IN THE EQUAL OPPORTUNITY TRIBUNAL OF WESTERN AUSTRALIA

Matters No. 15 and 16 of 1999

BETWEEN

SHELLEY ARCHER

Complainant

- and –

STATE SCHOOL TEACHERS UNION

Respondent

Delivered: 13 July, 2001.

REASONS FOR DECISION
APPLICATION TO DISMISS THE COMPLAINTS
SECTION 125(1) OF THE *EQUAL OPPORTUNITY ACT 1984*
Deputy President Donaldson and Deputy Members Ackland and Pal

---

COMPLAINTS

1. Ms. Archer has made two complaints against her former employer, the State School Teachers Union ("SSTU"), alleging contraventions of the *Equal Opportunity Act 1984*.

2. In Complaint 15 of 1999 Ms. Archer alleges that the SSTU contravened s.66B(2) of the Act, discriminating against her on the ground of an alleged impairment by denying her access to benefits associated with employment. What became Complaint 15 of 1999 was lodged with the Equal Opportunity Commission on around 7 April 1997.

3. In Complaint 16 of 1999 it is alleged that the SSTU victimised Ms. Archer because she had made what came to be Complaint 15 of 1999. What became Complaint 16 of 1999 was lodged with the Equal Opportunity Commission on around 23 September 1998.

4. The two complaints were referred to the Tribunal by the Commissioner for Equal Opportunity pursuant to s.90(2) of the *Equal Opportunity Act 1984* and thereafter inquired into pursuant to s.107 of the *Equal Opportunity Act 1984.*

5. These two complaints have been dealt with together and came before this Tribunal for hearing on 19 and 20 April 2001 and 14 and 15 May 2001. The complaints are presently part heard. Ms. Archer's case in respect of both complaints has closed in the sense that all witnesses relied upon by her have been called. One of the Respondent's witnesses was unavailable to give evidence on 14 or 15 May 2001. Even so, the Respondent applied on 15 May 2001 to have both complaints dismissed pursuant to s.125(1) of the Act on the ground that each Complaint was misconceived or lacking in substance.

APPROACH OF THE TRIBUNAL TO APPLICATIONS UNDER s.125(1) OF THE ACT ALLEGING THAT THE COMPLAINT IS MISCONCEIVED OR LACKING IN SUBSTANCE

6. Section 125(1) of the Act provides that:

> "Where, at any stage of an inquiry, the Tribunal is satisfied that a complaint is frivolous, vexatious, misconceived or lacking in substance, or that for any other reason the complaint should not be entertained, it may dismiss the complaint."

7. Misconception is a different contention to one that a complaint lacks substance. In many cases the Tribunal will be able to determine at a relatively early stage of an inquiry that a complaint is misconceived. That a complaint lacks substance will ordinarily require that at least a considerable proportion of the complainant's evidence be heard. As provided in the section, an application under s.125(1) can be brought at any stage of an inquiry.

8. For the reasons most thoughtfully expressed by Sir Ronald Wilson in *Assal v Department of Health Housing and Community Services* [1990] HREOCA 8 it is wrong to seek to prescribe by putatively rigid formulae the nature of the power exercisable under s.125(1) to dismiss a complaint as being misconceived or lacking in substance.

9. In respect of both of these complaints Ms. Archer has given her evidence, called all witnesses whom she proposed to call and presented all other evidence.

COMPLAINT 15 OF 1999 - ALLEGING THAT THE SSTU CONTRAVENED SECTION 66B(2) OF THE ACT

10. The Tribunal has had considerable difficulty during the course of the hearing comprehending the precise nature of this complaint. The Complainant was given a number of opportunities to clarify the essential nature of her complaint and, at the request of the Tribunal, on 3 May 2001 (that is between the first two hearing days and the resumed hearing) provided what was styled Further and Better Points of Claim.

11. Points of Claim in this Tribunal are not pleadings as understood in courts of law. They do not prescribe the scope of the Tribunal inquiry. None-the-less, it is incumbent upon those coming to the Tribunal to clearly articulate the nature of their complaint. This is most obviously and readily achieved by complainants identifying the section or sections of the *Equal Opportunity Act 1984* alleged to have been contravened and express the complaint in the terms of the relevant provision or provisions.

12. Having regard to the Further and Better Points of Claim; this Complaint alleges that the SSTU, as the employer of Ms. Archer at the material time, discriminated against her contrary to s.66B(2)(b) of the Act.

13. Section 66B(2) of the Act provides that:

"It is unlawful for an employer to discriminate against an employee on the ground of the employee's impairment –

(a) in the terms or conditions of employment that the employer affords the employee;

(b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;

(c) by dismissing the employee; or

(d) by subjecting the employee to any other detriment."

14. There was some suggestion that the facts gave rise also to contravention of s.66B(2)(a). The complaint, falls obviously for consideration under s.66B(2)(b) and not s.66B(2)(a).

15. The discrimination alleged was on the ground of actual impairment of Ms. Archer within the meaning of s.66A(1)(a).

Relevant Facts

Ms. Archer's Impairment

16. Ms. Archer's impairment was a severe and chronic back injury. In or around July 1997 Ms. Archer was involved in a motor vehicle accident causing or at least exacerbating severe back injury and pain. The accident did not occur at work. It was a matter of no controversy before the Tribunal that Ms. Archer suffered the injury and that it caused her enormous pain and discomfort. Clearly, Ms. Archer's injury was an impairment as defined in the Act, being a "defect or disturbance in the normal structure or functioning of her body".

17. At the time of her motor vehicle accident Ms. Archer was an employee of the SSTU. She had been employed since 1994 as an advocate.

Ms. Archer's Entitlement to a Motor Vehicle

18. Prior to the motor vehicle accident Ms. Archer was provided with a motor vehicle by the SSTU to be used by her in the course of her employment. It was a Mitsubishi Magna. Other employees and officers of the SSTU were also provided with motor vehicles by the union. The Tribunal did not have the benefit of any satisfactory or conclusive evidence as to the contractual basis upon which the vehicle was provided to Ms. Archer or upon which other officers of the union were provided with vehicles. From the evidence provided, evidently the arrangements pursuant to which vehicles were provided to all officers of the Union were somewhat *ad hoc*. There was, however, no evidence led by the Complainant to the effect that it was a term of

her contract of employment that she be provided with whatever car she desired or that the car be of any particular type or have any particular characteristic or feature.

