

**EQUAL OPPORTUNITY TRIBUNAL  
OF WESTERN AUSTRALIA**

**Matter Number: 34 of 1997**

**IN THE MATTER OF A COMPLAINT BY:**

Gaby Ben Complainant

- against -

Sheryl Butler Respondent

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**REASONS FOR DECISION**

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**BEFORE:**            Mr N Hasluck, Q.C.            President  
                              Ms R Kean                        Member  
                              Mr D Forster                    Member

Complainant            appeared in person  
Mr R Bourke            Counsel for the Respondent

**HEARD:**                8 December 1997

**REASONS FOR DECISION:**            (Delivered: 10 December 1997)

The Complainant, Mr Gaby Ben, has alleged sexual discrimination in the area of provision of services pursuant to section 8 of the Equal Opportunity Act 1984. The complaint is brought against Ms Sheryl Butler, who is and at all material times was a legal practitioner employed by the Perth based law firm, D'Angelo & Partners.

The crux of Mr Ben's complaint is that the practitioner discriminated against him in a telephone conversation which took place on or about the 12th of March 1997. The Tribunal will look at the details of the relevant conversation in more detail later. For the moment, it is sufficient to notice that the call concerned certain advice that the practitioner had given to Mr Ben about a matter before the Family Court and the question of whether she would act or continue to act for him became the subject of the conversation. For ease of reference, the Tribunal will refer to this as "the March telephone call" and to D'Angelo & Partners as "the law firm".

It is immediately apparent that in order to determine what was said by each party during the March call, being essentially an exchange between two individuals in the absence of witnesses, it will be necessary to make a careful assessment of the credibility of each party to the call and to understand the circumstances giving rise to the call, as this will have a bearing on whether certain words are likely to have been spoken or not. Accordingly, the Tribunal was of the view that it was relevant and necessary for the

purposes of that aspect of the matter to receive in evidence testimony and documents concerning the family law matter in which Mr Ben was involved. The Tribunal pauses briefly to note that for his part, Mr Ben strongly opposed the admission of any such evidence. In his view, the Tribunal only had to look at the telephone call and the following events in order to make a determination about his complaint.

Nonetheless, for the reasons mentioned earlier, the Tribunal ruled that the evidence should be admitted. The Tribunal also exercised the powers allowed to it under sections 119 and 120 of the Equal Opportunity Act to receive the transcript and findings of other courts and to inform itself as it thought fit in order to act according to equity, good conscience and the substantial merits of the case. It was on this basis, pursuant to a direction given by the Tribunal that various exhibits were received, including Family Court judgments and advice from the law firm relating to the same, notwithstanding an issue as to whether legal professional privilege had been waived. The effect of the Tribunal's ruling was to override the privilege if indeed it continued to exist.

The Tribunal also notes that in this jurisdiction, the complainant is obliged to make out his claim, and the essential ingredients of his case to the satisfaction of the Tribunal on the balance of probabilities.

The exhibits show that Mr Ben was born in France in 1947. He met his former wife in Malaysia in January 1986, and the parties later married and came to Australia. The parties to the marriage separated in August 1991 and then followed a series of legal proceedings and attempted reconciliations from time to time, the full details of which are not presently material. The Tribunal notes however that as a consequence of a judgment given by Tolcon J of the Family Court of Western Australia on the 9th of April 1992, Mr Ben's former wife was allowed sole guardianship and custody of the male child of the marriage, called "S" in the judgment, who was born on the 15th of April 1989.

The Tribunal also notes as appears from the judgment that Mr Ben was represented before Tolcon J by a legal practitioner, Mr Brent Meertens, although in all subsequent Family Court proceedings, Mr Ben has acted for himself, as a consequence of which he claims to be familiar with the workings of the court. Various proceedings did not resolve the matters in issue between the parties to the marriage. It emerges from the evidence that Mr Ben was late convicted of two serious assaults upon his wife, as a result of which, on the 1st of December 1993, he was sentenced by Muller J of the District Court to a term of imprisonment of 3 years and 8 months.

It appears from the relevant transcript, and was freely conceded by Mr Ben, that prior to the sentencing, he had been represented by a legal practitioner, Julie Wager, but

he terminated her instructions on the grounds allegedly that she had failed to carry out the instructions he had given to her.

