EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

Matter Number: 6 of 1994

IN THE MATTER OF A COMPLAINT BY:

BRENDEN DWYER

Complainant

- against -

UNITED STATES NAVY

Respondent

JUDGMENT

BEFORE: Mr N.P. Hasluck Q.C. - President (Sitting alone)

Complainant appeared in Person
Counsel for the Respondent - Ms E. Macrides

HEARD: 6 OCTOBER 1994

REASONS FOR DECISION: (Delivered: 26 JULY 1995)

The Complainant, Brenden Dwyer, claims that the Respondent, the United States Navy, discriminated against him on the ground of sex contrary to Section 19 of the Act by allegedly refusing to allow him access to a place that the public or a section of the public was entitled or allowed to enter or use.

The Respondent has now applied to the Tribunal for an order that the complaint be dismissed pursuant to Section 125 of the Equal Opportunity Act 1984 ("the Act") on the ground that the complaint is an abuse of process. Section 125 of the Act provides that where at any stage of an inquiry, the Tribunal is satisfied that a complaint is frivolous, vexatious, misconceived or lacking in substance, "or that for any other reason the complaint should not be entertained" it may dismiss the complaint. During the course of argument it became apparent that Counsel for the Respondent was relying exclusively upon the last limb of this provision and contended that where the facts and matters relevant to an application to strike out can be characterised as an abuse of process then this would fall within the concept of "any other reason" whereby the complaint should not be entertained. It therefore becomes necessary to look at the history of the matter in order to determine whether the circumstances of the present case can be characterised as an abuse of process.

Section 105(3) empowers the President to determine any question of law or procedure in the absence of other members of the Tribunal. The materials before the Tribunal for the purpose of the application consist of the Commissioner's Report, which was submitted to the Tribunal pursuant to Section 93 of the Act, a statutory declaration sworn by the Complainant and various attachments which was marked as Exhibit A and the affidavit of Elena Jane Macrides, sworn 5 October 1994 which was marked as Exhibit B. The latter Exhibit included, as attachments, the affidavit of Erica Evans, sworn 14

August 1994, the affidavit of Debra Crook, sworn 11 August 1994 and the affidavit of James Dana Winter, sworn 15 August 1994. James Dana Winter at the time of swearing his affidavit was the Commander of the U.S. Seventh Fleet representative for Western Australia and was authorised to make the affidavit on behalf of the Respondent having commenced his employment in that position on 26 June 1994. His predecessor in the position was Commander David Cahoon who has now retired from the U.S. Navy and has returned to the United States.

According to the introductory paragraphs of Commander Winter's affidavit, the Complainant has become well known to the United States Navy over the past 11 years. He has commenced numerous actions against the U.S. Navy and companies contracted by the U.S. Navy including the advertisers, caterers and function organisers, security companies used for parties, as well as regularly threatening various people related to the U.S. Navy with litigation, including Commander Cahoon personally. The Complainant has also allegedly made several claims for compensation against the United States Navy under the Status of Forces Agreement.

It is apparent from the Commissioner's Report that some years ago the Complainant complained to the Equal Opportunity Commission about parties organised by the United States Navy with the assistance of local agencies and independent contractors to which members of the public were invited. His complaint was settled when the United States Navy agreed not to advertise or hold parties to which only local women but not local men would be admitted.

It seems that on 18 October 1992 the Complainant saw an advertisement in The Western Australian newspaper inviting "Ladies" to a complimentary dinner dance at the Fremantle Passenger Terminal. There were two of these dances,

one to be held on 20 and one on 21 October. On 21 October 1992 the Complainant lodged a complaint with the Equal Opportunity Commission in which he set out at some length the nature of his concern.

The letter accompanying the complaint refers to his opposition to the United States Navy's apparent resumption of its policy of discrimination against local males in refusing them entry to parties held for the United States Navy's personnel. He mentions having raised his concerns over the situation some years ago and to undertakings he claimed to have received at that time that the parties would no longer be closed to males other than U.S. military personnel, and that the parties would no longer be advertised inviting local women to attend.

