

**EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA**

Matter Number: 14 of 1994

IN THE MATTER OF A COMPLAINT BY:

GARY EVERSLED

Complainant

- against -

CITY OF GERALDTON

First Respondent

and

GEOFFREY WHITEHURST

Second Respondent

and

TREVOR BEAVER

Third Respondent

and

COLIN BAKER

Fourth Respondent

JUDGMENT

BEFORE: Mr N Hasluck Q C - President
 Mrs R Kean - Member
 Mr C Jacobs - Deputy Member

 Counsel for the Complainant - Ms H Andrews
 Counsel for the Respondents - Mr N Douglas

HEARD: 14 December 1995

REASONS FOR DECISION: (Delivered: 6 August 1996)

These Reasons for Decision concerning the further damages to be awarded to the Complainant, Gary Evershed, arise out of and are supplementary to a Judgment delivered by the Tribunal on Friday 11 August 1995 ("The Judgment").

The Complainant alleged that the Respondents discriminated against him on the ground of political conviction. The complaint arose out of circumstances surrounding the Complainant's application for the position of Director of Community Services with the City of Geraldton on 8 March 1993.

The Tribunal found that on 29 March 1993 a selection committee comprised of the second, third and fourth Respondents and Counsellor Gill reached a unanimous decision to recommend that the position of Director of Community Services be offered to the Complainant. Subsequently, however, the third Respondent raised a concern about the Complainant's suitability for the position in view of the fact that he had contested a seat for the Australian Labor Party at the 1993 election. The concern was that if the Complainant ran for parliamentary office on a future occasion then he might not devote sufficient time to the duties required of him as an employee of the City.

The Tribunal held that the issue raised by the third Respondent proved to be decisive, that is to say, in combination with other factors, it caused all those counsellors present at a special meeting of the council summoned to resolve the issue to reject the Complainant's application for employment. The Tribunal was satisfied that had the Complainant's political affiliation with the Labor Party as a previously endorsed candidate been notionally abstracted from the debate, then the Complainant's application would have been

successful, and in that way he was treated less favourably than a candidate who was not encumbered by the Complainant's political background. The Tribunal attached liability to the City and to the third and fourth Respondents but excused the second Respondent from liability. General damages of \$7000.00 payable by the City were awarded to the Complainant as compensation for the injury to his self-esteem. Notwithstanding the findings against them, the Tribunal held that the third and fourth Respondents were not liable in damages and were not obliged to contribute to the amount payable by the City. It was common ground at the hearing that in addition to recovering general damages the Complainant was entitled to pursue a claim for special damages against the City in respect of particular loss allegedly flowing from the discriminatory conduct. The Tribunal ruled that this matter should be either resolved by agreement or be dealt with at a later date.

As the issue concerning special damages could not be resolved by agreement, a further preliminary hearing was held on 14 November 1995 on which occasion the President gave directions that the issue should be dealt with at a further hearing on the basis that the parties would be at liberty to present evidence by affidavit concerning financial loss and deliver written submissions concerning the relevant principles of law. Counsel for both parties agreed, however, that the parties should also be at liberty to present verbal submissions.

A further hearing was then arranged for 14 December 1995. Exchanges between counsel for the respective parties evidenced a requirement that the Complainant should be present at the hearing in order to be cross examined on his affidavit evidence. During the course of this further hearing the evidence given previously by the parties was supplemented by the first affidavit of the

Complainant (described as sworn 19 October 1995), the Complainant's further affidavit sworn 12 December 1995, a schedule of removal costs verified by the Complainant in the course of oral testimony and the affidavit of Neil Peter Bennett sworn 14 December 1995 which was tendered on behalf of the Respondent. After receiving this evidence and hearing argument, the Tribunal then reserved its decision. Subsequently, however, in early 1996, it became apparent that the Complainant wished to correct certain items on the schedule of removal costs (which had previously been described as estimates) by reference to the costs actually incurred following upon his transfer from Geraldton to Perth in circumstances which the Tribunal will deal with later. Accordingly, a further affidavit relating to that matter sworn by the Complainant on 14 May 1996 was then delivered to the Tribunal. This affidavit included reference to matters other than the foreshadowed downwards adjustment of the previously estimated removal costs. As will appear later, however, nothing turns on this aspect of the matter because the Tribunal does not propose to allow the claim for relocation costs and expenses.

