

EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

No 9 of 1998

ANDREA McKEOWN
First Complainant

ANNE WATTS
Second Complainant

ROBYN CALDWELL
Third Complainant

PAULETTE REYNOLDS
Fourth Complainant

LEONIE SIDDONS
Fifth Complainant

and

DIANNE KERWIN
Sixth Complainant

- against -

CARCIONE NOMINEES PTY LTD
Trading as
FARMER JACK'S, WAIKIKI

REASONS FOR DECISION
(Delivered: 4 December 1998)

BEFORE: Mr L W Roberts-Smith QC, Deputy President
Mrs R Kean, Member
Mr K Wyatt, Deputy Member

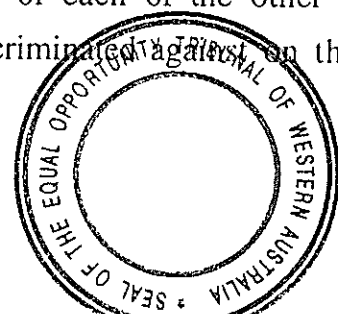
HEARD: 28, 29, 30 October 1998

Counsel for the Complainants: Mr A MacDonald

Counsel for the Respondent: Ms M Saracini

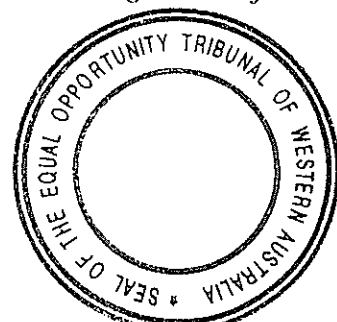


- [1] The respondent, Carcione Nominees Pty Ltd, (“Carcione Nominees”) is a private company with an issued share capital of \$2.00 and of whom the directors are Giovanni Carcione, Marie Carcione, Vincenzo Carcione, Anthony Carcione, Ronald Carcione and Linda Maria Perdiija (formerly Carcione).
- [2] At all relevant times Carcione Nominees owned a supermarket at Waikiki, a suburb approximately 5 km southeast of Rockingham in Western Australia. The supermarket traded under the business name “*Farmer Jack's*”.
- [3] In May 1997 a number of people were working as casual checkout operators at *Farmer Jack's*. They were employed under workplace agreements with Carcione Nominees. The six complainants were among those so employed. At that time they were aged 28, 34, 30, 41, 47 and 46 years, respectively. They were paid wages at a rate of \$13.50 per hour. (described in evidence as “the adult rate”).
- [4] It was pleaded that on Monday 5 May 1997 each of them was dismissed from her employment with *Farmer Jack's*. In each instance following her dismissal, each complainant received a reference from her employer stating that whilst her services had been terminated because of a downturn in business and a consequent need for staff rationalisation, she was a “diligent and conscientious” employee.
- [5] It is the complainants’ case that they were in fact dismissed because they were of an age requiring that they be employed at a senior’s rate of pay and that the driving force behind the dismissal was the desire on the part of Carcione Nominees to employ junior checkout operators in their place who would then have only to be paid the junior casual rate, which was \$6 to \$11 per hour or thereabouts.
- [6] So it was that on 26 May 1997 Ms Andrea McKeown lodged what purported to be a representative complaint against Carcione Nominees complaining on her own behalf and on behalf of each of the other 5 complainants that they had been unlawfully discriminated against on the



ground of their age. In fact however, Ms McKeown's complaint was accompanied by separate complaint forms in the name of and signed by each other complainant. By letter to the Commissioner of Equal Opportunity dated 25 November 1997 Ms McKeown withdrew her request that the original complaint be treated as a representative complaint.

- [7] At a preliminary hearing before the Tribunal on 1 May 1998 the point was made that there were at that stage 6 separate complaints before the Tribunal. That is clearly correct. However, if it be necessary for the Tribunal to make a positive determination about this pursuant to Section 114 of the *Equal Opportunity Act 1984* ("the *EOA*"), that determination is that Ms McKeown's complaint shall not be dealt with as a representative complaint.
- [8] Section 108 of the *EOA* provides that where the Tribunal considers that two or more complaints arise out of the same or substantially the same circumstances or subject matter, it may hold a single enquiry in relation to those complaints. In this instance the Tribunal was of that opinion and consequently determined at the outset of the hearing that these matters would be the subject of a single enquiry.
- [9] Before turning to a more detailed examination of the complaints and the evidence, it is necessary to briefly refer to the provisions of the *EOA* dealing with age discrimination.
- [10] Section 66W(2) of the *EOA* makes it unlawful for an employer to discriminate against an employee on the ground of the employee's age by (amongst other things) dismissing that employee.
- [11] So far as is relevant to the present case s.66V of the *EOA* provides that -
- "(1) For the purposes of this Act a person (in this subsection referred to as the "discriminator") discriminates against another person (in this subsection referred to as the "aggrieved person") on the ground of:*
- the age of the aggrieved person;*



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the discriminator treats the aggrieved person less favourably than in the same circumstances or in circumstances that are not materially different the discriminator treats or would treat a person who is not of that age."

[12] It is necessary also to mention section 5 of the *EOA* which reads:

"A reference... to the doing of an act on the ground of a particular matter includes a reference to the doing of an act on the ground of two or more matters that include the particular matter whether or not the particular matter is the dominant or substantial reason for the doing of the act."

[13] Each of the complainants filed Points of Claim dated 14 May 1998. Apart from reference to their particular ages and periods of employment in paragraphs 1 and 2 each of the individual Points of Claim were otherwise identical.

[14] That being so it is convenient to set them out verbatim:

The Complainant is () years of age.

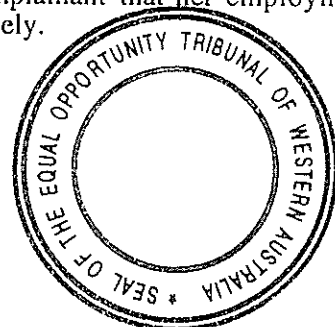
The Complainant was employed by the Respondent from () to (), under a Workplace Agreement as a part-time casual check-out operator at the Farmer Jack's store at Waikiki ("the store"). The Complainant's wage was \$13.50 per hour.

The Respondent's Workplace Agreement specified the rate of pay of casual 'junior', that is, casual employees under 21 years of age. The Respondent's wage for a casual junior was significantly lower than the Complainant's wage.

On 2 May 1997, the Respondent placed on the sliding door at the entrance to the store a notice advertising positions available for casual junior check-out operators to work at the store.

On 2 May 1997, the Respondent lodged with the Commonwealth Employment Service, Rockingham ("the CES"), a vacancy notice for 10 junior check-out operators, aged 15 to 17 years, to work at the store, commencing as soon as possible. The rate of pay for each position was ranged from \$6.00 to \$8.50 per hour, depending on the age of the applicant.

On 5 May 1997, the store manager informed the Complainant that her employment with the Respondent was terminated, effective immediately.



The Respondent did not dismiss any member of the store's casual staff who was paid at junior rates.

At the time of her dismissal, the Complainant was provided with a 'Employment Separation Certificate', in which the Respondent cited the reasons for the Complainant's dismissal as a shortage of work.

Shortly after her dismissal, the Respondent provided the Complainant with a written reference, recommending the Complainant to prospective employers but stating that the services of the Complainant were no longer required due to a "necessary rationalisation."

Following the dismissal of the Complainant, the Respondent employed several casual juniors aged 15 to 17 to work on the store's check-out.

The Respondent unlawfully discriminated against the Complainant on the ground of the Complainant's age by treating her less favourably than in the same circumstances the Respondent treated or would treat a person who is not of the Complainant's age, specifically, a person aged between 15 and 17 inclusive, contrary to sections 66V and 66W of the *Equal Opportunity Act 1984*.

Particulars

The Complainant repeats paragraphs 6 to 10 above.

As a result of the unlawful discrimination referred to in paragraph 10, the Complainant has suffered loss and damage.

Particulars

Stress, humiliation, loss of confidence and self-esteem;

Financial loss as a result of being dismissed from her employment by the Respondent.

The Complainant claims against the Respondent:

compensation;

such other orders as the Tribunal deems fit."

- [15] Carcione Nominees filed Points of Defence dated 22 June 1998 in respect of each complaint. Again, apart from claiming all complainants were paid one hour's pay in lieu of notice (a claim not pleaded in respect of the complainant Anne Watts), and matters to do with the complainants' individual ages and periods of employment, they were all in identical terms:

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The Respondent denies paragraph 3 of the Points of Claim and says that the Applicant's (sic) workplace agreement specifies only the Applicant's hourly rate.

The Respondent denies paragraph 4 of the Points of Claim and says that it placed a notice in the store for one casual junior check out operator on the afternoon of 2 May 1997.



The Respondent denies paragraph 5 of the Points of Claim and says that on the afternoon of 2 May 1997, it requested the CES to locate one junior check-out operator for a position in the store and requested 10 referrals to allow it to select the most appropriate candidate for the store. This request was later withdrawn by the Respondent given its changed financial circumstances.

After a review of the Respondent's financial position and its operational requirements, it decided to let go 6 employees. The employees to be selected were those not performing as well as others and who were costing the Respondent more to employ. After consulting with the Store Manager and an acting supervisor as to which employees should be dismissed, the decision was taken to dismiss the Applicant and 5 others.

