

**IN THE EQUAL OPPORTUNITY TRIBUNAL  
OF WESTERN AUSTRALIA**

Matter Number 39 of 1997

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

**JEAN MARTIN**

Complainant

- against -

**CEREBRAL PALSY ASSOCIATION OF  
WESTERN AUSTRALIA**

Respondent

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**REASONS FOR DECISION**

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Before:                    Mr N Hasluck, QC                    President  
                              Mrs R Kean                            Member  
                              Mr S Rowe                            Deputy Member

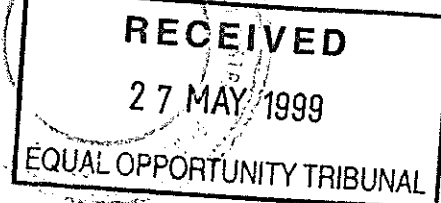
For the Complainant:                    Ms N Johnson, QC  
                                                      Ms J Stevens

For the Respondent:                      Mr I Curlewis

Heard:                      19, 20, 21, 22, 23 April 1999

**REASONS FOR DECISION**

Delivered 28 May 1999



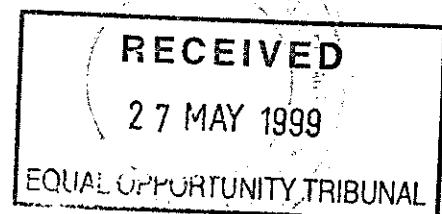
## REASONS FOR DECISION

The Complainant, Jean Martin, claims that the Respondent, the Cerebral Palsy Association of WA, discriminated against her on the ground of impairment. The complaint arises out of her employment by the Respondent Association and a proposal to change the layout and configuration of the office area that took effect in June 1996.

### Cerebral Palsy Association

The Association is a charitable organisation. It is funded by both the Commonwealth and State Governments and is answerable to a Board of Directors. It also receives funds by way of private donations and as part of its operations has constituted a fund raising section for that purpose. The Board of Directors runs the Association through a management team which at all material times, during the years 1995 and 1996, included the Chief Executive Officer, Dr Ruth Shean, the Manager of Finance, Mr Ron Widison, the Manager Administrative Services, Mr Chris Kumar, the Manager of Fund Raising, Ms Robyn Torre, the Manager Adult Services, Mr David Brown, and the Manager Children's Services, Ms Penny Bird. The members of the management team principally concerned with the matters in dispute were Dr Shean, Mr Kumar and Ms Torre.

The Association occupied office premises at the Sir David Brand Centre at 106 Bradford Street, Coolbinia. The premises included a working area occupied by secretarial staff servicing the fund raising and administrative activities of the Association. Prior to the events in question this was essentially an open working area with a low counter effecting a separation of the working area from the corridor. Windows along the external wall provided a view of the outside world

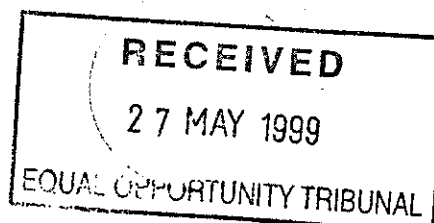


and it is material to note that air conditioning ducts were situated next to the external wall. The managers of the administrative and fund raising areas, Mr Kumar and Ms Torre, had their own offices nearby. Other office staff occupied an area on the far side of the corridor and all staff had access to canteen and toilet facilities in the building.

It was apparent from the evidence that management recognised an obligation to provide the Association's office staff with an uncrowded, light, well ventilated and airy working space. The Tribunal also notes that provision had been made for staff members to refer any matters of concern to a "staff advocate" who had a responsibility to take up such concerns with management. An experienced nurse, Sister Willox, was available to staff on the premises. Further, the Association paid an annual fee to an external agency called INDRAD which was there to provide consultancy to any member of staff with a current problem at no expense to the staff member.

### The Complainant

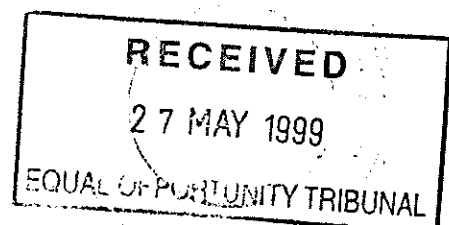
Jean Martin was born in England on 22 July 1947 and is presently 52 years of age. She was married, and had children of independent means. She commenced work with the Association in July 1990 on a part time basis but in due course rose to the position of secretary to the Manager Administrative Services, reporting directly to Mr Chris Kumar, being by then employed on a full time basis. She said in evidence that throughout her life she had suffered from a condition which she thought of as being "claustrophobia". This seemed to be related to an unfortunate experience in her youth when she came close to drowning. She described herself as a "self diagnosed claustrophobic" in that in certain situations, which seemed to be related to confined spaces such as lifts or cinemas, she felt uncomfortable and panicky. Throughout her adult life she had been able to cope with this condition by avoiding or vacating a space which



brought on the symptoms and as a result she had never had occasion to obtain an exact diagnosis of her condition.

It will become apparent in due course that there is a degree of controversy as to the exact nature of Mrs Martin's condition but it is important to note, for the time being, that at all times prior to the crucial incident on 12 June 1996 she herself characterised her condition as "claustrophobia" and there is no evidence to suggest that she used any other description to third parties. Indeed, according to paragraph 3 of the Amended Points of Claim filed on behalf of the Complainant in these proceedings, the symptoms of the Complainant's psychiatric condition were said to include fear of enclosed spaces, anxiety about being in a place from which escape might be difficult, anxiety and panic attacks. "At all material times the complainant believed her condition to be claustrophobia and so described it to others including her fellow employees." The Tribunal notes in passing that when Mrs Martin first applied for a position with the Association she completed a medical report in which she denied suffering from any current medical conditions including 'mental disorder (anxiety state depression etc)'.

Mrs Martin said in evidence that she generally got on well with her fellow employees and prior to the events in controversy had no complaint about the adequacy of her work environment or the attitude of her fellow employees. During the course of 1995, however, she was asked to assume some additional duties, namely, to provide secretarial support to the group handling "referrals". This involved her in the classifying and recording of information and decisions relevant to incoming applications for assistance. She found this to be a rather tedious and unpleasant task. By letter dated 24 October 1995 she wrote to Ms Bird, as the Manager of Children's Services (with a copy of her letter being provided to Mr Kumar and her preferred staff advocate, Ms Anne Reynolds) in these terms:

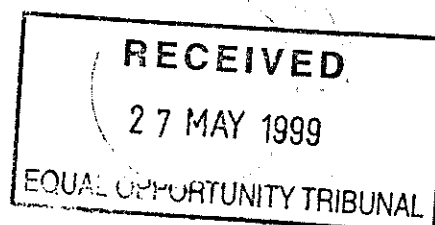


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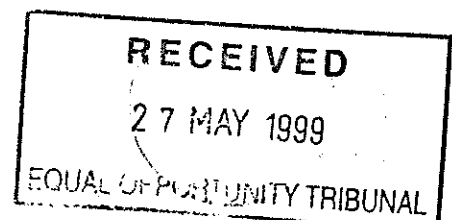
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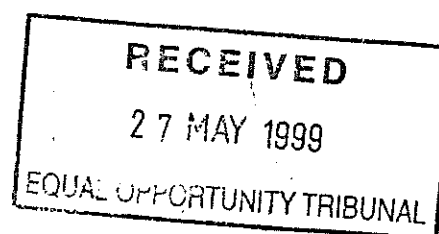
Mrs Martin said in evidence that she generally got on well with her fellow employees and prior to the events in controversy had no complaint about the adequacy of her work environment or the attitude of her fellow employees. During the course of 1995, however, she was asked to assume some additional duties, namely, to provide secretarial support to the group handling "referrals". This involved her in the classifying and recording of information and decisions relevant to incoming applications for assistance. She found this to be a rather tedious and unpleasant task. By letter dated 24 October 1995 she wrote to Ms Bird, as the Manager of Children's Services (with a copy of her letter being provided to Mr Kumar and her preferred staff advocate, Ms Anne Reynolds) in these terms:



"With respect to the duties of the Referral Clinic for which I have been responsible during the last ten weeks, please accept this letter as notification that I no longer wish to undertake these obligations on a permanent basis. The proportion of time I have been required to allocate to duties arising from the Referral Clinic has been substantial to the point where it is affecting my job satisfaction. Whilst I have never 'shied away' from additional duties, I do not feel the Referral Clinic should become a permanent role of my position. When I was given the duties of the Referral Clinic, I was of the understanding that I would be consulted as to whether I was having any difficulties. Over the past ten weeks, however, no one has taken the time to discuss whether I was having any problems with these extra duties. I have increasingly found the duties associated with the Referral Clinic to hold no challenge and to be having a detrimental effect on my job satisfaction. Given that my applications for both the Programme Assistant and Secretary, Children's Services positions were unsuccessful, it is apparent to me that there is a lack of confidence in my abilities within the Association. I feel the duties of the Referral Clinic should be passed to another individual, however I am willing to continue to conduct these duties in the short term until they can be allocated to another staff member."

According to Dr Shean, and Mr Kumar, it was at about this time that they felt some tension between themselves and Mrs Martin which was interfering with communication between the parties. Dr Shean said in evidence that she made an attempt to ameliorate some of Mrs Martin's concerns by setting up a new system to help her deal with the referrals. Nonetheless, she was troubled by other matters relevant to Mrs Martin's performance as a secretary on those occasions when Mrs Martin had been briefly seconded to her including Mrs Martin's alleged lack of efficiency in dealing effectively with amendments to typed drafts of outgoing documents dictated by Dr Shean. She referred also to comments made by Mrs Martin voicing disapproval of women in executive positions with qualifications superior to those held by Mrs Martin.