It emerges from the evidentiary materials mentioned earlier including evidence given at the original hearing, that at all material times the Complainant was Director of the Geraldton Regional Community Education Centre. This was a service organisation reliant upon federal government funding. He was forty years of age. He had held a variety of teaching and senior roles within the Ministry of Education and had various qualifications including Diploma of Education, Bachelor of Education and an Associateship in Town and Regional Planning. He had lived in Geraldton for close to eleven years and had a strong desire to remain in the area. He was a married man and his wife had two sons, aged eighteen and nineteen, who lived and worked in Geraldton and it was also her preference to remain in the area. The Complainant testified

that his commitment to Geraldton was illustrated by his attempt to represent the local constituency as an endorsed Labor candidate for the State parliamentary seat in the 1993 election. The Complainant also gave evidence of wishing to follow a career path in local government. He had applied for positions on the community services side of local government with two other local authorities outside the Geraldton area prior to his application in March 1993 for the position of Director of Community Services with the City of Geraldton.

The position of Director of Community Services with the City was for a term of three years commencing 7 May 1993 and therefore expiring 6 May 1996. It was common ground at both hearings that the base salary which the Complainant would have been paid as Director of Community Services of the City, had he secured the position, would have exceeded the base salary (gross) which he was being paid as Director of the Geraldton Regional Community Education Centre. The Tribunal pauses to note that the affidavit evidence presented on behalf of the Complainant at the second hearing included a schedule setting out the contrast between the two positions. The Tribunal understood that there was no contest as to the figures appearing on the schedule, and especially as to the difference between the two levels of remuneration in respect of various nominated periods. The matters in issue principally concerned the Complainant's duty to mitigate his loss, an issue of causation and the question of whether the Complainant could claim for loss of earning capacity or loss of earnings beyond 6 May 1996 when the term referable to the position he had applied for would have expired, an issue concerning removal expenses, and the question of whether loss of earnings should be calculated on a net basis so as to bring to account the effect of taxation.

The Complainant accepted that the position he had applied for was for an initial contract term of three years. In his affidavit of 19 October 1995, however, he referred to his belief that, subject to satisfactory performance, his term would probably have been extended so that he held the position of Director of Community Services for a total period of five years. He said that there are limited opportunities for employment at a senior management level in Geraldton because of the size of the city. Positions at the level of Director of Community Services were very few and the incumbents usually remained in a senior position for many years. He asserted that he had therefore been denied a very significant career opportunity in being refused the position he had applied for and he had also lost work experience which he would have gained in the position of a kind which would have significantly enhanced his future prospects.

The Complainant, by counsel, accepted that he had a duty to mitigate his loss. In his affidavit sworn 12 December 1995 he said that following the decision of the City not to proceed with his appointment as Director of Community Services, he continued to look for suitable and equivalent employment in Geraldton. There were two suitable positions advertised, both of which he applied for and was short listed but not selected. These were the position of Divisional Children's Services Officer with the Department of Community Development and Assistant Director of the Geraldton Regional College of TAFE.

In view of the fact that his present position with the Community Education Centre was unlikely to exist after 1 January 1997, owing to withdrawal of funding, he became increasingly concerned about his prospects of obtaining

suitable employment in the Geraldton area. Accordingly, despite his desire to remain in Geraldton, he decided that he had no alternative but to seek employment elsewhere. He therefore eventually applied for and obtained the position of Manager of Community Services with the Town of Bassendean in the metropolitan area of Perth. It appears from the affidavit that his base salary (gross) with the Town of Bassendean will also be lower than the salary he would have obtained had he been appointed as Director of Community Services of the City of Geraldton. The Complainant goes on to say that the discriminatory conduct complained of has resulted in his having to relocate in Perth and this has resulted in further financial loss to himself, particulars of which were provided at the further hearing and via the further affidavit sworn 14 May 1996 mentioned previously. The effect of this evidence is that the Complainant incurred expenses of \$5,569.25 in selling his property in Geraldton and expenses of \$7,885.00 (being principally stamp duty of \$6,935.00) in acquiring a property in Perth. The amounts in question give rise to a claim for \$13,454.75 in all in respect of removal costs.

