

IN THE EQUAL OPPORTUNITY TRIBUNAL  
OF WESTERN AUSTRALIA

Matter Number 19 of 1997

IN THE MATTER OF A COMPLAINT BY:

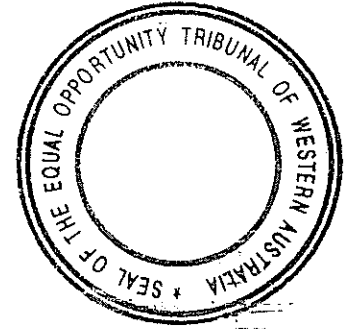
**NIDTHAYA McINTOSH**

Complainant

- against -

**HAUTLIEU PTY LTD Trading as  
RUSSELL PATHOLOGY**

Respondent



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**REASONS FOR DECISION**

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Before:                    Mr N Hasluck, QC                    President  
                                 Mr C Jacobs  
                                 Mrs T Ackland

For the Complainant:                    Ms H Andrews

For the Respondent:                    Mr M Zilko

Heard:                    4-7 August 1998  
                                 11 August 1998

**REASONS FOR DECISION**

Delivered:



### Reasons for Decision

The Complainant, Nid McIntosh, claims that the Respondent, Haultier Pty Ltd trading as Russell Pathology, discriminated against her on the ground of her family status. She also claims that she was subjected to victimisation contrary to Section 67 of the Equal Opportunity Act 1984 as a consequence of lodging a complaint concerning the alleged discriminatory conduct. These complaints arise out of her employment with the Respondent which commenced in February 1992.

### Russell Pathology

Dr Robert Russell is a medical practitioner who went on to become qualified as a clinical pathologist in 1979. A few years later he set up a firm called Consultant Pathology Services and then, in March 1988, via the Respondent company, he commenced trading as Russell Pathology.

There were a number of firms operating in the field of pathology as at 1992 including the St John of God Health Care Group and Western Pathology, also known as Western Diagnostic Pathology, the latter firm being controlled by the Mayne Nickless Group. These two firms controlled about 85% of the pathology market and the other 15% was divided up between a number of small operators including the Respondent. At that time the Respondent company had laboratory premises at Victoria Park and premises used principally for administration in Maylands. The Respondent firm was dependent upon being recommended by medical practitioners and consequently there were various collecting centres located throughout the metropolitan area at which samples could be taken from patients for processing at the laboratory in Victoria Park. Payment for services rendered by the Respondent was obtained largely from Medicare and in order to function efficiently it was important to maintain a strict control over billing

(otherwise known as accounts receivable) and the collection of debts owed to the company by private patients.

Dr Russell addressed all these matters while giving evidence and it was apparent that he was very much a 'hands on' manager who was fully acquainted with every aspect of his business. He also had to keep a close watch on the work of the cytologists, phlebotomists, screeners and other technical staff employed by the firm.

### The Complainant

On 8 February 1992 the Respondent placed an advertisement in *The West Australian* newspaper for an "Office Manager". At that time the financial affairs of Russell Pathology were under the control of a Mr Ray Woolley and with an employee the Tribunal will call H being principally responsible for accounts receivable. The latter employee had followed some unacceptable practices and her employment had been terminated with the result that a replacement had to be found. The Complainant replied to the advertisement and in due course was interviewed by Dr Russell.

Nidhaya McIntosh (known as Nid by her colleagues) had a degree of Master of Economics from an university in Thailand and had subsequently obtained professional accounting qualifications from Edith Cowan University. Her sister, Teerawan Polsittichock, was already working for Russell Pathology as a screener in the cytology section of the business at Victoria Park. Nid McIntosh commenced work in the position of senior clerk accounts receivable but, on her evidence, after a probationary period, she assumed the position of office manager. According to her, she reported to the financial controller, Ray Woolley, and was in turn responsible for some employees below her including Belinda Ford. She saw Dr Russell quite frequently and enjoyed congenial relations with him in the first few years of her employment. At that time Dr Russell's personal assistant was Betty Flynn who took an interest in a number of managerial matters and was also involved in running another of Dr Russell's companies to do with medical supplies.

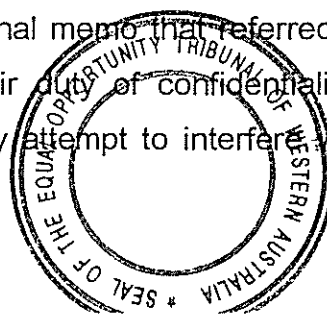


### The Initial Period of Employment

Nid McIntosh said in evidence that during the initial period of her employment, that is to say, from February 1992 to April 1995 she enjoyed good relations with Dr Russell and other senior figures in the Respondent firm. She was responsible for billing Medicare and private patients. She was entrusted with the power to counter-sign cheques on behalf of the firm. Various witnesses confirmed that she carried out her work efficiently and was generally respected.

Ray Woolley said that she tackled new tasks with the same proficient manner as she displayed in all her work. Michael John Fitzgerald commenced employment with the firm in 1989 and was offered the position of assistant accountant in January 1993 after completing a part-time degree in accounting. He held that position for 12 months and was responsible for monthly accounts, payroll functions and other duties assigned to him by Ray Woolley. He said that at that time Nid McIntosh's position was office manager and she looked after a number of aspects of the business, including incoming cash flow, payment of supplies, Medicare receipts, and the debtors function. Apart from Nid there were three other people working in the accounts section, including Nid's assistant, Belinda Ford, and Dr Russell's mother. Nid was generally responsible for supervising these people. At no time whilst Mr Fitzgerald was working in the accounts department did he have cause to question Nid's ability or attitude. She appeared to get along with all the staff in the accounts department.

Mr Fitzgerald went on to say that in early 1993 Ray Woolley discontinued his association with the Respondent firm and started a pathology business with Russell Pathology's laboratory manager, Mr John Neal, who had resigned. According to Mr Fitzgerald, the atmosphere around the office at this time was quite tense and Dr Russell distributed an internal memo that referred to the new rival business and reminded staff of their duty of confidentiality. Dr Russell, in the memo, was quite clear that any attempt to interfere with the



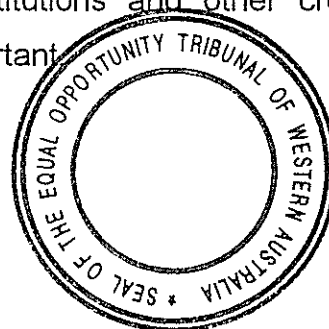
goodwill of Russell Pathology would be met with legal action. The relevant memo, dated 12 March 1993, reads in part:

"I can assure all staff that any attempt to transfer the goodwill from this business and all of its employees to any other like business for the benefit of a few individuals which might endanger our livelihood will be met with the appropriate legal response no matter what the cost."

Mr Fitzgerald also recalled an occasion soon afterwards when a meeting was held at which Dr Russell said that it had come to his attention that Sue Neal, an employee of Russell Pathology, and a daughter of John Neal, had been trying to attract clients away from Russell Pathology in favour of her father's firm. Dr Russell then went on to announce in front of the assembled staff that Sue Neal was dismissed from her employment.

The Tribunal pauses to note that Sue Neal gave evidence at the hearing and confirmed that her employment with Russell Pathology was terminated soon after her father had set up the rival organisation. She said, during the course of her evidence, that she was not aware her father intended to set up a rival firm until it happened and she had not in fact been soliciting business on her father's behalf. Aggrieved by the termination, Sue Neal commenced proceedings in the Industrial Relations Commission. The relevant transcript shows that in the end Dr Russell was prepared to pay the amount claimed by the disaffected former employee so long as she was prepared to give an undertaking not to damage his business through breach of confidentiality.