The Applicant was informed that the Respondent:

had to be terminated due to a downturn in business and its difficult financial position which necessitated a rationalisation of staff;

would consider offering her work when, and if, its financial position improved;

would provide an Employment Separation Certificate;

would provide a reference explaining that she was let go due to a necessary rationalisation of staff.

As to paragraph 7 of the Points of Claim, the Respondent admits that the junior casual check-out operators working at the store at the material time were retained.

The Respondent also says at the material time that 7 senior casual check-out operators were retained (apart from the other senior check out operators who were dismissed on 5 May 1997) in its employment.

The Respondent admits paragraph 8 and 9 of the Points of Claim.

The Respondent admits paragraph 10 of the Points of Claim and says that these casuals were engaged over a 2 month period of time to meet its changing operational requirements.

The Respondent denies paragraphs 11 and 12 of the Points of Claim.

The Respondent denies that the Applicant is entitled to the relief claimed or to any relief at all."

[16] By letter to the Tribunal Registrar dated 26 October 1998 (two days before the hearing) the Respondent's solicitors gave notice that they proposed to seek leave to amend the Points of Defence at the hearing. After brief submissions by counsel for all parties leave to amend was granted. The most significant amendments so made were a new paragraph 3 (the subsequent paragraphs being renumbered):

On 16 September 1996, the Complainant entered into a workplace agreement with the Respondent regulating the terms and conditions of her employment. Relevantly, the Complainant:



was employed on a casual basis (clause 2 of the agreement);

could resign her employment on 1 hour's notice or forfeiting an equivalent amount (clause 2 of the agreement);

could be dismissed on 1 hour's notice or payment of an equivalent amount in lieu (clause 2 of the agreement);

was paid a casual loading (clause 5 of the agreement);

agreed that the workplace agreement would expire on 31 August 1997."

- [17] and amendments to paragraphs 5 and 6 so as to read (the amendments are indicated):

The Respondent denies paragraph 4 of the Points of Claim and says that it placed a notice in the store for one casual junior check out operator on the afternoon of 2 May 1997. This notice was later removed by the Respondent.

The Respondent denies paragraph 5 of the Points of Claim and says that on the afternoon of 2 May 1997, it requested the CES to locate one junior check-out operator for a position in the store and requested 10 referrals to allow it to select the most appropriate candidate for the store. This request was later withdrawn by the Respondent ~~given its changed financial circumstances.~~

After a review of the Respondent's financial position and its operational requirements, it decided to let go 6 employees. The employees to be selected were those ~~not performing as well as others and who were costing more to employ~~ not flexible in their hours of work. After consulting with the ~~store manager and an acting supervisor~~ as to which employees should be dismissed, the decision was taken to dismiss the Complainant and 5 others."

- [18] In respect of the complainants Robyn Caldwell and Paulette Reynolds a new paragraph 8 was added:

The Complainant was scheduled to work on Tuesday 6 May 1997. However, the Complainant failed to attend for work. Accordingly, the Complainant ceased employment with the Respondent of her own volition."

- [19] It is unfortunate to say the least that amendments as significant as some as these were, were not sought until two days before the hearing. The complaints were made to the Equal Opportunity Commission in May 1997, were referred to the Tribunal in March 1998 and the original Points of Defence were filed on 22 June 1998. Nonetheless, so far as the conduct of the hearing itself is concerned, the Tribunal is satisfied that the amendments enabled the facts really in issue between the parties to be identified and the complainants were adequately able to address those on which the Respondent had shifted its ground.



[20] Prior to the hearing a direction had been made by the Tribunal that all parties file and serve witness' statements which, together with any additional testimony, would stand as their evidence in chief. Ms McKeown's statement was in the form of an affidavit as she now lives in the United Kingdom and her oral testimony was taken by telephone conference call.

[21] Each of the complainants was a casual employee of Carcione Nominees. Each was employed under a Workplace Agreement. The Agreements were in identical terms. Those terms relevant to this case were

Casual Employment

This contract of service shall be casual and may be terminated by one hours notice on either side. If such notice is not given one hours wages shall be paid for forfeited as the case may be provided that an employee may be summarily dismissed for gross misconduct.

Wage Rates

Junior Workers Casual Hourly Rate

15to16 years of age	\$..... Per hour
16to17 years of age	\$..... Per hour
17to18 years of age	\$..... Per hour
18to19 years of age	\$..... Per hour
19to20 years of age	\$..... Per hour
20to21 years of age	\$..... Per hour

Adult Casual Hourly Rate \$13.50

The casual hourly rate as shown is inclusive of casual loading.”

[22] and in each instance the document stipulated that the Agreement would expire on 31 August 1997. That had to be read subject to clause 6 which provided (inter alia) that if, at the expiration date, a new Agreement had not been signed, then the instant Agreement would remain in force until replaced by a new one.

[23] Confronted with the document signed by her each complainant conceded that her employment was casual and was terminable on 1 hours notice by either party (or 1 hours pay in lieu). Although not all the complainants had an appreciation that their hourly rate of pay included a component (“casual loading”) to compensate for lack of permanence and related



benefits, that was clearly so — although nothing turns on that fact for present purposes.

[24] Subject to the effect of section 66ZS of the *EOA* (with which we deal below) there was no dispute between the parties as to the legislation and legal principles applicable in this case. The issue is essentially one of fact, namely, did the Respondent decide to terminate the complainants' casual employment wholly or partly on the ground of their age?

[25] The legal considerations may be shortly stated.

[26] It is unlawful for an employer to discriminate against an employee on the ground of that employee's age.ⁱ In this context "age" means chronological age.ⁱⁱ Discrimination "on the ground of" a person's age occurs if a person is treated less favourably than another person of a different age is or would be in the same or similar circumstances because of that person's age or a characteristic appertaining or imputed generally to persons of that age.ⁱⁱⁱ

[27] Of course, there must a causal connection. A complainant must show (on the balance of probabilities) that their age (or actual or imputed characteristics of their age) caused the employer to decide to dismiss the employee or had a sufficiently proximate bearing upon the dismissal of the employee.^{iv}

[28] Age need not have been the only nor even the dominant consideration influencing the decision to dismiss: it will be sufficient if it be shown to have been one of the grounds.^v

[29] Nor is it necessary for a complainant to prove an intention to harm^{vi} or to discriminate.^{vii}

[30] Discrimination can be notoriously difficult to prove; those who discriminate frequently do not demonstrate or express their prejudices directly. Other and legitimate reasons will often be given for conduct which is in reality discriminatory. So it is that direct evidence



discrimination is often not available and reliance must be placed on an inference of discrimination from an objective consideration of the relevant facts and circumstances. Whilst it is the case that discrimination cannot be inferred when more probable innocent explanations are available on the evidence ^{viii} that proposition turns on a failure to discharge the onus of proof rather than upon any inherent deficiency of circumstantial evidence as such.

The Evidence

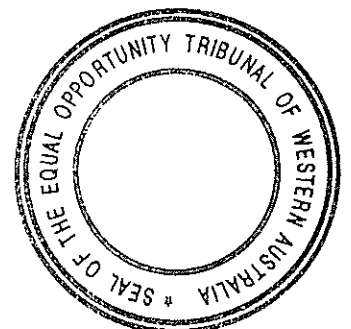
- [31] The evidence established that the complainants had been employed by Carcione Nominees from various dates the earliest being February 1995.
- [32] Carcione Nominees operated *Farmer Jack's* stores at Waikiki, Leda and Kelmscott.
- [33] The Waikiki store commenced trading in about November 1993 but it was burnt down in August 1995 and was closed for about four months during rebuilding. All Waikiki store staff were laid off during the closure. The store reopened just before Christmas 1995.
- [34] Each of the complainants was employed on a Workplace Agreement which despite their varying commencement dates all stipulated that they were to terminate on 31 August 1996 (but subject to the extension provisions to which reference has already been made).
- [35] At the outset or in the initial stages of her employment each complainant discussed with the store supervisor the particular rosters which she would work each week. That seems to have been done not unnaturally on the basis of mutual convenience. Once set they were then the hours which the individual complainant worked unless she either swapped by arrangement with another employee to suit their own needs or were requested by store management to change for some reason. None of this occasioned any difficulty and so in each instance their employment continued on the basis that they ordinarily worked the hours for which they had been rostered.



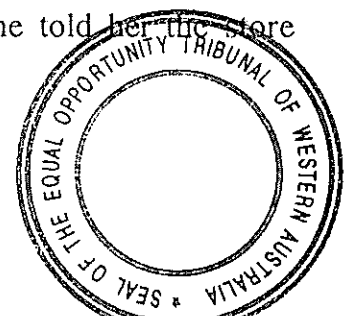
- [36] There were essentially 2 rosters. The rosters for Thursday and Saturday of each week were worked only by juniors; the rosters for the remaining week days were worked by 15 seniors and 3 juniors.
- [37] On Friday 2 May 1997 some of the complainants had their attention drawn to a handwritten notice on the door of the store. The notice was an advertisement for applications for a junior checkout operator. The complainants' case was that the notice referred to "operators" but the respondent's case was that it referred only to operator in the singular.
- [38] **Ms McKeown's** evidence was that she commenced employment at *Farmer Jack's* Waikiki in December 1995 as a casual checkout operator. For the first few months she worked the afternoon shift but later asked to be moved to the morning shift so she could be free to pick up her son from school in the afternoon. That request was agreed to and she worked the morning shift thereafter.
- [39] On Friday 2 May 1997 Ms McKeown arrived at work to commence her morning shift when she saw a notice on the door at the front entrance. The notice was written on a *Farmer Jack's* promotional flyer and according to her it read: "Junior Checkout Operators Required - Apply Within". She approached Ante Perdiija and jokingly asked him if they were going to lose their jobs. He said he did not know anything.
- [40] On Monday 5 May 1997 about half an hour before the end of her shift Patricia Brown, the supervisor, approached Ms McKeown and told her that Vince Carcione wanted to see her in the office. She went to see him and Mr Carcione told her that business was slow at the store and that he was "letting her go" because they could not afford to employ her any more. She testified that she asked him why he couldn't just cut her hours but could not recall his response. She then asked him what he was doing about the other checkout operators and he replied that everyone was going. He explained that there was a shortage of work but when business picked up she would be recalled. She was to be provided with an Employment Separation Certificate and a reference.