Mrs Martin agreed in evidence that as a consequence of the referrals issue, a degree of strain marked the relationship between herself and Dr Shean and Mr Kumar towards the end of 1995, and in following months, but she denied having made the comments attributed to her by Dr Shean. She admitted, however, that



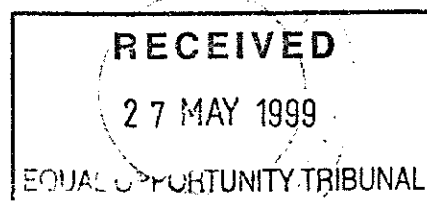
at some stage she may have indicated to Dr Shean that she felt rather intimidated by her presence.

It is against this background that events relevant to a rearrangement of the work space allocated to the support staff for fund raising and administration fall to be considered.

### Change to Office Premises

On 31 October 1995 a meeting was held between Mrs Martin, Dr Shean, Mr Kumar and Ms Reynolds, the staff advocate. During the course of this meeting reference was made to the possibility of partitioning being put up in the office to divide the administration and fund raising areas. According to Mrs Martin, justification for the change was said to be a need to reduce the noise level from the corridor. According to the complaint she later lodged with the Commissioner of Equal Opportunity, and the evidence she gave at the hearing, her response to this proposal was to the effect "don't box me in, I suffer from claustrophobia". She was told that her condition would not be a problem because management was looking at the installation of glass partitions. Nonetheless, on the Complainant's case, Mrs Martin made it clear to the persons present at the meeting that whether the partitions were made of glass or not, if she felt boxed in, then the partitioning would be a significant problem for her.

The Tribunal pauses to note that, according to evidence given on behalf of the Association at the hearing by Dr Shean and Mr Kumar, there were various reasons for the proposed partitioning, although not all of these reasons were canvassed with those present at the meeting or staff generally, because to do so might have created a sense of unease in the staff as to whether they were fully trusted by management. Management was conscious not only of a need to reduce noise levels but also of a need to improve efficiency and to ensure the confidentiality of data and information being dealt with in the administrative

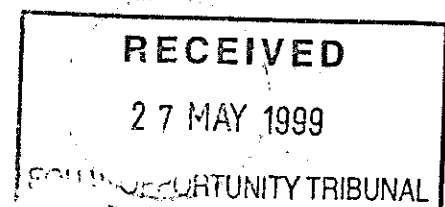




section of the relevant space. Part time voluntary helpers were accustomed to come to the fund raising area and there was a perception by management that their presence was not only a distraction but also created a risk in regard to matters of security and confidentiality. These issues had been present in the minds of management for a considerable period of time, it was said, but they could only be addressed in the budget phase of the Association's activities which took place in March each year.

Dr Shean and Mr Kumar went on to say that it was not until March 1996 that a firm decision was taken to proceed with the partitioning. The relevant document is a memorandum dated 26 March 1996 to members of the management team to which was attached a list of approved expenditures agreed in the mini-budget session held on Monday 25 March 1996. The list includes the item "Partitions - Fund Raising area - \$4,000" being one item on a list of 76 items, including such matters as provision for employing extra staff members, staff training schemes, provision of various items of equipment, provision of parking spaces and acquisition of computers. Most of the items of expenditure are for comparatively small amounts. The Tribunal was told that any item in excess of \$10,000 would have to be referred to the Board of Directors for approval.

Both Dr Shean and Mr Kumar appeared to concede under cross examination that apart from the memorandum just mentioned there did not seem to be any contemporary document preceding the crucial meeting in which the justification for erecting the partitioning was set out. In light of Mrs Martin's evidence at the hearing that reduction of noise was the only matter mentioned at the October meeting, it became a matter of controversy at the hearing as to whether the Association was truly concerned about matters such as security and confidentiality as asserted by the witnesses called on its behalf. The Tribunal recognises that the question of whether the partitioning was a matter of real importance to the Association may have a bearing upon the issue to be dealt with in due course as to whether it was reasonable for the Association to proceed with

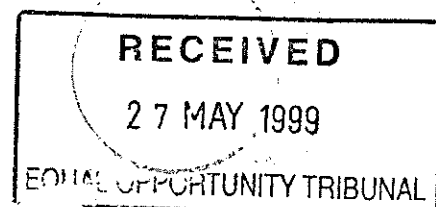


the partitioning notwithstanding Mrs Martin's objections to the proposed course of action. The Tribunal will return to this issue in due course. For the moment, it is sufficient to note that both Dr Shean and Mr Kumar indicated in their evidence that no particular significance could be attached to the absence of documentation concerning the partitions. The amount being spent was comparatively small, and, as one item in a long list, it was discussed at the relevant meeting with the various pros and cons being dealt with in discussion. The work had to be done by the end of the current financial year.

### **Installation of Partitioning**

Mrs Martin raised her concerns about the partitioning with Sister Willox, but didn't ask Sister Willox to take any specific action. She also telephoned and spoke to Claire Thomas, a union representative from the Hospital and Salaried Officers Association. As a result of that conversation she was led to believe that she should register her concerns with management and should also take medical advice. When she told her GP, Dr Scott McGregor of the Mirrabooka Medical Centre, about her phobia and the fears she had concerning the partitioning, the doctor said that there were ways around her phobia including medication and desensitisation. Mrs Martin explained that she had never had to take medication and did not want to start at her age as she felt that she had handled the situation quite well so far. She did not act on her doctor's advice or obtain any exact or written diagnosis of her condition.

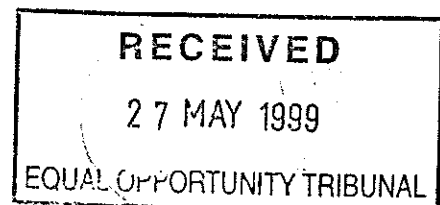
Mrs Martin also informed some of her work colleagues, in general conversation, that she was subject to panic attacks. She mentioned that she could not put her face under the water, did not go swimming, was unable to wear hats and was not inclined to travel on boats. Robyn Torre, head of the fund raising section, suffered from claustrophobia, and as a consequence, sometimes experienced slight panic attacks when going to the hairdresser or to restaurants. She was sympathetic to Mrs Martin's situation. It was clear from the evidence that Mrs



Martin had never experienced an extreme reaction to an enclosed space, and it therefore seems that the symptoms under discussion were thought to be of a comparatively mild order. They could usually be alleviated by removing oneself from the source of discomfort. Further, both parties to the discussion seemed to understand that the pattern of discomfort was irregular and unpredictable. Sister Willox said in evidence that she was not asked to take any specific action because Mrs Martin informed her that she (Mrs Martin) was handling the situation.

As a consequence of a conversation with the Association's maintenance supervisor Mrs Martin learned that the partitioning was going ahead. At that time the office space which she occupied with Sharon Hoddy (a fellow employee in the administration section) and Jacqueline Wadington and Coralie Cook (employees in the fund raising section) measured 7.75 metres long and 5 metres wide. The western face of the building consisted of continuous glass and the northern and southern faces, brick walls. The eastern side was an open counter area with a 1.2 metre wide doorway in the centre being the only access point. Mrs Martin's desk was located near the south west corner of the office facing north with the glass windows, which are covered with curtains, in clear view to Mrs Martin's left hand side. It was apparent to her from her meeting with Mr Kumar in October 1995 and from her recent conversation with the maintenance supervisor that the effect of the partitioning would be to leave her in a constricted space.

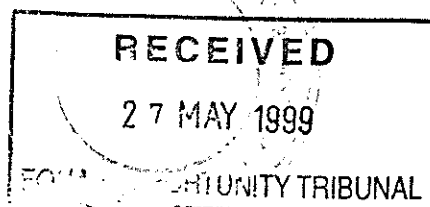
Mrs Martin and Sharon Hoddy were called in to Mr Kumar's office in early April 1996 for a discussion about the partitioning proposal. It appeared to be common ground at the hearing that as a consequence of discussion at this meeting there was agreement that rather than the office space being divided into four smaller offices it was to be divided into two offices only and some adjustments were to be made to the height of the central or internal partition running from the corridor to the external wall. There was a considerable degree of controversy between the



parties, however, as to the reasoning relevant to these adjustments to the partitioning proposal.

According to Mrs Martin, she pointed out that as the air conditioning/heater was on her side of the office, if the partitioning went all the way to the ceiling, then none of the other staff would receive the cool/warm air. She said that in this and in following discussions with Mr Kumar she made known her concerns about the height of the internal partition and specifically requested that it be lowered to "head height while sitting". She said in evidence that it was conveyed both to Mr Kumar and to Robyn Torre, as the two section heads with a direct interest in the partitioning issue, that because of her claustrophobia she needed an assurance that she could get out of the area if the doorway separating the proposed two new offices (being a doorway in the internal partition) was blocked. If the height of the internal partition was lowered consistently with her request then she would probably be able to cope with the situation.