Dr Russell confirmed in evidence that confidentiality was an important consideration. Competition in the pathology field was keen. Most of the pathology businesses were using similar techniques but on the financial side of the business it was important that cash flow and credit details be kept confidential otherwise a business such as Russell Pathology might have difficulty in obtaining credit from lending institutions and other creditors. Medical practitioner referral lists were also important.

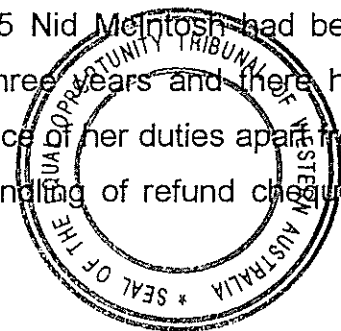


### Bentley Park

In July 1994 the Respondent firm moved to new premises at Technology Park, 3 Turner Avenue, Bentley with the result that both the laboratory staff and administrative staff were brought under the same roof. Some other changes took place at about this time including the departure of Betty Flynn and her replacement by a new personal assistant for Dr Russell named Emma Griffin (sometimes referred to as Emma Benney). The latter had previously worked for the accounting firm Arthur Anderson and was apparently knowledgeable about office systems. According to Dr Russell, he gave weight to various proposals put forward by Emma Griffin for revising the structure of Russell Pathology to reflect and respond to changes that were taking place elsewhere. These changes included a revision of the Medicare system of billing (following the introduction in Canberra of the Electronic Data Interchange or EDI method of paying accounts) and a perceived need to gradually move towards "multi skilling", that is to say, a system whereby each employee within the accounts section would be familiar with and able to perform the various tasks handled by the section.

Dr Russell said in evidence that, consistently with this line of thought, he took on as general manager of Russell Pathology a fellow medical practitioner well known to him, namely, Dr Karthigasu. The latter took up his position in April 1995. He is described as general manager in various documents and letters relevant to the present dispute but it became apparent as Dr Karthigasu himself gave evidence that his principal experience was as a medical practitioner and pathologist. He himself conceded that for a considerable period of time after taking up his employment he was not fully familiar with the various duties performed by those in the accounts section and was not experienced in the field of human resources administration.

The Tribunal pauses to note that as at April 1995 Nid McIntosh had been employed by Russell Pathology for a period of three years and there had been no significant complaints about her performance of her duties apart from a comparatively minor incident concerning the handling of refund cheques.

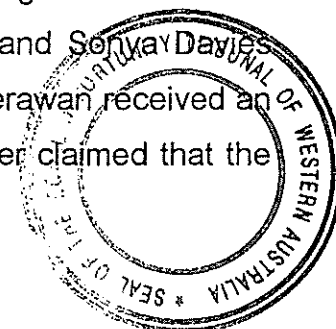


This caused Betty Flynn to express some criticisms about Nid McIntosh in a memorandum to Dr Russell dated 29 April 1994. It is apparent from that memorandum, however, that there was some difference of opinion between the two women as to their respective areas of responsibility which might explain the criticism. It is also significant that when Emma Griffin commenced her employment and prepared a document describing the positions held by the senior employees of Russell Pathology she described Nid McIntosh as holding the position of "Office Manager".

Nid McIntosh believed that she was generally respected but it appears that, unbeknownst to her, at least one senior member of staff was not well disposed towards her. Annette Sheahan was the head of the data entry section. In April 1995 she submitted a staff appraisal form to Dr Russell concerning Nid McIntosh which was extremely critical of her colleague, describing her as having poor communication skills and making reference to her lack of drive and lack of acceptance of responsibility. This form includes the passage: "I have no respect for her as a co-worker let alone as a manager due to her pathetic work output and work ethic." Nid McIntosh had no knowledge that Annette Sheahan had completed this form and was not aware that her co-worker held this adverse opinion of her. The appraisal form is expressed in general terms and does not pinpoint any facts or matters which were substantiated in evidence before the Tribunal concerning Nid McIntosh's alleged lack of competence. The appraisal form is simply dated "April 1995" and must therefore be considered in relation to certain controversial events that occurred in that month.

### Teerawan's Resignation

The Complainant's sister, Teerawan, gave notice of her wish to resign to Dr Russell and to her supervisor, Ms Sonya Davies, on 26 April 1995, as she needed time to take her son to school. Unhappily, her resignation coincided with arrangements previously made whereby Dr Russell and Sonya Davies would attend a conference in Spain. On 27 April 1995 Teerawan received an angry email message from Sonya Davies in which the latter claimed that the



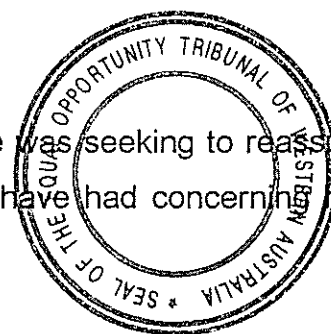
timing of the resignation was calculated to disrupt the leave arrangements previously made. She went on to say, rather bitterly, that another member of the Davies family was disadvantaged and deeply distressed by the resignation.

Teerawan was upset by this communication and enlisted the aid of Nid McIntosh's husband to compose a reply refuting the allegation and saying that she should not be expected to endure abuse of this kind. A copy of the reply was provided to Dr Russell on 28 April 1995. A few days later Teerawan was questioned about this letter by Dr Karthigasu and by Emma Griffin. She was also called into the office of Dr Russell and accused of encouraging other screeners to leave the company. Dr Russell then handed her a cheque for her final payment and told her not to return to work although she still had three days remaining under the period of notice she had given. Dr Russell said that her presence was upsetting other members of staff. On 5 May 1995 Teerawan obtained a job as a part time screener with the rival organisation Western Diagnostic Pathology. Dr Russell confirmed in evidence that he was aware soon after Teerawan's resignation had taken effect that she had gone to work for the rival organisation.

### The Complainant's Position

Several days after Teerawan's letter was received by Dr Russell, Nid McIntosh was called into her employer's office to discuss the incident concerning her sister and Sonya Davies. During the course of that interview Dr Russell informed the Complainant that her job was safe. He also questioned Nid McIntosh about her husband's authorship of Teerawan's response to the Sonya Davies criticism. This suggested to Nid McIntosh that the question of her future with Russell Pathology had become an issue in Dr Russell's mind, notwithstanding his representation that Nid McIntosh would not be affected by her sister's resignation.

Dr Russell said in evidence that in this interview he was seeking to reassure Nid McIntosh and alleviate any anxiety she might have had concerning her



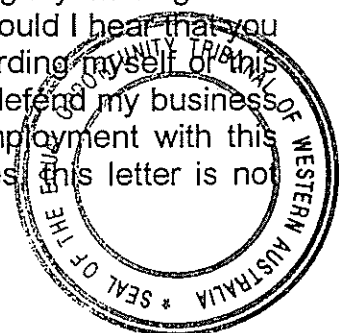


own position as a result of her sister's resignation. He also said in evidence that he was not particularly concerned by the fact that Teerawan had gone to work for a rival organisation because not only were there other employees with family members in rival organisations but also, earlier that year, he had commenced confidential negotiations with Dr McCully of Western Diagnostic with a view to selling Russell Pathology to the larger firm. In the course of those negotiations he had supplied trading figures concerning his business. Nonetheless, there were indications in the documentary evidence that Dr Russell did feel strongly about Teerawan's resignation.

A document was received in evidence (Exhibit 18), being a printout from Dr Russell's computer, in which he listed "interview questions for Teerawan Polsittichock" and the tenor of these questions reveals a rather angry frame of mind. For example, the first question was "why did you use one of my expensive pre-printed envelopes to anonymously deliver to me a copy of an Email?" Dr Russell said that he did not draw upon these private ruminations during the course of his interview with Teerawan and Teerawan in her evidence did not suggest that her employer's demeanour during the course of the interview was outwardly angry. Nonetheless the computer printout is a matter to be weighed in the balance.