- [41] She said she left the office and began to cry. She felt expendable and worthless. She had worked at *Farmer Jack's* for 18 months and had enjoyed doing so. She was confident at her job and had not expected to be dismissed without any consultation or discussion.
- [42] She returned to the shop floor and clocked off. She saw Leonie Siddons who had gone into the office immediately before her. Ms Siddons looked upset. She then found out that Ms Siddons had just been dismissed as well. She then went home.
- [43] Ms McKeown is a single parent and has a son who was 6 at the time. She was receiving a sole parent pension while working at *Farmer Jack's* but that had been reduced due to her income from that employment. She was worried at the time about what she was going to do about paying bills and other expenses. It was over a week before she received the separation certificate and reference in the post from Carcione Nominees.
- [44] Fortuitously Ms McKeown's mother, worked in another supermarket at Rockingham City Shopping Centre and was able to secure a position for her there which she was able to commence about 2 weeks after losing her job at *Farmer Jack's*. In her new position she worked 12 hours a week at \$13.00 an hour. Even with her subsequent job, Ms McKeown found she was anxious about what might happen to her if business slowed down or if the store just wanted to save money by employing junior staff. That was a fear she never had previously. She worked in her new position until the end of January 1998 when she left Western Australia for the United Kingdom.
- [45] Ms Anne Watts commenced casual employment with *Farmer Jack's* in August 1995 at the Leda store. She was transferred to the Waikiki store in about July 1996. She was rostered to work mornings on Monday, Wednesday, Thursday and Friday and that roster did not change during the period of her employment at the Waikiki store. Patricia Brown was one of her supervisors. The floor manager was Ante Perdija.



- [46] During her employment with *Farmer Jack's* she took about 2 weeks off each year for school holidays, swimming lessons and the like. She would take off another week or so each year if she was sick or if one of the children was sick and her husband was not at home.
- [47] On Thursday 2 May 1997 she was at work when she noticed that Patricia Brown was in the office with Vince Carcione. They were talking. She thought it was very unusual for Vince to be there because he hardly ever was.
- [48] On Monday 5 May she went to work and did her shift as usual. About half an hour before the end of her shift she noticed Andrea McKeown arriving back at her checkout. She was crying and told Ms Watts that she had just been sacked. Patricia Brown then approached her and said that Vince Carcione wanted to see her in the office.
- [49] In the office Ms Watts asked Mr Carcione if she was going to be the next person to get the sack and he said yes she was. She said she asked him how he could do that to them and explained that they had financial and family commitments and they depended on her income from her job. She said she asked him if there was any way to keep them on. He replied that there was not and he really had no choice. He said that she would be paid an hour's pay in lieu of notice and would be provided with a reference. She asked if she could go straight home and he agreed. She said she just could not face working at the checkout knowing she had just been fired. She was crying and was embarrassed.
- [50] She said she was really upset and could not believe that management would do that to them without consultation or discussion.
- [51] That night she telephoned Robyn Caldwell and found out from her that some of the other day time checkout operators had also been dismissed.
- [52] She said that she went back to the store the next and saw Vince Carcione. She asked why they had been dismissed. Mr Carcione told her the store



had lost a lot of money in the previous month. He assured her that it had nothing to do with her work performance and in fact she came highly recommended. He simply said the store could not afford to pay them any more.

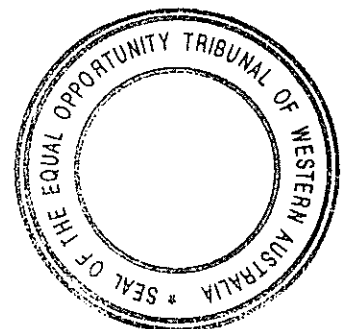
[53] She was most anxious about what she was going to do. She and her husband had recently taken out a personal loan for work on their house. A couple of days after being dismissed she went to the Department of Social Security in Rockingham to ascertain what benefits she might be entitled to. She was not eligible for Job Search Allowance because of her husband's income but did submit a new application for Parenting Allowance.

[54] She also went to the CES in Rockingham to look for suitable job vacancies. There she noticed a vacancy notice for *Farmer Jack's* at Waikiki. That notice referred to 10 vacancies for checkout operators aged 15 to 17 years.

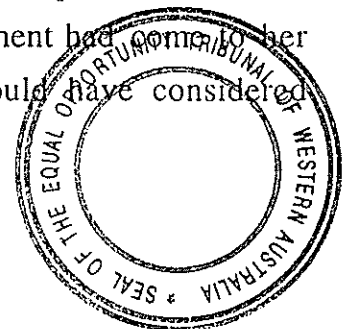
[55] She made numerous attempts to find work subsequently but despite that was unsuccessful until eventually obtaining a job with Coles at Warnbro Fair in February 1998.

[56] **Ms Robyn Caldwell** commenced working at *Farmer Jack's* Waikiki in February 1995. She resumed that employment when the store reopened in December that year following its rebuilding after the fire. She worked the same hours and shifts as she had previously done and continued to work them consistently until August 1996 when she changed to the morning shift. She said that management asked her whether or not she wanted to change shifts and she asked to be moved to the morning shift because it fitted in with her family commitments. It was about that sign she signed the workplace agreement.

[57] About March 1997 Patricia Brown, her supervisor, told her that her shifts were to be reduced and that she would not be needed on Mondays.

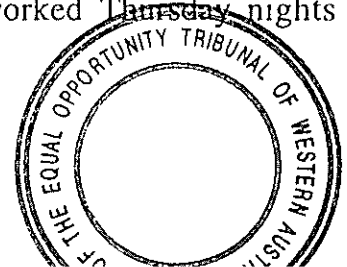


- [58] The only time she took off work while employed at *Farmer Jack's* was about August 1996, some months after she separated from her husband. She did not work her usual Wednesday shift for about 5 or 6 weeks while she attended counselling to help her with the separation. Her second time off was for 3 weeks in or around February 1997 when she was hospitalised for an operation.
- [59] On Friday 2 May 1997 she arrived at work and went to the office. One of the supervisors asked if she had seen the notice. She said she had not and went down to have a look at it. The notice she saw was placed on the door at the front entrance and said: "Junior Checkout Operators Required - Apply Within". She asked the supervisor what was going on and she replied that she did not know. No one from management had said anything to her. The checkout operators working that shift talked about the notice joking that they would all get the sack.
- [60] On Monday 5 May, Ms Caldwell received a telephone call at home from Anne Watts who was crying and said that she and some of the other checkout operators had been sacked and that she should expect the same when she arrived at work the following day. Ms Caldwell waited until her 2 children arrived home from school and then drove down to *Farmer Jack's* to see what was happening. She approached Patricia Brown, one of the supervisors, and asked her if she was next on the list. Ms Brown said yes and that if she came to work the next day she would be dismissed, but she did not give a reason. According to Ms Caldwell Patricia Brown added that she did not have to come into work the next day but that she would be paid for the day anyway.
- [61] Ms Caldwell was very upset. She had been working at *Farmer Jack's* for over 2 years and had enjoyed it. She was upset in particular because this was happening without any discussion or negotiation.
- [62] She agreed that the hours she worked enabled her to drop the children off at school and pick them up but said that if management had come to her and said they needed to reduce staff costs she would have considered



reducing her hours or working in another area of the store. She said that in the end they did not even pay her for the one hour notice or for the 4 hours that she would have worked on the Tuesday.

- [63] A few days later she was able to obtain very casual canteen work at HMAS Stirling Naval Base on Garden Island on and off for the following 3 months. She worked there during school hours to fit in with her children. After a while she was being asked to work at the Base during hours that she found harder to manage so had to give the job up.
- [64] She is a single mother on a sole parent pension. When working at *Farmer Jack's* her pension was adjusted to take account of her income from the store.
- [65] After being dismissed from *Farmer Jack's* she did not draw a Job Search Allowance but did seek other employment at local supermarkets as a casual checkout operator/packer or any other such position, but only during the children's school hours.
- [66] For 2 years prior to September 1996 **Ms Paulette Reynolds** had casual employment at a newsagency in a shopping centre at Waikiki where she worked about 6 hours a week. *Farmer Jack's* supermarket was located in the same shopping centre.
- [67] In September 1996 Linda Carcione offered her a job as a casual checkout operator at *Farmer Jack's* and she accepted that as it provided her with more work than the newsagency job. She signed a workplace agreement and worked 18 hours a week on Tuesday and Wednesday afternoons and Thursday and Friday mornings.
- [68] Her roster did not change during the whole time she was employed at *Farmer Jack's* and she took no time off while employed at the store except for perhaps one shift.
- [69] She observed that the adult checkout operators such as herself tended to work the day shifts, whereas a lot of the juniors worked Thursday nights



and Saturday mornings. In her experience that was mainly because adults were available to work the days shifts and were reliable.