He went on the say that the advertisement appeared to contravene the agreement reached previously and alleged that an exchange unsatisfactory to the Complainant had taken place between he and Commander Cahoon concerning the matter. The letter refers to a controversy between the Complainant and Commander Cahoon as to whether the advertisement constituted an invitation to a private function or whether it was an invitation to a public occasion. The essence of the complaint was that the Complainant had been denied access to a party which was being held for United States military personnel on the basis of being open to female invitees only.

According to the Complainant's letter, on 21 October 1992 he went to the place where the function was being held and was refused entry to the premises. He had with him a copy of the Equal Opportunity Act and during the course of an exchange with those in charge he made various submissions as to why, as a matter of law, he was entitled to enter. The Complainant asserted, in effect, that not only had there been an infringement of the agreement previously arrived at

but also a failure to comply with the statutory provisions concerning discrimination on the ground of sex. It is apparent that copies of the letter of complaint were simultaneously dispatched to Mr Paul D. Williams, a journalist in St Paul U.S.A., Mr Melvyn Sembler, the United States of America Ambassador in Canberra, the Australian Foreign Minister, the International Directorate for the National Organisation of Women in Washington D.C., the Department of State and to the Editors of various newspapers both in America and Australia.

On 6 January 1993 the Complainant lodged another complaint with the Equal Opportunity Commission naming the Respondent as a party to the dispute and referring to the earlier correspondence. The letter said that on 29 December 1992, a fleet of U.S. Navy warships berthed in Fremantle and remained there until after the New Year. The Complainant alleged that the United States Navy "yet again" held parties of the kind previously complained of but to the Complainant's knowledge did not publicly advertise them as they had done in the past. Nonetheless, he alleged, the Respondent was continuing with its policy of discrimination.

The Complainant alleged that on Wednesday, 30 December 1992 he travelled to Fremantle to attend one of the parties and was confronted at the door to the venue by a door attendant who informed him that only ladies were being admitted without an invitation, and that men were to be denied entry to the parties by virtue of those instructing him who he called "the Yanks". The Complainant left the scene of the party and drove to a public telephone and spoke to the officer of the deck of the ship U.S.S. Valley Forge. The Complainant alleges that admissions were made during the course of the conversation which corroborated the information he had previously obtained that

women were being admitted to the parties without an invitation. The Complainant alleges that a few days later he had a telephone conversation with Commander Cahoon about the matter.

The stance adopted by the Complainant, as reflected in his letter of complaint, was that if a portion of the public could be admitted to the parties with or without invitation on the basis that they were females, the parties could not be regarded as private. The Complainant required that the matter he had raised by way of complaint should be investigated. In due course the Commissioner for Equal Opportunity entered into correspondence with Commander Cahoon as the U.S. Seventh Fleet representative.

Reference was made to the role of the independent contractor who organised the social functions and to the question of whether the United States Navy could be held accountable for the contractor's actions. Reference was also made to the Foreign States Immunities Act 1985 which might have the effect of immunising the United States Navy against liability. After a period of investigation the Commissioner for Equal Opportunity exercised her power under Section 89 of the Act to dismiss complaints which are misconceived or lacking in substance principally because she was of the opinion that the matters raised by the Complainant "do not come within the jurisdiction of the Act, pursuant to Section 9 of the Foreign States Immunities Act 1985". This view is expressed in the Commissioner's letter dated 7 July 1993. The Complainant then called upon the Commissioner to refer the dispute to this Tribunal. It therefore follows that, in strict analysis, there are two complaints before the Tribunal, but the central allegation, common to both, is an allegation of discrimination on the ground of sex by refusing the Complainant admission to a public place.

Counsel for the United States Navy made it clear at the hearing before this Tribunal of the application to dismiss the complaint, that the Respondent did not intend to rely upon the immunity, if any, conferred by the Foreign States Immunities Act 1985, or by any similar legislation or inter-governmental agreement purporting to confer an immunity. The Tribunal is therefore required to deal with the application for dismissal simply by having regard to the effect of Section 125 of the Equal Opportunity Act.