In addition, by letter dated 15 May 1995 Dr Russell wrote to Teerawan requiring her to return to the laboratory a slide containing her personal pap smear tests on the basis that "this slide remains the property of Russell Pathology and failure to return the slide by tomorrow will force me to take further action." He went on to remind her that she was obliged to respect her confidentiality agreement with regard to information she had been privy to during the course of her employment and said further:

"Since your resignation, I have been approached by other staff and told that you have made derogatory comments regarding my 'management abilities' and this laboratory's 'financial stability'. Should I hear that you are making any further defamatory comments regarding myself or this laboratory I will take whatever action is required to defend my business reputation. While I am disappointed that your employment with this company could not end under better circumstances, this letter is not



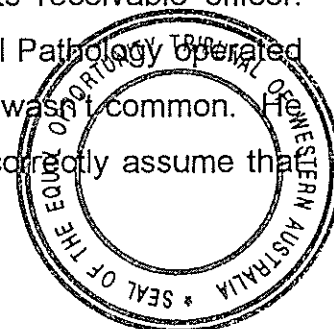
meant to constitute any sort of accusation with regards to your actions or intentions.”

### Subsequent Events

On 23 May 1995 Nid McIntosh was given a new contract of employment which arguably effected an alteration to her position. In the relevant contract letter dated 23 May 1995 she is described as “Accounts Manager”. The letter includes a clause indicating that her duties were on a probationary basis for three months and contains a confidentiality agreement. Nid McIntosh was concerned by the tenor of this document and subsequently negotiated for the probationary clause to be struck out of the agreement.

Nid McIntosh and other employees had not previously been required to sign written agreements. Dr Russell and other witnesses for the Respondent said in evidence that this requirement formed part of the proposed restructuring and pointed to the fact that other employees were required to sign such agreements. In particular, reference was made to an agreement signed in May 1995 by Belinda Ford, the accounts clerk, which also included a probationary clause. It is significant, however, that Nid McIntosh’s assistant received a significant salary increase and was also given responsibility for handling the Medicare billing. Nid McIntosh, on the other hand, was now assigned the task of following up debts due from patients and was expected to communicate frequently by telephone with outstanding debtors in the performance of this task.

Dr Russell said in evidence that the position now assigned to Nid McIntosh under the new contract of “Accounts Manager” did not signify any reduction in responsibility because, on his view of the matter, she had never been office manager and any references to her as office manager were due to a misunderstanding. She was employed as an accounts receivable officer. Betty Flynn was the office manager at that time. Russell Pathology operated under a ‘flat’ management structure and the use of titles wasn’t common. He conceded, however, that the staff would generally and correctly assume that



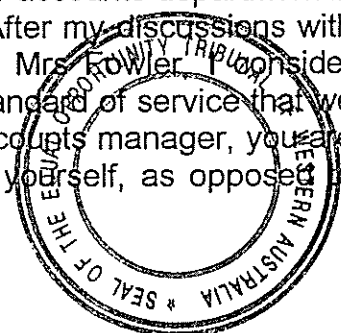
any instruction given by Ms Griffin or Dr Karthigasu reflected Dr Russell's requirements. In a letter to the Equal Opportunity Commission he said "at Russell Pathology we impose my standards ... Breaches of these standards are not tolerated, especially at a managerial level."

Dr Russell also said in evidence that Nid McIntosh obtained a new range of duties under the written agreement. The Tribunal notes, however, that the evidence he gave at the hearing to this effect was somewhat inconsistent with a statement he made in answer to a letter from the Commissioner of Equal Opportunity at an earlier stage of the dispute in which he said, in regard to the new contract of employment dated 23 March 1995, that the new position "represented a decrease in her total area of responsibility". He also said that the new contracts for Ms McIntosh and Ms Ford were brought about because of serious concerns held by management as to the capabilities of Ms McIntosh. It is significant that these concerns, if any, had not been outwardly conveyed to Nid McIntosh prior to the signing of the relevant contract. The Tribunal also notes in passing that in letters signed by Betty Flynn she described herself not as office manager but as 'personal assistant' or 'administrative assistant'. Ray Woolley in his evidence described her as a 'sort of personal assistant' to Dr Russell.

### Various Incidents

On 1 June 1995 a customer made a complaint about Nid McIntosh's telephone manner and lack of helpfulness. It seems that Dr Karthigasu inquired into this matter in a manner which discomforted the Complainant. Dr Karthigasu then wrote a letter to Nid McIntosh referring to the incident. That letter reads, in part:

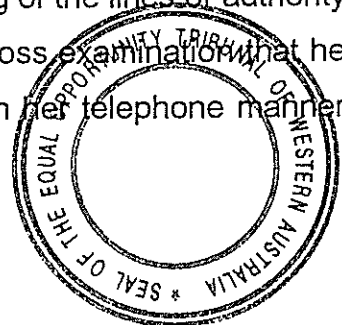
"I refer to the incident concerning Mrs Fowler and her complaint regarding the quality of service provided by our accounts department in dealing with her account enquiry this week. After my discussions with various staff members and this episode with Mrs Fowler, I consider your behaviour in this case to be below the standard of service that we expect from our staff ... in your position as accounts manager, you are expected to ... investigate account enquiries yourself, as opposed to



sending a copy of the account to the patient and asking the patient to conduct the investigation, process account enquiries and solve any problems that arise, as opposed to passing the call to a data entry clerk who is less experienced than yourself in the accounts area and cannot possibly give the patient the standard of service that an accounts manager should provide. You should consider this letter to be your first written warning concerning your standard of conduct. You hold a critical position in Russell Pathology and should further complaints be received, or other areas of your work be assessed as below an acceptable standard, I will be forced to review your employment with this company."

Nid McIntosh gave evidence that in the same month her junior colleague in the accounts section, Belinda Ford, was reprimanded over a similar yet more serious incident, but only verbally. Nid McIntosh was concerned that her junior colleague seemed to be treated in a more lenient manner. The Tribunal notes in passing that it is apparent from the letter just mentioned that Nid McIntosh was regarded as holding a senior position, namely, accounts manager, and that position placed her at a level above a data entry clerk.

In October 1995 Nid McIntosh was informed by Dr Russell that she was not performing her work to a satisfactory level. Further, on 31 October 1995 Dr Russell's personal assistant, Ms Griffin, allegedly informed the Complainant, in an aggressive manner and in a public area that she was to attend to the telephone duties of Belinda Ford when Belinda Ford was absent from her desk. A month later, on an occasion when Nid McIntosh had transferred a call from an irate patient to Belinda Ford in an attempt to calm the patient down, Ms Griffin, in a peremptory way, informed Nid McIntosh that she was to take the call. Ms Griffin prepared a lengthy memorandum dated 22 November 1995 directed to Dr Karthigasu in his capacity as general manager about this incident. This apparently prompted Dr Karthigasu to write a letter of the same date to Nid McIntosh requiring her to comment in writing about "your ability to carry out your duties as a debt collection person with special reference to verbal phone communication" and "your understanding of the lines of authority in Russell Pathology". Dr Russell conceded under cross examination that he never spoke to Nid about the alleged inadequacies in her telephone manner in an attempt to sort out the problem.