Witnesses for the Association presented a different view of the matter. According to Mr Kumar discussions with relevant staff, including Mrs Martin, took place concerning the partition on various occasions. He said that as a result of submissions made by staff, including Mrs Martin, the Association agreed to divide the subject space into two offices only and as a result of a subsequent request, specifically made by the Complainant, the Association agreed to erect the glass partitioning on the internal partition to a height which was 600 mm below the ceiling, to place a glass panel in the door in the internal partition and to reverse the swing of that door; in short management had done its best to meet her request, and had responded in a reasonable way. He and Robyn Torre confirmed in evidence that Mrs Martin did not provide them with any medical certificate documenting her condition. On the basis of Robyn Torre's knowledge of claustrophobia they adopted a "wait and see" attitude, in the belief that Mrs Martin's concerns had been accommodated by the changes, and this was conveyed to Mrs Martin. It is material to note that a witness called by Mrs Martin,

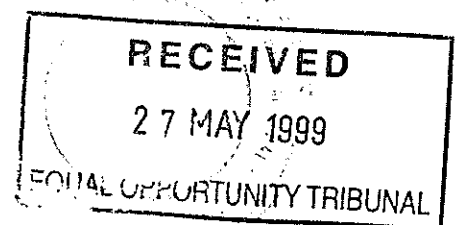


namely, Coralie Cook who worked in the fund raising section, seemed to think that the height of the internal partition had been lowered to accommodate Mrs Martin's concerns.

### The June Events

A meeting was held in Mr Kumar's office on 6 June 1996 at which Mrs Martin was represented by Anne Reynolds as her staff advocate. By this time the partitioning was being erected above the counter on the corridor side of the relevant space. When Mr Kumar asked whether Mrs Martin had any problems with the partitioning being erected she indicated she was troubled by it. When she asked Mr Kumar what would happen if, when the partitioning was completed, she found that she could not enter that area, his response was "once you go in there you'll be fine." This caused her to become agitated. Although she was minded to leave the meeting, she was persuaded to stay. Mr Kumar then suggested that Mrs Martin attend INDRAD. After a conversation with Sister Willox, Mrs Martin was persuaded to attend INDRAD and did so on 11 June 1996.

Mrs Martin arrived at work on 12 June 1996 and found that work on the internal partition was now proceeding. According to her, she persuaded herself to sit at her normal work place which was now being closed in and attempted to work in a normal manner. However, because of the disruption, she took an early morning tea break. When she returned to her work station another panel of half glass and timber was about to be erected. She began to feel apprehensive and short of breath so she left her desk and walked quickly to the toilet. She was extremely agitated and suffering pins and needles in both hands. She couldn't get her breath and her mouth went dry. She attempted to wash her face but found that she was experiencing a seizure and fell to the floor. She felt that she was on her own and was going to die. Sister Willox intervened and arranged for her to be conveyed to the sick bay where she received further treatment. Her son arrived



a short time later and took her home. Later that day she attended Dr McGregor at the Mirrabooka Medical Centre.

His report on the incident reads as follows:

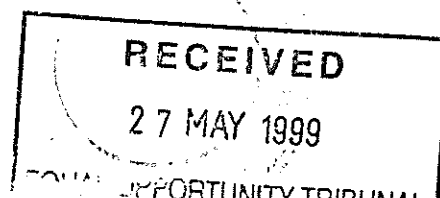
"On the 12<sup>th</sup> June 1996 Mrs Martin presented to me with symptoms of a severe anxiety attack, provoked by the erecting of partitioning around her work area. This episode was witnessed by a nurse at her work place and myself. Symptoms gradually settled with reassurance and 10 mg of Valium. I placed her unfit on workers compensation and referred her to Dr Sanath De Tissera, Psychiatrist, for management. There is no doubt in my mind that changes in her work place exacerbated, to a severe degree, her pre-existing claustrophobia."

On that day he also provided her with a medical certificate directed to Mr Kumar, dated 12 June 1996, which reads as follows:

"I am writing this in behalf of the abovenamed (Jean Martin). It would appear that from descriptions from Jean and also Lyn Willox (Nursing Sister), Jean suffered a severe anxiety/panic attack today at work. This seems to have been precipitated by a feeling of claustrophobia in the work environment. I have no hesitation in suggesting that Jean avoid any situation that may precipitate a feeling of claustrophobia and possible anxiety."

### Subsequent Events

On the following day Mrs Martin returned to work and went to see Sister Willox. They both attended Mr Kumar's office at approximately 8.32 am. Mrs Martin apologised for what had happened the previous day but said it was beyond her control. Mrs Martin handed over the letter given to her by Dr McGregor and informed Mr Kumar that she could not go back into the office space created by the partitioning and asked whether she could be relocated. She made it clear that she wanted to work. According to her, Mr Kumar's response was that this could not be done. Mrs Martin knew that the partition was going up. Her inability

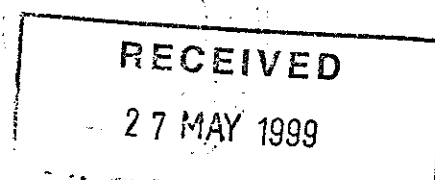


to cope with the situation was her problem and she needed to get help. Reference was made to a possible workers' compensation claim but Mr Kumar allegedly indicated that the incident did not fall within the relevant criteria. Against this background, and in the absence of any suggestion as to where else in the building she might work, Mrs Martin left the office in the belief that no other option was available to her.

A handwritten statement prepared and signed by Mrs Martin subsequently in support of her workers' compensation claim contains this description of the events on that day:

"Lyn (Wilcox) and I entered Chris's office. He said that he hadn't expected to see me in at work. I placed Scott's (McGregor's) letter on the desk. I apologised to Chris for what had happened the day before but that I had no control over what was happening. I said 'I now realise after what's happened that I can't go into that room. I just want to get on with my work so please could I be relocated.' Chris answered 'that is not an option. You knew the wall was going up. It's your problem. You need to get help.' I asked him 'where does that leave me. I'm not refusing to work, I just cannot work in that environment.' Lyn cut in and informed Chris that my doctor had wanted to put me on workers' compensation but I didn't want to stay away from work. Chris came back with 'this is not workers' compensation.' I said that my doctor thinks it is. He explained how workers' compensation worked – first certificate - WC claim form both go to the insurance company. The insurance company then makes inquiries and he (Chris) would oppose the claim, stating that I was the one with the problem. ... 8.50 am Lyn and I left Chris's office – Lyn walked down the hallway and I drove straight to the doctor's."

Mr Kumar gave a different account of what took place at the meeting on 13 June 1996. According to him, he drew attention to the fact that the renovations had been changed to meet Mrs Martin's requirements. He said that there was no possibility of relocating her within the Sir David Brand Centre because there was no other suitable space available. He also explained that if she wished to lodge a workers' compensation claim, she would have to follow the appropriate claim procedure. Under cross examination, he conceded that no substantial thought



was given to the possibility of placing her desk in some other area on an interim basis.

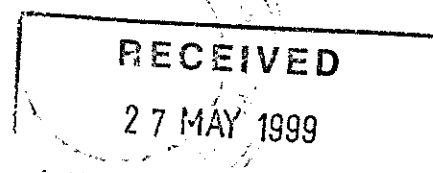
In due course Mrs Martin presented a claim for workers' compensation and while this claim was being investigated by the Association's insurer she remained away from work. In addition to being treated by Dr McGregor and Dr De Tissera, she was also sent to the insurer's adviser, Dr D Shub, Consultant Psychiatrist from Perth Medico Legal Consultants, for review. Much later, in the course of prosecuting her complaint under the Equal Opportunity Act, she was assessed by Dr Oleh Kay, an independent expert engaged by her solicitors.

### **Workers' Compensation Claim**

Mrs Martin contended that her workers' compensation claim was opposed by the Association in a manner which amounted to discriminatory conduct. This allegation was denied by the Association. According to Mr Kumar, consistent with the usual practice, the claim was handled by the insurer. It was the insurer which opposed the claim and disputed liability with the result that the matter became the subject of a conciliation conference held at Work Cover WA on Wednesday 31 July 1996. On the basis of the information and medical reports before him, the conciliation officer ordered the employer, under Section 84Y of the Workers' Compensation and Rehabilitation Act 1981, to pay weekly payments of compensation for a period not to exceed 10 weeks, this being the maximum compensation which could be enforced by a conciliation officer.

An affidavit was received in evidence from the conciliation officer, Mr Murray Champion, to which was annexed a file note which purported to reflect what took place at the conciliation conference. The file note is in these terms:

"A conciliation conference was held on Wednesday 31 July 1996 and was attended by the worker, her husband and her daughter Julie Martin together with Alan Cropley from MMI Insurance. This is an application



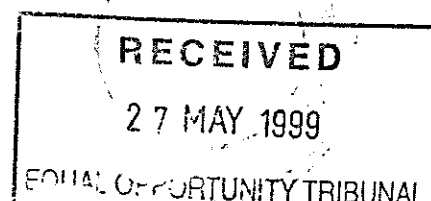


filed by the worker seeking weekly payments of compensation from 13 June 1996 and continuing together with payment of medical and other expenses. On the evidence before me today it is quite clear the worker has an entitlement to compensation. Both the psychiatrist whom MMI referred the worker to see and the worker's own treating psychiatrist support the worker's claim. Apparently it is the employer who is being difficult in relation to this matter according to MMI Insurance. In an effort to appease the employer MMI Insurance have arranged for Dr Shub Consultant Psychiatrist to attend the work place to view the area and also to discuss the matter with the employer. At my suggestion the worker's daughter, Julie Martin will attend also at that assessment to ensure a balanced position is given to the Consultant Psychiatrist. MMI don't envisage any problems with this matter but wish to ease the employer's concern relating to the employee's claim."

Dr Shub subsequently attended the premises but without Mrs Martin or her daughter Julie being present. There was some controversy at the hearing as to whether this was due to further obstruction of the claim by the Association. Mr Kumar denied that any obstruction was intended. After the meeting, Dr Shub prepared a report for the insurer's solicitors, Crisp & Partners, dated 26 August 1996 in which he stated that "having inspected the area in which Mrs Martin was previously working, I am somewhat surprised that she had become symptomatic although I cannot obviously judge what she perceives to be anxiety provoking or frightening."