The matter was referred to this Tribunal on 27 April 1994. By letter to the Registrar dated 4 May 1994 the Complainant noted that the matter had been referred to the Tribunal and requested *"that the Tribunal suspend the setting of a date for the preliminary hearing"* until he had received further information from various parliamentarians and journalists in the United States of America and in Australia. Elsewhere in the letter he refers to a trip he took to the United States towards the end of 1993 and the representations he made to various American politicians. He says that *"I was fortunate enough to have been invited to speak about the issues surrounding these parties on radio in Minnesota, which attracted the attention of a personal electorate secretary to Minnesota Senator, Paul D. Wellstone (Democrat). Another journalist in the United States, based in Washington, has also forwarded my case against these parties (and other issues involving the United States Navy's relationship with the Australian people where it concerns the sexual and social exploitation of women, their contempt for this country's social culture and legal system and so forth) to Congresswoman Patricia Schroeder (Democrat Colorado) whom I understand is investigating my complaints and will be relating my concerns to Admiral Michael Boorda, U.S.N., the American Navy's new Chief of Naval Operations"*.

The matter was listed for hearing before this Tribunal on 28 June 1994 after the usual notices to that effect had been dispatched to the respective parties. The Complainant did not attend on the return date but the Respondent was represented by Counsel, Ms Macrides. The matter was then adjourned *sine die* because of the Tribunal's reluctance to dismiss a complaint in the absence of the Complainant, bearing in mind that in this jurisdiction complainants are frequently not represented and are not always fully conversant with the implications of the legal process.

Subsequently, notices were dispatched to the parties listing the matter for a further preliminary hearing to be held on 16 August 1994. Again, the Complainant did not attend the hearing and on that occasion Counsel for the Respondent applied to strike out the complaint pursuant to Section 125 of the Act on the grounds that it was lacking in substance or otherwise should not be entertained. Once again, the Tribunal was reluctant to strike out the complaint pursuant to an application of which no prior notice had been given to the Complainant and orders were therefore made at that hearing for notice of an application to dismiss to be served upon the Complainant to the intent that the matter would be dealt with at a further hearing of the Tribunal on Thursday, 6 October 1994.

Counsel for the Respondent tendered affidavits in support of the application to dismiss at the hearing on 16 August 1994 suggesting that the Complainant had deliberately refused or failed to attend the preliminary hearings of which notice had been given. Accordingly, at the hearing on 16 August 1994 the Tribunal directed that these affidavits should be served upon the Complainant together with notice of the forthcoming application to dismiss the claim so that he would be under no misapprehension as to what was being alleged against him, and as to

what the consequences might be if he refused or failed to attend the further hearing on 6 October 1994 at which the application for dismissal would be dealt with.

It seems that the Complainant received these documents and in answer to them prepared the statutory declaration marked as Exhibit A which the Tribunal will come to in a moment. He attended at the hearing on 6 October 1994 in person and said that he would make submissions on his own behalf. He indicated that he had received some legal advice in regard to the matter but said that he could not afford to be represented at the hearing. No application for an adjournment was made and the Complainant indicated that he was ready and willing to put arguments in answer to the application for dismissal and the hearing proceeded accordingly.

The Tribunal now turns to the various affidavits filed and served on behalf of the Respondent which comprise Exhibit B.

The Tribunal has already referred to the introductory paragraphs of Commander Winter's affidavit sworn 15 August 1994. At paragraph 8 the affidavit goes on to say that current actions against the Respondent by the Complainant include Local Court Joondalup, Number 1 of 1994 between the Complainant and Lt. D.W. Haas, a Lieutenant in the U.S. Navy (particulars of the claim being for $252.40 for "social and cultural abuse"); application dated 13 December 1993 pursuant to Status of Forces Agreement Article 12 for damages in the amount of $300.00 for "social and cultural abuse"; application dated 26 July 1993 pursuant to the Status of Forces Agreement Article 12 for property loss alleged stolen from the Applicant by visiting U.S. Navy personnel whilst at a restaurant and at an officer's hotel room; Application dated 26 July 1993 pursuant to the Status of

Forces Agreement for the costs involved in bringing this application in the Equal Opportunity Commission in the amount of $5,000.00. In regard to the last-mentioned matter the Tribunal pauses to observe that although this Tribunal does have power to award legal costs the power is circumscribed and would clearly not be exercised until the matters in issue had been determined in favour of one party or the other. Thus, it is difficult to see on what basis a claim for costs associated with a complaint investigated by the Commissioner which has now been referred to this Tribunal could be legitimately claimed.