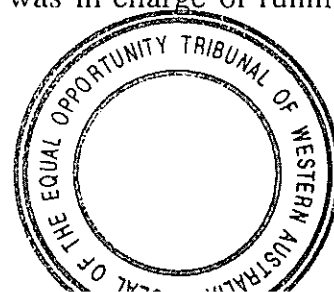
- [70] She said that at work on Friday 2 May she saw that a notice had been placed on the entrance door to the store. It was white A4 sized sheet with a handwritten notice saying words to the effect: "Junior Checkout Operators Required -Apply Within". She stated that she definitely remembered that the notice asked for applications for "operators". She said most of the checkout staff on shift that morning saw the notice and were laughing amongst themselves about which one of them was going to get the sack but not seriously thinking that it would happen.
- [71] On Monday 5 May Ms Reynolds received a telephone call from a girlfriend who had been speaking with Dianne Kerwin. Dianne worked the afternoon shift on the checkout Monday to Friday. Her friend said that Ms Kerwin wanted to let her know that a couple of the girls at *Farmer Jack's* had been sacked.
- [72] Even though she did not work Mondays Ms Reynolds went down to the store to find out herself what was going on. When she arrived she found Andrea McKeown in tears. Dianne Kerwin told her that she and Andrea had been sacked. Ms Reynolds approached Patricia Brown and asked what was happening. The latter confirmed that the other 2 had been sacked. Ms Reynolds asked if she would be sacked if she turned when she turned up to work the following day and was told that she would. She replied that in that case she would not be coming in. She said that Patricia Brown told her then that she did not have to come in but she would still be paid for the shift anyway. She said Ms Brown also said that she had no control over it she was just doing what she was told.
- [73] Ms Reynolds went home in a state of shock. She did not know what to do. Her husband had not worked for a couple of years because of a work related injury. He was on worker's compensation and had a claim that still had not been resolved.



- [74] She subsequently received an Employment Separation Certificate and a written reference. The Certificate stated that she was terminated because of a shortage of work but she said that was the first she knew about it. The reference refers to a necessary rationalisation of staff. Again, she said no one from the store talked to her about any necessary changes. She said she did not receive her pay for the Tuesday shift.
- [75] For Ms Reynolds the weeks following her dismissal from *Farmer Jack's* were particularly stressful and difficult. Her husband's claim was finalised a month or so after she was dismissed but in the meantime they had to deal with lawyers, court appearances and so on. To be told that she was sacked and then to realise that their income would drop was "just terrible news". Her daughter was at university and her son was completing an apprenticeship. Both were living at home at the time and were dependant on the family income to a significant extent.
- [76] She was worried about her age and how it would affect her job prospects. At 41 she was self conscious about that and felt it a disadvantage when compared to younger job applicants. Nonetheless she approached a number of newsagencies and other employers in Rockingham.
- [77] In July 1997 she obtained casual work at the Malibu Newsagency for 12 hours a week at an hourly rate of \$13.45, where she remained until March 1998 when she started full time employment with the Warnbro Fair Newsagency.
- [78] She said the thing that really upset her about being sacked from *Farmer Jack's* was that she had been a loyal and reliable employee who got on well with management. Not once did they come to her and say they had a problem with the business or that changes would have to be made. She testified she would have considered any reasonable request in order to keep her job even if it meant fewer hours or less pay. She simply did not understand why they did not ask her considering that she thought they had a very good relationship.



- [79] **Ms Leonie Siddons** commenced work as a casual checkout operator at the *Farmer Jack's* Waikiki store in December 1995. At her employment interview she was asked about her age and told them she was then 47. She said that they told her they preferred older women to work for them because they relate more to the women customers.
- [80] She started at the Waikiki store the day it reopened following the fire. For the first 4 months she worked a week day morning shift 5 days a week.
- [81] Her then supervisor asked her if she would like to start a half hour earlier each day and as she did not mind that her shift was changed accordingly Monday to Friday. The only other change to her roster occurred about a year after she started when she agreed to begin at 7.30 am on Monday to help with getting the "specials" ready. Otherwise her roster was consistently the same until she was dismissed.
- [82] She took very little time off while working at *Farmer Jack's*. She took one day off about January 1996 and some time at Easter in 1997 to go to Rottneest with her family. She had about 3 days off because of illness, 2 of those in or around August 1996.
- [83] On 2 May 1997 she saw that a notice had been placed on the door at the entrance to the store. According to her the notice said: "Junior Checkout Operators Required - Apply Within".
- [84] On Monday 5 May 1997 she arrived at work at 7.30 am and began her shift. She took a morning tea break at 9.30 am. On returning to her checkout she saw her till had been removed. That had never happened to her before. The supervisor, Patricia Brown, told her to try and find something to do for the rest of the morning.
- [85] At around 12.30 pm Ms Brown told her to go up to the office. Ms Siddons knew that Vince Carcione was in the store that morning and that was unusual. Vince was in the office when she went in and introduced himself. He said that he did not know her but that he was in charge of running the



Carcione family companies. He said that the Waikiki store was not working and that he would have to "let her go". She asked him if it had anything to do with her work and he said it did not. He told her he would give her a reference and if things improved she would be contacted.

- [86] She was shocked. She thought she was the only one that had been sacked but soon found out from Andrea McKeown and Anne Watts that they had been sacked too.
- [87] She was told to get her uniform drycleaned and return it to the store. When she returned to the store with her uniform a junior casual, who had been working odd days during the week as well as Thursday nights and Saturdays, was working her shift.
- [88] She felt very let down that an employer who valued her services could get rid of her so easily without consulting her or letting her know until the last minute. She said if they had approached her and explained how they were having financial problems with the store she would have agreed to take a pay cut or roster herself off for a period and would not have minded working in another department or dropping a shift or two.
- [89] Following her dismissal from *Farmer Jack's* she felt depressed and humiliated for some weeks. She would avoid talking to regular customers of *Farmer Jack's* because she thought they might believe she had been sacked for disciplinary reasons. She did not want to have to explain what had happened. She was anxious too because she and her husband had applied for a loan to start renovations on their house and her income from *Farmer Jack's* was going to help them repay that loan.
- [90] She applied for a number of jobs but was unsuccessful until she obtained one as a courier in March 1998 at \$12.00 per hour for 10 hours a week.
- [91] Nonetheless, having been dismissed from *Farmer Jack's* has made her sensitive about her age. She is still apprehensive that she could be



dismissed without warning and for no reason to do with her ability to do her job.

- [92] Ms Dianne Kerwin commenced employment at *Farmer Jack's* Waikiki on 30 August 1996. She recalled that during her job interview the then supervisor told her she was glad to be interviewing a senior applicant as she preferred them.
- [93] For the first 8 weeks she worked shifts from Monday to Thursday. Patricia Brown was the afternoon supervisor. She asked Ms Brown if she could work a shift on Friday if it was available and was then put on to the Friday afternoon shift as well. All her shifts were afternoon rosters and her roster did not change from that point through to the date of her termination.
- [94] The only time she had off while employed at *Farmer Jack's* was for 2 weeks in March and April 1997 when she went interstate following the death of her brother.
- [95] On Thursday 1 May 1997 Patricia Brown told her that her hours would be cut so that she would be working 3 shifts a week instead of 5 as of the following Monday. No reason was given.
- [96] On Friday 2 May 1997 she was at her checkout when 3 customers at different times approached her and asked her about the vacancy for junior checkout operators. She said she could clearly see a handwritten notice on the door from her position on the checkout and it definitely referred to "operators" in the plural.
- [97] On Monday 5 May she arrived at work 10 minutes early before starting her shift at 1.00 pm. She noticed Leonie Siddons standing at the end of the cigarette counter. Ms Kerwin said hello and noticed that Ms Siddons appeared upset. She asked her what was the matter. Ms Siddons said she had just been dismissed. When asked why she said she wasn't sure. Ms Kerwin went over to clock on and saw Andrea also crying who also told her she had just been sacked. After Ms Kerwin clocked on Patricia Brown



put her on the No 2 checkout. Anne Watts was then finishing up her shift and was going to see Vince Carcione in the office. She came back down 15 minutes later looking distressed then left.

[98] Ms Kerwin worked the rest of her shift wondering if she was going to be next. Patricia Brown told her she did not know what was going on.

[99] At 5.30 pm, at the end of her shift, Patricia Brown told her that Ante Perdija, the floor manager, wanted to speak with her. She said to Patricia that she knew what it was about and Patricia appeared surprised. Ante Perdija was working on the specials at the entrance and Patricia Brown said to him "you don't have to worry about Dianne, she already knows". Ante Perdija said to Ms Kerwin that he was very sorry but the store had to change staff around. The store was not making enough money and "staff had to be let go". He requested that she dryclean the uniform and return it and she would be reimbursed for the cost and paid one hour's wage in lieu of notice.

[100] According to Ms Kerwin this exchange took place in front of customers as a consequence of which she was very embarrassed and humiliated.

[101] She was also concerned about her family debts and how they would be serviced. She and her husband had recently taken a loan to buy a pool and her weekly wages had been factored into the repayments. At 47 years of age she felt quite insecure about the prospect of finding any other work let alone work as a checkout operator. Her husband was employed full time and so she was not eligible for social security.

[102] She revised her resume and within a couple of weeks began to make enquiries about casual work. She also applied for vacancies for clerical or computer positions appropriate to her level of experience.