By this time Nid McIntosh was deeply concerned by the tendency of these various incidents and the unfriendly manner adopted by senior figures in the business. Assisted by her husband she wrote a lengthy letter in reply to Dr Karthigasu commenting on the particular incident and saying, in regard to her understanding of the lines of authority, that:

“Dr Russell owns the company, and he has appointed you as General Manager; Emma Griffin is your Executive Assistant; Ruben Donn is the Financial Controller, and he is my direct supervisor. Accordingly to the new employment contract mentioned above, I report directly to the Financial Controller.”

Simultaneously, she directed a letter to Dr Russell himself which included the following passage:

“I am very concerned about the tone of Emma Griffin’s memorandum, and the letter from Dr Karthigasu. I feel that I am being treated unfairly by the management of Russell Pathology. My loyalty to you and to the company is under no question whatsoever. In the 4 years that I have been working for you, I have always been confident in my ability to cope with and rise above the tasks and duties that I have been assigned. I feel that, for reasons that I am not aware of, persons within this organisation are treating me in an unfair manner, and this is causing me undue stress and grief. I forward this for your information.”

This letter was delivered to Dr Russell and simultaneously Nid McIntosh made an attempt to discuss with him her complaint of unfair treatment. Both the Complainant and Dr Russell seemed to agree in evidence that the conversation in question was interrupted by a phone call with the result that the complaint was not fully ventilated in Dr Russell’s presence. It was apparent from the evidence that Dr Russell made no attempt to follow up on the complaint or get to the bottom of his employee’s deep rooted concern that she was being treated unfairly. He said in evidence that as far as he was concerned this was a matter for Dr Karthigasu and as he had confidence in the capacity of his general manager to deal with such matters, ~~he himself~~ did not feel obliged to enquire further. His recollection of the brief interview was rather vague but he conceded under cross examination that he might have

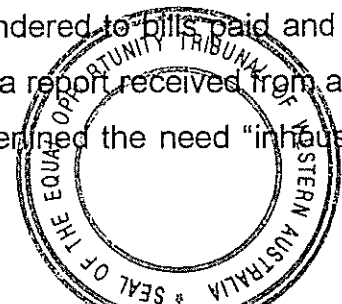


repeated the remark he had made some months earlier that Nid's position was not affected by Teerawan's resignation.

#### April 1996

Various witnesses confirmed that early in 1996, consistently with the restructuring proposal, Russell Pathology was moving towards multi skilling. This meant that Annette Sheahan was destined to assume greater responsibilities because of her skills as a data entry operator. Various witnesses for the Respondent suggested in evidence that all those likely to be affected by the change to multi skilling were fully instructed as to the implications of the change and reference was made to staff briefing sessions during the lunch hour. Nonetheless, neither Dr Russell nor the witnesses called by him were able to point to any comprehensive document setting out the restructuring and multi skilling credo for the benefit of a senior staff member such as Nid McIntosh or to point to any specific occasion on which she was informed about the implications of the new system. Nid McIntosh testified that she was given no specific instruction and felt marginalised. Annette Sheahan made it clear in her evidence that she certainly gave no specific instruction to Nid McIntosh on a one to one basis because of perceived difficulties with communication. This evidence was consistent with the harsh view of Nid McIntosh previously expressed by Annette Sheahan in the appraisal form she had submitted to senior management in April 1995. It therefore seems likely that Nid McIntosh did not receive any specific instruction from Annette Sheahan, although the latter was the leader of the data entry team.

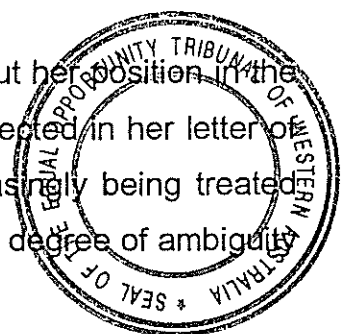
Dr Russell in his evidence stressed the importance of the data entry function. Credit control was central to the firm's financial health. He said, emphatically, that without data entry being kept up to date you can't tell what proportion of the overall debt had not been paid by private patients. He produced computer print outs to illustrate the monthly ratio of bills rendered to bills paid and how the target ratio could be achieved. He pointed to a report received from a firm of chartered accountants in mid 1995 which underlined the need "in house to



systematically and timeously follow up late payers", a report which looked at the prospect of 'outsourcing' this function. Dr Russell contended that rigour in credit control was essential because Medicare payments hadn't kept pace with CPI movements. A handwritten note made by the financial controller, Reuben Donn, in early March is also significant. In that note, dated 2 March 1996, he made a rough calculation of the financial consequences of terminating Nid's employment. This note includes the passage "if we asked her to work out her notice, then severance pay is \$4,846.15". His calculations suggested that after 4 to 5 years continuous service she was entitled to 3 weeks notice and 8 weeks severance pay. Dr Russell said in evidence that Nid never suggested to him that she was being treated unfairly because of her sister's resignation. He said that with his staff he was generally polite and compassionate but that he might not 'warm' to an employee who was not performing 'up to expectation'.

On 4 April 1996, the day before Nid McIntosh was due to take annual leave, Dr Russell informed her that her work performance was unsatisfactory and that she would no longer be employed in her current position when she returned to work. The nature of the meeting is reflected in Dr Russell's typed notes of that date. The notes indicate that upon her return she would be expected to learn data entry and participate in the night roster. According to Item 1 in the notes "RJR said that Nid should have noticed that the administration area of the company was being restructured and staff were being multiskilled". The tone of this remark – that Nid should have 'noticed' that restructuring was taking place - strongly suggests that Nid was not being given any individual attention in regard to the restructuring but was being left to her own devices. She was also told at this meeting that upon her return she would be "on the administration staff under the supervision of Annette Sheahan."

By this time Nid McIntosh was extremely concerned about her position in the firm. Her complaint to Dr Russell of unfair treatment reflected in her letter of 24 November 1995 had been ignored. She was increasingly being treated with indifference or in an unfriendly manner. There was a degree of ambiguity



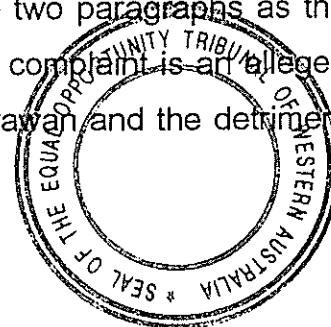
about her role and the range of her responsibilities. She was now principally concerned with debt collection but simultaneously was being confronted with criticisms of her telephone manner – these criticisms including reference to her accent - and her ability to carry out the task. She was having to perform her work not from a conventional office but from a medical suite which was also used for taking samples from patients. She had to keep working because her husband was attending university and the household depended on her income. It was against this background that during her annual leave, on 9 April 1996, she lodged with the Commissioner of Equal Opportunity a complaint of discrimination on the ground of family responsibility or status naming as the persons involved "Dr Karthigasu, Ms Emma Griffin, Dr Russell."

The letter accompanying her complaint included reference to the incidents detailed above. The letter concludes:

"It is clear that the treatment which I receive from the management of Russell Pathology is different to that which other employees around me receive. Of particular relevance is the harsh reactionary set of responses to small events that, since the middle of 1995, I have received from management where there has been a perceived break in protocol. This is in contrast to the reaction of management to others, who from time to time fall outside what the company perceives as acceptable practice. Because of the timing associated with the rise in this attitude, and the bitterness that surrounded the resignation of my sister, I have concluded that the problems outlined above are related to the ongoing ill feeling generated among certain individuals within the organisation as a result of my sister's resignation.

In any event, the reasons behind these events is fairly inconsequential. What is important to me is that my position in the workplace has become ambiguous. I feel as though I am constantly under threat, and believe that I am isolated and marginalised from any sense of normal workplace environment. This has led to an inability to sleep properly, feelings of stress and tenseness, and fears that this situation will result in an overall deterioration of my general health."

