IN THE EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

Matter No. 22 of 1999

BETWEEN

BARBARA MASTAGLIA

Complainant

- and –

RAMSAY HEALTH CARE AUSTRALIA PTY LTD

Respondent

REASONS FOR DECISION

BEFORE:	**Mr G Donaldson (Deputy President)**
	Mrs E Brice (Deputy Member)
	Ms M Fadjiar (Deputy Member)
HEARD:	13th October 2000
DELIVERED:	1 December 2000
FOR COMPLAINANT:	Mr A MacDonald
FOR RESPONDENT:	Mr G Bull

COMPLAINT

On 29 April 1998 Ms. Mastaglia lodged with the Equal Opportunity Commission a complaint in respect of certain conduct of the Respondent, being the operator of the Hollywood Hospital ("the Hospital").

The complaint was referred to the Tribunal by the Equal Opportunity Commission pursuant to s.93(1) of the *Equal Opportunity Act 1984* in or about July 1999. The Tribunal conducted an inquiry into the complaint by way of hearing on 13 October 2000.

FACTS – MS. MASTAGLIA'S EYESIGHT

1. Ms. Mastaglia was at the time material to this inquiry a registered general nurse and registered midwife. She commenced practice as a nurse in or about 1972 and worked in various positions in hospitals in Western Australia and Victoria until 1987.

2. From 1987 to 1993 Ms. Mastaglia practiced as a nurse in the general medical practice surgery of a Dr. Savage. Ms. Mastaglia's employment with Dr. Savage ended in or about September 1993. From that time until the occurrence of the events the subject of this inquiry Ms. Mastaglia was involuntarily unemployed in the sense that she sought but was unable to find work as a nurse or otherwise.

3. Ms. Mastaglia suffers from retinitis pigmentosa.

4. Ms. Mastaglia gave evidence, which was uncontradicted and which the Tribunal accepts, to the effect that she was diagnosed with retinitis pigmentosa approximately 20 years ago while practising as a nurse in Victoria. After diagnosis Ms. Mastaglia continued to practice as a nurse.

5. In her evidence to the inquiry Ms. Mastaglia described the symptomology of retinitis pigmentosa as essentially "tunnel vision". The Tribunal had presented to it a letter of an ophthalmologist, Dr. Douglas Candy to Ms. Mastaglia's general medical practitioner Dr. Steve Dorotich of 2 July 1998 in which Dr. Candy stated that the retinitis pigmentosa resulted in Ms. Mastaglia having a restricted field of vision to 10 degrees from fixation.

6. It is clear from Dr. Candy's letter that Ms. Mastaglia as at 2 July 1998 suffered also from myopia and other eye problems which impeded perfect vision. As a result of the retinitis pigmentosa and other problems identified by Dr. Candy it is evident that Ms. Mastaglia's sight is impaired.

7. Although Ms. Mastaglia reckoned that the retinitis pigmentosa had resulted in a progressive deterioration of her vision for a time, her evidence is that degeneration had seemed to have ceased some years ago and prior to the

events material to this inquiry. The Tribunal accepts this as a summation of the onset of the condition. In this respect Ms. Mastaglia presented as an honest and forthright witness. As will become clear from later evidence Ms. Mastaglia displayed in her dealings relevant to this inquiry conspicuous and admirable honesty and candour in respect of her condition and its symptomology. There is no reason to doubt her summation of the onset, progress and incidents of her conditions.

8. Ms. Mastaglia in evidence gave her opinion that her various eye disorders had not in the past impeded her from practising as a nurse in any of the jobs that she held from the time of the onset of the retinitis pigmentosa until ceasing work with Dr. Savage in 1993. She offered in examination in chief the evidence that at times in the past her eye conditions had required that when undertaking some tasks as part of her practice, such as for instance removing stitches, she needed to rely upon extra lighting and used specially prescribed spectacles.

9. No evidence was presented to cast doubt upon the fairness of this opinion or summation. Common sense suggests that the indulgences described by Ms. Mastaglia when (say) removing stitches would not have impeded competent practice as a nurse in a general medical practice. As such, there is no reason not to accept her evidence that her eye conditions had not in the past impeded her from adequately fulfilling the requirements of her practice as a nurse.