Commander Winters goes on to say that the Complainant has made numerous comments to newspaper, radio and t.v. journalists over the past 11 years in relation to his campaign against the U.S. Navy. The various articles exhibited to the affidavit are relied on in support of that assertion. An article written by a Mr John Brinkley of the Rocky Mountain News Washington Bureau says this:

> *"A U.S. aircraft carrier is due to dock in Perth, Australia and rape counsellor Brenden Dwyer is apprehensive.*
>
> *He said a longstanding tradition of naval officers and enlisted men throwing wild parties at Perth hotels when their ships go into port there has gotten ugly.*
>
> *"I wind up three or four days after these parties with women in my office, bawling", Dwyer told the Rocky Mountain News.*
>
> *During a mid-June port visit by four Navy ships, two women and a 16-year-old girl have said they were raped by U.S. Navy officers and sailors. Dwyer said U.S. naval personnel had raped or assaulted women there before, and that he witnessed an assault at a party he crashed last year"*

The Brinkley article apparently caught the attention of various prominent figures in the United States and a number of them commented upon it. Other exhibits include an extract from The West Australian of Monday 11 July 1994 referring

to a high ranking U.S. Navy officer being sent to Perth to investigate of allegations of rape by American sailors. A later report said that the senior U.S. Navy officer had not found any evidence in Perth to substantiate the allegations.

Commander Winter goes on to say in paragraph 10 of his affidavit that in his belief the articles just mentioned emanated from the Complainant. He points out that the Complainant is named in the first article. The author of that article has been named by the Complainant in letters to Commander Winter's predecessor and to the Tribunal. He goes on to say that, in relation to the allegations of complaints to police about visiting U.S. Navy personnel, investigations by Commander Winter with the Fremantle and Perth police have concluded that they have no basis.

Commander Winter goes on to say:

> *"The Complainant" continually telephones the U.S. Consulate in Perth and has done so for over the past year. A ban was placed on the after hours emergency Consulate number for any calls made by Mr Dwyer on 17 July 1993 due to harassing calls received by the U.S. Consul-General, Mr Emil Skodon, and other Consulate duty officer. A log was kept for May and June 1994 by the switchboard operators of the U.S. Consulate showing how regularly he calls the office of the U.S. Consulate General...*
>
> *12. The Complainant's consistent course of conduct towards the Respondent as described above, leads to a fair inference that this application is not a serious application on the grounds of discrimination but part of an ongoing campaign by the Complainant against the U.S. Navy...*
>
> *13. I believe a fair inference can be drawn that the Complainant is deliberately delaying this matter to further his campaign as evidenced by his non-appearance at the first preliminary hearing and the subsequent newspaper articles.*

14. I believe the Complainant was present in Australia on the day of the preliminary hearing and deliberately misled the Tribunal. The reasons for this belief are based on the following facts.

(a) The Complainant telephoned the U.S. Consulate on the day prior to the hearing from a local telephone number.

(b) The Complainant telephoned the United States Consulate on the day of the hearing from a local telephone number and asked the switchboard operator for the fax number of my predecessor. He was given the number and a facsimile arrived later that afternoon in his handwriting from a Perth facsimile number."

The Commander concludes by saying that it can be inferred from the matters referred to in his affidavit that the Complainant is using the Tribunal application to legitimise his personal campaign to vex, inconvenience and annoy the Respondent and it is on that basis that the application is being made to dismiss the Complainant's complaint.

The papers in support of the application also include the affidavit of Debra Crook sworn 11 August 1994 in which she states that she was the switchboard operator at the American Consulate General Office in Perth on 28 June 1994. She says further that on the morning of 28 June 1994 she received a call from a man identifying himself as Brenden Dwyer asking to speak to Commander Cahoon. She told him that Commander Cahoon was not available. He also requested a fax number to fax a letter to Commander Cahoon. She said that the phone call sounded local as there were no STD pips. At 2.00 o'clock on the same day a facsimile was received from Mr Dwyer addressed to Commander Cahoon on the number that she had provided to the caller.