For ease of reference the Tribunal will refer to these two paragraphs as the 'family status complaint'. An important feature of the complaint is an alleged causal link between Nid's status as the sister of Teerawan and the detriment





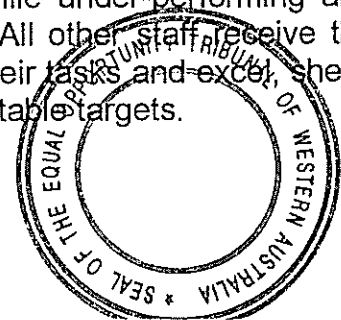
she allegedly experienced at Russell Pathology in the fourteen months following her sister's resignation.

### The Return to Work

According to the Complainant, her unfortunate situation did not improve upon her return from annual leave. It was made clear to her that she would henceforth be obliged to spend a good deal of her time at the keyboard on data entry duties, although, unlike the others engaged in those duties, she had not had any training as a typist. She also discovered that certain of her working files were missing and there was a degree of prevarication by Annette Sheahan as to what had happened to these files. Nid McIntosh no longer had an identifiable desk or place to sit in the office and had to look to Annette Sheahan on a daily basis for instructions as to where she was supposed to sit. She was mainly doing data entry work, a job that Dr Russell conceded, under cross examination was 'tedious'. In his view, her former position in the company had evaporated with the onset of EDI in November 1995 and the introduction of multiskilling. He could not point to any occasion when this was clearly explained to her.

By letter dated 10 May 1996 the Equal Opportunity Commission advised Russell pathology that a complaint alleging unlawful discrimination had been lodged by Nid McIntosh. This produced an angry reaction. A memorandum was received in evidence dated Monday 20 May 1996 from Dr Russell to Ms Griffin apparently expressing "some thoughts of the resolution of Nid's problem" and reading in part as follows:

- "1. Long standing complaints from RJR re debtors and supervision of any other staff.
2. Got her job originally because her sister worked here and Sonya (on Teerawan's advice and a personal meeting) recommended Nid ...
5. Nid continues to be a fiscal drag while under-performing and crowing about unequal opportunity. All other staff receive the same degree of freedom to perform their tasks and excel, she is almost unique in not achieving any suitable targets.



6. Shwe (sic) cannot explain her job to RJR, nor give anything like a sensible report on her activities.
7. Telephone records suggest she does not make many contacts per day anyway and we have for some time wondered what she actually does all day.
8. She has changed written protocols designed to limit the possibility of fraudulent activities (stealing) with no explanation and no discussion with RJR who put these protocols in place with Nid. ...
10. I am tracking KD re instant dismissal. I could be talked into an investigation of the accounts and the possibility of missing money."

Dr Russell agreed under cross examination that he had no reason to believe Nid was involved in any misuse of funds, but as the firm was now 'locked in battle' with the Complainant it was reasonable to review various options under the 'tit for tat' philosophy. He said: "I never start a fight, but when someone lodges an Equal Opportunity complaint against me, there's not much reason for me to sit back and not join the fight, okay?"

Some attention should also be given to a memorandum dated 23 May 1996 from Annette Sheahan to Nid McIntosh a copy of which was provided to Dr Russell, Dr Karthigasu and Ms Griffin. This stated that all accounts and data entry staff had been incorporated into one department called Administration of which Annette Sheahan was the manager. It went on to say that all members of the new team "are multi skilled in all aspects of data entry, billing, receipting, debt collection and associated tasks." Nid McIntosh was told that as a member of the team she was required to become proficient in all tasks and it was pointed out that she required extensive training in data entry. She had therefore recently been requested to work the 1.00 to 9.00 pm shift, although it was noted in the memorandum that Nid McIntosh had stated that she was unable to fill the position until August due to the absence overseas of her husband and her inability to find a babysitter for her son. The expectation was that a data entry operator should be able to enter a minimum of 20 forms per half hour with 98% accuracy.

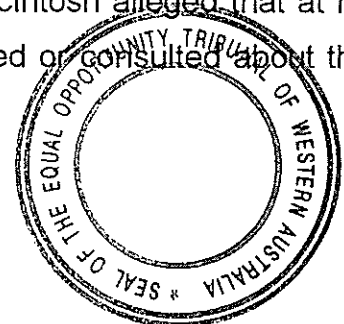


The Tribunal pauses to note that other evidence indicated that operators such as Annette Sheahan and Belinda Ford, both of whom had some training as typists, were able to perform at the rate of 30 forms per half hour, and the expectation was initially that Nid McIntosh should be able to achieve a level of 15 forms per half hour. It seemed to Nid McIntosh that she was now being asked to work essentially as a typist. At a later stage she made a notation to this effect upon the Sheahan memorandum, saying: "I'm not a typist".

### Alleged Victimization

Nid McIntosh said in evidence that on 30 May 1996 she was called in to Dr Karthigasu's office to answer allegations that she was hiding confidential information belonging to Russell Pathology in her handbag. A search was conducted but no such material was found and an apology was extended to Nid McIntosh. The testimony of Belinda Ford suggested that this search came about because Belinda had noticed Nid McIntosh placing some documents in her handbag, reported the incident, and also noticed Nid McIntosh removing the documents in question before the search was conducted. In addition, the Complainant alleged that on 10 June 1996 she arrived at work to find her computer menu "wiped". When she asked for a replacement menu she was provided with a menu which was suited only to basic clerical tasks and not her normal duties.

On 11 June 1996, Dr Russell informed Nid McIntosh that things had become rather "messy" because of her complaint to the Equal Opportunity Commission. He meant by this, he told the Tribunal, that other members of staff were upset by news that a complaint had been made. He instructed Nid that she was to take 2 weeks of accrued annual leave, commencing immediately. On the same day Nid McIntosh was advised in writing by Annette Sheahan, the person now designated as her supervisor, that she was to work an evening shift from 15 July 1996. Nid McIntosh alleged that at no stage prior to receiving this advice was she informed or consulted about the requirements of the evening shift position.



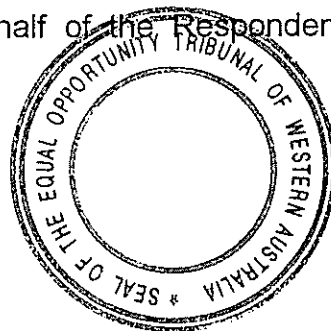
By this time the Complainant had concluded that she had no future with Russell Pathology. She felt totally ostracised and had reached a stage where she was having to eat her lunch alone in the storeroom and was no longer part of the general activities of the office. At times, as she sat alone, she was reduced to tears. She was sleeping badly. According to her sister Teerawan she had lost weight and her social life had diminished.

### The End of the Employment

On 12 July 1996 Nid McIntosh submitted her resignation to Dr Russell. The relevant letter was polite and formal in its tone and made no mention of unfair treatment. On 29 July 1996, soon after the termination of her employment with Russell Pathology, she obtained employment with the John Septimus Roe Anglican Community School. She had previously been employed by Russell Pathology at a higher salary and thus evidence adduced on her behalf at the hearing included a schedule of loss detailing the difference between the salary she had been receiving at Russell Pathology and the lesser salary obtained from the Anglican Community School in the period between 30 June 1997 and 30 June 1998. This amounted to a total of \$3,461.

In due course a complaint of victimisation contrary to Section 67 of the Equal Opportunity Act 1984 was added to the complaint of discrimination on the ground of family status previously made, and in doing so she relied upon those events detailed above which took place subsequent to Russell Pathology receiving notice of her original complaint.

As a part of the procedures before this Tribunal, the parties were required to file pleadings and in that regard the Points of Claim filed on behalf of the Complainant include reference to many of the incidents detailed above and advance a claim for compensation based on unlawful discrimination and victimisation. Points of Defence were filed on behalf of the Respondent denying liability.