19. From the evidence provided to the Tribunal there was a general incomprehension amongst employees and officers of the union as to the basis or bases upon which vehicles were provided to them. As such, the evidence led as to the rights of the union in respect of vehicles once allocated to employees was opaque. The entitlement seemed, however, most clearly expressed by Mr. Farrell, another advocate employed by the union at relevant times, to the effect that the vehicle allocated to him could be allocated to any other officer or employee of the union at any time at the direction of the Secretary. So, if he had been directed by the Secretary of the union to transfer his vehicle to another employee he would have had no option but to do so[1].

20. The Tribunal accepts and finds that the SSTU, as Ms. Archer's employer, had a lawful right to direct all officers of the Union who were provided with a vehicle by the Union to transfer the vehicle allocated to them to any other officer for any reason. Accordingly, for the purpose of this application, the Tribunal proceeds on the factual basis that all officers of the SSTU (with the obvious exception of Ms. Archer) who at the material time were provided with a motor vehicle by the union could have been lawfully directed to swap their vehicle for that allocated to Ms. Archer.

21. The complaint is that Ms. Archer was discriminated against on the ground of her impairment by being denied access to a benefit associated with her employment within the meaning of s.66B(2)(b). The benefit alleged to have been denied was an "appropriate" motor vehicle. The Complainant gave no great assistance to the Tribunal in clarifying further what "appropriateness" entailed. The Tribunal has construed this to mean a motor vehicle which would not, when or as required to be driven by Ms. Archer in the course of her employment, exacerbate her back injury or cause her increased back pain and discomfort.

---

[1] Hearing of 14 May 2001, T94.

Characterisation of the Benefit Associated with Employment Denied Ms. Archer

22. As will be seen, identification or proper characterisation of the "benefit associated with employment" (within the meaning of s.66B(2)(b)) which Ms. Archer alleges she was denied is difficult but critical to the disposition of this application and this Complaint.

23. Although it was a matter of some controversy in evidence before the Tribunal, for the purpose of this dismissal application the Tribunal proceeds on the factual basis that driving the allocated vehicle caused Ms. Archer pain and discomfort from the time that she returned to work in or around July 1997 until the issue in respect of the vehicle "came to a head" in November 1997.

24. In November 1997, Ms. Archer sought to be provided with another identified vehicle within the SSTU "fleet". This involved, in essence, a swap of Ms. Archer's allocated vehicle for the other identified vehicle. The identified vehicle was at the time allocated to Ms. Whitney the then senior Vice President of the Union. It was a more recent model Mitsubishi Magna. This other vehicle was not provided to Ms. Archer.

25. Recognition that it was the failure of the SSTU to provide this other identified vehicle to Ms. Archer that is the gravaman of the complaint is of central importance. It is patent from the course of the evidence that the essence of Ms. Archer's complaint or dispute with her employer was not that she was not provided with or was denied access to a suitable or "appropriate" vehicle but that she was not allocated the particular identified vehicle. That this is so is clear from the evidence that:

    (a) Ms. Archer identified the particular vehicle that she sought.

    (b) At the time that the specified vehicle was sought there was no clear basis for Ms. Archer to have thought that it would be any more "appropriate" than the vehicle allocated to her. Indeed, from the evidence provided, there does not appear to be or have been at any time any rational basis for Ms. Archer to think or have thought that the

alternate vehicle would have alleviated her back pain or had any effect different from that of the allocated vehicle.

(c) Ms. Archer sought the particular vehicle of Ms. Whitney even though it was the same make, model and specification of the vehicle allocated to Mr. Farrell. Some time after first seeking that Ms. Whitney's vehicle be allocated to her Ms. Archer drove Mr. Farrell's car and determined that it was less painful for her to drive than her own car. Yet Ms. Archer did not seek to have this car allocated to her but rather to have Ms. Whitney's car.

(d) At no time was any scientific or even particularly sensible analysis undertaken as to which of the vehicles in the fleet was the most "appropriate" for Ms. Archer. Rather, Ms. Archer seemed to simply resolve that she wanted Ms. Whitney's car.

(e) There was no evidence that the seat in Ms. Whitney's vehicle was different to the seat in Ms. Archer's car or that there was any specific feature of Ms. Whitney's car that was materially different.

26. On this basis, within the meaning of s.66B(2)(b), the complained of benefit associated with employment to which access was denied by the employer was the provision to Ms. Archer of the identified vehicle.

27. In this matter, the failure or refusal of the SSTU to allocate the identified vehicle to Ms. Archer constituted a denial of a benefit associated with employment, within the meaning of s.66B(2)(b). It has been held, at least for the purpose of this application, that the SSTU could lawfully have allocated the vehicle to Ms. Archer. As such, the right to have the vehicle allocated to Ms. Archer was a "benefit associated with [her] employment". The SSTU did not allocate the vehicle to Ms. Archer and thereby "denied" her such benefit.

The Basis Upon Which this Benefit Associated with Employment Was Denied Ms. Archer

28. The evidence presented in respect of this matter was most unsatisfactory. Firm conclusions cannot readily be made.

29. As will come to be seen, for the purpose of dealing with this application to dismiss the complaint, and this complaint generally, it is unnecessary to positively determine this issue.

30. Suffice to say, on the basis of the evidence presented to the Tribunal, the circumstances of Ms. Archer not being allocated the vehicle which she requested and earlier incidents that occurred during her period of employment with the SSTU, inspire wonder and virtual disbelief. It is shameful that a simple matter of whether an employee suffering a disability is to be provided with one vehicle or another from within an employer's fleet of vehicles gave rise to the conduct reflected in the evidence presented to the Tribunal. Of course shameful conduct is not necessarily a contravention of the *Equal Opportunity Act 1984.*

Scheme of the Relevant Provisions of the Act

The Relationship Between s.66A and s.66B(2)

31. The proper construction and operation of ss.66A and 66B of the Act are vexing. Imperative is the realization that s.66B is the relevant "substantive" provision. It creates and prescribes the unlawful act or acts. Section 66A is, in a sense, adjectival.