Counsel for the Respondent cross examined the Complainant on his affidavits and, in doing so, suggested that the Complainant had not taken sufficient steps to mitigate his loss in that he had not applied for various local government positions beyond Geraldton for which he was qualified and had only applied for two positions otherwise than in the local government sector. It was put to the Complainant that he was not necessarily limited to seeking positions in Geraldton as evidenced by the fact that he had applied for positions outside Geraldton on two occasions prior to the submission of the disputed application to the City of Geraldton in March 1993. It was also put to him, and he did not contradict the assertion, that he made no attempt to contact local government associations to ascertain what vacancies were available, and did not make a

thorough attempt to review advertisements relating to positions available including advertisements appearing in a specialist publication produced by Tony Smythe. In that regard, counsel for the Respondent in his closing submissions placed reliance upon the affidavit of Neil Peter Bennett sworn 14 December 1995 to which were exhibited a wide range of position vacant advertisements relating to numerous local government positions in the period commencing in mid 1993 and running through to the end of 1995. In reviewing the various advertised positions, however, the Tribunal notes that they related exclusively to positions on the east coast of Australia.

The “schedule of loss of earnings” relied upon by the Complainant (the mathematics of which were not disputed by counsel for the Respondent) was exhibited to the affidavit of the Complainant sworn 12 December 1995. A copy of that schedule is exhibited to these reasons as a convenient point of reference. The schedule contrasts the salary that the Complainant would have earned as Director of Community Services of the City of Geraldton with the salary actually earned by the Complainant (with the figure in each case being a gross figure) and indicates that the difference and therefore the claimed total loss of earnings was to the date of hearing, \$11,347.00, to 30 June 1996 \$18,464.99 and to 30 June 1998 \$29,976.00 (the latter date representing the initial three year contract as extended for a period of two years, being the period the Complainant contended would represent the duration of the appointment in real terms).

The Tribunal pauses briefly to note that, in reviewing these figures, it emerges that the difference between salary as Director of Community Services and the salary as Director of the Town of Bassendean is \$5,756.00 per annum or (in round figures) \$110.00 per week. Thus if one were to determine the

difference (and therefore the claimed loss) for the period 7 May 1993 to 6 May 1996, rather than the period 7 May 1993 to 30 June 1996 as appears on the schedule, it would be necessary to reduce the figure of \$18,464.99 mentioned earlier by \$880.00 (representing eight weeks at \$110.00 per week) to arrive at a figure of \$17,584.99 in respect of the three year period from 7 May 1993 to 6 May 1996.

In the course of its earlier judgment the Tribunal had occasion to review the principles emerging from the decided cases relevant to an award of damages pursuant to Section 127 of the Equal Opportunity Act. The decided cases indicate that damages are compensatory in nature. If there is a sufficient cause or connection found between the unlawful act established under the legislation and loss sustained by the Complainant, damages may be awarded to the extent of that connection. When assessing damages the Tribunal considers that the appropriate approach is to compare the position in which the Complainant might have been expected to be if the discriminatory conduct had not occurred with the situation in which the Complainant was placed by reason of the Respondent's conduct. See Dugan v Shore Inn.Pty Ltd (1992) EOC 92-457 at 79, 293. Although it cannot be stated that in all claims for loss or damage under the Act the measure of damages should be the same as the measure of damages in tort, it is the closest analogy that can be found and one that would in most cases be a sensible and sound test.

It was strongly urged upon the Tribunal in the circumstances of the present case that any award of special damages should be regarded as compensation for "loss of earning capacity" rather than "loss of earnings". Hence, because damages awarded would be only to compensate the Complainant for the loss suffered, it is net, rather than gross, earning figures which should be used.

See Cullen v Trappel (1980) 146 CLR 1. Reference was also made to a number of decided cases in which an award of special damages, whether it goes beyond the date of judgment or not, should be calculated on a net basis. See Jamal v Secretary, Department of Health (1986) EOC 92-162; Bennett v Everitt (1988) EOC 92-244 and Erbs the Overseas Corporation Pty Ltd (1986) EOC 92-181.

