EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

Matter Number: 9 of 1995

IN THE MATTER OF A COMPLAINT BY:

JOHN PARSONS

Complainant

- against -

WESTERN AUSTRALIAN FIRE BRIGADES BOARD

Respondent

JUDGMENT

BEFORE:	Mr N.P. Hasluck Q.C.	-	President
	Mr D. Forster	-	Member
	Ms M. Fadjiar	-	Deputy Member
	Counsel for the Complainant	-	Ms P. Giles
	Counsel for the Respondent	-	Mr A. Sefton

HEARD: 20 JUNE 1995

REASONS FOR DECISION: (Delivered:Friday 11 August 1995)

The Complainant, John Parsons, alleges that his former employer, the Western Australian Fire Brigades Board, who is the Respondent in these proceedings, discriminated against him on the ground of age in the area of employment. The Respondent denies liability and has raised in answer to the complaint Section 66ZS of the Equal Opportunity Act ("the Act") whereby it is not unlawful to do an act if it was necessary to do that act in order to comply with the written law of the State.

It became apparent that this line of defence had raised a preliminary legal issue which should be disposed of before the matter proceeded further and arrangements were therefore made for the matter to be dealt with at a preliminary hearing on Tuesday, 20 June 1995.

Fire Brigades Act

The Respondent is constituted pursuant to provisions of the Fire Brigades Act 1942. By Section 5 of that Act various districts are constituted as fire districts for the purposes of the Act. The Western Australian Fire Brigades Board is constituted to pursuant to Section 6 which provides that the Board should be a body corporate and shall be capable in law of suing and being sued. By Section 25 the functions of the Board are to take all necessary steps for preventing and extinguishing fires and protecting and saving life and property from fire. The Board has the power to do all things necessary or convenient for or in connection with the performance of its functions. The Board may, in performing its functions, act alone or in conjunction with any person or department of the Government or State instrumentality.

By Section 29 the Board shall from time to time appoint such employees as shall be deemed necessary and, subject to the provisions of a relevant award or industrial agreement under the Industrial Relations Act 1979, or of any relevant award or agreement under the Public Service Arbitration Act 1966 and the Regulations, the Board shall have the power of suspension and removal of all such officers and members and employees.

Section 29(2) provides that:

> *"Subject to any award or industrial agreement under the Industrial Relations Act 1979 or of any relevant award or agreement under the Public Service Arbitration Act 1966 the officers and members of any permanent fire brigade and the other employees aforesaid shall be respectively paid such salaries and wages from the funds of the Board as the Board shall from time to time direct, or as may be directed by regulations."*

By Section 35 the Governor has power to make regulations for various purposes including pursuant to Section 35(e) *"for the establishment and maintenance of brigades and for the payment of salaries or wages to officers and members of permanent brigades and other employees."*

Fire Brigades Regulations

It was common ground at the hearing that the Governor had made regulations pursuant to the provisions of the Act. In Part III the Regulations contain various financial provisions. By Regulation 56 all payments of $2.00 and over shall be made by cheque upon the bankers of the Board, signed by any two of the persons from time to time appointed by resolution of the Board for that purpose.

Part VI of the Regulations contains provisions relating to permanent fire brigades and provisions relating to employees of the Board. By Regulation 119 all officers and firemen shall render immediate obedience to all lawful orders from their senior officers and must conform to all rules and regulations which have been made or may be made from time to time in the Brigade orders. By Regulation 129 firemen shall receive such sick, annual and other leave (other than long service leave) as determined by an industrial award or agreement, provided that further sick leave, with or without pay, may be granted at the discretion of the Board. By Regulation 133 no officer or fireman shall accept or engage in any employment for reward other than in connection with his duties or absent himself while on duty from the station to which he is attached without permission of the officer in charge.