32. Section 66A(1) provides:

> *"66A Discrimination on ground of impairment*
>
> *"(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 impairment if, on the ground of –*
>
> *(a) the impairment of the aggrieved person;*

(b) a characteristic that appertains generally to persons having the same impairment as the aggrieved person;

(c) a characteristic that is generally imputed to persons having the same impairment as the aggrieved person; or

(d) a requirement that the aggrieved person be accompanied by or in possession of any palliative device in respect of that person's impairment,

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."

33. Section 66A exclusively prescribes for all substantive (in the sense of contravention creating) provisions of the Act when a discriminator discriminates against an aggrieved person on the ground of impairment. The Tribunal does not have power or jurisdiction to invent or apply any other notion of discrimination on the ground of impairment.

34. One of the difficulties in construing ss.66A(1) and 66B is that on one reading of s.66B(2)(b) the section leaves no function, meaning or operation to s.66A(1).

35. This is manifest in this complaint. Here the failure or refusal of the SSTU to allocate the identified vehicle to Ms. Archer constituted a denial of a benefit associated with employment, within the meaning of s.66B(2)(b). The SSTU could lawfully have allocated the vehicle to Ms. Archer. The corollary of this is that Ms. Archer had a right to have the vehicle allocated to her. As such it was a "benefit associated with [her] employment". As the SSTU did not allocate the vehicle to Ms. Archer it "denied" her such benefit.

36. It is at this point in the process of construction that the relationship between s.66B and s.66A becomes uncertain.

37. On one conceivable construction, the next question to be considered becomes whether this denial came about by reason of discrimination by the SSTU against Ms. Archer on the ground of her impairment. That this is the question and the sequence appears from the presence of the word "by" in s.66B(2)(b). Of course, this term in other statutes effects a causative link or element; see for instance s.82(1) of the *Trade Practices Act 1974.*

38. If this is the meaning to be accorded to the word "by" where it appears in s.66B(2)(b) the word creates a causative requirement or link between the discrimination by the employer of the employee by reason of impairment (on the one hand) and the denial of benefit.

39. Next, it might be thought, s.66A, for the purpose of s.66B(2), gives meaning and operative effect to the words "to discriminate against an employee on the ground of the employee's impairment" and therefore answers whether the denial of the vehicle to Ms. Archer came about by reason of discrimination by the SSTU against Ms. Archer on the ground of her impairment. That this might be thought to be so arises from the prefatory words of s.66B(2) which recite the words defined in s.66A.

40. On this construction, it might be thought that the combined operation of the provisions is as follows:

> *It is unlawful for an employer to, on the ground of the employee's impairment, treat an employee less favourably than in the same circumstances, or in circumstances that are not materially different, the employer treats or would treat a person who does not have such an impairment by denying the employee access to a benefit associated with employment.*

41. As this transliteration shows, it is not obvious why, on such a construction, s.66A is necessary to an effective and clear operation to s.66B(2)(b). If the word "by" where it appears in s.66B(2)(b) creates a causal requirement, the section operates clearly and independently of s.66A; where an employee has been denied access to a benefit associated with employment because of ("by") the employee's impairment, the section is contravened. Denial of the benefit

because of the impairment is *necessarily* less favourable treatment. Accordingly, on this construction, s.66A has no clear, or possibly even conceivable, operation.

42. This construction arises from giving to the word "by" this causative operation. Of course, this construction of s.66B(2)(b) does not express the "causation standard" to be applied. The Common Law often times applies a so-called "but for" causation test or standard. In this context application of such a standard would frame the inquiry so:

> *Where an employee has been denied access to a benefit associated with employment and, but for the employee's impairment the employee would not have been denied the benefit, a contravention occurs.*

43. The "but for" causation analysis is not invariably a tool of great subtlety or accuracy.

44. In this appreciation lies the understanding as to the proper relationship between s.66B(2)(b) and 66A. It is notable that not all subsections of s.66B(2) (or for that matter s.66B(1) and other substantive provisions) are prefaced with the word "by". This rather suggests that the word where it does appear does not create a causative nexus or link.

45. In essence, for the purpose of s.66B(2)(b), s.66A provides the way of determining the causal link (or standard for assessing causation) between impairment and denial of employment associated benefit. So:

> *If in denying an employment associated benefit an employer treats an employee less favourably than in the same circumstances, or in circumstances that are not materially different, the employer treats or would treat a person who does not have the employees impairment; the section is contravened.*

46. On this construction, the word "by" where it appears in s.66B(2)(b) has the same meaning and effect as if the word "in" had been used. It does not connote a causative element.

The Relevant Effect of s.66A

47. The notion of less favourable treatment in s.66A is premised upon treatment of the aggrieved person by the discriminator differently than the discriminator treats or would notionally or imputatively treat non-impaired persons in the same or not materially different circumstances. Clearly, "comparison" is more difficult where treatment of others is imputed.

48. Section 66A(1) also requires that in making the required comparison the Tribunal is to assume that the circumstances of the notional other person are the same or not materially different to those of the aggrieved person.

49. In this respect, s.66A(2) of the Act provides that:

> *"For the purposes of subsection (1) or (1a), circumstances in which a person treats or would treat another person who has, or has a relative or associate who has, an impairment are not materially different by reason of the fact that different accommodations or services may be required by the person who has an impairment."*

50. The effect of s.66A(2) is rather that of a deeming provision. It deems that the circumstances of the aggrieved person, to which comparison is made, are not to be considered different to those of the notional other by the fact that the aggrieved person requires accommodations or services. In effect a discriminator cannot by way of defence (as it were) contend that treatment of an aggrieved person was less favourable than that of a notional other person because the aggrieved person required some form of different accommodation or service. In this inquiry it is unnecessary to decide the question of whether "accommodations" and "services" where they appear in s.66A(2) bear the meanings prescribed in the definition section of the Act. It is noted that Keifel J in *Commonwealth v Humphries* [1998] 1031 FCA appears to have decided that the terms do bear these meanings. *Prima facie,* and in the absence of fulsome consideration, this appears unlikely at least in respect of "accommodations". The singular is defined and "accommodations" used in s.66A(2).