[103] Evidence was also called on behalf of the complainants from the Commonwealth Department of Employment, Education, Training & Youth Affairs ("DEETYA"), part of which was the Metropolitan Employment



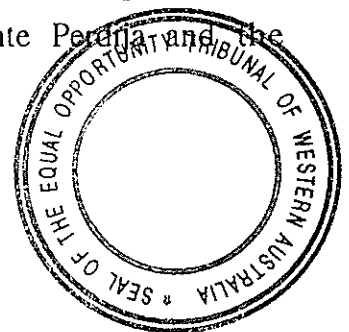
Servicing Unit. The main agency through which job vacancies lodged with that Unit would be advertised was the Commonwealth Employment Service ("CES"). According to Mrs Neeltje Shaw the telephone enquiry system for handling job vacancy advice and enquiries by employers was centralised at the Unit in Perth. An employer wishing to lodge a job vacancy notice with the CES would telephone a 1300 number and be put through to the Unit automatically. Depending upon the locality of the employer, an appropriate division of the Unit would handle the inquiry. Thus the Unit's southern cell would handle telephone inquiries by employers based in Rockingham.

[104] The Unit officer to whom the employer was speaking would key data directly into the computer's central database. The data could be retrieved and displayed on computer terminal and then printed out.

[105] Ms Shaw was shown computer printouts of data entries for employee positions advertised with *Farmer Jack's* at Waikiki. She was not the officer who took the call and entered the data but was able to explain the information on the printout.

[106] According to Ms Shaw the first printout indicated that an advertisement for 10 positions for casuals aged 15 to 17 years was created on 2 May 1997 and subsequently withdrawn on 27 May 1997. These positions were at *Farmer Jack's* Waikiki. The employer representative to be contacted was named as "Patricia Brown". A limit of 20 applicants was stipulated. That could mean either that the employer's representative had requested that 20 applicants be referred to the employer for the positions or that the Unit officer had recommended to the employer that 20 referrals be made. It was common for an officer to make such a recommendation. The database did not indicate on what basis the referral number was arrived at in this instance.

[107] A further printout was for a different position with the same employer. The employer representative nominated for that was Ante Peruffa and the



position was notified on 2 April 1997 and was withdrawn on 3 June that year. The referral limit was 16 applicants. It was for a single vacancy.

[108] In her evidence Ms Shaw spoke of the general practice within the office being for the operator taking a call from an employer to key in the data whilst speaking to the employer on the telephone. In some instances however, it happened that an operator was already working on a screen when required to take another call and in such circumstances the information could be written down and later keyed into the database. She was unable to say what had occurred in this instance.

[109] Mr MacDonald, who appeared for the complainants, informed the Tribunal that he did not intend to call the Departmental officer who had actually made these data entries because he was unable to recall making them.

[110] The complainants called **Julie New** another casual check-out operator who had worked at *Farmer Jacks*, Waikiki, for about 18 months to September 1997. She said that although she was not one of those dismissed in May 1997 she was transferred from the check-out to the delicatessen section. She mentioned another senior casual whose shifts were reduced from five to one day a week. Julie New recalled three new junior staff commencing the same week the six complainants were dismissed.

[111] In cross-examination she conceded she was not happy about being moved from the check-out to the delicatessen section and she eventually left *Farmer Jacks* for that reason. When pressed about when the three juniors had in fact started work she agreed (we thought somewhat reluctantly and with a degree of irritation) that she could not dispute that they commenced on 6 May, 20 May and 9 July 1997 respectively; nor did she know whether they were permanent or casual employees. In re-examination, when again asked when the new junior staff had started, she said (t.233):

"I reckon they were there the day after, as I can remember, because if they weren't there who was going to work the check-outs?"



[112] That answer of course implies conjecture on her part and also ignores the facts that after the complainants were dismissed there were still 9 seniors and 3 juniors on the Monday to Friday roster.

[113] It is clear that following their dismissals the complainants were extremely upset and concerned. They met together probably at least on 2 or 3 occasions to discuss the situation and the options open to them.

[114] One result of their meetings and discussions was an agreement that they would all file notices of application for compensation for unfair dismissal and age discrimination with the WA Industrial Relations Commission.

[115] Notices of application were accordingly prepared and all were filed together on 20 May 1997.

[116] Paragraph 12 of the notices required a statement of brief details of the circumstances of the dismissal. These details appeared in the handwriting of each complainant. They were in all cases almost identical. For example, Ms Watts wrote:

"I was called into the office 30 minutes prior to finishing my shift and informed that my employment was terminated effective immediately!"

The reason stated for termination was given as no longer able to afford me due to rationalisation of staff. However prior to this an advertisement for junior checkout operators was placed on the store front window and also with CES. I claim unfair dismissal on the ground of age discrimination due to employing juniors..."

[117] In paragraph 13 in each instance the complainant indicated she was not claiming reinstatement and the reason given was:

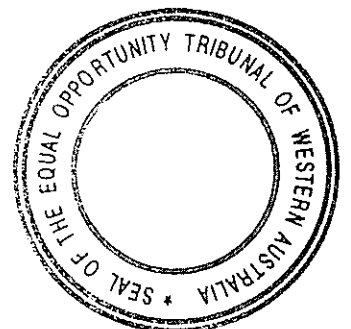
"I would not feel secure back in their employ."

[118] The only complainant whose description at paragraph 12 varied from the others was Dianne Kerwin's and the variation in her case was only at the commencement of her description where she stated:

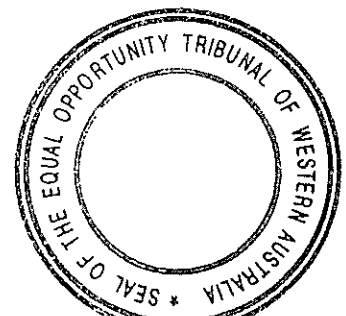


"I was told in the supermarket aisle at 5.30 pm when my shift finished that my employment was terminated effective immediately..."

- [119] Otherwise her description was in the same terms as that of the other complainants.
- [120] The complaints made to the Equal Opportunity Commission were also dated 20 May 1997 although the Commission's date stamp indicates they were received on 26 May.
- [121] According to the Commissioner's report (tendered in evidence before the Tribunal) she wrote to Carcione Nominees informing them of the complainants' allegations and requesting a response on 11 June 1997. It seems however that the Industrial Relations Notices of Application were served on Carcione Nominees on the evening or night of 20 May 1997 when all of the complainants went around to the *Farmer Jack's* store and delivered them personally in a group.
- [122] In her evidence **Ms Patricia Brown** told the Tribunal that she has been a supervisor at *Farmer Jack's* Waikiki for approximately 2 years. Prior to that she was employed for 12 months at the store as a casual shop assistant. She is directly answerable to Ante Perdija, the store manager. As at May 1997 she was only acting supervisor and so although she had then most of the duties she presently has, she was unable to hire and fire staff.
- [123] She explained that the shop has 7 cash registers although only 4 are usually open at any one time. The registers are operated by casual checkout operators. In her statement dated 21 October 1998 she said there was a total of 7 casual checkout operators on the Monday to Friday roster of whom 3 are seniors and 4 are juniors. The store now operates on one shift less than operated up to May 1997. Up until May 1997 there was an additional shift between 10.00 am and 3.00 pm but that has been abolished in that month. In her evidence before the Tribunal she said there were 5 seniors and 5 juniors on the Monday to Friday roster.



- [124] The hours employees work varied depending upon business requirements, trading patterns and the availability of casuals to attend for work. That is why checkout operators are employed on a casual basis.
- [125] Part of Ms Brown's responsibilities is and was at the relevant time to prepare the rosters for the shop. There are 2 rosters - one covers work Monday to Friday and the other covers work Thursday night and Saturday.
- [126] She is familiar with each employee and their preferred hours of work. She has obtained that familiarity because of her experience working at the store and her knowledge of the individual employees.
- [127] Ms Brown said that following the reopening after the fire the shop had 7 registers operating at any one time although over time the number of registers operating decreased due to several factors including fewer customers, school holidays, hot weather and other factors. There were times when all the registers were not being used even though checkout operators were on duty. She would then direct the cashiers who were not busy to do other duties. She said she recalled telling Mr Perdiija from time to time that she thought they were overstaffed with cashiers.
- [128] She recalled a conversation with Vince Carcione in the office in early May 1997. He asked for her view on how things were going with the store and she told him in substance that the cashier section was overstaffed. According to her Mr Carcione said that the store's accounts showed it was not making a profit and he needed to reduce the expenses starting with the wages' bill by reducing the number of employees. Ms Brown reminded him in substance that she had previously expressed the opinion to him that some cashiers "could be let go". They then had a discussion about it and decided to examine the rosters with a view to better accommodating the business requirements and reducing the number of checkout operators. Mr Carcione asked her about each person named on the roster and which ones they could do without.