Regulation 141 is in these terms:

> *"Any officer or fireman desiring to terminate his service (unless under special circumstances) must give at least 7 clear days notice in writing, addressed to the chief officer. Any officer or fireman resigning or discontinuing his duties without such notice, or without special permission, shall be liable to forfeit all pay due to him, and to be formally dismissed."*

Regulation 141A is in these terms:

> *"An officer, fireman or other employee of the Board -*
>
> *a) may retire from the service of the Board on or after reaching the age of 55 years;*
>
> *b) if he has not retired from the service of the Board before reaching the age of 65 years, shall so retire on reaching that age."*

The Tribunal pauses to note that neither the Act nor the Regulations contain any definition of what constitutes "resigning" or what is meant by the term "retire" from the service of the Board. There is room for argument, of course, as to whether, notwithstanding the absence of a definition, the meaning of the term "retire" may be affected by the terms of Regulation 141A whereby the concept of retirement is linked to the attainment of a certain age.

The Tribunal also pauses to note that when considered in their entirety the provisions of the Fire Brigades Act and the Regulations made thereunder suggest that the financial affairs of the Fire Brigades Board are strictly controlled and that payments made out of the funds of the Board can only be made in accordance with its statutory and contractual obligations. Prima facie, the Board does not have a general discretion to waive its obligations or make payments in order to achieve what might be thought to be a just result in the circumstances of a particular case. The effect of Section 29(2) of the Fire Brigades Act and the related provisions mentioned earlier is that the Board is positively obliged to make payments by way of salary if the employee is eligible to receive the same in the sense that he or she has met whatever requirements are prescribed by an industrial award. As the Board is given no general discretion to disburse its funds as the need arises, it seems to follow that before making any payment to an employee the Board is under a duty to establish that the circumstances or conditions necessary to justify such a payment have actually arisen or are in existence.

Industrial Relations Act 1979

The Industrial Relations Act 1979 sets up an Industrial Relations Commission which is obliged to perform the various functions assigned to it by the Act which

include the resolution of industrial disputes. By Section 34 the decision of the Commission shall be in the form or an award, order, or declaration and shall in every case be signed and delivered by the Commissioner constituting the Commission that heard the matter to which the decision relates.

Section 37 provides that:

> *"1) An award has effect according to its terms, but unless and to the extent that those terms expressly provide otherwise, it shall, subject to this section -*
>
> *a) extend to and bind -*
>
> *i) all employees employed in any calling mentioned therein in the industry or industries to which the award applies; and*
>
> *ii) all employers employing those employees; and*
>
> *b) operate throughout the State, other than in the areas to which section 3(1) applies."*

Fire Brigade Employees Award

It was common ground at the hearing that pursuant to provisions of Industrial Relations Act the Commission had made an award to be known as the Fire Brigade Employees' Award 1990 which was published in the Western Australian Industrial Gazette. There have been various amendments to the Award full particulars of which were made available to the Tribunal at the hearing. The Tribunal understood as a result of the exchanges occurring during the course of the hearing that it was at liberty to treat a consolidation of the Award prepared by the Fire Brigades Board (which was handed to the Tribunal during the course

of the hearing) as an accurate reflection of the provisions of the Award at the material times mentioned below ("the Award").

Clause 1A provides it is a condition of this Award/Industrial Agreement that any variation to its terms on or from the 24th day of December 1993, including the arbitrated safety net adjustment of up to $8.00 per week, shall not be made except in compliance with the principles set down by the Commission in reasons for decision in Matter Number 1457 of 1993.

Clause 1B provides that:

> *"It is a condition of this Award that the wages and conditions which apply to employees covered by Clause 3 - scope of this Award do not exceed those prescribed in the Award."*

By Clause 3 the Award shall apply to those employees classified in Clause 6. In Clause 6 one finds reference to various categories of employee such as firefighters, station officers, district officers and fire safety assistants. Clause 12 deals with long service leave.