51. Application or invocation of the impairment discrimination provisions of the *Equal Opportunity Act 1984* is problematic where the alleged less favourable treatment is the failure by an employer to provide to an employee some form of "benefit" (within the meaning of s.66B(2)(b)) that is sought uniquely by persons with an impairment or sought by a person because of an impairment. This is not to say, however, that the provisions cannot operate in such circumstances. But such cases are not likely to often arise. This is because, as noted above, s.66A operates on a premise of differential treatment in similar circumstance. Where the benefit (within the meaning of s.66B(2)(b)) sought by the employee and denied by the employer is particular to the employee's impairment *qua* the notional other, the circumstances are *ipso facto* differentiated. Section 66A(2) does not obviously operate. Having deemed that the circumstances of the aggrieved person, with which comparison is made, are not to be considered different to that of the notional other by the fact that the aggrieved person requires accommodations or services – that is once this deeming of "same circumstance" is effected – the work of s.66A(2) is seemingly done.

52. Accordingly, as a practical matter, where s.66B(2)(b) is infringed the benefit (within the meaning of s.66B(2)(b)) sought by the employee and denied by the employer will rarely be the accommodations or services referred to in s.66A(2).

53. In this case, this difficult issue of the application of the impairment discrimination provisions of the Act to circumstances of failure by an employer to provide to an employee some form of "benefit" sought uniquely by a person with an impairment or sought by a person because of an impairment does not need to be determined.

54. This difficult issue, when it does arise, will require recognition of the subtle inquiry required by s.66A, in which inquiry s.66Q(2) may assist.. Section 66A posits "treatment" as something broader than the denial of employment associated benefit. Put otherwise, the regime of the Act conceives of the denial of employment associated benefit as an aspect of "treatment". No doubt, it was due to the flexibility and subtlety of this notion of "treatment"

that the framers of the legislation preferred it to the more blunt analysis that the alternative construction of s.66B(2)(b) outlined above would have required.

55. Because, however, in this Complaint the Complainant has defined the employment associated benefit that she contends was denied her as being an "appropriate" motor vehicle, it is appropriate that it be acknowledged that - in a situation where an agreement between employer and employee contains a term to the effect that (say) the employer will provide to the employee all equipment necessary to enable the employee to undertake his/her employment; where the employee suffers from an impairment and seeks an item of equipment required by reason of such impairment so as to allow the employee to fulfil the employment; and it is denied, it may be that s.66B(2)(b) is infringed. This is because of the breadth of the notion of "treatment" in s.66A and would be so even though the employee seeks the equipment by reason uniquely of the impairment.

56. Such a case is not, however, the present. Even though the Complainant contended that the employment associated benefit that she contends was denied her was an "appropriate" motor vehicle, there was no evidence that this was a term of her contract of employment. As has been held, the benefit sought and denied Ms. Archer was the identified vehicle of Ms. Whitney.

57. This analysis recognises the centrality of identification of the nature of the employment associated benefit alleged to have been denied in applying s.66B(2)(b), and in a sense more generally, the need for precise identification and characterisation of the acts said to constitute unlawful conduct in respect of the application of all substantive provisions of the Act.

DECISION - COMPLAINT 15 OF 1999 - ALLEGING THAT THE SSTU CONTRAVENED SECTION 66B(2) OF THE ACT

58. In this matter, the "benefit associated with employment" (within the meaning of s.66B(2)(b)) denied Ms. Archer was the vehicle identified by her. In denying her the particular vehicle, there is nothing in the evidence presented in the inquiry to date, nor is it conceivable that other evidence could be elicited,

to suggest that the SSTU treated her differently than it did or would have treated any other employee who did not suffer from the impairment endured by Ms. Archer who wished to swap his/her vehicle for that of another employee.

59. This conclusion can be reached without having to decide or resolve the reason behind or basis for the refusal by the SSTU to allocate the identified vehicle to Ms. Archer. Simply, there is nothing to suggest that in acting in the manner that it did the SSTU treated Ms. Archer any differently than it would have treated an unimpaired employee.

60. Accordingly, the complaint is misconceived and lacks substance. It is appropriate that it be dismissed.

COMPLAINT 16 OF 1999 - ALLEGING THAT THE SSTU VICTIMIZED MS. ARCHER BECAUSE SHE HAD MADE COMPLAINT 15 OF 1999 AND THEREBY CONTRAVENED SECTION 67 OF THE ACT

61. Section 67 of the Act relevantly provides that:

> *"67 Victimisation*
>
> *(1) It is unlawful for a person (in this section referred to as the "victimiser") to subject, or threaten to subject, another person (in this subsection referred to as the "person victimised") to any detriment on the ground that the person victimised –*
>
> *(a) has made, or proposes to make, a complaint under this Act;*
>
> *(b) has brought, or proposes to bring, proceedings against the victimiser or any other person under this Act;*
>
> *(c) has furnished, or proposes to furnish, any information, or has produced or proposes to produce, any documents to a person exercising or performing any function under this Act;*

(d) has appeared, or proposes to appear, as a witness before the Tribunal in a proceeding under this Act;

(e) has reasonably asserted, or proposes to assert, any rights of the person victimised or the rights of any other person under this Act; or

(f) has made an allegation that a person has done an act that is unlawful by reason of a provision of Part II, IIA, III, IV, IVA or IVB,

or on the ground that the victimiser believes that the person victimised has done, or proposes to do, an act or thing referred to in any of paragraphs (a) to (f)."

62. The Complainant's contention is that her employment with the SSTU was terminated or not renewed when its term expired in or around September 1998 because she had made what became Complaint 15 of 1999.