As a result of their investigations, MMI accepted the claim on a without prejudice basis, paying out of pocket expenses, offering a position with the employer in Inglewood commencing 14 October 1996, and a reinstatement of annual and sick leave. A period of incapacity was agreed from 13 June 1996 to 11 October 1996 inclusive.

Mr Kumar said in evidence that Mrs Martin was referred to Western Rehabilitation. Attempts to resolve the matter through rehabilitation proved unsuccessful as Mrs Martin declined offers of work. Eventually, as soon as an opportunity arose in its Opportunities Programme in Inglewood, the Association



made arrangements for her to be employed in that programme in a new position. At all material times, the Association has maintained its position that the decision whether to accept, oppose or settle the workers' compensation claim was solely a decision of the insurer and that it did not seek to obstruct settlement of the claim.

### Expert Opinion

The report of Dr Scott McGregor dated 10 December 1996 previously mentioned contains not only a summary of the events of 12 June 1996 but also a review of subsequent events. The report includes the following passage:

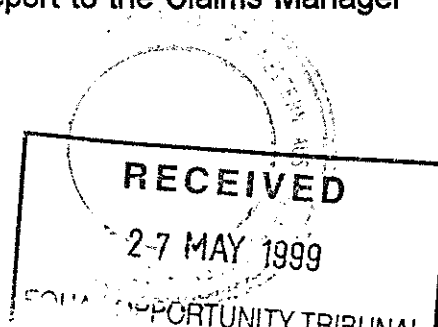
"Mrs Martin was placed on the medication Moclabemide 150 mg bd with Propranolol 40 mg tds, to attempt to control general anxiety since the abovementioned episode (of 12 June 1996). She was later commenced on Xanax 0.5 mg bd, as symptoms were not improved after one week.

After the ensuing weeks, symptoms improved gradually and meditation/relaxation techniques taught by Dr De Tissera were helping. Mrs Martin, however, expressed ongoing frustration and anger at the situation at her workplace. She claimed to have been receiving no support from work superiors, or that her direct supervisor was being as antagonistic as possible.

I continue to review Mrs Martin on a regular basis and was able to closely follow her progress with treatment etc. She continued to suffer symptoms to a lesser degree right up until October and as far as I am aware and is still not back to her pre-morbid level of functioning. Mrs Martin ceased all medication by early October. She was unfit to work on medical grounds until mid October.

At this stage, she is still coping reasonably well in a different working environment. However, I have not seen Mrs Martin in person so I am uncertain of how she is coping exactly."

The psychiatric assessment of Mrs Martin closest to the traumatic event was provided by Dr Shub who was asked to provide a report to the Claims Manager



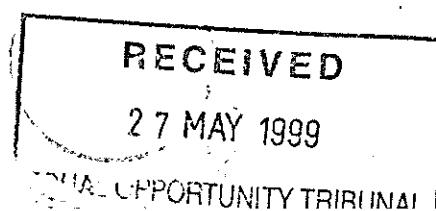
of MMI workers' compensation, being the insurer handling the claim. Dr Shub's report is dated 19 July 1996. The recitation of her history includes this passage:

"She stated that she has experienced claustrophobic symptoms since the age of 8 following a near drowning episode in England. She becomes extremely distressed and anxious when there is the perception of being confined in a particular area with no escape avenues. However, she has managed to minimise her symptomatology by controlling her environment to the extent that she avoids situations or circumstances which would precipitate anxiety."

Dr Shub then goes on to describe the apprehension she experienced as a consequence of the proposed changes to the office area and the severe panic attack of 12 June 1996 which gave rise to "a range of physical symptoms such as accelerated heart rate, hyperventilation, tremulousness, dizziness, sensation of choking, feeling hot and sweaty and tingling sensations in her hands." Dr Shub notes that her symptoms continued for over an hour, and necessitated the administration of 10 mg of Daizepam by the on site nursing sister. He then refers to the medication subsequently prescribed by Dr De Tissera and goes on to say that "she feels that the medication has assisted her, and she is essentially asymptomatic – although she has experienced some sleep disturbance and appetite loss since the episode on 12 June 1996." He adds later, while reviewing her current symptoms, as at 19 July 1996:

"She has noted some fatiguability but is still able to maintain her normal activity level. She feels angry regarding her perception of mismanagement within her working environment. She has experienced no further panic attacks."

He concluded that she had claustrophobia, or in the more recent DSM4 nomenclature, Specific Phobia, Situation or Type (Coding 300.29). According to Dr Shub, the criteria relevant to such a phobia are an excessive persistent fear triggered by the presence of a specific object or situation with the phobic situation being one that is either endured with intense anxiety or distress or avoided, if

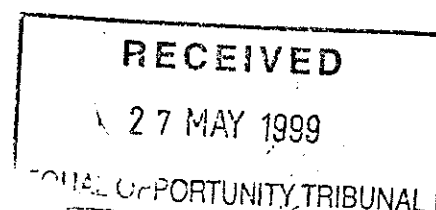


possible. He said that in his view Mrs Martin had made a recovery but remained phobic regarding being within enclosed spaces. His further comments read in part:

"She has not recovered from her disorder, but is able to function providing there are environmental modifications to allow her to continue functioning .... I consider that Mrs Martin can return to her previous full time duties providing that she is able to work within an environment that does not trigger her phobic reactions .... Mrs Martin's incapacity, in my opinion, is the inter-reaction between her pre-existing vulnerability and her current working environment .... there are specific cognitive/behavioural techniques which have demonstrated efficacy, and I consider that these are warranted in Mrs Martin's case .... one approach for example would involve a gradual desensitisation to the feared stimulus (enclosed spaces), whereas other interventions may involve a procedure known as 'flooding' in which the patient is exposed to the feared stimulus but with appropriate therapist support. The estimated recovery period is difficult to provide, though with a comprehensive programme I would expect that Mrs Martin's disorder could be significantly improved within a period of months."

In a subsequently written report, being the report mentioned earlier dated 26 August 1996, Dr Shub reveals that he inspected Mrs Martin's work place. He had this to say about it:

"Having inspected the area in which Mrs Martin was previously working, I am somewhat surprised that she had become symptomatic. Although I cannot obviously judge what she perceives to be anxiety provoking or frightening, it was my view that the area in which she worked was relatively spacious, well lit, and had satisfactory door access. I was unaware that Mrs Martin had worked in the mail room for approximately 3 years up to 40 minutes per day duration. It is my view that the mail room is a far less satisfactory environment than the office which had been partitioned and suggests inconsistency in her historical account in that no apparent complaints were made during this period of time .... I also note that she had worked for approximately 1 year in the area known as 'the typing pool' in which there were 4 desks and 3 co-workers. Again, I find it difficult to reconcile her account of developing symptoms within the office space which was partitioned, but not experiencing and distress while in either the typing room or mail room .... Although the newly partitioned office space is not optimal, it would seem to me to be satisfactory. I did not consider the space to be particularly confined, and there was



adequate visual and physical access. It was well lit, and I believe it was a far more appropriate working environment than either the typing room or mail room in which I understand she apparently managed to function without becoming symptomatic."

He then went on to say that in his view Mrs Martin was not incapacitated for work with the Association and again suggested that it might be useful to offer Mrs Martin psychological assistance with respect to her becoming desensitised to the work environment in question.

As previously indicated, during the course of prosecuting her complaint under the Equal Opportunity Act, Mrs Martin was assessed by an independent expert, Dr Oleh Kay, who had access to the medical reports previously obtained. Dr Kay seems to accept, in his report dated 19 February 1998, that there was no significant conflict concerning her historical data or symptoms, for the various reports reveal a long history of an anxiety disorder characterised by panic attacks, generalised anxiety symptoms and avoidance. He notes that "despite having had her problems for many years, her symptoms had minimal objective impact on her life and she only required psychiatric treatment following an incident at work in June 1996." He also made reference to the Diagnostic Standards Manual, known as DSM, and in response to the specific enquiry made of him by the solicitors for Mrs Martin as to whether claustrophobia "specific phobia, situational type" can be a subjective experience for each sufferer – this being a reference to Dr Shub's characterisation of the phobia – his report reads in part as follows:

"Ms Martin suffers from, using DSM IV terminology, panic disorder with agoraphobia. .... Claustrophobia is not a specific DSM IV diagnosis, but I believe that specific phobia – situational type, as diagnosed by Dr Shub is less apt than the particular diagnosis agoraphobia, partly because the prognosis for specific phobia is different to that of agoraphobia as are the associated phenomena of agoraphobia and specific phobia, in particular, panic attacks .... In answer to your specific question, the experience of panic is almost entirely subjective and, the type of experience and a person's response to the experience, is often quite different between one

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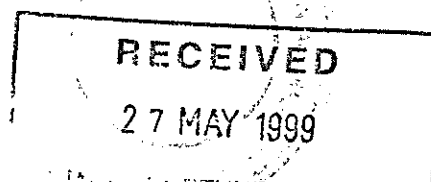
EQUAL OPPORTUNITY TRIBUNAL

person and another, indeed, often quite different between one triggering event and another.”