In January 1995 at a time when Mr Ben was still in prison, his former wife brought an application before the Family Court, seeking leave to remove her son from the jurisdiction and various consequential orders which would effect a complete separation of the child and herself from Mr Ben. On the 13th of January 1995, Barblett J made orders to that effect. It is apparent from the reasons for judgment that Mr Ben appeared in person. The learned judge noted that Mr Ben had been convicted of a very severe crime, and drew attention to various passages in the wife's affidavit, detailing the injuries she had received.

A few days later, Mr Ben sought from the Registrar of the court information about leave to appeal the ruling made by Barblett J, but at that time, he took the matter no further. He made another inquiry later and was told, that as the appeal period of 1 month had expired, he would have to apply for leave to extend the time for appeal. He did nothing further about the matter at that stage.

It seems that a few months later, whilst still in prison, he made contact with the law firm in order to pursue a personal injuries claim. This matter was handled by Mr Wong of the law firm. Mr Ben then decided to pursue the possibility of appealing the Barblett judgment. As a result of speaking to

another employee of the law firm, Mr Ron Ierace, who visited Canning Vale prison from time to time, Mr Ben wrote a letter to Mr Ierace of the law firm, dated the 2nd of July 1996, raising various issues in respect of which he was minded to seek relief, including leave to appeal to a Full Court of the Family Court.

This letter contains, vehemently expressed, wide-ranging allegations of corruption at various levels of the judicial system, including an allegation about Mr Ben's wife's solicitor, "for conspiring to pervert the course of justice". It was apparent that the solicitor in question was a female legal practitioner. The Tribunal is satisfied on the evidence that this letter to the law firm was accompanied by the Tolcon J judgment, the Barblett judgment, the former wife's affidavit mentioned by Barblett J, which affidavit included various abusive annotations by Mr Ben about his former wife, and the copy letter to the Family Court of the 17th of January 1995.

It seems that this letter and enclosures were referred to the respondent to this complaint, Ms Sheryl Butler, she being the practitioner in the law firm who handled family law matters.

She had been admitted to the Bar in February 1994, and had been with the law firm for a substantial period.

The Tribunal pauses to note that according to the practitioner, she was accustomed to act for both male and female clients, and a recent review of her previous files, shows that she had acted for 54 per cent male clients and 46 per cent female clients. An experienced barrister from the WA Bar Association, Mr John Hedges, spoke highly of Ms Butler's professional skills and integrity, and said that "speaking generally, she has never said or done anything which would indicate to me that she was discriminatory against any person in any way whatsoever". Mr Hedges, as a barrister, had worked with Ms Butler on a number of the cases that she was handling.

Eighteen months had now elapsed since the ruling given by Barblett. By letter dated the 29th of July 1996, the practitioner, Sheryl Butler, advised Mr Ben that after careful examination of the documentation, in her view, she was of the opinion that Mr Ben would not be successful in an appeal against the Barblett J decision. She indicated that a second opinion could be obtained from counsel if Mr Ben wished, provided fees in advance of \$750 were deposited with the law firm.

On the 23rd of August 1996, Mr Ben responded to this advice with what can only be described as an extremely rude letter. The practitioner was told to "spare me all the crap". He said that he was well versed in family law and would advise her what to do, namely, to prepare the application for leave, supported by an affidavit, including reference to the

fact that the judge had made it easy for Mr Ben's wife's lawyer to win the case and that he, Mr Ben, was set up by the lawyer of the wife. He said that he didn't take crap from lawyers, because they thought only of the money, and concluded that it was "up to you whether you take the case or not", that being a reference to the case of his that he wanted her to pursue.

In these circumstances, perhaps not surprisingly, the practitioner decided not to take the case, and by letter dated 17th of September 1996, wrote to Mr Ben to that effect, "the indications being that the solicitor/client relationship has already broken down". She returned the relevant documentation and suggested that Mr Ben contact the Family Court for precedents to enable him to conduct the matter himself or to contact the Law Society for referral to another family law solicitor.

This brought the solicitor/client relationship to an end concerning the family law matter, although the Tribunal understands that Mr Wong was still acting in the personal injuries matter.

Mr Ben proceeded to handle the matter for himself. He filed documents relevant to the leave to appeal at the Family Court on the 13th of October 1996, and advised the Family Court about his availability for a hearing by letter dated the 31st of October 1996. Three months later, when the matter came on for hearing before Holden J on 28th of



January 1997, Mr Ben appeared in person on his own behalf. His application for leave to appeal was eventually dismissed by Holden J.