Clause 12(1) provides that:

> *"Every employee shall be credited with a period of 13 weeks long service leave for and on the completion of each of the consecutive periods of continuous service as follows - the first 10 years, and thereafter for each period of seven years.*
>
> *a) long service leave shall be granted solely for recuperative purposes;*
>
> *b) no employee shall undertake during long service leave, without the consent of the Board, any form of employment for higher*

or award. Any contravention of this condition shall render the employee liable to dismissal."

Clause 12(13) deals with accumulation of leave and provides that *"Employees over the age of 55 years may, by written application to the chief officer, apply for permission to accumulate two periods of long service leave".* Such application shall be submitted as early as possible and shall not be considered unless reasonable notice is given.

Clause 12(14) deals with payment for leave credited as due. It provides:

a) an employee may, on commencing long service leave, be paid his/her salary or wages in advance, at his/her permanent classified rate of pay, for a period equivalent to the leave taken.

b) an employee who retires at the age of 60, or at any time thereafter up to the age of 65, or who retires on account of incapacity due to old age or through ill health, or the result of an accident, shall be paid for long service leave as credited.

c) an employee who resigns other than to escape dismissal, shall be paid for any long service leave as credited.

d) an employee who is dismissed, or who resigns in order to escape dismissal, shall be entitled to payment for any long service leave credited as due to him/her prior to the date of the offence for which he/she was dismissed or resigned in order to escape dismissal."

Importantly, for the purposes of these proceedings, Clause 12(15) deals with pro rata leave on retirement and provides that:

a) where an employee retires or is retired under the circumstances mentioned in this clause and has served continuously for at least 12 months next before such retirement, such employee shall be paid (in addition to any

complete periods of long service leave credited as due) for pro rata long service to the date of retirement.

b) ...

c) *subject to the provisions of this clause, any employee who is retired for any reason other than misconduct or unsatisfactory service, shall be paid for long service leave pro rata to the date of retirement."*

The Tribunal pauses to note that the Award does not contain any definition of what constitutes a resignation or retirement, nor does it expressly indicate what is embraced within the concept of an employee who "is retired".

Clause 33 of the Award deals with termination of employment. It provides that the employment of any employee covered by this Award shall be terminable by two weeks notice on either side except that an employee deemed guilty of gross misconduct or neglect of duty, may be instantly dismissed or suspended from duty and shall not be entitled to any such notice or payment in lieu.

Statement of Agreed Facts

The parties by the respective legal representatives had managed to negotiate a statement of agreed facts prior to the hearing of the preliminary issue and this was submitted to the Tribunal at the commencement of the hearing. As argument proceeded the various letters mentioned in the statement were received in evidence and therefore the facts and matters which follow reflect the statement of agreed facts as supplemented by the relevant correspondence.

The statement establishes that the Complainant, John Parsons, was born on 7 June 1953. He commenced employment with the Fire Brigades Board on 10 December 1976.

By letter dated 10 January 1995 the Complainant advised the Respondent Board of his intention to retire from his employment with the Respondent, to be effective on 24 January 1995. At the time he wrote the letter, the Complainant was 41 years of age.

His letter dated 10 January 1995 is in these terms:

> *"I am writing to advise you that I am giving 14 days notice that I wish to retire from service with the W.A. Fire Brigades Board, effective 0800 hours Tuesday 24 January 1995. Please advise the requirements necessary to complete the retirement process and provide me with a detailed payout figure ..."*

The statement of agreed facts goes on to state that if the Complainant had been 55 years of age or over as at 24 January 1995 the Respondent would have permitted him to retire. This was a reference to Regulation 141A of the Regulations referred to above which, as mentioned earlier provides that an employee of the Board "may retire from the service of the Board on or after reaching the age of 55 years".