In the course of dealing with other queries put to him including the question of whether the affected person can function in close spaces at some time and not in others and as to whether fear of being alone in a work place could aggravate the panic attacks and anxiety his report reads in part as follows:

“The nature of the disorder (agoraphobia) is that it follows a fluctuating course and sometimes people have severe panic attacks at one time in a situation and not in another. Paradoxically, they can feel most comfortable in a situation that most resembles an environment in which they feel least comfortable, for example, they may feel quite comfortable in their own bedroom at night when in a similarly sized darkened room they would feel terrified. The crucial issue is one of control. If a person who suffers from a condition feels that they are the master of their environment, or at least have reasonable control over it, they tend not to have symptoms, also if they are in an environment in which they feel they have little control or under the control of others, they may have intensive symptoms .... Being alone at work for Ms Martin may be a precipitating event for the experience of a panic attack, but it is less the fear of being alone that causes her difficulties and more the fear of not being able to control her destiny, in particular, not being able to respond to a panic attack by leaving the triggering environment which causes her most difficulty .... There is no doubt that the aggravating factors for agoraphobia are a concurrent physical illness eg influenza, and also the experience of other environments that cause stress eg bereavement or financial difficulties. In Ms Martin’s case, she lost both her parents several months before this episode at work .... It is not simply a matter of the working environment being spacious and well lit, factors that also need to be taken into account are the number of exits and entrances into a particular room, the placement of windows, whether she has to be in a particular room for a long period of time or whether it is a question of simply entering and exiting the room.”

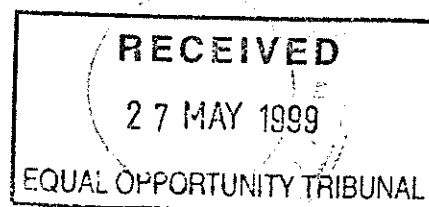
Dr Kay provided two further reports dated 4 June and 13 August 1998 which were generally consistent with the views he had expressed previously. He also elaborated on those views at the hearing. In his report dated 13 August 1998 he specifically addressed the question of whether the cause of her current



symptoms and whether her current need for ongoing pharmacotherapy was directly related to the incident at work on 12 June 1996. In that regard he said:

"In my opinion, if not but for the incident on 12 June 1996 Ms Martin's condition would be much as it was before the precipitating event. She may have benefited from pharmacotherapy, but there was no pressing requirement for it and this is contrasted by her presentation now where, on occasion, she exhibits quite marked symptoms and clearly has a pressing need for pharmacotherapy."

At a later stage, the solicitors for the Respondent Association engaged their own independent consultant psychiatrist, Dr Zelko Mustac, who reviewed various materials bearing upon the history of the matter and the medical reports of Dr Shub and Dr Kay mentioned earlier. He did not confer with Mrs Martin herself. In his report dated 29 October 1998 Dr Mustac drew attention to certain features of the case which struck him as unusual, namely, as a key feature of her disorder was anxiety about being in a place from which escape might be difficult. It seemed odd that she was troubled by an environment where she was able to move freely from office to office. Further, it seemed inconsistent that she was able to work competently in a smaller room, namely the mail room, and did so for a number of years prior to the complaint being lodged. He noted from Dr Shub's report that she seemed to feel angry regarding the way management had dealt with her situation and this seemed to confirm "that there is another issue other than that of mental illness namely motivation with regards to a return to work and her perception of needing to assert herself in a legal context." Dr Mustac thought "that the issue of control is more related to her perception that management were attempting to remove her from position rather than the size of the room." In other words, that the issue of the size of the office is not important in itself but rather represented an effort by her to assert herself. It may be that she was much more concerned regarding her fear of losing her position rather than concern regarding the partitioning as such. He went on to say in conclusion:

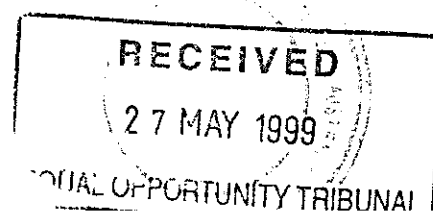


"I disagree that she suffers from a generalised anxiety disorder. I do not think there is any evidence of this. Instead, she has fear of specific situations such as placing her head in water, which would qualify as a specific phobia .... It would appear that she suffers from agoraphobia the diagnostic criteria of which are included for your perusal .... However this is a disorder which tends to fluctuate and I don't think it reasonable to conclude that a specific size of room would induce its development or necessarily relieve it. In fact it is the feeling of not being able to leave which is much more significant. An example is people who are nervous driving across bridges. Other examples include people who are nervous in movie theatres, not because of feeling enclosed in but rather because they know that they are expected to stay in the movie theatre until the end of the movie."

### Procedure

Mrs Martin lodged a complaint with the Commissioner of Equal Opportunity on 10 January 1997 referring to discrimination on the ground of impairment. Her complaint contained a detailed statement comprising 38 paragraphs which reflects the narrative set out above and which was subsequently reiterated in the Points of Claim filed on her behalf by her solicitors, the operative document being now described as the Complainant's Amended Points of Claim filed on 24 November 1998. It will be useful to look at some specific features of the Amended Points of Claim.

Having set out the circumstances giving rise to the complaint including reference to the traumatic events on 12 June 1996, Mrs Martin says in paragraph 34 that the panic attack experienced by the Complainant was caused by the Respondent's conduct in erecting the partitioning. The Respondent's conduct allegedly caused a deterioration in the Complainant's psychiatric condition which has not abated. In the period immediately following the erection of the partitioning, the Complainant's condition deteriorated to the point where she required constant monitoring. As a result, the Complainant's husband was required to terminate his employment so that he could care for her.



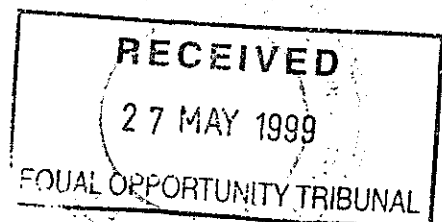


The Points of Claim then turn to subsequent events including Mrs Martin's meeting with Mr Kumar on 13 June 1996 in the presence of Sister Willox. She pleads that having provided Mr Kumar with the letter from her general practitioner and having informed him that she now realised that she could not go back into the room in question, Mr Kumar's response was that relocation was not an option. The Complainant had known that the partition was going up and it was her problem and she needed to get help. Reference is then made to an allegation (in paragraph 58) that the Respondent Association, in spite of medical information, full and detailed assessors' reports, staff information and the opinion of the insurer, decided on the basis of its own subjective understanding of claustrophobia, to deny the Complainant her workers' compensation claim.

In paragraph 59 it is alleged that the Respondent Association's conduct in erecting the partitioning, in refusing to alter the partitioning in accordance with the Complainant's requests, and in requiring the Complainant to work in the partitioned area was in contravention of Section 66A(3) of the Equal Opportunity Act in that the Complainant was required to comply with a requirement with which substantially all of her fellow employees could comply, with which she was unable to comply and which was in all the circumstances unreasonable.

It is also said, in paragraph 60, that the Respondent Association's conduct in denying the Complainant's workers' compensation claim was in contravention of Section 66A(1) of the Equal Opportunity Act in that the Respondent Association treated Mrs Martin less favourably because of her psychiatric condition than persons not suffering such an impairment.

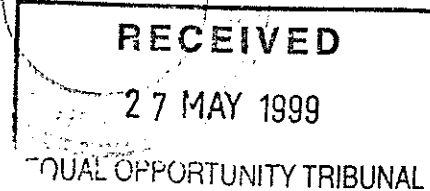
A claim is then advanced for damages for the Complainant's pain and suffering, stress, embarrassment, anxiety and humiliation and the deterioration of her psychiatric condition. Reference is also made to damages for loss of earnings incurred by the Complainant's husband in caring for the Complainant plus medical expenses of \$750. The Complainant by her pleading also sought a



formal written apology from the Respondent's Board of Directors or such other remedies as the Tribunal thinks fit.

The Respondent Association dealt with the various allegations in its Points of Defence, and its stance in regard to some of the matters in issue has already been indicated in the narrative set out above. On the Respondent's case, Mr Kumar and Mrs Torre took account of the Complainant's concerns and made some changes to the proposed partitioning. By paragraph 15.5 the Respondent Association accepted that Mr Kumar did advise the Complainant that once she entered the new partitioned offices she would be fine but went on to say that it was suggested to the Complainant that she attend INDRAD at the Respondent's expense. The Respondent did not formally admit that an incident of the kind described by the Complainant took place on 12 June 1996 with the result that Mrs Martin was obliged to leave work for the day but this did not seem to be seriously contested at the hearing. It was accepted in the pleading that Sister Willox reported the incident to Mr Kumar. It was also accepted that a meeting took place on the following day, 13 June 1996, at which Mr Kumar was handed a letter from Dr McGregor saying that Mrs Martin should avoid any situation that might precipitate a feeling of claustrophobia or anxiety.

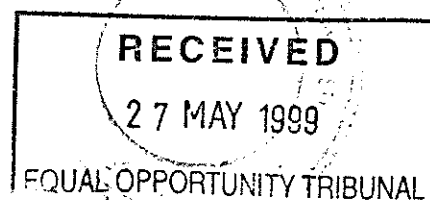
In regard to the meeting on 13 June 1996, the Respondent Association in its pleading goes on to say that Mr Kumar also reminded Mrs Martin that the Association had changed the renovations to suit her. He confirmed there was no possibility of relocating Mrs Martin because there was no other suitable space available. He explained that if she wished to lodge a workers' compensation claim, she would have to follow the appropriate claim procedure which was explained to her. In paragraph 24 of the Points of Defence the Respondent pleaded that when the first opportunity arose in the work place for a vacancy to where Mrs Martin could be relocated, that position was held open for her but subsequently, on two occasions, she declined to attend meetings with the



Association to discuss her return to work in the location the Respondent was holding open for her.