FACTS – THE HOSPITAL'S SHORTAGE OF NURSES

10. The Respondent operates the Hollywood Hospital. The Hospital is a privately managed acute care facility. Evidence was given by Ms. Nola Cruikshank, who is the Director of Clinical Services at the Hospital, which the Tribunal accepts, that many of the patients of the Hospital present with complex medical conditions that require often sophisticated surgery and other medical and nursing treatment. The average age of patients at the Hospital is, the Tribunal was told, in the order of 80 years of age and that approximately 80% of the patients are war veterans.

11. Ms. Cruikshank gave evidence, which the Tribunal accepts, to the effect that the Hospital had for some time prior to 1997 experienced extreme difficulty in employing capable nursing staff. Again, based on Ms. Cruikshank's evidence, the Tribunal accepts that this was brought about by an acute shortage of nurses in Western Australia.

12. In 1997 part of Ms. Cruikshank's task as Director of Clinical Services at the Hospital was to develop strategies to recruit nursing staff.

13. During 1997 the Hospital became aware of a strategy successfully deployed at Fremantle Hospital by which acute nursing care refresher courses were offered to nurses who had been either out of the workforce for a time or had been working in "non-acute" areas. As explained by Ms. Cruikshank, the aim of the Fremantle Hospital programme was to, as it were, lure nurses into employment by the means of the refresher course.

14. In 1997 Hollywood Hospital, on Ms. Cruikshank's recommendation, resolved to offer and conduct a similar course.

15. The course was to be undertaken over a one-month period, full-time and was to involve intensive theoretical and practical components.

16. The Hospital charged a fee of $400 payable by each of the participants. Ms. Cruikshank gave evidence, which the Tribunal accepts, that this price was fixed on the basis that it was the price charged by Fremantle Hospital. It requires no great ingenuity to surmise and so the Tribunal accepts that potential participants would have been price sensitive so that if the price of the Hollywood Hospital course exceeded that at Fremantle Hospital participants would, *ceterus paribus*, prefer the Fremantle Hospital course.

17. Of course on this analysis, fixing of the price to equate with the price charged by Fremantle Hospital would have occurred whether the motivation of Hollywood Hospital in conducting the course was solely for profit or solely as part of a nursing recruitment strategy.

18. Ms. Cruikshank gave evidence that the actual cost of conducting the course to the Hospital was in fact in the order of $1,300 per participant. No evidence as to how this cost was made up was given. For instance it was not explained whether this figure was arrived at based upon certain estimated or actual participation.

19. In any event, the Tribunal accepts and finds, based on the evidence of Ms. Cruikshank, that the cost to the Hospital of conducting the course exceeded the price charged and that the Hospital expected this to be so.

20. Patently this conclusion is inconsistent with a conclusion that the course was offered as a stand alone profit making venture.

21. Ms. Cruikshank gave evidence as to the motivation of Hollywood Hospital in resolving to offer and conduct the refresher course. This question of the Hospital's motivation assumed rather an overwhelming significance at the hearing before the Tribunal. Ms. Cruikshank stated and re-iterated on numerous occasions in her evidence that the Hospital offered the course solely as part of a nurse recruitment strategy. From the course that the inquiry took it was clear that this continual iteration arose from an apprehension on the part of the Respondent that the sole issue for determination by the Tribunal was whether the complaint fell within s.66K of the *Equal Opportunity Act 1984* and that this in turn was determined by the motivation of the Respondent in offering the course.

22. In any event, the Tribunal accepts and finds, based on the evidence of Ms. Cruikshank, that in resolving to offer the course and in conducting the course the Hospital was motivated solely by a desire to recruit competent nursing staff.

23. The overweening concentration in the evidence upon the Hospital's motivation resulted in little emphasis being placed in evidence upon certain other clearly material matters. These are perhaps characterised as going more to means than ends. For instance, it was clear from the course of evidence that effect was to be given to this motivation to recruit competent nursing staff to the Hospital in a number of ways, or perhaps it might be said that subsumed

within the overall motivation were several intentions. First, the course was to lure nurses back to nursing or out of other areas of nursing. Secondly, once in the course participants would be taught skills or have skills refreshed or renewed that would equip nurses to be employees of the Hospital or enhance their capabilities for employment with the Hospital. Thirdly, the course would allow the Hospital to view potential recruits in action to enable the Hospital to determine which of the participants it would target for recruitment.