According to the statement of agreed facts, the Respondent Board advised the Complainant by letter of 19 January 1995 that his cessation of employment would be recognised by the Respondent as a resignation. For the sake of completeness the Tribunal notes that the relevant letter is in these terms:

> *"In your letter you have stated your intention to retire from the Brigade effective 24 January 1995. Such a request is inconsistent with the Fire Brigades Act 1942, Fire Brigades Amendment*

Regulations 1986. Regulation 141A states that a "fireman may retire from the service of the Board on or after reaching the age of 55 years". Therefore, technically your cessation of employment will be recognised as a resignation. Your entitlements upon your cessation of employment are 6.15 days annual leave. You will also need to contact the Superannuation Board with respect to your superannuation entitlement."

The statement of agreed facts also establishes that the Complainant ceased employment with the Respondent on 24 January 1995. The Complainant was not paid pro rata long service leave by the Respondent. If the Complainant had been permitted to retire by the Respondent he would have been paid pro rata long service leave by the Respondent.

Subsequent Events

The Complainant subsequently lodged a complaint with the Commissioner for Equal Opportunity pursuant to provisions of the Equal Opportunity Act. The Commissioner investigated the complaint and advised the Complainant of her decision to dismiss the complaint, pursuant to Section 89 of the Act, since she was of the opinion that the complaint referred to an act that was not unlawful by reason of exception contained in Section 66ZS of the Act, a provision which the Tribunal will come to in a moment.

The Complainant was advised of his rights pursuant to Section 90 of the Act to request that the Complaint be referred to the Tribunal for inquiry, whereupon he proceeded to make the request and the matter was then referred to this Tribunal.

Statutory Provisions

In 1992 the Equal Opportunity Act was amended to cover discrimination on the ground of age.

At the hearing before the Tribunal, with a view to attempting to resolve what was said to be an ambiguity in the relevant provisions, Counsel for the Complainant sought to rely upon the Second Reading Speech of Tuesday 1 December 1992 as reported in Hansard as an aid to interpretation. That speech refers to the purposes underlying the amending Bill. The principal purpose of the Bill was to include further grounds of discrimination including age. The Minister said:

> *"This Bill makes the arbitrary use of age as a criterion to assess ability and capacity unlawful. Such discrimination occurs when assumptions about productivity, maturity and health are interwoven with age ... such discrimination is based on stereotype images of people at either end of the spectrum - too young to be responsible and too old to be productive and capable. The use of stereotypes when dealing with groups of people denies them the opportunity to participate as they choose in society. ...In relation to employment, the Bill does not include an exception which relates to the ability of the person to carry out work required to be performed in the course of the employment. Although such an exception was originally proposed in the discussion paper, it was deleted when submissions received cogently argued that the recommendations reinforce perceptions about the physical capacity of the ageing and the aged. The alternative exception provided in the Bill enables conditions to be imposed which comply with reasonable health and safety requirements. These amendments to the Act are predicated on the principle of ability to do the job."*

As a consequence of the amendments Section 66V now provides that a person discriminates against another person on the ground of age if on the ground of the age of the aggrieved person or a characteristic that appertains generally to persons of the same age of the aggrieved person the discriminator treats the aggrieved person less favourably than in the same circumstances, or in

circumstances that are not materially different, the discriminator treats or would treat a person who is not of that age.

By Section 66W(2) it is unlawful for an employer to discriminate against an employee on the ground of the employee's age (a) in the terms or conditions of employment that the employer affords the employee ... or (d) by subjecting the employee to any other detriment.

The Tribunal pauses to observe that against the background of these provisions the Complainant asserts that he has been discriminated against on the ground of his age in that another employee in the same circumstances, that is to say, someone who has rendered more than 10 years continuous service with the Board, would obtain a benefit by way of an entitlement to pro rata accumulated long service leave on the occasion of his ceasing to be employed by the Fire Brigades Board if he had reached the age of 55 and was permitted to retire in the manner allowed for by Regulation 141A. Thus, it is contended, an employee such as the Complainant, as a consequence of a consideration referrable to age, namely, his failure to attain the age of 55 years, is denied a benefit of which is available to employees whose only additional virtue is that they have attained the age of 55.