The Tribunal pauses to note that lengthy particulars of the matters comprising the family status plea are set out in paragraphs 5 to 10 of the Points of Claim. They cover the period from Teerawan's resignation in April 1995 to the lodgment of a complaint on 9 April 1996 and, pursuant to an amendment made at the hearing, include reference to the acknowledged fact that shortly after her resignation Teerawan commenced work with a rival organisation, Western Diagnostic Pathology, as a cytology screener. Particulars of the matters comprising the victimisation plea are set out in paragraph 13. They include the alleged hiding of confidential information on 30 May 1996, the alleged wiping of the computer menu, Dr Russell's requirement on 11 June 1996 that Nid take two weeks annual leave, the requirement that Nid work an evening shift and Nid's eventual resignation. For ease of reference the Tribunal will henceforth refer to these latter matters collectively as the events the subject of the victimisation plea.

### Statutory Provisions

By Section 35A of the Equal Opportunity Act discrimination occurs if, on the ground of the family responsibility or family status of the aggrieved person, the discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person who does not have such a family responsibility or family status. By Section 35B it is unlawful for an employer to discriminate against an employee on that ground in the terms or conditions of employment afforded to the employee or by subjecting the employee to any other detriment. It is important to note that by Section 5 of the Act discriminatory conduct of this kind need not be the dominant or substantial reason for doing the act complained of. It is also important to note the definition of family responsibility or family status in Section 4 which, in relation to a person, means:

- "(a) having responsibility for the care of another person, whether or not that person is dependent, other than in the course of paid employment;
- (b) the status of being a particular relative; or



(c) the status of being a relative of a particular person;”

The Tribunal pauses to note that during the course of closing submissions it emerged that the provisions concerning discrimination on the ground of family responsibility or family status were introduced in 1992. Counsel for the Respondent argued that the purpose underlying the amendment was to protect people from being discriminated against who had the care of somebody else in their family. This was challenged by Counsel for the Complainant. According to her, the second reading speech in Hansard on 24 September 1992 indicates that a broad definition of what constitutes family responsibility or family status was deliberately chosen. The exception from liability allowed under the new Section 35M in regard to the relative of an employee (where collusion might damage the employer's business) suggests that the prohibition contained in Section 35A was designed to cover situations of the kind under consideration in the present case. In other words, the new ground of discrimination was not confined to family responsibility or family status constituted by or flowing from the relationship of husband and wife. It included the status of being a 'relative' and that term, as defined in Section 4, embraces a person who is related to another person 'by blood, marriage, affinity or adoption', that is to say, a relative by blood such as the Complainant's sister.

The Equal Opportunity Act also contains provisions concerning vicarious liability. By Section 161 an employer can be held liable for the conduct of its employee or agent. Acts done on behalf of a corporate body can be treated as discriminatory conduct by the corporate body itself.

In regard to victimisation Section 67(1)(a) provides that it is unlawful for a person to subject, or threaten to subject, another person to any detriment on the ground of the person victimised has made or proposes to make a complaint under the Act.

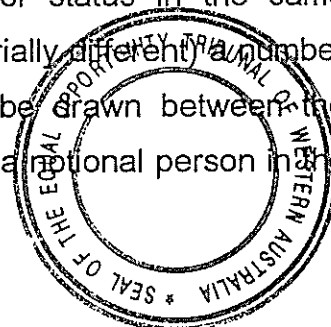


## Principles

The decided cases indicate that the Equal Opportunity Act is beneficial and remedial legislation with the result that it should be given a construction which is "a fair, large and liberal" interpretation rather than one which is "literal or technical". Nonetheless, it must not be given a construction that is unreasonable or unnatural. Given the artificial definitions of discriminations in the Act and the restricted scope of their applications, the Tribunal should not approach the task of construction with any presumption that conduct which is discriminatory in its ordinary meaning is prohibited by the Act. The Act is not a comprehensive anti-discrimination or equal opportunity statute; it is confined to particular fields and to particular activities within those fields. *IW v City of Perth* (1997) 71 ALJR 943.

It is apparent that the Complainant must prove her case on the balance of probabilities but the decided cases show that it is not necessary to establish a purpose or intent to discriminate, although evidence of any such intent will certainly be relevant. Discrimination can arise from thoughtlessness and neglect. All that must be shown to establish an act of unlawful discrimination is a causal connection between the alleged discriminatory act and the circumstances of the complainant. *Williams v Council of the Shire of Exmouth* (1990) EOC 92-296; *Waters v The Public Transport Corporation* (1991) 113 CLR 349.

In the absence of direct evidence, the complainant may use in support inferences drawn from the primary facts, although discrimination cannot be inferred when more probable innocent explanations are available on the evidence. *Fenwick v Beveridge Building Products Pty Ltd* (1986) EOC 92-147. In determining whether the aggrieved person has been treated less favourably on the ground complained of than the discriminator treats or would treat a person of a different family responsibility or status in the same circumstances (or in circumstances that are not materially different) a number of decided cases suggest that a comparison can be drawn between the situation of the aggrieved person and the situation of a hypothetical person in the

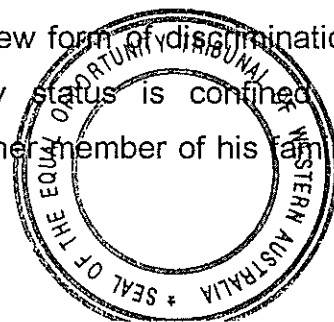


same or not materially different circumstances. *Bear v Norwood Private Nursing Home* (1984) EOC 92-109.

In regard to the comparison one should also have regard to *Boehringer Ingelheim Pty Ltd v Reddrob* (1984) EOC 92-108. In that case the court held that where an employer had decided not to employ a married female because of the possibility that she might disclose confidential information to her husband who was employed by a competitor the comparison to be undertaken was not simply between the person discriminated against and a notional person having similar attributes, albeit not of the same marital status as the aggrieved person, but between the aggrieved person and a notional person not having the same marital status as the aggrieved person. In other words, the statutory provisions did not require the employer to ignore characteristics which the aggrieved person in fact had merely because they were characteristics that were generally imputed to persons of the relevant marital status.

Reference was also made to the decision of this Tribunal in *Bridson v Kalgoorlie Taxi Car Owners Association Inc* (1996) EOC 92-403. In that case damages were awarded to a female employee because of the actions of her husband. The Tribunal took the view that the concept of discrimination on the ground of family status would extend to a decision to dismiss a person because he or she was connected by family to a notorious criminal or a prominent politician associated with a particular political cause. In such a situation, so the line of reasoning ran, the affected employee would not have been judged on his or her own merits, being a precept upon which the Equal Opportunity Act is based, but upon characteristics imputed to the employee in question.

Having regard to these previously decided cases, and the arguments put to the Tribunal concerning the scope of Section 35A of the Act, the Tribunal is not persuaded to the Respondent's view that the new form of discrimination on the ground of family responsibility or family status is confined to circumstances where a person is looking after another member of his family.





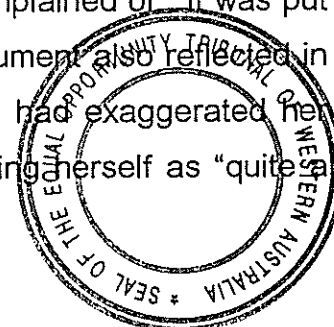
Remedial legislation of this kind should be given a liberal interpretation with a view to ensuring that employees or potential employees are dealt with on their merits. It follows that discrimination can occur where a person is disadvantaged because he or she belongs to a particular family. This view is consistent with the second reading speech in Hansard mentioned earlier. The operative provisions, and especially the relevant definition in Section 4, clearly allow for discrimination on the ground of status, irrespective of whether questions of responsibility are involved. Hence, it is open to Nid McIntosh to present a case based upon the family link to her sister Teerawan.