The Respondent Association by its Points of Defence accepted that Mr Kumar was in charge of workers' compensation issues, and that the insurer referred the claim to Dr Shub, but otherwise the Association denied any allegation of discriminatory conduct on its part. According to the Respondent, by its pleading, it was the insurer who opposed the workers' compensation claim and disputed liability with the result that the matter ultimately had to be settled by agreement. The Respondent Association pleaded further, in paragraph 36, that Mrs Martin was referred for rehabilitation as the insurer advised that it was inappropriate for the Association to contact Mrs Martin directly, although the Association was prepared to do so. As soon as an opportunity arose in its opportunities programme in Inglewood, the Association kept the position open whilst the position of the Complainant was unresolved. In normal situations the Association would have filled this position but it was left open as an option for Mrs Martin to consider should she wish to return to her previous work place.

The Association pleaded that the decision whether to accept, oppose or settle the workers' compensation claim was solely a decision of the Association's insurer and that the Association itself has not denied the workers' compensation claim. Finally, the Association pleaded in paragraph 43 that Mrs Martin made no effort to accept the modifications to her work area when with appropriate cooperation and good will on her part she could have conducted herself in such a way as would have assisted her in relation to her perceived concerns and enabled her to satisfactorily perform her duties in the modified premises. Particulars provided in support of that plea were that Mrs Martin had previously worked in an office of similar size to the renovated office with no problems. If she had felt claustrophobic, she could simply have left her seat and walked outside of the office at any stage. Her duties did not require her to remain sedentary in her office throughout the day, much of her time being spent outside her office walking



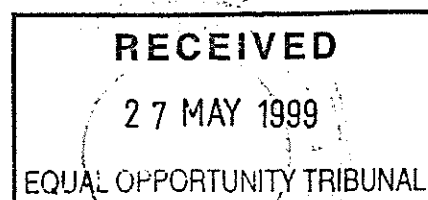
throughout the offices of the Association. The Respondent pleaded that its attitude and behaviour in relation to Mrs Martin was both reasonable and fair at all times and it therefore denied that it had in any way discriminated against the Complainant.

### **Statutory Provisions**

Before reviewing the evidence, it will be useful to look briefly at the statutory provisions bearing upon the matters in issue.

The term "impairment" is defined by Section 4 of the Equal Opportunity Act to mean any defect or disturbance in the normal structure or functioning of a person's body or brain, or any illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment, or which results in disturbed behaviour whether arising from a condition subsisting at birth or from an illness or injury. It was common ground at the hearing, in the light of the detailed evidence given by the experts, that Mrs Martin did suffer from an impairment at all material times in that on any view of the matter her disorder could be regarded as a defect or disturbance in the normal functioning of a person's brain or otherwise as a condition which resulted in disturbed behaviour. Further, the question of whether she suffered from an impairment within the language of the Act was not raised as an issue in the Points of Defence.

Section 66A(1) of the Act as amended addresses direct discrimination and provides that a person discriminates against another person on the ground of impairment if, on the ground of the impairment 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 an impairment. Section 66B provides that it is unlawful for an employer to

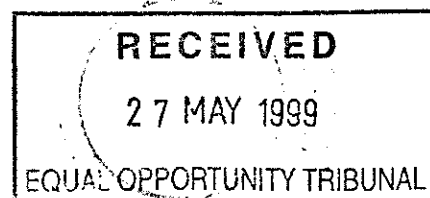


discriminate against a person on the ground of a person's impairment by dismissing the employee or by subjecting the employee to any other detriment.

The Complainant in the present case relies upon those provisions in regard to the cause of action reflected in paragraph 60 of the Points of Claim, that is to say, that the Respondent Association's conduct in denying the workers' compensation claim was discriminatory ("the workers' compensation claim issue").

In dealing with such an issue it is important to keep in mind that by Section 5 discriminatory conduct need not be the dominant or substantial reason for the act complained of. Further, by Section 161 where an employee or agent of a person does an act that would be unlawful under the Act if it were done by the person then the Act applies in relation to that person as if that person had also done the act. By Section 162 it is sufficient to establish that a person who acted on behalf of the body corporate in the matter acted on the ground relied on by the complainant. It follows from these latter provisions that the Association can be held vicariously liable for the conduct of its managers or managerial team.

Section 66A(3) of the Act addresses indirect discrimination and provides that a person discriminates against another person on the ground of impairment if the discriminator requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who do not have the same impairment as the aggrieved person comply or are able to comply, which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply. Again, if discrimination of that kind occurs in the course of the employment with the result that the employee is subjected to a detriment then relief of the kind allowed for by Section 127 of the Act is available to a claimant, such relief including an award of damages not exceeding \$40,000 by way of compensation for any loss or damage suffered by reason of the respondent's conduct.

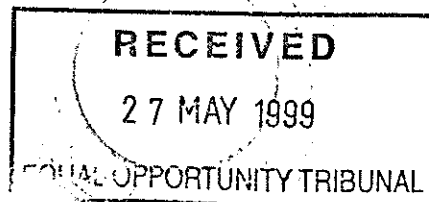


The Tribunal pauses to note, as indicated earlier, that Mrs Martin's claim of indirect discrimination on the ground of impairment is reflected in paragraph 59 of the Points of Claim which is expressed in terms sufficiently broad to encompass not only the events surrounding installation of the partitioning which gave rise to the traumatic incident complained of on 12 June 1996 but also the events on the following day, 13 June 1996, when Mrs Martin was allegedly told that she could not be relocated and, by implication, would have to work in the area which was now enclosed by the new partitioning.

For ease of reference, the Tribunal proposes to deal with this part of the claim in two parts being, first, the events leading up to and including Mrs Martin's panic attack on 12 June 1996 ("the 12 June issue") and the events on the following day when a meeting took place between she and Mr Kumar at Mr Kumar's office in the presence of Sister Willox ("the 13 June issue").

In a complaint of this kind Mrs Martin bears the onus of establishing that she has been the victim of unlawful discrimination, and the case must be proven on the balance of probabilities. The decided cases also indicate that in regard to a plea of direct discrimination a comparison can be drawn between the situation of the complainant and the situation of a notional person in the same or not materially different set of circumstances. Further, it is not necessary to establish deliberate discriminatory conduct for an act of discrimination to take place. The statutory provisions embrace conduct arising from thoughtlessness and neglect, but it must be shown that an act of unlawful discrimination is causally connected to the circumstances of the complaint and the loss complained of. *I W v City of Perth* (1997) 71 ALJR 943.

When one turns to the plea of indirect discrimination which, in the circumstances of the present case, is thought to embrace the 12 June issue and the 13 June issue a question arises as to whether the actions of the Association were



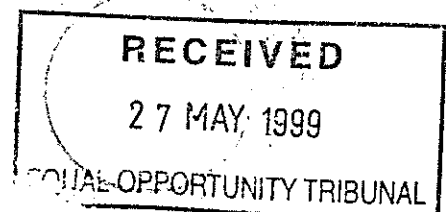
reasonable having regard to the circumstances of the case. The decided cases indicate that the test of what is reasonable is an objective one. Further, in deciding what is reasonable the Tribunal is entitled to have regard to the financial or economic circumstances of the Respondent Association. See *Waters v Public Transport Corporation* (1991) EOC 92-390.

### Findings

As previously foreshadowed, having regard to the pleadings and the way in which the case was argued at the hearing, the Tribunal finds that Mrs Martin did have an impairment within the meaning of the Act and was therefore in a position to advance a claim based upon that ground of discrimination. It was common cause at the hearing, as the Tribunal has already noted, that Mrs Martin suffered from an impairment within the meaning of the Act and there was a wide range of medical and psychiatric evidence to that effect. There is room for debate, however, having regard to the medical evidence, as to the exact nature of Mrs Martin's disorder.

After a careful review of the various expert opinions, the Tribunal prefers the view expressed by Dr Kay that Mrs Martin suffers from panic disorder with agoraphobia. The Tribunal was also satisfied, having regard to Dr Kay's report dated 19 February 1998, that the nature of the disorder is that it follows a fluctuating course with the result that sometimes a person with the disorder has severe panic attacks at one time in a situation and not in another. In Mrs Martin's case the experience of panic was likely to be entirely subjective with the result that it would be difficult to predict with confidence what might be a triggering event.

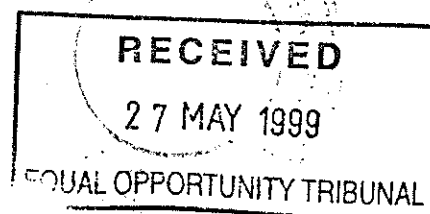
This view of the matter has certain implications in determining whether the approach adopted by her employer was reasonable in the circumstances of the case. On the one hand, it can be argued that the employer should have erred on



the side of caution in endeavouring to ensure that she did not come to harm. On the other hand, it might seem unreasonable to require the employer to make provision for a range of unpredictable possibilities that might not eventuate.

While considering the nature of Mrs Martin's phobia, the Tribunal digresses briefly to look at that part of Dr Mustac's evidence in which he seems to suggest that in the circumstances of the present case there might have been a factor underlying the trauma of 12 June 1996 other than Mrs Martin's phobia about having to work in the constricted space created by the partitioning, namely, stress arising from the notion that management was trying to remove her from her position. The Tribunal was not persuaded by this view and, consistently with its preference for the views expressed by Dr Kay, and its earlier finding about the nature of Mrs Martin's disorder, holds that on 12 June 1996 Mrs Martin experienced a trauma of the kind described in her evidence, as verified by Sister Willox and Dr McGregor, that is to say, to use the language of Dr McGregor's report "a severe anxiety/panic attack" and that this was caused by the construction of partitioning around her work area. The Tribunal is also satisfied that by the end of October 1996 Mrs Martin was able to return to work, although her recovery to some extent was impeded by Mr Kumar's stance, as expressed at the meeting on 13 June 1996, that, notwithstanding her trauma, he could not relocate her.