On the other hand, there is persuasive authority to the effect that, because, in strict analysis, damages for the loss suffered by Complainants to their ability to earn during the period between injury and assessment should be indeed regarded as compensation for damage to a Complainant's earning capacity, not as compensation for a specific loss of income, one should focus upon the deprivation rather than upon the amounts that would actually have been received. Thus, the amount awarded should not be taxable, notwithstanding taxation ruling number IT 2424 which foreshadows that damages which can be attributed to loss of earning capacity or loss of earnings will ultimately be taxed in the hands of the recipient. See Woods; Taxation of Damages for Discrimination (1988) 62 LJ page 441. Various decided cases have therefore proceeded from the premise that an award under this head should be made by reference to gross income, and that is the basis upon which counsel for the Complainant has presented the claim in the present case. See McCarthy v Metropolitan (Perth) Passenger Transport Trust (Transperth) (1993) EOC 92-478. It also seems to be questionable as to whether the principles to be derived from Cullen v Trappel (1980) 146 1 are truly applicable to the circumstances of the present case where the claim for relief relates to a comparatively short period.

The general principle for assessing damages is qualified by the duty to mitigate. This imposes a duty to take all reasonable steps to mitigate the loss consequent upon the breach and debars the Complainant from claiming any part of the damage due to the neglect to take such steps. See Bugden v State Rail Authority of New South Wales (1991) EOC 92-360. In that regard, counsel for the Respondent placed particular reliance upon the case of Cummaudo the Aerospace Technologies of Australia Pty Ltd (1990) EOC 92-316. In that case the Complainant applied for the position of spray painter with the Respondent company but was refused on grounds that were found to be discriminatory. He was precluded from obtaining relief, however, because of his failure to mitigate his loss by making himself available for another position with the Respondent company. Thus, in the circumstances of the present case, it was argued, the Complainant was under a duty to take all reasonable steps, including seeking alternative employment beyond Geraldton, to mitigate any effect that the discrimination may have had upon his earnings. If the Tribunal was not satisfied that he had taken reasonable steps then he could not recover the loss of income claimed.

It is important, however, in considering the duty to mitigate, to note that if there is a controversy as to whether the Complainant has mitigated his or her loss, the burden is on the Respondent to establish the Complainant's failure to do so. See Najdovska v Australian Iron and Steel Pty Ltd (1986) EOC 92-176; Erbs v Overseas Corporation Pty Ltd (1986) EOC 92-181. In addition, the nature of the obligation in the particular circumstances of the case must be carefully studied. In Yetton v Eastwoods Froy Ltd (1967) 1WLR 104 Blain J. said at page 115:

“Thus, the opportunity to reduce damages by finding reasonable (I repeat reasonable) alternative employment should be taken and indeed, sought, whether such employment is by the same defaulting employer or by someone else; in either case the test being whether it is reasonable to refuse it or not in the circumstances of each case.”

As this passage indicates, and as related cases illustrate, a man with a professional background cannot necessarily be expected to apply for and take up some position well below the level of his qualifications, or to disrupt his domestic circumstances completely. It is a question of what is reasonable in the circumstances and what is reasonable may be affected by the foreseeable consequences if an applicant of a particular status within a particular community suffered an injury as a consequence of a statutory tort. In special circumstances of this kind there would be a sufficient causal connection between the discriminatory conduct complained of and the loss subsequently experienced. In the circumstances of the present case, it must also be kept in mind that there was a period of uncertainty as far as the Complainant was concerned during which the complaint was under investigation by the Commissioner of Equal Opportunity, and with some prospects that the dispute might have been resolved by conciliation in the manner allowed for by the Act, or by a hearing before the Tribunal at a later date.

Against this background, the Tribunal considers that the Complainant did make a sufficient attempt to mitigate his loss. He was in a reasonably senior paid position at the time the discriminatory conduct occurred and with a comparatively narrow difference between the salary received in that position and the salary which would have been available to him if he had been offered the position applied for. If he had simply been left without employment of any kind, then the duty to mitigate, given the comparative limited range of

opportunities at his professional level in Geraldton, might have compelled him to apply for positions further afield. However, in the particular circumstances in which he found himself, the Tribunal considers that it was reasonable, bearing in mind that he was already in a paid position, to confine his application for alternative employment to the Geraldton district for a period after the injury complained of, and while his complaint was still being investigated. The evidence shows that during the period in question he was mindful of the duty to mitigate. He applied for two alternative positions, but was unsuccessful, and, in due course, he applied for and obtained a position in Perth suitable to his professional skills, albeit at a lower base salary than was available to him as Director of Community Services of the City of Geraldton. Accordingly, the Tribunal considers that in the special circumstances of this case the Respondent has not established that there was a failure to mitigate the loss of earning capacity and that the Complainant is entitled to recover on a gross salary basis an amount representing the difference between what he would have received as Director of Community Services and his estimated earnings in the alternative employment during the period of the contract, that is to say, from 7 May 1993 through to 6 May 1996. Having regard to earlier discussion, and especially to the reasoning reflected in the article published in 62ALJ page 441 referred to earlier, the Tribunal considers that the compensation is payable for the effect of the discriminatory conduct on earning capacity and that, in the manner contended for by counsel for the Complainant, it is appropriate that a comparison be drawn between the gross salary which would have been received in the position applied for and the estimated gross salary in the alternative employment. It follows from earlier discussion that, in the circumstances of the present case, the relevant figure for compensation through to 6 May 1996 is the sum of \$17,584.99.