- [129] It is unnecessary to detail the evidence of her views as to the availability or otherwise of individual employees. It is sufficient to observe that at the end of that process Ms Brown and Mr Carcione had identified the 6 complainants as being employees who all lacked flexibility in their hours of work and were not suitable to be reallocated to different duties.
- [130] Ms Brown was adamant there was no discussion about the age or the wage rates of the casuals and that the only document looked at was the Monday to Friday roster.
- [131] They reorganised the roster accordingly and Mr Carcione told Ms Brown that when the 6 cashiers who had been selected completed their shift on their next working day she was to send them up to the office to speak to him.
- [132] There was then some further discussion about the flexibility of the roster itself. According to Ms Brown whilst it covered their requirements it was "tight". As a result Mr Carcione suggested that they should employ a cashier who was flexible in hours of work and who could work Monday to Friday as needed and also 1.00 - 9.00 pm on a Thursday if someone called in sick, or perhaps Saturday if needed as a backup cashier between 8.00 am to 5.00 pm. She said she agreed to this as it makes rostering staff easier if someone is prepared to work any hours that the business requires and can start work on short notice. According to Ms Brown it was her experience that junior cashiers are more flexible in their hours of work and can fit in with the needs of business better. She mentioned that to Mr Carcione. As a result he told her she could advertise for a junior.
- [133] Later that day she placed an advertisement in the shop window for a junior checkout operator.
- [134] About 5 people responded to that advertisement but she did not hire any of them because all of the applicants were still at school and could only work Thursday night and Saturday morning.



- [135] Some time afterwards she was asked by management (she thought it was Mr Carcione) to remove the job vacancy sign but she could not now recall the reason for that.
- [136] On Monday 5 May she told Ms McKeown and Ms Watts as they were coming off their shift to go to the office because Mr Carcione wanted to speak to them.
- [137] She recalled that later that day Ms Caldwell came to the office and asked for Vince. Ms Brown said he was not there. Ms Caldwell then asked her essentially whether she would be finishing up as well. Ms Brown said that she was sorry but that was so. They were overstaffed and Mr Carcione was trying to fix up the shop financially. She said Ms Caldwell said she had just wanted to know and Ms Brown said if she wanted to see Mr Carcione she could stay or come back.
- [138] On 6 May she told the other cashiers at the end of their shifts that they had to speak to Vince. She recalled that one of them (she could not now remember who) asked what it was about. She said she did not know. She told Ms Kerwin that the manager Ante Perdija wanted to see her. At that stage Mr Perdija was standing in the entrance to the shop near the trolleys and the bulk specials. She saw Ms Kerwin approach Mr Perdija and heard her ask whether she was finishing up. She heard Mr Perdija say "yes you are, sorry", but heard nothing else as she was walking past.
- [139] **Vince Carcione** testified that Carcione Nominees presently employs approximately 150 people in total at its three Farmer Jack's store at Waikiki, Leda and Kelmscott. The company employs mostly casual employees to allow for the greatest flexibility to accommodate seasonal changes, special promotions, school holidays, customer demands and the economic situation generally.
- [140] He explained that before the Waikiki shop was burnt down in August 1995 that store had been trading well although profits had been minimal.



- [141] The grocery retail industry was going through some difficult times and there was considerable competition – there were three major competitors within a four kilometre radius of the Waikiki store.
- [142] When the store re-opened for business in December 1995, the volume of business was initially better than it had been previously but that improvement did not last and the level of business returned to its previous state. Thus, during 1996 although turnover was high, profit was low.
- [143] About December 1996 Carcione Nominees employed an in-house accountant and amongst other innovations he introduced quarterly profit and loss statements. That was the first time that sort of current and detailed financial information had been available to the directors on a regular basis.
- [144] The profit and loss statement for the first quarter of 1997 became available about late April of that year. It showed the store was not profitable despite a high turnover and indeed the store had made a financial loss in the quarter.
- [145] The directors reviewed the accounts and concluded that expenses were too high and had to be reduced. A number of measures were agreed upon and individual directors were given responsibility for implementing them. It was Vince Carcione's responsibility to review expenses, especially the wages bill, by reducing the number of staff employed by the company. The intent was to act as quickly as possible so as to try to make the business profitable or at least break even for the second quarter of 1997.
- [146] Mr Vince Carcione's main aim was to reduce the wages bill by reducing the number of employees. He obtained a wages summary report for the Waikiki store which showed the cost of wages and the number of staff employed. At that time there were 53 employees in the Waikiki store of whom 4 were fulltime and 49 were casual. The printout did not show the total employment cost of each employee; it merely gave overall figures.



[147] Vince Carcione said that on previous occasions Ante Perdija (the store manager) had told him that the Waikiki store was overstaffed especially at the cash registers. That was a view shared by Vince Carcione's father who was the company's Managing Director. The latter was particularly concerned about the high staffing levels at the cash registers where cashiers were not being kept busy.

[148] It was against that background that Vince Carcione decided his first task was to reduce the number of cashiers employed at the store.

[149] He said that he accordingly consulted Patricia Brown who was then acting supervisor for the front of the store and they discussed revised rosters and possible reduction in the number of cashiers employed. Mr Carcione said Patricia Brown was familiar with the individual employees and their work and he relied upon her observations as to the employees' availability to work, flexibility and range of relevant skills.

[150] All of this was done at a meeting at the Waikiki store between Patricia Brown and Vince Carcione on 2 May 1997.

[151] Mr Carcione's evidence in relation to this was essentially the same as that given by Patricia Brown and the outcome of the meeting was as she had described it.

[152] According to Vince Carcione, neither Patricia Brown nor he raised this issue of the age of the cashiers nor their rates of pay. He stated the only consideration he took into account in deciding who should be "let go" was their flexibility and availability to work.

[153] The changes they made to the roster resulted in two or three cashiers having to work double shifts without a break and for that reason in particular, he said, Patricia Brown suggested hiring one additional casual cashier. Given that the cost of wages was a concern for the business, Vince Carcione suggested that the new cashier be a junior. Patricia Brown agreed with that, expressing the view to him that in her experience juniors



were more flexible with their working hours because they were willing to work at odd hours and that would suit the store's requirements. Vince Carcione accordingly told her put a notice in the window of the store advertising for applicants for a new junior cashier position.

[154] According to Mr Carcione he saw his sister Linda Perdija later that day and mentioned to her that he was advertising for a junior cashier. She told him that she did not consider an advertisement on the window to be very effective and suggested she should contact a person with whom she previously had dealings placing job advertisements over the internet. He agreed to that but asked her to request ten applicants for the one position so that the most suitable applicant could get the job. He stated that he set a limit of ten because his experience was that one needed a certain numbers of applicants so as to find the most suitable person for the job yet a limit had to be imposed so as not to have to waste their time sifting through a large number of applications.

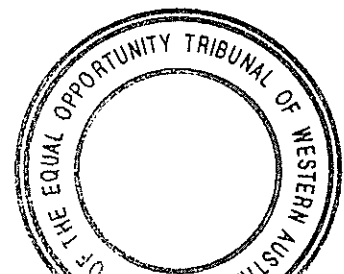
[155] Mr Carcione said he recalled that his sister told him shortly afterwards that she had contacted the person and had placed the vacancy ad for one junior checkout operator but seeking ten applicants for that position. He said he recalled that approximately 12 people applied for the position over the next 10 days and he interviewed each of them. However he did not hire anyone from those interviews because none of them were suitable.

[156] He testified that in the course of the interviews one of the applicants told him in effect that the advertisement placed with the CES was for more than one position. He was surprised to hear that.

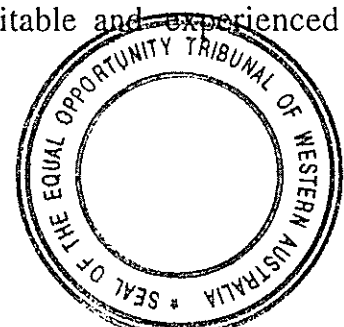
[157] He stated that as he had interviewed somewhat more than 10 applicants and found none of them suitable and because he was told that the ad was wrong he decided to withdraw the advertisement. Accordingly, a short while later he asked Linda Perdija to do so. She subsequently told him that had been done.



- [158] Vince Carcione said that at about the same time he instructed Patricia Brown to take down the ad placed in the shop window because he had not interviewed anyone who had responded to that and in any event had found a suitable cashier as a result of a recommendation from a current employee.
- [159] In the meantime, on Monday 5 May, Mr Carcione told Andrea McKeown that her services were no longer required because the store was not trading profitably at the time. He said that he could recall her saying in substance that he could not do that because she was only a single mother and the job was her only source of income. She started crying. He was apologetic and said that if things changed he would re-employ her.
- [160] On the same day he spoke to Leonie Siddons in his office and said much the same to her. Later on in the same day Anne Watts came into his office in tears and asked him whether she was next. He told her that unfortunately she was.
- [161] He had commitments elsewhere then and so asked his brother-in-law Ante Perdija to inform the other two cashiers Dianne Kerwin and Robyn Caldwell that they "had to be let go because of staff rationalisation." Ante Perdija subsequently said that he had told them.
- [162] Mr Carcione explained that other changes had also been made in the store the overall effect of which was that they saved some 40 to 45 hours per week.
- [163] One of those changes was to move Julie New temporarily from the checkout to the position of Delicatessen Assistant. Her position as a checkout operator was filled by a junior, Jeannie Walder, who had been recommended to them by one of the employees at another store. Jeannie Walder commenced work on 6 May and ceased there on 20 October 1997.



