accordingly, the amount of special damages will be reduced to the figure of $4,525.24.

The Tribunal has finally concluded that the Complainant should receive the sum of $3,000.00 by way of general damages and the sum of $4,525.24 by way of special damages making a total amount of $7,525,24.