The affidavit of Marian Helen Primrose sworn 11 August 1994 includes a passage in which she states that she was the relieving switchboard operator at the

American Consulate General Office in Perth on 27 June 1994. At 2.00 p.m. on that day she received a call from Brenden Dwyer asking to speak to Commander Cahoon. She told the caller Commander Cahoon was not available to speak with him. The caller asked if Commander Cahoon had a direct facsimile. The deponent said that if the caller faxed a letter to Commander Cahoon at the facsimile number for the whole office it would be received by him. The telephone line was very clear and there were no STD pips on the call.

According to the affidavit of Erica Evans sworn 14 August 1994 she is the manager of Military Tours which is contracted by the United States Navy to organise functions for fleet visits to Perth. She states that the Complainant was known to her as he had persistently telephoned her office to gain access to functions organised by Military tours on behalf of the U.S. Navy. He had threatened her office and herself with negative media reports. She says further that on 28 June 1994 prior to 9.00 am she received a telephone call from the Complainant forewarning her about impending newspaper articles in the United States newspapers and that Military Tours would be unfavourably mentioned in those articles. The telephone call was very clear and there were no STD pips. She then referred to correspondence commenced by her solicitors with a view to preventing harassing calls from the Complainant. The correspondence includes a letter dated Monday 4 July 1994 from the Complainant to the solicitors. The letter contains this passage:

> *"It would appear that your Client is over-wrought about the article which is to be printed in the United States this week. However, rather than to issue letters which choose to seek to threaten, harass or attempt to intimidate me, I would have recommended to your Client that they contact the American journalist concerned to ascertain exactly what I did or did not say.*

Should your Client have contacted Mr Brinkley, I am sure their fears that I had attempted to defame Military Tours could have been allayed. Mr Brinkley expressed absolute shock when I related to him the contents of your letter this morning by telephone, and he also noted that he agreed that not only had I not said anything which could possibly have approximated the defamatory, but nothing which would possibly be construed as defamatory - or even condemnatory - of Military Tours has been printed.

Because Mr Brinkley and I are absolutely certain that there was nothing that I said to him that could be construed as being defamatory and because I certainly at no time reported to any of the Staff of Military Tours that I had said anything which even approximated the defamatory, I am only left to assume that the member of Staff of Military Tours with whom I held a recent discussion has either misheard, misinterpreted or misunderstood something which I may have said to her...

Mr Brinkley is planning to write an article subsequent to the first one which will be printed this week. I will be sending him a facsimile of your letter to me, and this letter to your for his own use."

The Tribunal pauses to observe that in this letter the Complainant is freely conceding that he has been in contact with a journalist called Brinkley and the subject matter of their discussion was the conduct of U.S. personnel at parties in Australia. He denies, however, that he said anything defamatory.

The affidavit of Elena Jane Macrides sworn 5 October 1994 confirms that on 1 September 1994 pursuant to the orders made by the Tribunal on 16 August 1994 she served the Complainant with notice of a hearing of the application for dismissal and copies of the affidavits to be relied on by the Respondent mentioned earlier in this judgment.

It is quite apparent that the Complainant received the documents served upon him because at the hearing on 6 October 1994 he submitted in evidence by way

of answer to the various matters raised against him a statutory declaration sworn 29 September 1994. In that statutory declaration which was marked as Exhibit A he comments on the contents of the various affidavits at length but significantly does not in any real sense deny that he is behind a campaign directed against the United States Navy which has resulted in him communicating with various parliamentarians and with journalists in both the United States of America and in Australia. He comments *"I cannot be held responsible for any opinions expressed to media in this country or media abroad and nor am I in any way responsible for comments made in the media in this country or abroad by two women who allege to have been raped by visiting United States Navy/Marine Corps personnel".* It is significant, however, that he does not specifically deny having been in contact with the American journalist John Brinkley whose articles seem to draw upon assertions allegedly made by the Complainant as to the conduct of those aboard visiting U.S. Navy ships.