FACTS – MS. MASTAGLIA'S APPLICATION TO ENROL IN THE COURSE

24. Evidence was given by each of Ms. Mastaglia and Ms. Cruikshank as to certain of the requirements for registration of nurses in Western Australia. By reason of s.22 of the *Nurses Act 1992 (WA)* a person can not be registered as a nurse unless, inter alia, the person has practiced as a nurse within the 5 years prior to application for registration.

25. In the case of Ms. Mastaglia the effect of this was that by late 1998, being 5 years after she had ceased to work for Dr. Savage and last practiced as a nurse, she may have experienced difficulty maintaining her registration.

26. Ms. Mastaglia understood this at times material to this complaint.

27. The Hollywood Hospital placed an advertisement for the course in the employment section of the *West Australian* newspaper in March 1998. As the form of the advertisement is of some importance, it is re-produced as an annexure to these reasons. Ms. Mastaglia saw the advertisement, responded to it by telephoning and arranging for a copy of the application form for the course to be sent to her.

28. The application form was sent to Ms. Mastaglia under cover of the Hospital's letter of 27 March 1998. The following are the material parts of the form completed by Ms. Mastaglia:

- In response to the request - "Length of time since last employed" – "4.5 years".

- In response to the request - "Reason for applying to do this course" – "as I have not worked in nursing for a while and need some recent experience".

- In response to the request - "Do you have any health related problems, disabilities or injuries that may affect your performance in this position or the safety of others? If yes please give details" – "I can not work in dark areas or dimly lit areas".

- In response to the request - "If you answered yes to any of the above could you please give details of injury or illness, treatment obtained and current state of injury or illness" – "...Vision – retinitis pigmentosa – stable – tunnel vision. Myopia".

- In response to the request - "Are there any duties of the position you have applied for which you are unable to do due to health problems? If yes, please give details" – "I do not think so".

29. Ms. Mastaglia gave conflicting evidence as to her motivation for wanting to do the course. At one point her evidence was to the effect that her motivation for wanting to do the course was in the expectation that completion of the course would satisfy the practice requirement of s.22 of the *Nurses Act 1992 (WA)*. At another point her evidence was to the effect that she contemplated that completion of the course may give rise to employment opportunities with the Hospital.

30. From the totality of Ms. Mastaglia's evidence the Tribunal is satisfied that Ms. Mastaglia must have known and did know when reading the advertisement for the course that in offering the course the Hospital was doing so principally as a means of recruitment of nurses. This is evident from the title to the advertisement, "Audition Here for Hollywood". Likewise the text of the advertisement provides that, "successful completion of the program may lead to employment opportunities at Hollywood Private Hospital". The advertisement appeared in the employment section of the newspaper. That the Hospital in providing the course was doing so principally as a means of recruitment of nurses was re-inforced by the terms of the application form and

the explanatory material sent to Ms. Mastaglia with the application form. The application form was obviously and in some respects rather clumsily copied from an employment application or information form. For instance, the top of p.2 is headed, "Disclosure of an illness will not eliminate you from consideration for employment for the position sought". One of the questions asked is, "Do you have any health related problems, disabilities or injuries that may affect your performance in this position ...". Page 3 of the form commences with the warning, "Workers compensation may be refused if an employee provides false or deliberately misleading information at the time of seeking employment". Further down the page is a declaration that, "I declare the above information to be true in all respects. I acknowledge that any statement which I have made which is found to be false or deliberately misleading will make me, if employed, liable for dismissal".

31. From the totality of Ms. Mastaglia's evidence, the Tribunal is of the view that even though it was apparent from the advertisement and the application form that the Hospital was providing the course as a means of recruiting nurses, when reading the advertisement and when later responding to it, Ms. Mastaglia did not intend to seek employment with the Hospital even if she had successfully completed the course. Rather her interest in the course was in seeking to satisfy the practice requirement of s.22 of the *Nurses Act 1992 (WA)*.