63. Section 67 is a provision of the Act in the contravention of which the Tribunal has a particular, specific, over-riding and overwhelming interest. Contravention of s.67 is a grave matter indeed. Any such contravention strikes at the essence of the proper, effective and uninhibited operation of the Act and the fulfilment of the objects enshrined and expressed in the Act.

64. Inquiries into possible contravention of s.67 must not be stifled and examination of complaints of such contravention thorough. Any inquiry into contravention of s.67 is intensely factual. Unlike perhaps some other provisions of the Act, s.67 presents few difficult questions of construction or interpretation.

65. The evidence presented to the Tribunal by Ms. Archer and by witnesses called by Ms. Archer in respect of this matter was perfunctory. Indeed, this Complaint appeared to the Tribunal to be treated by the Complainant as something of an after thought.

66. Much time was spent at the hearing before the Tribunal seeking to determine whether Ms. Archer's employment with the SSTU was for a fixed term or otherwise. Much of this evidence was thought by the parties, in particular it seemed the Respondent, to be required because the Western Australian Industrial Relations Commission in a decision on 14 October 1999, in a proceeding brought by Ms. Archer against the SSTU, had found that Ms. Archer's employment was indefinite, or more properly that it was not a four year fixed term contract of employment.

67. Whether the agreement was fixed or otherwise had an obvious relevance in proceedings before the Western Australian Industrial Relations Commission involving unfair dismissal. Whether Ms. Archer's employment expired by effluxion of time or, alternatively, was terminated was clearly vital there. Clearly also, from the evidence that was presented to this Tribunal, there were a number of unsatisfactory aspects to the hearing before the Western Australian Industrial Relations Commission. It appears that certain evidence presented to the Commission was wrong[2].

68. For the purpose here of determining whether s.67 of the *Equal Opportunity Act 1984* was contravened it matters little whether Ms. Archer's employment was terminated or not renewed when it would otherwise have been on the ground of Ms. Archer having made Complaint 15 of 1999. Either way the section would clearly and seriously have been contravened.

69. Ms. Archer's evidence as to this matter was unsatisfactory. In examination in chief her evidence was as follows[3]:

> *"D/PRESIDENT: Can we make a couple of things clear. what actually occurred at the – because you have referred to it as alternatively "dismissal" and "retrenchment". What actually occurred?*
>
> *MR HOSKEN: Well, what actually did occur? --- In August the executive decided that –*

[2] 19 April 2001 Hearing, T78-80.
[3] Hearing on 19April 2001, T30-31.

Well, how were you notified? You weren't at the executive meeting? --- No, no, I was notified by Peter Quinn that they had extended my contract by 1 month. I had a meeting with Peter Quinn. I showed him my letter of appointment and indicated that my understanding was that I had been employed permanently.

MR HOSKEN: Right? --- And that there was no contract of employment. He came back to me in a further meeting and indicated that the union didn't have the finances to continue employing me and in their view there was a 4-year contract and that would finish in September.

And what was your interpretation of this? --- My interpretation was again it was a case of harassment and victimisation. I had an EO case and I had a workers' compensation case out against the Union."

70. Surprisingly, no further evidence was provided as to this matter in examination in chief. It is also notable that Ms. Archer expressed her understanding of victimisation as being one of "interpretation", albeit that this was in response to an obviously leading question.

71. Ms. Archer was examined on this matter by the presiding Deputy President as follows: [4]

"I think you also gave evidence that your termination of employment came about by reason of, I think you referred to it as, victimisation?--- Yes.

Because of this claim. Why do you have that feeling? Was anything said to you by anybody? --- By Peter Quinn. He had said to me that the senior officers – and I wasn't in any meetings but it was said to me other than with Peter Quinn.

What did Mr Quinn say to you? --- Peter Quinn said to me that the reason that they were dismissing me was because the union no longer

[4] Hearing on 19 April 2001, T38-39.

had the finances to employ me but he indicated to me that at the time of my dismissal the union's finances were better than what they were in the previous 12 months and that they actually needed three industrial officers to carry the work load.

When you say Mr Quinn indicated this to you – he said this to you at the meeting? --- Yes. yes, he said that to me in a meeting that I had with him at the time that he was telling me that they were going to terminate my employment.

D/PRESIDENT: Yes? --- Because naturally I asked him the reasons why they were terminating me.

Yes? --- Peter Quinn just indicated also, or said to me, that because of my workers' comp claim and because of me(sic) EO claim against the union they wanted me out in the hope that if they dismissed me I would leave the claims, that I wouldn't go any further with them.

That is what Mr Quinn said to you? --- Yes.

All right. Was there an indication from any other officer of the union? None of the other officers spoke to me about it.

And no discussion with any member of the executive, or any other member of the executive? --- No.

So the only person with whom you had any discussion about the termination of your employment was Mr Quinn? --- Yes. I had read – he had shown me the copy of the exec minutes or administrative minutes – where they had extended the contract and given me an end date and I didn't think there was any use speaking to Pat Byrne or Brian Lindberg about the matter because they had already made up their minds."

72. It is clear from this that Ms. Archer's understanding that her cessation of employment was linked to the making of Complaint 15 of 1999 arose solely

from what had been told to her by Mr. Quinn. Mr. Quinn was at material times the State Secretary of the SSTU.

73. Mr. Quinn gave evidence in this matter as a witness called by Ms. Archer. It is difficult to adequately summarise Mr. Quinn's evidence in this respect. Further, in respect of this matter Mr. Quinn's evidence was not entirely satisfactory. To appreciate and explain the manner in which the evidence was unsatisfactory it is necessary to re-produce it in full[5]:

> *"You were then when Shelley Archer's services were terminated in 98? --- Yes.*
>
> *And what was the state of the union then? --- Overall the union – the annual report was – my last annual report that I delivered to the state council saw the union's finances in the black and its assets – any debt on assets, I think, was all discharged.*
>
> *Right? --- So I think we were travelling pretty well.*
>
> *And what was the reason why Shelley Archer's services were terminated? --- Well, I think there were a number of reasons.*
>
> *And? --- Well, the argument that was put up was budgetary.*
>
> *And is that a valid argument? --- In my view it wasn't –*
>
> *D/PRESIDENT: Well, can we perhaps deal with it this way –*
>
> *WITNESS: Sorry?*
>
> *D/PRESIDENT (TO WITNESS): How did it come about that Ms Archer ceased employment with the union? --- The – I think it was the executive took a decision to not readvertise her position.*
>
> *D/PRESIDENT: And there was a meeting of the executive?--- yes.*

[5] Hearing on 20 April 2001, T162-166, 168-170, 173.