Nonetheless, the views expressed by Dr Mustac are a reminder that in the months preceding the 12 June incident the relationship between Mrs Martin and the management team had been marked by a degree of strain, originating, it seems, in Mrs Martin's wish to discontinue her association with the Referrals Group. The events leading up to the 12 June incident have to be viewed in this light. In other words, absent any other source of disagreement between the parties, management's failure to respond sympathetically to her concerns about the partitioning might be construed as a wilful indifference to her situation, but in the context of differences between the parties on various other matters, a degree

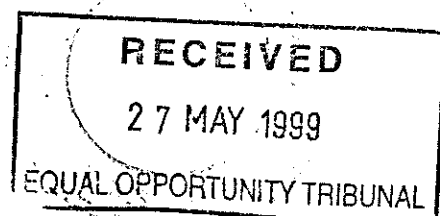




of caution on management's part in responding to her concerns becomes explicable. The Tribunal has already noted that discriminatory conduct need not be deliberate in order to be actionable. However, when it comes to drawing inferences in an attempt to understand and reach a finding as to the matters in issue, the Tribunal must be careful to give proper weight to facts and matters providing an explanation for what occurred which is unrelated to discriminatory conduct of the kind complained of.

The Tribunal also has to keep the following factors in mind. Mrs Martin's condition, on the Tribunal's finding, is now known to be a panic disorder with agoraphobia, a disorder which may give rise to a severe panic attack. Prior to 12 June 1996, however, Mrs Martin had not given the employer any formal notice in writing that she suffered from a condition of that kind. She made no mention of any such condition when she applied for a job with the Association. She did not obtain or present a medical certificate to the employer at any stage prior to 12 June. She had never suffered a panic attack of the severity that eventuated on 12 June 1996 and was therefore not in a position, even if she had been questioned further about her condition, to say what the consequences of non-compliance with her requirements concerning the partitions might be.

Mrs Martin spoke of herself as being "claustrophobic", and although, with the benefit of hindsight, it appears that she was probably mistaken in that characterisation of her disorder, (and as to other aspects of her phobia) it is also apparent that in conversation with Robyn Torre and Mr Kumar she left an impression that her discomfort was not likely to be extreme, and might not eventuate if she were able to absent herself from the work area or if the height of the partitioning was lowered. It must also be remembered that, according to various witnesses, the effect of the partitioning was not to create a small, sombre and oppressive office space, but, on the contrary, to provide a well lit working space with sufficient access, via a door in the internal partition, to allow movement to and fro. The office space being created by the partitioning had

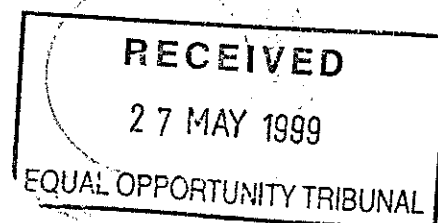


views through glass partitioning to the inner office, and through windows, to the outside world. Moreover, she had previously worked in the mail room – a space of similar size to the renovated office – without having any apparent problems.

It follows from earlier discussion that, when the Tribunal's finding as to the nature of Mrs Martin's condition is considered in relation to the 12 June issue and Section 66A(3) of the Act, the Tribunal is obliged to conclude that Mrs Martin, as the aggrieved person, was required to comply with a requirement or condition, namely, that she work in the office space created by the partitioning, with which her fellow employees such as Sharon Hoddy and Coralie Cook, could comply – they not being afflicted by her disorder – but with which she was not able to comply, as evidenced by the extremity of her reaction on the day in question, and by the subsequently obtained medical reports. Thus, one of the essential criteria of Section 66A(3) has been satisfied.

It also follows, however, having regard to the various factors that the Tribunal has just reviewed, that certain difficulties stand in the way of Mrs Martin satisfying the Tribunal on the balance of probabilities in regard to the 12 June issue that the stance adopted by the Respondent Association in installing the partitioning was, to use the language of the relevant section "not reasonable having regard to the circumstances of the case".

Prima facie, an employer is entitled to lay out its office space as it wishes, with a view to improving efficiency and meeting other managerial concerns, so long as proper provision is made for the safety and welfare of the staff. Notwithstanding a degree of controversy at the hearing about this matter, the Tribunal finds that the Respondent Association decided to install the partitioning for the reasons given by its witnesses at the hearing, namely, to reduce noise, to improve efficiency, to enhance security and to avert any possible breaches of confidentiality. The changes were necessary and therefore good and persuasive reasons were required to avert the changes. It is true that Mrs Martin raised her

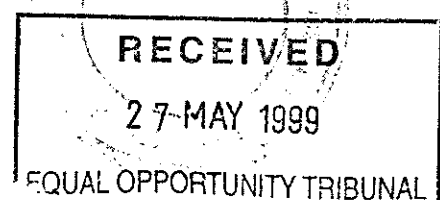


concerns with management but prior to 12 June her concerns were not backed up with medical evidence detailing the nature of her disorder, or foreshadowing the extremity of the panic attacks that might ensue. Indeed, unwisely perhaps, she left management with an impression that lowering the height of the internal partition, and some other comparatively minor modifications, would be enough to resolve the issue.

Having regard to Robyn Torre's experience, as a person with a diagnosed condition of claustrophobia, the three senior managers involved had reason to believe that the changes made to the partitioning might well prove to be sufficient, and in any event the degree of discomfort experienced might either not eventuate or not be severe. The medical opinion subsequently obtained confirmed that the nature of Mrs Martin's disorder is such that one cannot necessarily assume that a severe panic attack will ensue, simply because the person with the phobia enters an unfamiliar space. The Tribunal is therefore not satisfied on the balance of probabilities that the Respondent Association acted unreasonably in the circumstances of the case in adopting a wait and see attitude.

On the basis of the information before it, the Association could not foresee that Mrs Martin would be subjected to severe distress. On this view of the matter it becomes unnecessary to determine whether Mrs Martin insisted that the internal partition be lowered to head height while seated. Even if the Respondent Association had complied with such a request, it was not in a position to judge, in the absence of precise medical evidence as to the nature of Mrs Martin's disorder, whether such an alteration would be effective or not.

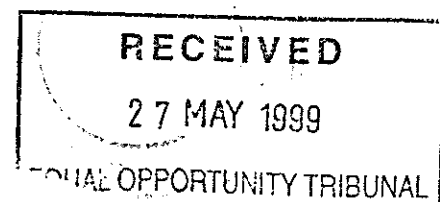
Different considerations apply when one turns to the facts and matters comprising the 13 June claim. Mrs Martin returned to work on the day after the severe anxiety/panic attack, bringing with her, on this occasion, a medical certificate from Dr McGregor confirming that she had suffered a severe



anxiety/panic attack at work the previous day, and identifying the partitioning as the cause of her distress. She met Mr Kumar with a view to discussing her situation and making known to him that she could not comply with the condition previously required of her because, unlike the other staff members, she personally could not work in the recently partitioned office area, notwithstanding that in general terms the new space was sufficient and other office workers would be able to work at that site. By this time Mr Kumar had been informed about the previous day's incident. Further, and in any event, Mrs Martin was accompanied by Sister Willox who was in a position to and did provide corroboration of the severity and cause of the panic attack described in the medical certificate handed to Mr Kumar at that meeting.

Against this background, it was no longer open to Mr Kumar, with or without the advice of Robyn Torre, to adopt a wait and see attitude as to whether Mrs Martin's fears were real or imagined, or whether, if real, the degree of discomfort could be removed or alleviated by temporarily vacating the problematic work space. He was now possessed of clear proof that the proposed work environment could be harmful to his employee. If he had shown concern and suggested that, owing to the unavailability of an alternative work area, she remain away from work for the time being until a solution to the problem could be devised, either by relocating her within the building or by taking further medical or psychiatric advice, with a view to finding a cure for her phobia, then it could be argued that the stance adopted by Mr Kumar was defensible having regard to the language of Section 66A(3) of the Act.

The Tribunal is satisfied, however, on the balance of probabilities, that this was not the effect of the words used by Mr Kumar. The Tribunal finds that he did use the words attributed to him by Mrs Martin, namely, that relocation was not an option. Her disorder was her problem. In essence, his response to her wish to continue working was that she would have to work in the area enclosed by the new partitioning or not work at all. This was requiring her to comply with a

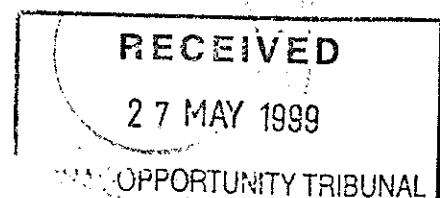


condition that she could not realistically comply with, having regard to the Tribunal's earlier finding as to the nature of her disorder, and that, in circumstances where she had already experienced a severe panic attack, this requirement was not reasonable.

At the time of the crucial exchange on 13 June 1996 Mr Kumar was effectively the representative of the Respondent Association. It follows from earlier discussion concerning the principles of vicarious liability reflected in Sections 161 and 162 of the Act that the Respondent Association is responsible for the conduct of its agent. By being asked to comply with a condition with which she was not able to comply, because of her impairment, she was subjected to a detriment in the course of her employment. The Tribunal therefore finds in favour of Mrs Martin in regard to this aspect of the cause of action reflected in paragraph 59 of the Points of Claim which the Tribunal has previously, for ease of reference, described as the 13 June issue.