The Tribunal pauses to note that the application of these provisions was not in issue at the preliminary hearing. Argument was confined to the question of whether the exception contained in Section 66ZS was applicable. The assumption on the part of counsel for both parties was that if the exception did apply then the complaint was lacking in substance. If the exception was found not to apply then the case would proceed to a hearing at a later date at which time, against the background of evidence received at a further hearing, the

Tribunal would proceed to determine whether there had been discrimination on the ground of age within the meaning of the statutory provisions.

This brings the Tribunal to Section 66ZS of the Act. It appears beneath the heading "Acts done under the statutory authority, etc."

Section 66ZS of the act provides that:

> *(1) Nothing in this Part renders unlawful anything done by a person if it was necessary for the person to do it in order to comply with a requirement of -*
>
> *(a) any other written law which is in force when this Part comes into operation, not being -*
>
> *(i) the rules of a society registered under the Co-operative and Provident Societies Act 1903;*
>
> *(ii) the rules of a credit union within the meaning of the Credit Unions Act 1979;*
>
> *(iii) the rules of a society registered under the Friendly Societies Act 1894; or*
>
> *(iv) the rules of a building society registered under the Building Societies Act 1976;*
>
> *or*
>
> *(b) an award or industrial agreement within the meaning of the Industrial Relations Act 1979 or an award within the meaning of the Industrial Relations Act 1988 of the Commonwealth insofar as that award or industrial agreement relates to the payment of wages or other remuneration to employees under the age of 21 or to the maintenance of a ratio between employees under a certain age and employees of or above that age, and it is lawful for a person to publish or display, or cause or permit to be published or displayed, an advertisement or notice relating*

to vacancies in employment for persons under the age of 21.

It is material to note that in Section 66ZS(3) the Commissioner is required within a period of two years to undertake a review of written laws referred to in subsection 1 with a view to identifying circumstances where discrimination on the ground of age occurs and to furnish a report of the findings of the review. In other words, it seems to be recognised that as a consequence of past attitudes there probably are various statutory provisions which reflect discriminatory practices. In considering the effect of this exception Counsel for the Complainant placed some reliance upon the Second Reading Speech in Hansard during the course of which the Minister said:

> *"The proposed Section 66ZS proposes to exempt acts which are done in compliance with industrial agreements which relate to provisions in awards and industrial agreements relating to the payment of youth wages, maintenance of ratios of junior employees and adult employees. This proposed section proposes that the Commissioner for Equal Opportunity review all written laws and regulations which contain age related provisions."*

Complainant's Submissions

Counsel for the Complainant submitted that the effect of Section 66ZS is to allow only an exemption in certainly narrowly defined areas and does not have the effect of excluding liability in the circumstances of the present case.

Counsel argued that by Clause 12 of the Award mentioned earlier an employee is entitled to 13 weeks long service leave after completion of the first 10 years of continuous service and thereafter for each period of 7 years. Clause 12(15)

provides for pro rata long service leave on retirement. It entitles the employee who retires (or is retired) and has served continuously for at least 12 months to be paid for pro rata long service leave to the date of retirement. Clause 12(15)(C) *(supra)* provides for payments to be made to "any employee who is retired for any reason other than misconduct or unsatisfactory service".

She went on to submit that as "retirement" is not defined in either the Fire Brigades Act and Regulations or in the Award the concept embraces any voluntary withdrawal of services and, contrary to the stance adopted by the Fire Brigades Board (and the Commissioner for Equal Opportunity subsequently), is not limited simply to a voluntary withdrawal of services in circumstances where the employee is eligible to obtain a particular benefit by virtue of having reached the age of 55 years. Refusal to grant him the pro rata long service leave was arguably discriminatory in that he was being treated less favourably than a person who is 55 years of age and "retires" from the Board and thereupon obtains certain benefits as a consequence of the terms of his employment.