When one turns to the victimisation plea it is important to note that Section 5 of the Equal Opportunity Act is specifically expressed to apply only to Parts II, III, IV and IVA of the Act. Section 67 concerning victimisation is in Part V and is therefore apparently excluded.

Further, the decided cases suggest that in examining the concept of victimisation weight must be given to the use of the word "subjected" as it appears in Section 67. This carries with it a requirement that the respondent intended to cause detrimental consequences to flow to the complainant and that there is a necessary causal connection between the conduct complained of and the detrimental consequences alleged. *Bhattachorya v Department of Public Works* (1984) EOC 92-117; *Regan v Kalgoorlie Taxi Car Owners Association* (1995) SCL 71.

### Findings

The Tribunal was favourably impressed by the manner in which Nid McIntosh gave her evidence. She spoke in a balanced and entirely coherent way about the problems she encountered towards the end of her employment with Russell Pathology although it became apparent that she had suffered considerable distress as a result of the matters she complained of. It was put to her in cross examination, and this was a line of argument also reflected in closing submissions, that she was hypersensitive and had exaggerated her account of what happened. She refuted this, describing herself as "quite



strong person". The Tribunal accepts her view in that regard. The Complainant had a good grasp of the realities of the situation and the Tribunal is satisfied that her perceptions were generally accurate. Her description of what took place in the early years of her employment and the circumstances surrounding Teerawan's resignation were corroborated by her husband, her sister, Mr Woolley and Mr Fitzgerald. The Tribunal has no reason to doubt the words of these witnesses.

When one turns to the testimony of witnesses called on behalf of the Respondent the Tribunal is obliged to sound a note of caution. Documents prepared by Betty Flynn and Annette Sheahan reveal a dislike of the Complainant. Dr Karthigasu is still employed by the Respondent company and, in any event, he conceded that he was not fully familiar with the work of the accounts section at the relevant time. Dr Russell conceded that his views were reflected in the actions of his senior colleagues and thus the question of his credibility is critical to a resolution of the case.

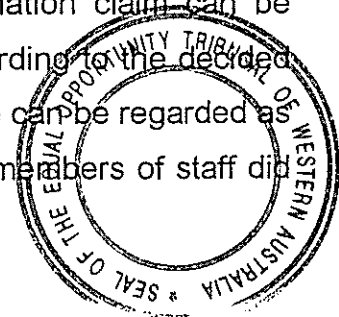
Dr Russell was a highly intelligent witness and spoke confidently and knowledgeably about his role as a "hands on" principal in his business. It was quite apparent that he understood every aspect of his operation including what happened in the accounts section. He professed a policy and practice of providing support for his staff in a compassionate way, but at the same time it was quite apparent that he was extremely sensitive about the issue of confidentiality and had a strong imperative to ensure that his business was operating in a profitable manner. Some of the documentary evidence certainly suggested that he was inclined to give priority to commercial considerations over the personal needs or anxieties of those below him and his failure to respond to the Complainant's written complaint of unfair treatment by letter dated 24 November 1995 sat rather inconsistently with his evidence that he was generally sympathetic to the apprehensions of his staff. Further, his suggestion that he was generally content to leave matters to Dr Karthigasu was inconsistent with the evidence given by the latter to the effect that he did not have a clear understanding of some of the duties performed by those in the accounts section and was not generally experienced in matters of



human resources management. It was quite apparent after April 1995 that Annette Sheahan was hostile to the Complainant and yet Dr Russell did little to ensure that the Complainant was fully conversant with Annette Sheahan's plans for multi-skilling.

When the sequence of events is looked at in overview it becomes apparent that Dr Russell's stance in relation to Nid McIntosh was affected by contradictions. He was polite and sympathetic while she was thought to be performing well but when, to use his words, she was viewed as a 'fiscal drag' his attitude changed, for there can be little doubt, to use his own words again, that Dr Russell did not 'warm' to those who were not performing 'up to expectation' in a firm whose proprietor was extremely sensitive about credit control and the need for confidentiality. Paradoxically, his meticulous attention to detail weighs against him in this context. It is quite clear to the Tribunal, having regard to the early congenial years of Nid's employment, that by 24 November 1995 she was obviously out of favour with Dr Russell because both then and thereafter he made no real effort to allay her anxieties, although this would have been his natural inclination during the earlier era. The Tribunal is satisfied on the balance of probabilities that the criticisms of Nid's performance at her place of work were unwarranted.

Against this background the Tribunal has little difficulty in concluding that the Complainant was marginalised during the final year of her employment and experienced considerable distress as a result of the unfriendly atmosphere at her place of employment. Further, the Tribunal also finds that this unpleasant atmosphere was partly fostered and certainly condoned by the senior management group consisting of Dr Russell, Dr Karthigasu, Ms Griffin and Ms Sheahan. Dr Russell's views were reflected in the actions of the management group and thus, pursuant to the rules of vicarious liability allowed for by the Act, it is open to the Complainant to attach liability to the Respondent company if the necessary constituents of the discrimination claim can be established. In that regard the Tribunal notes that, according to the decided cases, a pervasive atmosphere of ill-will at the work place can be regarded as a detriment. It is apparent from the evidence that other members of staff did

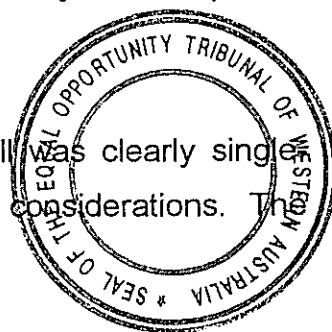


not have to put up with an atmosphere of this kind and thus it can be said that Nid was treated less favourably than her fellow employees.

Nonetheless, the crucial question is whether there is a sufficient causal link between the alleged discriminatory conduct and the adverse consequences relied on. In this case by her original complaint and by her Points of Claim subsequently filed, the Complainant asserts that she experienced adverse consequences because of the circumstances surrounding her sister's resignation and because her sister then went to work for a rival pathology organisation, namely, Western Diagnostic. There is no direct evidence to this effect and therefore the Complainant is principally reliant upon inferences being drawn by the Tribunal.

Dr Russell asserted on behalf of the Respondent firm that there was an innocent explanation for the distress Nid McIntosh experienced which is sufficient to rebut any adverse inferences, namely, that her position in the accounts section had 'evaporated' owing to the introduction of the EDI and multiskilling systems and she was conscious that her accounting skills had become superfluous. He denied having any thought of discriminating against her because of her sister's resignation and subsequent association with a rival firm. He went further and said that the evidence, looked at in its proper light, is entirely to the contrary. He tried to find a place for her in the restructured organisation. It is argued on his behalf that prior to going to the Equal Opportunity Commission Nid McIntosh did not complain to her employer of any alleged link between her sister's resignation and the events that followed. It is also argued that there is insufficient evidence that she was treated less favourably than her fellow employees in circumstances where changes were taking place and other employees in the accounts section were experiencing inconvenience as illustrated by the fact that others were assigned to 'work stations' rather than to individual desks, this being supposedly a consequence of the new multiskilling system.