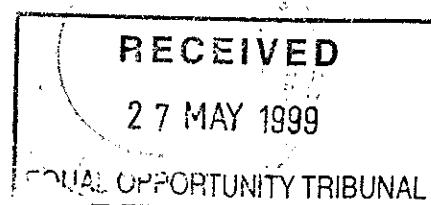
The Tribunal now turns to the cause of action reflected in paragraph 60 of the Points of Claim, being the cause previously characterised as the workers' compensation issue. In these Reasons the Tribunal does not in any way purport to make a determination as to whether the workers' compensation claim advanced by Mrs Martin pursuant to provisions of the workers' compensation legislation had merit. The question for the Tribunal is whether the stance adopted by the Respondent Association in the period preceding settlement of the claim meant that Mrs Martin was treated less favourably than the Association would treat employees without her particular impairment in such circumstances, with the result that she was subjected to a detriment in her employment contrary to Sections 66A(1) and 66B of the Equal Opportunity Act.

The Tribunal recognises that a claim of this kind could succeed if there was sufficient evidence available to support such a plea. It was for this reason that the Tribunal dismissed an application to strike out the plea of direct discrimination



at an early stage of the hearing. In other words, if, in a hypothetical case, the evidence showed a pattern of conscious or malevolent behaviour by an employer aimed at obstructing or defeating a claim advanced by an employee then this could amount to discriminatory conduct, even though the employer was ostensibly doing no more than asserting its right to defend a claim brought against it. Such a finding could be made without the Tribunal having to reach any final determination as to whether the employee's claim was well founded or not. The employer's fault, that is to say, the less favourable treatment afforded to the employee in a hypothetical case of that kind, would lie in the extremity of the employer's conduct, and the distortion of the normal legal process, for in most cases an employee would be entitled to assume that the employer, with or without the assistance of an insurer, would process the claim in a reasonably objective manner and having regard only to the criteria established by the legislation.

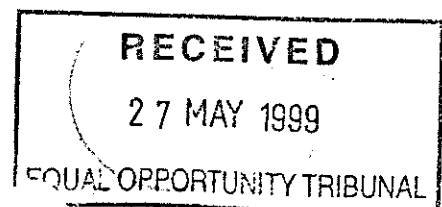
It has to be kept in mind, however, that in regard to a claim of this kind, it will be more difficult than in some other circumstances to draw inferences from the evidence unfavourable to the party resisting the claim. Any citizen, confronted with a claim at law, including a corporate citizen, is entitled to have the claim dealt with in accordance with the procedures established by the relevant legislation. It is not necessarily obstructive to insist that a case be proved. In circumstances where there is a degree of ambiguity about the strength of a claim, either because of the facts of the matter or because of some fine point of statutory interpretation involved in the case, it becomes additionally difficult for a Tribunal exercising an entirely different jurisdiction, such as the Equal Opportunity Tribunal in the circumstances of the present case, to infer that the employer's stance was obstructive. A litigant faced with a claim is entitled to have the claim tested by a close scrutiny of the evidence, by investigators and assessors at an early stage of the process, or by the relevant court or tribunal at a later stage, if the matter reaches that point. If this were not so, then nearly



every defendant could be subject to accusations of discriminatory conduct simply because a decision was taken to defend a claim.

In the circumstances of the present case, the Tribunal is not satisfied that the Respondent Association acted in a discriminatory manner in the way it dealt with Mrs Martin's workers' compensation claim. It is apparent from the evidence that Mr Kumar harboured doubts about the validity of the claim. The injury complained of was intangible and in the absence of detailed assessment by experts, of the kind that was eventually forthcoming, it was obviously difficult for a layman such as Mr Kumar to know what factors underlay the claim or whether an alleged psychiatric injury fell within the purview of the relevant statute. It does seem that he communicated a degree of scepticism about the claim to the insurer, but for the reasons previously given by the Tribunal, in the context of an unusual form of claim, where the facts of the matter were accompanied by elements of ambiguity, such as Mrs Martin's previous work in the mail room, and some pre-existing differences of opinion arising from her wish to discontinue her work with the Referrals Group, it becomes difficult to draw inferences unfavourable to the Respondent Association, especially in circumstances where the claim was being handled throughout by the insurer.

It is also material to note that the evidence of Mr Copley, although he was a witness called by Mrs Martin, did not reinforce the Complainant's case, or the account of the conciliation conference contained in Mr Champion's disputed file note. Mr Copley could not recall a discussion of the kind suggested in the file note that it was the employer who was being difficult. Mr Kumar, under cross examination, made no admission of fault. This part of Mrs Martin's claim will be dismissed.



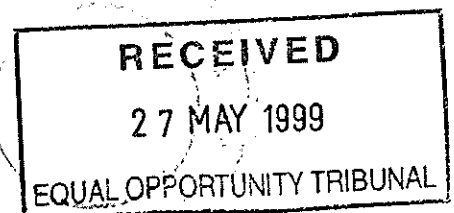
### Relief

This brings the Tribunal to the question of relief. In the circumstances of the present case, the main ground of relief was a claim for damages pursuant to Section 127(b)(i) of the Act whereby the Tribunal is at liberty to award damages by way of compensation for any loss or damage suffered by reason of the Respondent's conduct.

In *Hall v Sheiban Pty Ltd* (1989) EOC 92-250 the court suggested that the measure of damages in such cases are analogous to claims of tort. One should compare the position which the complainant might have expected to be in if the discriminatory conduct had not occurred with the situation which he or she was placed by reason of the conduct complained of. In *Alexander v Home Office* (1988) 1 WALR 968 the court suggested that the award should not be minimal because this would tend to trivialise or diminish the respect for public policy implicit in the legislation.

The Tribunal has held that although certain facets of Mrs Martin's claim are not supported by the evidence with the result that the Tribunal is not satisfied that she is entitled to relief in respect of those issues, the Tribunal is satisfied that the events of 13 June amounted to discriminatory conduct on the ground of impairment. It now becomes necessary to define to what extent, if any, such conduct caused loss or injury and whether Mrs Martin is entitled to relief.

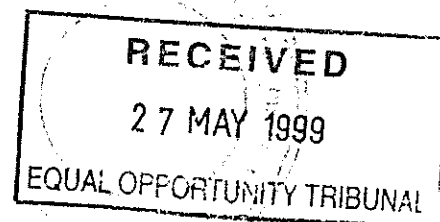
It is important to keep in mind at the outset that on the Tribunal's findings the severe panic attack experienced by Mrs Martin on 12 June was undoubtedly related to her disorder and the installation of the partitioning in circumstances which brought on the attack. The panic attack was in the nature of an injury and left her unsettled for many months thereafter. Nonetheless, on the Tribunal's finding, the panic attack was not caused by discriminatory conduct. It is therefore necessary to draw a distinction between the loss or injury resulting from the





events on 12 June, for which no liability attaches to the Respondent Association, and the hurt and humiliation experienced by Mrs Martin as a consequence of Mr Kumar's action on 13 June, which the Tribunal has characterised as discriminatory conduct, whereby her request for relocation was turned down and she was left with no option but to leave the office premises until the various legal and medical issues had been resolved. The Tribunal must also keep in mind that part of her agitation in the weeks that followed was due to her belief – a misconception on the Tribunal's finding – that the Respondent Association was seeking to obstruct her workers' compensation claim in a manner that amounted to discriminatory conduct. Any so-called loss arising from this latter aspect of the matter must also be put to one side, for the Tribunal has found against Mrs Martin on that issue.

The evidence does suggest, however, that Mrs Martin was undoubtedly affronted by Mr Kumar's attitude at the 13 June meeting. The fact that her by now sufficiently documented concerns were brushed aside did give rise to a real sense of hurt and humiliation. The employer recognised an obligation to provide office amenities that were not likely to threaten an employee's safety or welfare, this, of course, being consistent with the employer's obligation under the Occupational Safety and Health Act 1984. Thus, if an employee had come to Mr Kumar with a medical certificate to say that exposure to freshly painted partitioning would exacerbate a skin allergy, then it is inconceivable that Mr Kumar would have insisted that such an employee work in the potentially threatening space. Accordingly, in the present case, on the Tribunal's finding, Mrs Martin was bound to and did in fact experience a degree of humiliation when Mr Kumar brushed aside her request for relocation, supported by medical certificate in the presence of Sister Willox, simply because the impairment in question was of a less tangible kind. The evidence also suggests that to some extent this impeded her recovery. Likewise, this stance, now found to be discriminatory, eventually obliged to engage Dr Kay and to meet his fees.



The Tribunal also pauses to recall that in a number of previous decided cases, courts and tribunals working in this area of the law have determined that the damages awarded should not be minimal. Mrs Martin has obtained some relief as a consequence of having prosecuted a claim for workers' compensation with the result that she has not been obliged to bring a claim for loss of earnings before the Tribunal by way of a claim for special damages. The critical question is what should be awarded to her by way of general damages.

In *Boldra v MPTT* (1992) EOC 92-458 an applicant for the position of bus driver who was removed from the selection process because of an impairment recovered \$1,400 by way of damages. In *Churchill v Town of Cottesloe* (1993) 92-503 this Tribunal awarded \$5,000 by way of general damages in circumstances where the Tribunal held that the employer in question had not made sufficient inquiry into the exact nature of the employee's impairment, although, in that case, the default was accompanied by dismissal. In the present case the Tribunal is obliged to take account of the fact that there was no dismissal and the employer eventually found Mrs Martin another position in the organisation.

Against this background, the Tribunal will award Mrs Martin \$2,500 by way of general damages plus \$750 in respect of the account of Dr Kay, making an award of \$3,250 in all. In circumstances where Mrs Martin failed in certain aspects of her claim, with the result that no fault was attributed to the Respondent Association in respect of the conduct complained of, it would not be appropriate for the Tribunal to require that an apology be provided by the Respondent Association or that the other forms of relief sought by the Complainant be granted.