The Complainant submitted that the exception contained in Section 66ZS does not apply because it only exempts an act if it was necessary for the person to do the act in order to comply with the requirement of ... "any other written law".

Counsel for the Complainant submitted that it was not necessary in order to comply with the provisions of any written law for the Board to refuse to grant the Complainant his pro rata long service leave. The Award is not expressed in negative or exclusive terms. It simply provides that once a person retires, he or she is entitled to pro rata long service. However, it does not prohibit expressly any person leaving his or her employment prior to the age of 55 years from being granted pro rata long service leave. The Regulations do nothing more than

convey a sense of what is meant by "retirement" and do not purport to govern the circumstances in which a payment may be made. The Regulations are simply silent on the question of whether the payment should be made. It therefore cannot be said that the Fire Brigades Board was under a duty not to pay the amount which might otherwise be due, or that the Board was otherwise (within the language of the Act), of necessity required by the Regulations and the Award to refuse payment.

Decided Cases

Counsel for the Complainant drew attention to the fact that equal opportunity legislation in Australia and the United Kingdom provides for similar exemptions to that provided in Section 66ZS and there has been a tendency for such exemptions to be read narrowly in order not to defeat the purposes of the legislation.

In Hampson v Department of Education and Science (1991) 1AC 171 a teacher who had trained in Hong Kong came to England and applied for qualified teacher status but her application was refused by the decision-maker pursuant to provisions which were held to allow him a discretion in regard to the recognition of qualifications within the language of the Race Relations Act. This was said to be permitted by a provision whereby otherwise discriminatory acts done "in pursuance of any instrument were rendered lawful". The House of Lords held that the exception was on its true construction restricted to acts or requirements specified in the instrument since any wider construction of the expression would be irreconcilable with the anti discriminatory purpose of the Act. The discretionary power was "in pursuance of any instrument" in a general sense of being exercised in accordance with the relevant provisions but being the exercise

in administrative discretion it was not "in pursuance of" the Regulations within the meaning of the statutory exception in the narrower and more preferable sense of being dictated by or a requirement of the Regulations.

In delivering the principal judgment of the House of Lords, Lord Lowry pointed out that the Race Relations Act bound the Crown, which, apart from the prerogative, discharges its duties and exercises its powers by virtue of a multitude of statutes and regulations. The Act was not only binding on the Crown but on local authorities and a large number of statutory bodies, including the governing bodies. These bodies would achieve virtual immunity under the wide construction. The exception in the Act was not intended to exclude discretionary acts but only those which had to be performed as a matter of obligation or duty.

Counsel also drew attention to a number of decided cases relevant to this point arising under the legislation in New South Wales. Prior to the amendment of the Anti Discrimination Act 1977 in that State in 1982 the comparable section was worded "anything done by a person in compliance with" an act, instrument, court order, award or agreement was rendered lawful even though it might otherwise have been discriminatory. In Director General of Education and Anor v Breen (1984) EOC 92-015 the Court of Appeal held that "in compliance with" could refer to acts in accordance with the statute, even though there was no duty to act. It seems that in order to avoid this wide interpretation of the exception the Section was subsequently amended with the result that the exception only applies if the decision-maker has no choice under the legislation controlling his actions but to commit the discriminatory act.

A narrow interpretation of a similar Victorian provision was adopted by the High Court in Waters v The Public Transport Corporation (1991) EOC 92-390. In that case the Minister for Transport made a direction under the Transport Act (Vic) for the introduction of certain changes to the Victorian Public Transport system. The changes were alleged to have a discriminatory impact upon people with disabilities. The High Court held the compliance with the Minister's direction did not come within an exception contained in Section 39(E)(ii) of the Equal Opportunity Act (Vic) relating to acts done to comply with the provision of "any other Act" as there was a discretionary element involved in the Minister's decision to introduce the changes. Mason C.J. and Gaudron J., said that the words, in the context of the Act, should be construed narrowly, with the effect that "a provision of ... any other Act" could only refer to that which is necessary "in order to comply with a specific requirement directly imposed by the relevant provisions as distinct from a requirement imposed by some person in the exercise of some power conferred by the provisions".