The Tribunal is not satisfied on the evidence that the Complainant is entitled to be compensated for the five year period contended for. A point must obviously be reached in which a disappointed applicant has to start making other arrangements with the result the causative link between the discriminatory conduct and the loss complained of is finally severed. The Tribunal is not persuaded to the view that the employment would have extended for the period of five years contended for. As to the matter of the removal expenses, the Tribunal is not satisfied that the amount in question can be said to be causally related to the discriminatory conduct. It follows from earlier discussion concerning the duty to mitigate that in the circumstances of this case the Complainant was entitled to present his claim on the basis that it was reasonable to remain in Geraldton rather than seeking professional employment elsewhere. However, when it comes to a question of considering his subsequent relocation to Perth in order to pursue a career opportunity in local government with the Town of Bassendean, the Tribunal is not satisfied that there is a sufficient causal connection between the discriminatory conduct and the removal expenses involved in the transfer of his family to Perth. This move was effectively prompted by the withdrawal of funding at his then place of employment. Accordingly, this aspect of the claim for special damages will be disallowed.

In summary, then, in addition to the sum of \$7,000.00 previously awarded to the Complainant by way of general damages, the Tribunal holds that the City of Geraldton is obliged to pay the further sum of \$17,584.99 to the Complainant by way of special damages representing the difference between the base salary he would have received as Director of Community Services of the City had the discriminatory conduct not occurred and the estimated income received in other employment during the contractual term applicable to the

position of Director of Community Services. In addition, the Tribunal is satisfied that the Complainant incurred the sum of \$314.40 by way of transport costs, as a consequence of the Respondent requiring that the Complainant be cross examined on his affidavits for further hearing, and this amount of \$314.40 will be allowed to the Complainant by way of costs.

ATTACHMENT "B"

EVERSHED v CITY OF GERALDTON AND OTHERS
EQUAL OPPORTUNITY TRIBUNAL NO. 14 OF 1994

SCHEDULE OF LOSS OF EARNINGS
SUMMARY

B
GARY FRANCIS EVERSHED
12
DECEMBER 1995
JL Bope

7 May 1993 (date of anticipated commencement in position of Director of Community Services

to

12 June 1995 (date of hearing)

(a)	Salary would have earned as Director of Community Services	\$110,419.50
(b)	Salary actually earned	<u>\$ 99,071.56</u>
	Difference	<u>\$ 11,347.94</u>

Projected Loss of Earnings

13 June 1995 to 30 June 1995
(date of hearing until date of anticipated salary increase)

(a)	Salary would have earned as Director of Community Services	\$ 2,739.93
(b)	Salary in current position	<u>\$ 2,425.91</u>
	Difference	<u>\$ 314.02</u>

1 July 1995 to 30 June 1996

(A)	Salary would have earned as Director of Community Services	<u>\$ 57,041.03</u>
LESS		
(B)	Salary expected to earn in current position to 17.1.96	\$ 27,346.00
(C)	Salary expected to earn with Town of Bassendean 18.1.96 to 30.6.96	<u>\$ 22,892.00</u>
	Difference	<u>\$ 6,803.03</u>

1 July 1996 to 30 June 1997

(A) Salary would have earned as Director of Community Services	\$ 57,041.03
(B) Salary expected to earn with Town of Bassendean	\$ 51,285.00

Difference	\$ 5,756.03
------------	-------------

1 July 1997 to 30 June 1998

As above	\$ 5,756.03
----------	-------------

Total Loss of Earnings to date of hearing:	\$ 11,347.00
--	--------------

Projected Loss of Earnings 13 June 1995 to 30 June 1998:	\$ <u>18,629.00</u>
--	---------------------

<u>Total Loss:</u>	\$ 29,976.00
--------------------	--------------

=====