To deal with that?--- Yes.

and that was on an understanding that her position was a fixed-term position? --- I can't attest to that. I can't swear –

Well, were you at the executive meeting where it was discussed?--- I am not sure. I had two – the only two absences in the 9 years or so I was there occurred in 1998. One was later in the year; one was a little earlier. I certainly – I'm familiar with minutes, is why I'm – what I'm recollecting. I'm familiar with the debates that went on prior amongst senior officers.

I see. In relation to Ms Archer's position?—That's right; continued employment of Ms Archer. I certainly had discussions with senior officers over this. The – and my argument was that I thought the financial argument was incorrect. We'd previously just put on an advocate, an extra advocate, a third advocate, several months prior to that, so there was certainly no difficulty with budgets at that time. We, just prior to that event again, not continued the contract of a temporary advocate who'd been working with the union, so things began to sort of – the temporary advocate act discontinued. A new advocate was put on. Ms Archer's contract was discontinued. Now, I mean, it was fairly interesting to me that that happened within a matter of months and the argument used in the last example was budgetary. The budgetary argument didn't seem to arise in the previous appointment.

So you were having discussions obviously with people within the union about this? --- Yeah.

With whom?--- The senior officers. We met – the administrative committee met formally –

Yes? ----- once a week, which comprises the group I indicated earlier – the president, senior vice president, vice president and myself – and we would then also either before or after that have a short meeting on

senior officer matters that we'd sort of feel out each other's views, if you like, to try and progress things including matters we disagreed on so that there'd be some – you could progress things or not. The matter with Ms Archer, in my view, as I say, the budgetary argument was completely incorrect.

Who put that?--- Mr Lindberg.

And who was the executive at this stage?—The executive comprised – my numbers might be a bit wrong, but 17 people –

D/PRESIDENT: Sorry. Who comprised the senior officers?---The senior officers were –

The president was Mr Lindberg?--- -- the president, senior vice president –

And who was the senior vice president?—The president was the – the president was – in 1997 was Mr Lindberg; senior vice president was Ms Whitney.

I think we're in 98 now?--- In 98 we're talking about Mr Byrne – sorry, Ms Byrne, senior vice president.

As the senior vice president. Mr Lindberg is the president?--- President, that's right.

The other vice president?--- Mr Keeley.

And yourself? --- And myself as general secretary.

And so Mr Lindberg - - your evidence was Mr Lindberg suggested that there were budgetary reasons?---That was the argument he was going to run with.

All right. Were there any other discussions as to why the position ought not be --?--- Between Mr Lindberg and myself – he had spoken to me several times and the variation on a fairly continuous theme was

that he didn't get on with Shelley; thought she was paranoid; was fairly direct about that and wouldn't countenance her continued employment in the union under any circumstances.

Because of what he described to you as a perception of paranoia?--- And he disagreed with her. He disagreed with her liaisons, her friends within the union, the way she operated which I thought was highly professional but nevertheless Mr Lindberg took some disagreement with that. A whole range – I mean, Shelley had come to the executive and come to the senior officers on a number of occasions to seek a solution to problems of smear sheets being distributed within the union; stories being leaked from the union office to gossip journalists at The West Australian; stories being published really had nothing to do with Shelley, in fact they were comments about her fiancee and myself, but again she was dragged into that; letters that related to her former employment at another union circulated within the union office and amongst our members. So there was some antagonism between Mr Lindberg and Ms Archer for Shelley's view that Mr Lindberg was not doing enough to protect her interests.

So it was principally Mr Lindberg, was it, who was --?--- He was the person I spoke to mostly about that issue and I've already given—

D/PRESIDENT: Yes?--- -- evidence with regard to Ms Whitney and Ms Archer.

Yes. Sorry, Mr Hosken.

MR HOSKEN: That's all right.

(TO WITNESS): And I understand that Ms Whitney finished her tenure at the end of 97? --- Yes.

And then – is it Pat Byrne --?--- That's right.

- - took over. what was – did you ever have any dialogue with Pat Byrne about the vehicle and Shelley Archer's condition in 1998?--- I

think I approached her in the first period that she was in and asked that the matter be taken up. She said she'd seen the correspondence.

Right?--- And I asked would it be – would she take it up and consider it and I got a polite but firm "no".

On what ground? --- Didn't give me one.

Didn't give you one. Did Shelley Archer's application to the Equal Opportunity Commission have any impact on the union? --- In what regard? I mean, there's –

In their attitude, their reactions, their --?—Well –

The whole --?--- Well, yeah –

The whole gamut?--- Okay. The teachers' union was a union that enjoyed some success and, if I can be a little bit bold about it, perhaps some reasonable consideration this end of town. We're one of the only unions that was active at this forum in a fairly regular way and I suppose the union's standing here, the way the union saw its standing with the Commission and the Tribunal, was okay. It was quite good. So certainly from that point of view – and I say "quite good" in the sense that we'd taken a number of cases here that became landmark cases in terms of teachers' conditions that related to matters of transfer of information and so on and been quite successful. So of course there was the perception within the union that here we were employing the services of the Tribunal and the Commission in pursuing the objectives of the union and suddenly we were being perceived as a victim of bad practice.

D/PRESIDENT: Well, when you say "perceived within the union" that was stated to you by people?—Well, it was – there was discussions amongst the industrial staff. I put that view myself that it was a pretty poor show that here we were down here on a regular basis advocating

equity and fairness for teachers in a general sense and now being dragged down here ourselves, to put it bluntly.