It appeared to be common ground at the hearing before the Tribunal that the burden of establishing that the exception is available to excuse conduct otherwise unlawful lies upon the party alleged to be guilty of unlawful discrimination which, in the circumstances of the present case, is the Respondent Fire Brigades Board.

Respondent's Submissions

Counsel for the Respondent submitted that the Complainant had not reached the age of 55 years and was therefore not eligible to retire and receive pro rata long service leave. Although the term is not defined expressly the effect of Regulation 141A is that a cessation of employment can only be described as a

retirement if it is effected by an employee who has reached the age of 55 because it is only in that context that term retirement occurs. Any withdrawal of services prior to the employee having reached the age of 55 can only be characterised as a resignation, being the stance adopted by the Fire Brigades Board in the circumstances of the present case.

Counsel went on to submit that the actions of the Respondent were "necessary" in order to comply with the requirement of the written law, namely, Regulation 141A of the Regulations, because the Board was obliged to respect and act in accordance with the eligibility requirement established by that provision. Unlike the instrument in Hampson v Department of Education *(supra)* the Board was not exercising a discretionary power. It was not in a position to make a discretionary determination as to whether a withdrawal of services should be characterised as a resignation or a retirement. Any attempt to treat the withdrawal of services as a "retirement" notwithstanding that the employee had not attained the age of 55 would be an unauthorised payment because there was no provision in the Fire Brigades Board Act or Regulations to permit a payment in such circumstances.

For all these reasons, it was argued, that the exception applied because the Fire Brigades Board was duty bound to decline any attempt to have a voluntary withdrawal of services characterised as a retirement in circumstances where the age of 55 had not been attained and in that way it was necessary for the Board to do the operative act, namely, the refusal of the application for a pro rata long service payment, "in order to comply with a requirement of any other written law". In this case the written law was the Fire Brigades Act and Regulations made thereunder, and Regulation 141A in particular, considered in combination.

Findings on the First Issue

The Tribunal considers that the effect of Section 66ZS(1)(a) exempts the Board from liability in the circumstances of the present case. The Board could only make payments to employees where they were eligible to receive the same. In the absence of any discretion or specific power to the contrary, the Board was under a duty to establish that the circumstances creating the eligibility existed. The effect of Regulation 141A was to establish that in order to retire one had to reach the age of 55 years. The Board was therefore obliged to refuse to make the payment sought by the Complainant. The refusal was necessary in order to meet the requirement of the statute controlling the operations of the Board and the regulations made thereunder. Within the language of the relevant provision it was necessary in order to comply with a requirement of a written law with the result that conduct which might otherwise have given rise to a liability under the Act was excused pursuant to Section 66ZS(1)(a).

Second Issue

The second line of argument advanced by Counsel for the Complainant related to a construction of Section 66ZS(1)(a) read together with sub-paragraph (b) of that section. Counsel submitted, in effect, that the exception only purports to exclude anything done by a person if it was necessary for the person to do it in order to comply with the requirement of "any other written law" or, having regard to Section 66ZS(1)(b) an award, insofar as that award relates to remuneration of employees under the age of 21 or to the maintenance of a ratio between employees under a certain age and employees of or above that age. Counsel submitted that the operative act, (i.e. the thing which had to be done) was a payment under the Award and in the circumstances of the present case the

Award did not fall within the concept of "any other written law" because that exception was confined to statutory provisions and the alternative area of exclusion, which is to be found in 66ZS(1)(b), deals only with narrowly limited facets of awards which do not apply in the circumstances of the present case.