At the hearing before this Tribunal, Mr Ben complained bitterly that the practitioner had prejudiced his case by her delay in 6 months preceding the hearing, but the Tribunal is not convinced by this. The practitioner acted with reasonable expedition while she was actively handling the file, and she returned the brief in mid-September as the Tribunal has already noted. It is significant that neither before Holden J or later, before the Full Court of the Family Court, when that body proceeded to uphold the Justice ruling on appeal in May 1997, was there any suggestion reflected in the reasoning of the various judicial bodies that Mr Ben had been let down by his solicitor or that he had made such a complaint.

It seems that in the weeks following Holden J's ruling, Mr Ben gave thought to appealing the decision of Holden J. Accordingly, he asked Mr Wong of the law firm to approach the practitioner to see whether she would resume acting for him. According to her, having reviewed the file and having discussed the matter with Mr Wong, she decided to telephone Mr Ben to say that she was not prepared to continue or re-enter the matter as by this time, he was out of prison and in the position to take the telephone call. Her view remained as before, and as previously expressed, that she couldn't establish the necessary relationship of trust

between solicitor and client, and it was apparent from the correspondence she had received and the documents she had seen, that Mr Ben had a history of disagreement with professionals in the field of family law and with female professionals, and legal practitioners in particular.

It was common ground at the hearing that this telephone call was the only time that Ms Butler spoke to Mr Ben. According to her, she introduced herself, whereupon he left the phone briefly and returned. She said she was uncomfortable about his allegations, about those in the Family Court system, and was not prepared to act because the solicitor/client relationship was non-existent. She said that she would give him a list of solicitors and he might prefer to choose a male solicitor. According to her, he reacted violently to this, accused her of discrimination and slammed down the phone.

Mr Ben gave a different account of this central incident. His description of what took place, as it appears on his complaint to the Equal Opportunity Commissioner, dated 16th of April 1997, is in these terms:

"On 12th March 1997, Ms Butler rang me back to confirm to me that she was not prepared to take my case any further. On her own words, she stated that she respects the Family Court and the Family Court respects her, and that for that reason, she doesn't take the case of any man. She said she had rather take the case of a woman, which she knows is an open cut case, ie, which is easy to win. I said to her, 'You make a big mistake in your profession by telling that you are discriminating against me and against other men'. Then, I told her, 'I'm going to talk to your bosses, Mr D'Angelo and Mr Fong ...(on tape)... about this

matter. Then it is to me to sue you for discrimination'".

The passage on the complaint form suggests the conversation was reasonably substantial. At the hearing before the Tribunal however, Mr Ben gave a slightly different version. He said at first that the conversation lasted about "20 seconds", or in any event, when pressed upon the length of the call, he said it was for a very short time.

According to him, she said that she wouldn't act for him because she wouldn't act for men. He said she was making a big mistake and hung up. Before doing so, he'd managed to activate a voice-activated tape recorder in his pocket, although it turned out he was unable to produce the tape at the hearing before the Tribunal because, according to him, the vital passage was erased by dictation over it. He denied that she said anything about referring to other solicitors and on the other hand, she denied in her evidence making any statement that in general terms, she didn't act for men.

It seemed to be common ground at the hearing before the Tribunal that Mr Ben was the one who terminated the telephone call abruptly. When pressed, Mr Ben was unable to say positively that the telephone call was on the 12th of March 1997 as alleged in his complaint form, and he conceded that it might have been some days earlier.

At the hearing before the Tribunal, Mr Ben placed a good deal of reliance upon events subsequent to the March telephone call. His complaint form puts the matter in this way:

"After that, I had a conversation with Mr Fong, the partner in the firm. After that, Mr Fong spoke to her and she admitted that she made a mistake and wanted to make an apology orally and in writing. I told Mr Fong that I didn't want Ms Butler's apology, because it was a very blatant and disgusting discrimination against me, especially when it comes to the Family Court."

The Tribunal digresses briefly to note that at the hearing, Mr Ben in fact indicated that he would be satisfied to receive an apology without any monetary compensation in full satisfaction of his claim.

Mr Ben gave evidence at the hearing as to what happened after the March telephone call. He also called Mr Wong and Foo as witnesses to corroborate his story, the latter, Mr Foo, being a partner in the law firm responsible for administration.