The Complainant goes on to say this :

> *"13. There is absolutely not a "campaign" against the United States Navy or Marine Corps or its personnel on my behalf, but rather a concerted effort on my part to be admitted to parties held for such personnel (which includes female U.S. military personnel), to which I feel that I am entitled in view of the 12 or 13 years my family and I have been befriending and providing hospitality for U.S. military personnel.*
>
> *14. Ill-health precluded my attending the first Preliminary Hearing even after my planned trip abroad had been postponed. (My planned trip abroad was postponed because the airline I was to have flown out of Australia with refused to carry me in my then state of ill-health). The trip I was to have undertaken at that time has been rescheduled for December 1994."*

During the course of the hearing on 6 October 1994 the Tribunal gave the Complainant every opportunity to explain why he was not present at the preliminary hearings in June and August. During the course of the relevant exchange the Complainant agreed that he wrote to the Registrar of the Tribunal on 20 June 1994 stating that he had made plans to be out of Australia and *"I depart Perth on June 25th"*. During the course of the exchange he accepted that he did not in fact depart on 25 June and did not attend the hearing on 28 June even though he was aware that a hearing was to be held. He did not deny the allegation that towards the end of June, as alleged by witnesses for the Respondent, he had telephoned the Consulate but in fact made no attempt to communicate with the Tribunal in writing to the effect that his earlier letter suggesting that he was departing on 25 June should be disregarded. He claimed that he attempted to telephone the Tribunal but had no record of who he spoke to. He also confirmed during the course of the exchange that he was aware that there was a hearing on 16 August and said that *"I was unable to attend that because of commitments to my employer"*. His only attempt to excuse himself from the need to attend the hearing in August was a lengthy and somewhat rambling letter dated 11 August 1994, in which he refers to the difficulties he is having in communicating with various parliamentarians in the United States. There is no direct reference to an inability to attend owing to difficulties with his employer. The Complainant's letter of 11 August 1994 also contains this passage:

> *"I am writing to the Tribunal on this occasion to relate that I would accept a commitment from the United State Navy that it will invite my partner and I to the next United States Navy Officers party which is held during the next U.S. warship fleet visit as being appropriate conciliation of this matter, along with a commitment that I am invited to future functions as well...*
>
> *To sum up my positions - If the United States Navy can make a commitment to me that it will invite me to future parties held for*

visiting U.S. Navy Officers. I do not believe that there will be grounds for any further complaints from me regarding this matter, and I will accept that as appropriate conciliation of this matter on this occasion."

Against this background, the Tribunal is satisfied that the Complainant did not make a conscientious attempt to attend the Tribunal on the occasion of the preliminary hearings listed in June and August or to provide a sufficient and reasonable explanation for his absence. It is apparent that he was only minded to attend the hearing on 6 October 1994 when it became apparent that an application to dismiss his complaint would be advanced on that occasion.

The Tribunal now turns to the principles governing the exercise of the discretion to dismiss which is allowed to the Tribunal pursuant to Section 125 of the Act having regard to the criteria which are set out in that provision. The Tribunal has already noted that the Respondent is relying only upon the last limb of the provision upon the basis that it will embrace a situation where there has been an abuse of process.

The Tribunal observed in previously decided cases that courts and tribunals within the legal system of this State are generally allowed to control any abuse of process. The rationale of an inherent jurisdiction to that effect is to ensure that the legal process is not abused by the institution of groundless proceedings. Most of the decisions bearing upon that approach are not directly applicable to the circumstances of the present case. Further, the Tribunal accepts that the issue presently before it must be decided solely by reference to the provisions of the Act referred to earlier which do not exactly coincide with the criteria reflected in the Supreme Court rule or which are to be found in the cases concerning the inherent jurisdiction of the superior court. This Tribunal does

not have an inherent jurisdiction to control process. Nonetheless, the decided cases may be of assistance in understanding the rationale of provisions such as Section 125, and it is useful to note that a similar approach has been adopted by other Tribunals working in the field of Equal Opportunity legislation and by this Tribunal also. See Yarran and Another v Westpac Banking Corporation (1992) ECO 92-440.