There is some force in these submissions. Dr Russell was clearly single minded in his pursuit of efficiency and other commercial considerations. The

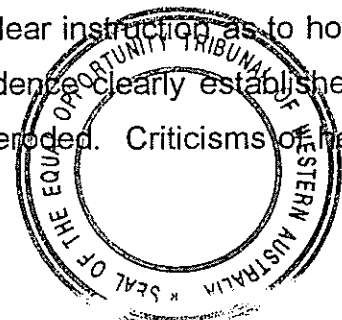


Tribunal accepts that it was legitimate for an employer such as Dr Russell to restructure his operation in response to developments taking place elsewhere and to insist upon high standards of performance. The Tribunal also accepts that part of the Complainant's feeling of alienation was possibly due to the introduction of new methods at the workplace. Nonetheless, the Tribunal has to keep steadily in mind that discrimination can arise from thoughtlessness and neglect and as a consequence of the rule reflected in Section 5 of the Act discriminatory conduct need not be the dominant or substantial reason for doing the act complained of. By that provision, a reference to the doing of an act on the ground of family status includes a reference "to the doing of an act on the ground of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act."

In the present case there are a number of facts and findings from which inferences can be drawn in favour of the Complainant's case and in support of what the Tribunal has called, for ease of reference, the 'family status complaint'. This shorthand description includes the additional matter raised by amendment at the hearing and an alleged causal link between Teerawan's resignation and subsequent events adversely affecting the Complainant.

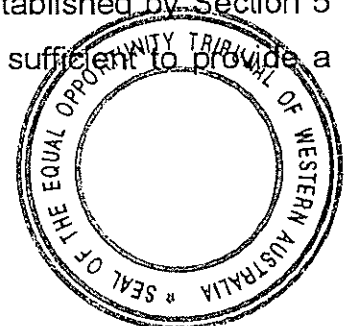
The Tribunal finds that Nid McIntosh was a generally well-respected senior employee but soon after her sister's resignation the attitude towards her began to change. Dr Russell's computer note and the letter he wrote to Teerawan show that he was angered by Teerawan's resignation and saw implications in it for his business in regard to confidentiality, this being a matter of profound concern to him.

The Tribunal is satisfied that at meetings in May 1995 and on or about 24 November 1995 Dr Russell made remarks to Nid McIntosh about her job being 'safe' which indicated that her family link to Teerawan had become an issue in Dr Russell's mind. Nid was not given any clear instruction as to how she was to cope with the restructuring and the evidence clearly established that the range of her responsibilities was gradually eroded. Criticisms of her



performance were reduced to writing, and most of the criticisms were either exaggerated or unjustified. Her letter of complaint dated 24 November 1995 was ignored. Dr Russell made it clear, and this was borne out to some extent by his conduct in the early years of the employment, that he gave close attention to the needs of his staff. From mid-1995 he failed to do so as far as Nid McIntosh was concerned. The Tribunal is able to infer from these various findings and acknowledged facts that the change of attitude experienced by the Complainant was due to an underlying reason, namely, Teerawan's resignation and her employment by a rival firm. This inference is corroborated by Dr Russell's trenchant memo dated 20 May 1996 in which he noted that Nid 'got her job originally because her sister worked here' and went on to canvass the possibility of an 'investigation of the accounts'. The extremity of his response damaged his credibility, as did the inconsistencies in his testimony mentioned earlier. Thus, the Tribunal attached little weight to his assertions that there was an innocent explanation for what occurred, namely, that Nid McIntosh was distressed by the change to multi-skilling.

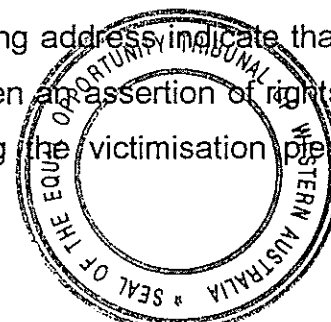
The Tribunal is satisfied that Nid was treated less favourably than other employees in the accounts section. The other members of staff were accustomed to being treated with politeness and respect, and they were able to regard themselves as members of a harmonious team. From mid 1995 onwards, as a consequence of her sister's resignation, Nid was treated in a progressively unfriendly manner and, unlike other members of the staff, she was criticised in writing. The hostility shown towards her by Dr Russell and those senior members of staff reporting to him amounted to a detriment within the meaning of the relevant statutory provisions. It follows that the Tribunal is satisfied on the balance of probabilities that the Complainant was discriminated against on the ground of family status in the manner alleged in the Points of Claim filed on her behalf. The discriminatory conduct referable to family status was not necessarily the sole reason behind the events complained of but within the conceptual framework established by Section 5 of the Act it was a substantial reason, and therefore sufficient to provide a basis for relief.



For the reasons previously expressed in the Tribunal's review of the relevant principles, slightly different considerations apply when one turns to the complaint of victimisation. The Tribunal has already noted that in regard to this issue Section 5 of the Act does not apply with the result that the Tribunal must be satisfied that victimisation was a dominant or substantial reason for the events the subject of the victimisation plea. The Tribunal remains entitled to draw inferences from facts established by the evidence but in the case of the victimisation plea these should be additionally directed to the question of intention and whether the Complainant was 'subjected to' a detriment.

The Tribunal's findings against the Respondent concerning the family status complaint have a bearing upon the victimisation plea because these earlier findings reveal the presence of an underlying animosity harboured by the employer against Nid McIntosh as a result of Teerawan's resignation and her subsequent employment by a rival firm. To this must be added the angry response to the Equal Opportunity complaint reflected in Dr Russell's memo dated 20 May 1996 and his concessions under cross examination that he saw himself as being 'locked in battle' with the Complainant from that point on. The Tribunal has already noted that the pervasive atmosphere of ill-will at the workplace directed towards Nid McIntosh referred to earlier amounted to a detriment. This detriment was exacerbated by Dr Russell's requirement on 11 June 1996 that Nid take two weeks leave and the other matters comprising the victimisation plea. The Tribunal is satisfied that the events complained of in the Points of Claim were a consequence of Dr Russell's angry frame of mind with the result that the claim of victimisation has also been made out as pleaded.

The Tribunal digresses briefly to say that its finding in regard to victimisation should be regarded as independent of its finding in regard to the family status issue, that is to say, even if the Tribunal be wrong on that issue the Respondent remains liable under the victimisation plea. The decided cases relied on by Counsel for the Complainant in her closing address indicate that victimisation can occur simply because there has been an assertion of rights under the Act. In this case the events comprising the victimisation plea



represented a new and additionally unpleasant phase of the relationship between the parties which flowed from the Complainant's assertion of her rights.

### Relief

By Section 127 of the Act the Tribunal is empowered to award damages. Previously decided cases show that in a case of a statutory tort of this kind damages can be recovered for humiliation, emotional distress (falling short of nervous shock), embarrassment, hurt feelings and the like. See *Allders International Pty Ltd v Anstee* (1986) EOC 92-157. It is important that awards compensating for injured feelings should not be minimal because that would tend to trivialise or diminish the respect for public policy: *Hall v Sheiban Pty Ltd* (1989) EOC 92-250.

These principles were affirmed by the Supreme Court in this State in *MTT v McCarthy* (1993) EOC 92-478; 92-546 although the Tribunal notes that according to the court in that case, it is important that the Tribunal look in detail at evidence bearing on the question of what is an appropriate award of damages to compensate for loss of the kind addressed by the statutory provisions.

As with any other loss or injury, compensation will be recoverable where and to the extent that loss or injury shown to be caused by the wrongful act and is sufficiently proximate to it. See *Erbs v The Overseas Trading Corporation Pty Ltd* (1986) EOC 92-181; *Allegretta v Prime Holdings Pty Ltd* (1991) EOC 92-364. In the present case the Complainant was greatly distressed by what occurred but she wasn't obliged to seek medical treatment. She was also able to find alternative employment. In these circumstances the Tribunal will award \$4,000 in respect of the family status claim, \$2,500 for victimisation and special damages of \$3,461 for loss of salary amounting to a total award of \$9,961.