- [164] A second junior was employed as a checkout operator on 20 May and on 7 June another junior was employed to work Saturdays only. She subsequently ceased working at the store on 21 March 1998.
- [165] In July 1997 Carcione Nominees hired two junior checkout operators to work Thursday nights and Saturdays.
- [166] No new senior checkout operators were employed between May and July 1997.
- [167] After the dismissal of the six complainants the company had 10 senior checkout operators employed at the store and their employment continued. Subsequently one of those transferred to the company's Leda store in June 1997 at the company's request. Three resigned their employment in May 1997, February 1998 and September 1998 respectively, and one changed from a casual position to a full time position. The remaining five senior casual checkout operators are still employed at the Waikiki store.
- [168] In her evidence **Linda Perdija** confirmed that in early May 1997 Vince Carcione had spoken to her on the phone and told her that he had instructed Patricia Brown to place an add in the window of the Waikiki store for a junior checkout operator. Linda suggested there was a more effective way to seek new employees and undertook to ring a contact of hers to advertise it on the internet. That was agreed. She said that shortly afterwards she telephoned Kim Vann and told him that they wished to advertise for one junior checkout operator at the Waikiki store. The requirements were that the applicants should be aged 15 to 17, be able to do product scanning, customer service, stack shelves, cleaning etc, should live locally, be prepared to be employed as a casual and be available to work Saturday and Thursday nights. She told him that she wanted 10 applicants for the one vacancy. She testified that she asked for this because it was her usual practice when trying to fill a vacancy as it allows more people from whom to choose the most suitable and experienced applicant.



[169] Linda Perdija stated that some time later Vince Carcione asked her to cancel the advertisement. He did not tell her why and she did not ask. She telephoned Mr Vann and told him to cancel it.

[170] In general terms **Ante Perdija's** evidence broadly supported that given by the other witnesses called by the respondent in relation to the business situation at the Waikiki store and the measures decided upon to improve it. His only direct involvement in these matters was on the afternoon of Monday 5 May 1997 when Vince Carcione told him that he had spoken with most of the checkout operators they had decided to dismiss but had commitments elsewhere and wanted Ante Perdija to inform the remainder. He agreed to that and intended to speak to them in the office upstairs.

[171] His evidence was that just before closing time on Monday 5 May one of the checkout operators whose name he could not now recall approached him at the front of the store as he was working on a display for the following day's business. He said that as it was almost closing time there were no customers anywhere around. The employee said to him that she already knew what it was he wished to see her about to which he responded apologetically that it was not her it was simply that the store was not making enough money and some staff had to be "let go". He said she was upset but not crying. She simply seemed to accept what he said and left.

[172] There is no doubt that the complainants were extremely upset about the events of 2 to 6 May 1997. Their distress and hurt about the loss of their jobs and their concern about the financial and other consequences of that were reinforced by growing anger with the way the situation had been handled by the respondent's representatives and by their perception of the unfairness of what had been done.

[173] They met together on several occasions after 6 May to discuss what had happened to them, why and what they could do about it. It is apparent (as indeed they assert) their understanding was that the respondent had dismissed all of them intending to replace them with junior casual



employees who would be paid appreciably less than the complainants. They agreed on a course of action, namely to apply to the State Industrial Relations Commission claiming unfair dismissal and age discrimination and to lodge complaints with the Equal Opportunity Commission claiming unlawful discrimination on the ground of age. The Tribunal is satisfied that by the time they wrote out their IRC and EOC complaints on 20 May 1997 the complainants had received their Employment Separation Certificates and references from the respondent. The references were in similar terms. Each stated the particular complainant's services were no longer required.

"...Due to a necessary rationalisation of staff"

[174] and that she was a diligent and conscientious employee and recommended her to any prospective employer.

[175] We are satisfied that the phrase "rationalisation of staff" used by the complainants in their written complaints was drawn from their letters of reference, but was also an accurate reflection of at least the effect of what had been said to various of them independently by Vince Carcione, Ante Perdija and Patricia Brown respectively.

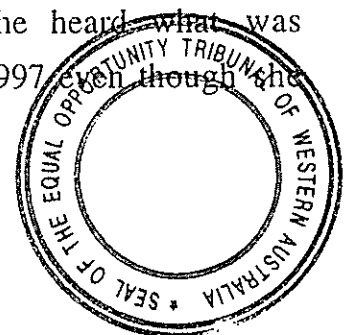
[176] To the extent they wrote that as the result of some consensus arrived at by them collectively it was nonetheless accurate in substance.

[177] The position was somewhat different when (with the exception of Dianne Kerwin) each of them wrote:

"I was called into the office 30 minutes prior to finishing my shift and informed that my employment was being terminated, effective immediately..."

[178] Mrs Kerwin wrote that she had been told in the supermarket aisle at 5.30pm when her shift finished. That was in accord with her evidence.

[179] However Paulette Reynolds' evidence was that she heard what was happening, went into the store on Monday 5 May 1997, even though she



was not rostered to work until the following day, and learned from Patricia Brown that she was to be sacked when she turned up for work. Robyn Caldwell's evidence was to similar effect. Under cross-examination Mrs Reynolds conceded that what she had written about in her complaint was wrong - she had not even been at work the day she was told. As she explained it:

"Well, mostly talking to the other girls and they were all called in and you get... you're sort of writing down what you think and that's what I've done. I've written down the wrong part. I went into the office but I wasn't called in and I didn't work on the Monday, but it's still the same thing." (T.129)

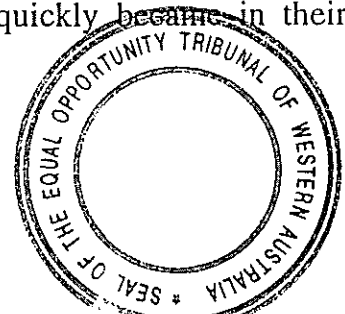
[180] She confirmed that in her complaint she had also written:

"However prior to this an advertisement for a junior check-out operator was placed on the store front window."

[181] and that was correct.

[182] When cross-examined about the wording in her complaint by contrast with what she said otherwise had in fact occurred, Mrs Caldwell sought to explain that she wrote down "what was going to happen" to her (t.208). Ms Saracini's description of that explanation as a "strained reconstruction" is apt.

[183] There is nothing either surprising or wrong about the complainants meeting together to talk about what had happened to them, to sympathise with, console and support each other and to discuss what action they should take. All of that is perfectly natural. There is, however, a potential for individual recollections of events and conversations to be influenced by the group discussion and become less reliable as a consequence. We think the group view of the complainants that the notice on the store door on 2 May 1997 referred to "check-out operators" (in the plural), though honestly held, is an early reconstruction which quickly became in their



minds a fixed truth. We accept the evidence of Patricia Brown, Vince Carcione and Ante Perdija on that point, that the notice referred to "a check-out operator" position.

[184] One argument advanced by the respondent in relation to Paulette Reynolds and Robyn Caldwell was that as they had been rostered to attend work on Tuesday 6 May but had failed to attend for work they had ceased employment of their own volition and accordingly had not been dismissed by the respondent within the meaning of section 66 W(2)(c) EOA.

[185] The distinction at common law between a permanent employee and a casual employee is that a permanent employee is on the regular established staff so that his or her employment pattern is general as distinct from merely temporary whereas casual employees are employed as and when required.^{ix} Each engagement of a casual worker constitutes a separate contract of employment.

[186] Permanent employment is defined generally by reference to the normal retiring age, intervening sickness or misconduct excepted, or at least to an expectation of the employee that unless exceptional circumstances intervene, he or she may anticipate continuous employment for an indefinite time. Temporary employment on the other hand is generally defined by reference to some specific period of time or some future event which will obviously result in the termination of the contract.^x

[187] The term "casual employee" does not otherwise have a recognised legal meaning.^{xi}

[188] A casual employee may work under a continuing contract of employment, even though the working days and hours of that employee are variable. That was the situation here: each complainant was employed under a workplace agreement expressed to be in force until 31 August 1997. The period of notice on resignation or dismissal was specified in the Agreement.



- [189] The respondent relied upon *TWU v Eastern Goldfields Transport Board*^{xii} and *Western Excavating (EEC) Ltd v Sharp*^{xiii}, contending that for the purposes of the EOA "dismissal" required termination of the employment relationship by the action of the employer and could not include an employee voluntarily leaving her employment.
- [190] So much can be accepted, but there is more to it than that. Each of these cases was concerned with the common law concept of constructive dismissal.
- [191] In *TWU v Eastern Goldfields Transport Board* the employee had been told by the employer that if he did not resign he would be dismissed. The Full Bench of the WA Industrial Relations Commission held that threat to be a constructive dismissal.
- [192] In *Western Excavating (ECC) Ltd v Sharp* the English Court of Appeal held there was no constructive dismissal of the employee when the employer refused to give him a loan and told him his holiday pay could only be paid to him if he was actually on holiday or resigned. As one member of the Industrial Tribunal put it at first instance:

"... the employee's decision to resign was not caused or originated by any misconduct on the part of the company, but was solely his own personal decision. There has, therefore, been no dismissal, whether constructive or otherwise"^{xiv}

- [193] In this case it is clear Vince Carcione had decided to terminate the employment of the six complainants. He had implemented that decision in relation to some of them and given directions to implement it in respect of the others. Patricia Brown had been told to send each of the complainants to see him at the end of their shifts. She knew what decision had been made. So when Paulette Reynolds and Robyn Caldwell arrived and spoke to Patricia Brown on Monday 6 May and they asked her if they were to be sacked when they turned up for work the following day she told them they were. We accept their evidence that she told them they were.



to come in the following day under the circumstances and that they would be paid 1 hours pay in lieu of notice - although we are not satisfied she said they would be paid for the shift even though they did not work it. We think they most likely misunderstood what was said about the 1 hour pay in lieu.