In Varawa v Howard Smith Co Limited (1911) 13 CLR 35 at page 91, Isaacs J. had this to say:

> *"In the sense requisite to sustain an action, the term "abuse of process" connotes that the process is employed for some purpose other than the attainment of the claim and the action. If the proceedings are merely a stalking horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate they are regarded as an abuse of process for this purpose and as ex hypothesi the final judgment however given will have no reference to the ulterior purpose, there is no necessity to await the irrelevant determination.."*

This approach was followed recently in Williams v Spautz (1992) 174 CLR 509 where the High Court held that proceedings are brought for an improper purpose, and thus constitute an abuse of process, where the purpose of bringing them is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond what the law offers. An improper act by the party instituting the proceedings is not an essential ingrediient in the concept of abuse of process.

In Assal v Department of Health, Housing and Community Services (1992) EOC 92-409 the President of the Human Rights and Equal Opportunity Commission, Sir Ronald Wilson had this to say:

> *"I find it consistent with the pastorally sensitive and conciliatory purpose of the Act (the Racial Discrimination Act) to interpret the power of summary dismissal conferred by Section 25X as reflecting the intention of the legislature that it is in the public interest, as well in the interests of both parties, that the hearing of a complaint which is clearly shown to be lacking in substance should be summarily terminated. Certainly, it is no kindness to a complainant to shrink from the exercise of power conferred by Section 25X of the Act in circumstances where that exercise is clearly warranted."*

On a later occasion, Sir Ronald Wilson, sitting as an inquiry Commissioner in Adelaide of GVR v Department of Health, Housing and Community Services (unreported 23 August 1993) said:

> *"The meaning of the term "lacking in substance" has been considered in a number of decisions of this Commission. My view, which is one I have expressed previous in Assal v Department of Health, Housing and Community Services, is that a claim which presents no more than a remote possibility of merit and which does no more than hint at a just claim would ordinarily be found to be lacking in substance."*

A similar approach is reflected in the decision of Von Dussa J, in Nagasinghe v Worthington (1994) 53 FCR 175. In that case, of course, as in decisions of Sir Ronald Wilson, the court was concerned with complaints thought to be lacking in substance, but these decisions nonetheless provide some guidance as to what falls within the purview of a provision such as Section 125 which is clearly aimed at controlling the processes of the court.

In the circumstances of the present case, the Tribunal considers that there has been an abuse of process. The Complainant disputes the use of the term "campaign" but a careful consideration of his actions over an extensive period of time would suggest that he is acting in opposition to the Respondent in a way which most people would probably describe as a campaign. It is clear that he is

liaising with the media and making submission to various parliamentary representatives in the United States of America and in Australia with a view to effecting changes to certain practices and that the real purpose of his campaign is not to obtain relief for an injury that he himself experienced as a consequence of the events referred to in his complaints in October 1992 and January 1993, but a desire to negotiate conventions and understandings satisfactory to him in regard to the way in which social functions organised for visiting U.S. personnel are conducted.

The discrimination provisions of the Equal Opportunity Act create a statutory tort. It is central to a claim for relief pursuant to those provisions that there is a clear causal link between the act complained of and a degree of injury or grievance experienced by the individual complainant. In the present case, the Tribunal is satisfied, within the language used by Isaacs J. in Varawa's case *(supra)*, that the process involved in having the complaints referred to the Tribunal for adjudication is being employed predominantly for an improper purpose, that is to say, "for some purpose other than the attainment of the claim in the action". This is evidenced by the affidavits adduced by the Respondent and by inferences drawn from the Complainant's failure to refute the allegations contained in the affidavits tendered against him that he is involved in a campaign against the Respondent that goes beyond the specific events the subject of his two complaints. It is also evidenced by the fact that he did not make a conscientious attempt to comply with the Tribunal's procedural requirements on 28 June and 16 August 1994. There appears to be only a tenuous link between the acts complained of and the matters required to redress the grievance, such as it is, with the result that pursuit of the claim is not warranted.

Accordingly, in the exercise of its discretion under and by virtue of Section 125 of the Act the Tribunal will dismiss the complaint on the basis that it should not be entertained in circumstances where the complaint is an abuse of process. The Tribunal will hear further submissions from the parties as to whether there should be any order for costs.

Nicholas Hadrich
26 July 1995