MR HOSKEN: Did anyone comment to you, make comment to you, about it? You said you made your comment but --?--- It was, you know, in sort of discussions with staff. I didn't think much about of it – much of it.

But with the executive or anyone there? – The executive took a decision to –

Well, senior officers? --- Look, I'll need – yeah. Look, the senior officers and – the admin committee, then it would have gone to the executive to – to – now just bear with me – to defend it, to defend the action. It was taken out of my hands so I'm speaking – yeah, I mean, it's just what I can recall from reading the minutes. Now, I—it was taken out of my hands, so much of the sort of to-ing and fro-ing on the matter was left to others and the reports back to the – back to the admin committee and the executive.

And would that – would it normally be taken out of your hands if it had arisen?—No.

Why was it taken out of your hands; any explanation?--- No, none at the executive. It was a proposition – well, none at the admin committee. It was a proposition that had obviously been worked through because there was no discussion – worked through in my absence, certainly no discussion about that, and the management of and reporting of the matter in my recollection was a fait accompli. It was taken – as a number of other cases were at that time as well, I must say.

D/PRESIDENT: Where was the actual decision made not to renew Ms Archer's employment? was that a decision made by --?--- The executive.

Now, the executive is the 17 or 18 member body, is it?---Yeah.

And so is the manner in which that body operated that the administrative committee took a recommendation to the executive and the executive formally made a decision?--- would receive the minutes and the minutes would be within a – the executive would receive the minutes of the administrative committee with a recommendation just – so there was rarely a debate.

I see?--- It was just an adoption of that and whatever was recommended.

But the formal decision in relation to employment or discontinuation of employment would be made by the executive upon recommendation of the administrative committee?--- Or the president and the senior vice president, or in some cases the general secretary in separate reports, yeah."

MR HOSKEN:

(TO WITNESS): Mr Quinn, if my client had not had a back injury what would have the treatment been like for her by the union?—In a – are you asking in a political environment at the time?

Well, in any sense. I mean, she has a back injury and she's treated in a certain manner. What if she didn't have a back injury?--- I believe that she would have been subject to the same sort of harassment that had been going on before that.

So do you think that there was any particular reason why she was treated in the manner that she was treated?--- I think I probably covered some of those but her – what do you call it when someone's engaged to someone – her fiancee, sorry.

Yes?—Was and still is a good friend of mine and –

D/PRESIDENT: Is this Mr Reynolds?---Yes. And that arrangement, both my friendship with Kevin Reynolds and Shelley, wasn't appreciated by some people in the union.

MR HOSKEN: You mentioned that Brian Lindberg thought that Shelley Archer was paranoid, I think?--- That was the term he used to me.

And what's your attitude to that – to that statement?--- I think if you call someone who disagrees with you "paranoid" it's got almost a – it's a very difficult one to argue out of, isn't it? I mean, because if you respond to it and react to it and say, "That's not right," or get emotional and aggressive towards that, I mean, you get some way down the track to making it a self-evident comment. So it's sort of fairly neat, in a way, to call someone "paranoid", knowing they're going to bite..

So is your answer to that question that she was or wasn't paranoid?--- Certainly not paranoid.

Okay? --- A tactical thing.

It was tactical? --- Yes.

What, did you think it was part of an orchestrated --?--- Well, certainly Brian's view of Shelley that he expressed to me, and in my view it had no basis in fact – I found her to be a hard-working, intelligent and well-balanced person.

MR HOSKEN: So the course that Shelley took of having to seek refuge from industrial relations or the Equal Opportunity Commission, did you think that was being paranoid or unsubstantiated?---No, not at all.

And why?--- Well, I think there were no other options left that were available to her.

You mentioned before someone was employed and then someone – or someone was fired and someone was employed. What was the situation there? ---We had a temporary advocate that was on a short – he was on a short-term contract. I just forget for how long, maybe 6 or 9 months. I forget.

Yes?—It was extended and then it was – at the end of that second – that extension it was determined and one of the discussions – one of the arguments that was used at the time was that we didn't have any money.

And?---Well, we did and not long after that we appointed a full-time advocate, in fact, on the – on a contract.

All right. And Matt Farrell, you say, was appointed a few months before Shelley Archer, her term --?—In that same year, yes.

Before she was terminated? Yeah.

How did he – and he remained on, did he? --- He still remains on. He's still there, yes.

Okay. In 1998 how would he compare to Shelley Archer in --?--- As an advocate –

performance, in standard of work?--- Well, Shelley's experience before she came to the teachers' union was in the field of advocacy working in the Industrial Commission, negotiations with employers, bringing agreements to a final stage, if you like. Matt's only employment experience with the union was as an organiser in the TAFE sector, so they don't compare. There's only one who was doing the job. Matt was liaising with members in TAFE colleges.

Then – well, how can you explain her termination then? How would you explain her termination to the Tribunal then?---Well, I can't in a rational sense other than to say that Shelley was not wanted for reasons that weren't related to her professional ability.

What about her disability? --- Well, there are no other – there are no other arguments that can be put up to me that would satisfy me that could be defended. You'd made the judgments if you were looking at appointing anyone, an industrial advocate in particular, on their basis to do the job. So if that wasn't a criteria – a criterion, you would have to look to other reasons.

MR HOSKEN: And the other one you say is her disability?--- Of course.

You were mentioning about –

D/PRESIDENT: Well, do you mean by that no other rational reasons?—Sir, I can't – I mean, I was, you know, involved in that job for a number of years. There were – I mean, if you're looking at apples for apples, you were comparing, you know, the relative skills, there was only one person there—in that process from the appointment of Matt Farrell to seeing Shelley forced out there was only one choice to me. I mean, someone had been doing the job and was good at it, not someone who was in my view factionally aligned with the group who were there who came in at a time when we were supposedly having budgetary problems.

But I think the question related more to the reasons why Ms Archer's employment was not continued?---Well, there's no other – in my mind there was no other rational reason. Certainly, I mean, I was trying by elimination to knock out the – anything else that was there. You'd Have to go for the question of discrimination."