FACTS – THE REJECTION OF MS. MASTAGLIA'S APPLICATION

32. Ms. Mastaglia's application for admission to the course was rejected. The Tribunal was hampered considerably in its inquiry by the inability of the Hospital to provide clear evidence as to the reasons for rejection of Ms. Mastaglia's application. The officer of the Hospital who made the decision to reject, a Ms. Eileen Lamb, left the employ of the Hospital and moved to Tasmania. No attempt to take her evidence by telephone or other means was sought by the Hospital. A statutory declaration of Ms. Lamb made on 25 November 1999 was admitted into evidence at the inquiry but Ms. Lamb was not able to be cross-examined, nor was the complainant given any notice of the statutory declaration prior to the hearing.

33. The Tribunal was told by Ms. Cruikshank that the reasons for the Hospital refusing the application were:

- Ms. Mastaglia had stated in her application form that she could not work in dark or dimly lit areas,
- The lapse of time since Ms. Mastaglia had last worked,
- The area in which Ms. Mastaglia had previously practiced, i.e. in a general medical practice and not in acute care,
- The inference that Ms. Mastaglia wanted to participate in the course for experience only and not as a precursor to possible employment.

34. It is notable that in the statutory declaration of Ms. Lamb no mention is made of any factors other than the first. Rather Ms. Lamb swears that in the a conversation with Ms. Mastaglia on 23 April 1998 after Ms. Mastaglia had been advised that she was not to be admitted to the course, Ms. Lamb "discussed her stated impairment with her and that her condition might make it difficult for her". Further Ms. Lamb deposes that she advised Ms. Mastaglia in this conversation that "her stated condition and her stated limitations would prevent her from fulfilling all aspects of the course".

35. Ms. Mastaglia gave evidence as to this conversation, consistent with this.

36. Notable from this evidence is that the Hospital clearly did not deal with Ms. Mastaglia on the basis solely that she was a person who was unable to work in dark or dimly lit areas. Rather she was considered and treated by the Hospital as a person who was unable to work in dark or dimly lit areas because she suffered from the affliction of retinitis pigmentosa.

37. Accordingly, it is plainly contrary to the Hospital's own evidence for it to contend that in dealing with Ms. Mastaglia it, as it were, ignored the fact that she suffered form retinitis pigmentosa and focused exclusively on the fact that she was unable to work in dark or dimly lit areas.

38. The further explanations of Ms. Cruikshank as to why Ms. Mastaglia's application for admission to the course are implausible. It would be expected that if they were motivating factors they would have been recounted in the statutory declaration of Ms. Lamb. Further, such explanations defy credulity when an aim of the course was to lure nurses from outside the workforce back into nursing. The explanation smacks of ex post facto invention by the Hospital for the purpose of avoiding a finding that the reason for the rejection of Ms. Mastaglia's application was inevitably linked to her eye condition.

39. From this evidence, and in the absence of any cogent contrary evidence, the Tribunal finds that the sole reason for the Hospital refusing Ms. Mastaglia's application for admission to the course was because of her inability to work in dark or dimly lit areas due to her affliction of retinitis pigmentosa.

40. The conclusion that the Hospital would, other than for Ms. Mastaglia's inability to work in dark or dimly lit areas due to her affliction of retinitis pigmentosa, have offered her a place in the course is inexorable.

THE ISSUES

The parties to this complaint have filed Points of Claim and Defence respectively, the latter having been amended. From the Points of Claim and Defence it is evident that both parties considered that the sole issue arising from these facts was whether the Respondent acted unlawfully in contravention of s.66K of the *Equal Opportunity Act 1984.* At the inquiry the parties were invited to consider whether the evidence disclosed that the Respondent acted unlawfully in contravention of s.66B(1) of the *Equal Opportunity Act 1984.*

SECTION 66K OF THE *EQUAL OPPORTUNITY ACT 1984*

Section 66K of the *Equal Opportunity Act 1984* relevantly renders it unlawful for a person

> "who provides goods or services or makes facilities available to discriminate against another person on the ground of the other person's impairment by

refusing to provide the other person with those goods or services or to make those facilities available to the other person".

Clearly Ms. Mastaglia's affliction, retinitis pigmentosa, is an impairment as defined in s.4 of the Act; that is, it is a defect or disturbance in the normal structure or functioning of Ms. Mastaglia's body. It is important, however, that the impairment be understood as the disease of retinitis pigmentosa. For the purpose of the Act the impairment is not tunnel vision or inability to work in dark or dimly lit areas. These are symptoms or concomitants of the impairment.