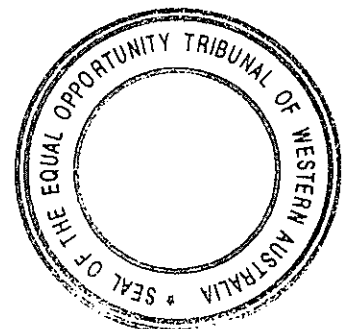
[194] As acting Supervisor, Patricia Brown did not have authority to terminate the employment of staff. But that decision had already been made; she merely communicated it to them. Whilst she had no express authority to do that it was within the scope of her apparent authority and in any event was adopted by the respondent in that the respondent in fact paid the 1 hour in lieu and sent both complainants an Employment Separation Certificate and reference acknowledging their dismissal.

[195] Under these circumstances we are satisfied Paulette Reynolds and Robyn Caldwell were dismissed by the respondent within the meaning of section 66W(2) of the EOA.

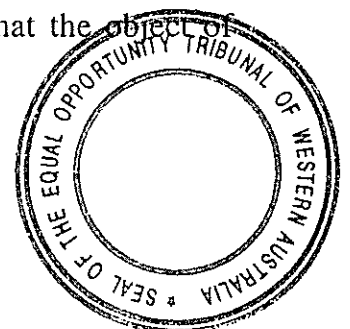
[196] Even if there were not an actual dismissal of those two complainants by an agent of the respondent acting within the scope of her apparent authority, the Tribunal finds there was a constructive dismissal. The complainants' decisions not to attend work the following day were based on the knowledge communicated to them on behalf of the employer that if they did they would be sacked.

[197] That brings us to what is really the central issue in this case, namely whether or not the complainants were dismissed wholly or partly on the ground of their age. We put to one side the question whether the fact that senior employees are paid more than juniors is a characteristic appertaining or imputed generally to persons of the complainants' ages — for the moment we assume it is.

[198] We begin with the chronological course of events.



- [199] The decision to dismiss the six complainants was made on Friday 2 May 1997. The respondent caused a notice to be placed at the front of the store inviting applications for a check-out operator position that day. The CES advertisement for 10 junior casual check-out operator positions was also placed on 2 May.
- [200] Andrea McKeown, Dianne Kerwin, Anne Watts and Leonie Siddons were told of their dismissal at the end of their shifts on Monday 5 May; Paulette Reynolds and Robyn Caldwell were rostered for Tuesday but came in on Monday 5 May and were also told then.
- [201] The letters of reference from Carcione Nominees were dated 15 May.
- [202] The complainants' applications to the IRC were dated 20 May and handed to Vince Carcione later that same day. The complaints to the EOC were also dated 20 May but were not received by the Commission until 26 May.
- [203] The CES advertisement for 10 positions was withdrawn on 27 May (an earlier advertisement for a single position had been lodged on 2 April; that was withdrawn on 3 June 1997).
- [204] According to a table showing the total number of employees at Farmer Jacks, Waikiki, between 1 January 1996 and 31 December 1997 (ex. R9: copy attached to these reasons), between January 1996 and April 1997 the number had fluctuated from a high of 61 in March 1996 to a low of 47 in July of that year. In May 1997 there were 52 employees (including the complainants). In June 1997 there were 45 and the number did not increase again above that until November/December, when it rose to 47.
- [205] The evidence was that December is generally one of the busiest months for supermarkets; in December 1996 there were 52 staff employed at *Farmer Jacks*, Waikiki; in December 1997 there were 47 — and in the meantime the respondent had dismissed the six complainants. These figures obviously lend some credence to the respondent's claim that the object of



the exercise in May 1997 was to reduce the number of employees overall - not simply to replace seniors with juniors.

[206] On the other hand the evidence does show that to the extent it was thereafter necessary to employ additional casuals in and after May 1997, they were always juniors.

[207] We do not accept the evidence of Julie New that three juniors were employed the week after the complainants left. We had the impression Ms New may have had some personal antipathy towards Patricia Brown and/or the respondent; her evidence was of general impressions and we think not accurate. We accept the evidence led for the respondent as to the respective dates of employment of the new (junior) casuals employed during the second half of 1997.

[208] As already observed, the complainants necessarily rely on inference to demonstrate that their age was a factor in their dismissals. There is no direct evidence of that. Vince Carcione and Patricia Brown deny that it was even raised.

[209] Given that the whole purpose of the exercise on 2 May was to reduce wages costs and given the fact that the complainants' rate of pay was up to three times that being paid to the juniors, it would on the face of it be surprising for that consideration not to even be mentioned. However, the fact was, there were 15 seniors and only 3 juniors on that roster and both Vince Carcione and Patricia Brown were adamant in their evidence that the only considerations they discussed were the availability for work, flexibility and skills of the employees on that roster.

[210] As to those matters there was no dispute that none of them had been discussed with any of the complainants. Patricia Brown thought she had a good understanding of the commitments, availability, work preferences and other factors personal to the individual complainants and was prepared to make recommendations about their continued employment on the strength of her understanding and without bothering to check that it was correct.

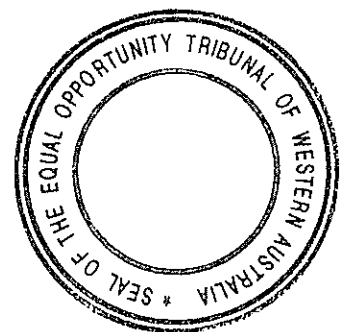


In some instances it was: she knew, for example, that Robyn Caldwell could not work after 3pm because she had to collect her children from school. In other instances, however, Patricia Brown's understanding was quite wrong: for instance she believed Paulette Reynolds was inflexible in her hours because she also worked a certain number of hours a week in a newsagency. In fact Mrs Reynolds had not worked at the newsagency since September 1996.

[211] But whether or not the way in which these decisions were made was unsatisfactory and unfair for these reasons is not something it falls to this Tribunal to determine nor, indeed, to express any view about. The only matter for us to determine is whether or not the complainants were unlawfully discriminated against wholly or partly on the ground of their age(s).

[212] The CES advertisement for 10 positions lodged on 2 May and withdrawn on 27 May, after the respondent was given notice of the complainants' applications to the IRC claiming unfair dismissal and age discrimination, would give rise to a strong inference against the respondent were it not for the evidence of Linda Perdija in particular. She testified that the advertisement she asked to be placed was for 10 applicants for one position. Kim Vann, the DEETYA officer who took the advertisement was not called by the complainants and we were told that was because he had no recollection of it. Linda Perdija was quite clear about her evidence; she was supported by Vince Carcione and indirectly by Patricia Brown. In the face of that evidence the complainants have not satisfied us the respondent was seeking to fill ten positions.

[213] So too, although we have reservations about the matter we cannot be satisfied on the balance of probabilities on the evidence before us that age (ie the wage differential between senior and junior rates of pay) was a factor in the decision made by Vince Carcione on 2 May 1997 to dismiss the complainants.



[214] That being so, the complainants have failed to establish their case and their complaints must be dismissed.

[215] In light of this conclusion it is not necessary to grapple with the question whether in the circumstances of this case the wage-rate applicable to senior casuals could properly be regarded as a characteristic appertaining or imputed generally to persons of the complainants' age(s) within the meaning of section 66V of the *EOA* and the effect of section 66 ZS on the resolution of that question.

i section 66W(2)(c) *EOA*

ii section 4(1) *EOA*

iii section 66V *EOA*

iv *Director General of Education & Anor v Breen & Ors* (1984) EOC 92-015; *Haines v Leves* (1987) EOC 92-192.

v Section 5 *EOA*; *Ghockson v Commissioner of Police* (1996) EOC 92-798.

vi *Waters & Ors v Public Transport Corporation* (1991) EOC 92-390; 173 CLR 349.

vii *Australian Iron & Steel v Banovic & Anor* (1989) EOC 92-390; 173 CLR 349.

viii *Fenwick v Beveridge Building Products Pty Ltd* (1986) EOC 92-147 and *Department of Health v Arumugam* (1988) VR 319.

ix *McClelland v Northern Ireland General Health Service Board* (1957) 1 WLR 594.

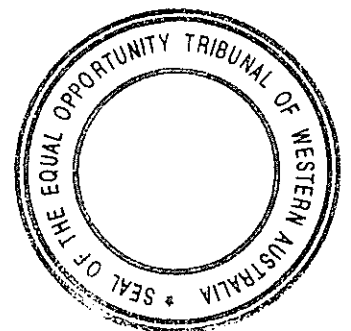
x *In Re Montgomery and Commissioner for Superannuation* (1985) 3 AAR 69 at 73.

xi *Doyle v Sydney Steel Co. Ltd* (1936) 56 CLR 545; *Linehan v Northwest Exports Pty. Ltd* (1981) 57 FLR 49, 57-61; *Amzu v Sunland Enterprises Pty Ltd* (1998) 241R 467.

xii *TWU v Eastern Goldfields Transport Board* (1989) 69 WAIG 1895, 1897.

xiii *Western Excavating (EEC) Ltd v Sharp* [1978] QB 761, 769.

xiv *Op.cit.*, at p.767



**TOTAL NO. OF EMPLOYEES AT FARMER JACK'S WAIKIKI DURING 1/1/96-
31/12/97**

Month	No. of Employees
Jan 96	59
Feb 96	60
Mar 96	61
Apr 96	60
May 96	55
June 96	58
Jul 96	47
Aug 96	48
Sep 96	51
Oct 96	53
Nov 96	55
Dec 96	52
Jan 97	51
Feb 97	55
Mar 97	57
Apr 97	54
May 97	52
Jun 97	45
Jul 97	44
Aug 97	44
Sept 97	44
Oct 97	40
Nov 97	46
Dec 97	47