As Mr Ben was not in a position to cross-examine these witnesses, they having been called by him, they were not especially helpful to his case. Mr Foo agreed that he and Mr Wong met with Mr Ben and that he, Mr Foo, canvassed the possibility of an apology being offered to settle the claim, but according to Mr Foo, that notion was canvassed for commercial reasons only. That is to say, to appease a dissatisfied client.

According to the evidence of these witnesses, no admission was ever made to them by the practitioner or by them to Mr Ben to the effect that the words referred to in Mr Ben's complaint form were spoken by the practitioner.

Correspondence contained in the Commissioner of Equal Opportunities report, which became an exhibit at the hearing, set out a formal denial of the central allegation on behalf of the respondent practitioner.

Against this background, the Tribunal now turns to the question of liability. By section 8 of the Equal Opportunity Act, a person discriminates another person on the ground of the sex of the aggrieved person if the discriminator treats the aggrieved person less favourably than in the same circumstances the discriminator treats a person of the opposite sex.

By section 5, the matter complained of need not be the substantial or dominant reason for the doing of the act. By section 20, it is not permissible to discriminate on the ground of sex in the provision of services. Thus, if the practitioner referred to providing legal services on the basis of the gender of a particular client, then arguably, relief might be available in such a case, but this of course depends upon what words were spoken and in the circumstances of this case, whether the words complained of by Mr Ben were actually spoken as alleged.

The Tribunal noted earlier that in a matter of this kind, which depends upon a crucial conversation in the absence of witnesses, findings must be made on the balance of probabilities, having regard to the credibility and demeanour of the witnesses and matters which may assist the drawing of inferences as to whether the crucial words were spoken or not.

As to the last mentioned matter, the Tribunal feels obliged to take account of the uncontradicted evidence on behalf of the practitioner that she had acted for both male and female clients in roughly equal proportions, and the evidence of Mr Hedges, the barrister, in support of her integrity. If, as alleged, she said she didn't act for men, then this would be contrary to the way she actually conducted her practice and this rather suggests that no such statement was made.

Further, when one looks at the background which the Tribunal has described at some length, it was consistent with everything that had happened previously, that the practitioner should decline to act, not on the basis of any consideration of the sex of the client, but because having regard to the complainant's history, the necessary relationship of trust between solicitor and client did not exist.

Further, there was sufficient material in the documents she had previously seen, to support such a stance. The various judgments and the letters written by Mr Ben to the law firm

make it credible that she might have decided not to act on the basis which she says she conveyed to him in the crucial telephone conversation, namely, that the necessary relationship of trust did not exist. The Tribunal also notes that she did not resile from her declared position under cross-examination.

Against this, the Tribunal sets the evidence of Mr Ben. He gave different accounts of what occurred in regard to the telephone conversation, and his demeanour at the hearing before the Tribunal was highly volatile. It was quite clear to the Tribunal that any exchange between Mr Ben and a solicitor having some association with his affairs, given the court cases he had been through, was likely to turn into an argument very quickly, and before he allowed the other party to the conversation sufficient opportunity to present their viewpoint in its entirety. The materials before the Tribunal clearly showed that Mr Ben had a habit of asserting that men were disadvantaged as compared with women in the legal system, and this was consistent with evidence he also gave to the Tribunal in the present case.

In the Tribunal's view, he was quite capable of magnifying a statement about an unwillingness to act for him, in the circumstances of the particular case, into a proposition that the practitioner was generally not willing to act for men. It is clear that it was he who hung up abruptly and the Tribunal acknowledges the possibility that he might have

done so without fully understanding what was being said to him.

The Tribunal is also conscious that there were signs of prevarication in various parts of Mr Ben's evidence, including his unfounded allegation of delay by the practitioner, and this seems to be consistent with the impression formed by other courts and Tribunals.

Accordingly, having carefully evaluated the evidence as a whole, the Tribunal is not satisfied that the words "complained of" as set out in the complaint form were spoken and in particular, is not satisfied that the practitioner said she didn't take the case of any man. It follows that she didn't discriminate against Mr Ben on the ground of his sex, and the complaint must be dismissed. The Tribunal considers that the practitioner, having regard to the abusive letters she had received from Mr Ben and the materials before her which included reference to a history of serious assaults on his part, and disagreement with female professionals in the legal system, was entitled to proceed cautiously and refuse to act on his behalf in the circumstances. She declined to act, not because of his sex, but because she could foresee that the necessary relationship of trust and confidence between solicitor and client could not be established between her and Mr Ben. The complaint will therefore be dismissed. There will be no order as to costs.