"Right. And the resignation, was this part of that –

D/PRESIDENT: Whose resignation:

MR HOSKEN: Sorry. The termination, sorry, of Shelley Archer, was that part of that campaign? --- Well, it was over the same period. Shelley wasn't part of the group that were running the show.

Are you saying that's because of her injury or because of her bringing the claim or both?---Well, I suppose one thing led to another, I mean, in the sense that you don't endear yourself to some employers for bringing claims of that nature, more particularly one that doesn't agree with you."

74. Mr. Quinn in giving this evidence appeared indecisive. As can be seen from the above extract, at one point his evidence appeared to be to the effect that Ms. Archer's employment with the union was discontinued because of personal antipathy between her and senior union officers. At other points his evidence appeared to suggest that it was because of Ms. Archer's relationship with her fiancé. Of course, these two matters may have been related. Mr. Quinn's later evidence linking the cessation of Ms. Archer's employment with the lodging of what became Complaint 15 of 1999 with the Commission was simply incredible. It is inconceivable that if Mr. Quinn knew or had been told or had concluded that Ms. Archer's employment with the Union had ceased because of her lodging a complaint with the Equal Opportunity Commission that he would not have a clear recollection of the matter and clearly stated so.

75. No other evidence was led by the Complainant in respect of this Complaint.

76. Mr. Lindberg, who was at material times the President of the SSTU, was called by the Respondent and gave evidence of his understanding of the circumstances giving rise to the cessation of Ms. Archer's employment with the Union. He denied that it was related to the making by Ms. Archer of Complaint 15 of 1999 but rather was motivated by financial constraints on the union. Mr. Lindberg was not meaningfully cross-examined as to this matter.

77. Accordingly, on the state of the evidence as it stands, there is no evidence, other than at best a somewhat vague impression of Mr. Quinn, indicating that the decision of the SSTU to terminate Ms. Archer's employment or not renew it was due to or in fact related in any material way to Ms. Archer having made

Complaint 15 of 1999. It is notable also that s.5 of the Act does not apply to a complaint of contravention of s.67.

78. One further witness, Ms. Whitney, has been foreshadowed as giving evidence on behalf of the Respondent in this inquiry. Ms. Whitney was the senior Vice President of the SSTU until the end of December 1997. On the basis of the evidence of Mr. Quinn reproduced above, it appears that Ms. Whitney was not a member of the executive of the union in 1998 when the decision in respect of Ms. Archer's employment was taken[6]. Moreover, Mr. Quinn in his evidence relevant to this complaint makes no specific reference to Ms. Whitney. Further, due to the fact that the Complainant did not seek in any meaningful way to cross-examine Mr. Lindberg as to this matter, it could hardly be expected that this matter would even be put to Ms. Whitney.

79. At the hearing before the Tribunal on 15 May 2001 the legal representatives of both the Complainant and Respondent made detailed submissions in respect of this application to dismiss Complaint 16 of 1999. Counsel for Ms. Archer did not indicate during the course of his submission that Ms. Whitney was a witness essential to a determination of this Complaint. Indeed, for the reasons outlined above, it is difficult to conceive how she could be.

80. The Tribunal admitted into evidence a document left at Ms. Archer's home while she was on leave recovering from her back injury which by its context and nature could only have been produced by a fellow employee of the Union. The document contains obscene abuse of Ms. Archer. It is evident from this and from other evidence provided to the Tribunal that relations between Ms. Archer and at least some employees and officers of the union were poisonous.

81. The Tribunal is in a position to proceed to determine whether the complaint lacks substance within the meaning of s.125(1) of the Act confident that all evidence that was going to be put before the Tribunal is before it.

82. There is no credible evidence to support the Complaint that Ms. Archer's employment with the SSTU was terminated or not renewed because she had

[6] See also Hearing on 20 April 2001, T165.

lodged or made Complaint 15 of 1999. Whether the effective cause of the cessation of Ms. Archer's employment was, as indicated by Mr. Lindberg, financial constraints upon the union at the relevant time, or whether it came about directly or ultimately as a result of deep personal animosity toward her, as evidenced by the vile document left at Ms. Archer's home, the Tribunal is in no doubt that Ms. Archer's employment with the union did not cease because of the lodging with the Equal Opportunity Commission of what became Complaint 15 of 1999.

83. As such, this Complaint is lacking in substance and ought to be dismissed pursuant to s.125(1) of the Act.

Costs

84. The Respondent sought the costs of these inquiries pursuant to s.125(2) of the Act in the event that the Complaints were dismissed.

85. Of course costs under s.125(2) do not follow the event of a dismissal pursuant to s.125(1). This is clear from the section.

86. In exercising the discretion as to costs in this matter the Respondent referred to the fact that the Commissioner for Equal Opportunity had dismissed these Complaints pursuant to s.89 of the Act. This of itself does not excite the discretion. Pursuant to s.90(1) of the Act complainants have a right to require the Commissioner to refer complaints to the Tribunal whatever decision is made by the Commissioner. Accordingly, where a complainant exercises the right given to them under the Act it is difficult to conceive that this exercise, of itself, could be sufficient to attract an order pursuant to s.125(2).

87. The Respondent pointed to no other or additional factor relevant to the discretion as to costs.

88. Although Complaint 15 of 1999 is to be dismissed pursuant to s.125(1), it involved difficult questions and issues the path to the resolution of which was not greatly illuminated by the light of authority. Although at times the Tribunal had some difficulty understanding the Complaint, this was due

largely, it seemed to the Tribunal, to the intrinsic difficulty of the issues. There was nothing in respect of Complaint 15 of 1999 which compels an order for costs and no order under s.125(2) will be made.

89. It is impossible in any sophisticated way to separate out the costs of Complaint 16 of 1999. In any event, little time was spent in evidence on this matter. Accordingly there will be no order as costs under s.125(2) made in respect of the inquiry into this Complaint.

ORDERS

85. Accordingly, it is ordered that pursuant to s.125(1) of the Act, Complaints 15 and 16 of 1999 be dismissed.