Counsel argued, in other words, that the Award in the present case does not fall within the ambit of Section 66ZS(1)(b) because sub-paragraph (b) only relates to awards insofar as these awards relate to the payment of wages to employees under the age of 21 years or to the maintenance of ratios between employees of certain ages. This is an extremely narrow exemption, the effect of which only exempts certain parts of an award, namely, those that relate to junior rates of pay and age ratios within workplaces. The effect of this is that the Award in the present case is not excluded by sub-paragraph (b). The relevant provisions of the Award in the present case relate to long service leave not to any of the special and rather narrow circumstances addressed by sub-paragraph (b).

Further, Counsel submitted, the Award in the present case cannot be regarded as "any other written law" so as to bring the situation within the first limb of the exception. This is because the question of awards and industrial agreements are dealt with exclusively by the provisions of Section 66ZS(1)(b). In accordance with the *expressio unius principle* of interpretation, it is reasonable to conclude that parliament only intended that awards be excluded in the manner set out in sub-paragraph (b). This view of the matter is reinforced, Counsel submitted, by the categories of legislation set out in Section 66ZS(1)(a). They are all Acts of Parliament, and therefore in an entirely different category to industrial awards.

Counsel also suggested that the Tribunal was entitled to take into account the Second Reading Speech relating to statutory provisions referred to earlier. That

speech suggested that the view of the government at the time was the need for overarching provisions relating to age discrimination with a number of limited exceptions. The speech said that the *"proposed Section 66ZS exempts acts which are done in compliance with industrial agreements which relate to provisions in awards and industrial agreements relating to the payment of youth wages, maintenance of ratios of junior employees and adult employees"*.

Findings on Second Issue

Having given careful consideration at the various arguments advanced on behalf of the Complainant, the Tribunal was nonetheless satisfied that the exception did apply to the circumstances of the case. The Tribunal's reasoning in that regard has already been revealed in its earlier finding. The Tribunal considers that the operative act which had the potential to attract the application of those provisions of the act making discrimination unlawful on the ground of age was not simply a decision under the Award to pay or not to pay. The criteria contained in the Award were certainly one point of reference as to the circumstances in which a payment should be made to an employee who was departing voluntarily. However, the terms of the Award could not be applied to the situation in isolation. The Fire Brigades Board was also duty bound to give consideration to the Fire Brigades Act and Regulation which also had an effect upon the circumstances in which payments could be made.

Before a payment could be made the Board had to determine whether the circumstances amounted to a retirement. If the employee was clearly over the age of 55 years then it might seem that the Board was going straight to the provisions of the Award in order to determine the nature of the entitlement and that thus, superficially, the Award was the only point of reference. However, in

circumstances where the employee had not reached the age of 55, the Board then had the slightly more difficult task of determining whether the withdrawal of services could properly be characterised as a retirement (or circumstances where the employee "is retired") within the meaning of Clause 12(15) of the Award. In order to resolve that dilemma it was obliged to look not only at the provisions of the Award but also at the statutory controls which regulate the manner in which it conducted its business. Those controls included Regulation 141A which indicated that a withdrawal of services could not be characterised as a retirement unless the departing employee had reached the age of 55 years and was eligible for retirement. Thus, the act complained of could properly be described as an act done of necessity in compliance with provisions of the Regulations which, being a written law, brings the case within the first limb of the exception constituted by the relevant provision, namely, Section 66ZS(1)(a). This finding is consistent with the earlier finding made by the Tribunal in regard to the first issue.

Conclusion

It therefore follows from the reasons set out above that in the view of the Tribunal the Respondent Board is entitled to rely upon the exception constituted by Section 66ZS(1) with the result that, on this finding, the complaint is lacking in substance and should be dismissed. As foreshadowed earlier, it therefore becomes unnecessary to examine the question of whether the various steps taken by the Board in reliance upon the provisions of the Act and Regulations and the Award amount to unlawful discrimination within the Act or to proceed further with the conduct of the inquiry.