In this respect, the Tribunal has found as a matter of fact that the Hospital refused Ms. Mastaglia's application for admission to the course by reason of her affliction of retinitis pigmentosa and her inability to work in dark or dimly lit areas.

Section 5 of the Act has the effect that so long as the fact of Ms. Mastaglia's impairment of retinitis pigmentosa was a reason for the Hospital refusing her admission to the course the impairment is a ground of discrimination.

Here, the Respondent discriminated against Ms. Mastaglia on the ground of her impairment of retinitis pigmentosa even though an aspect of the Hospitals refusal to admit her to the course was the symptomology of the impairment expressed by Ms. Mastaglia rather than strictly the impairment itself.

Within the meaning of s.66A of the *Equal Opportunity Act 1984,* and for the purpose of s.66K, the Respondent treated Ms. Mastaglia by reason of her impairment less favourably than in the same circumstances it would have treated a person not suffering the impairment. The Respondent did not admit her to the course when in the same circumstances it would have admitted a person not suffering the impairment.

The principal matter of contention before the Tribunal in respect of s.66K was whether anything done or offered by the Hospital constituted a service or the making of a facility available for the purpose of s.66K.

Whether the conduct of the Hospital the subject of inquiry constitutes the provision of a service or the making available of a facility within the meaning of s.66K is a difficult and vexing question.

None of the inclusive meanings in the definition of "services" in s.4 of the Act assist.

Legislation does not operate in a vacuum. Determining its scope and application requires, first, precise characterisation of the actions of the Respondent subject to inquiry. The term "characterisation" is itself used in different contexts with various fluid meaning. Those schooled in the Conflict of Laws appreciate its subtlety.

Characterisation here is used with the meaning ascribed by Gummow J in *IW v City of Perth* (1997) 191 CLR 1 at 44[1].

Here the actions of the Respondent were to invite nurses to apply for a course of instruction and training in acute care nursing. The sole relevant purpose of the Respondent was, through attracting participants for the course, to identify competent nursing staff to subsequently be offered employment with the Hospital.

It is irrelevant in determining whether this conduct constitutes the provision of a service for the purpose of s.66K that the course was ultimately provided for a fee or free. This much is clear form the express terms of s.66K.

Flowing inevitably from this, it is not determinative that the motivation of the Hospital in ultimately providing the course was self-interest. It is axiomatic and patent that acts can constitute a service if done for profit and out of rigid self interest.

It is irrelevant that the Respondent was, in one sense, in the business of providing services, that is health services. Determination of whether given acts constitute a "service" is not determined by characterising the predominant activity or status of the actor. This much is clear from *IW v City of Perth* (1997) 191 CLR 1. Similarly, a person can in the course of its business provide many different services within the meaning of s.66K.

A more difficult question is whether the term is to be construed by excluding from the field of its possible operation actions which fall more clearly or obviously within other Divisions of Part IVA of the Act.

[1] See also *IW v City of Perth* (1997) 191 CLR 1 at 16-17 (per Brennan CJ and McHugh J).

Of course s.66K and all provisions of the Act are to be construed as aspects of a coherent statutory whole. Patently this does not mean that the same acts might not constitute separate contraventions of different provisions of Part IVA of the Act.

As this is so, the meaning of "services" in s.66K is not constrained by a fear of co-extensive infringement.

It is inappropriate to seek to characterise conduct for the purpose of s.66K by seeking to construe actions in terms of contractual offer and acceptance. By this is meant that it matters not that the advertisement of the course by the Hospital was strictly an invitation to treat and that the Hospital could lawfully have simply refused to accept Ms. Mastaglia's application for, as it were, no reason at all. It would be wholly artificial and would subvert the clear purpose of the Act, as expressed in s.3, to characterise the acts of the Respondent as providing a service of considering offers to participate in the course by reasoning deriving from pre-conceived notions founded in the Common Law.

The act of inviting offers to participate in the course cannot be isolated from provision of the course.

The Tribunal concludes that the actions of the Respondent in inviting nurses to apply for the course cannot be divorced logically, or having due regard to the purposes of the Act, from provision of the course itself.

Clearly in provision of the course the Respondent was providing tuition and training, even if solely for the purpose of recruitment. Provision of tuition and training falls almost inevitably within the term "services" for the purpose of s.66K.

It is relevant to characterisation of the Respondent's conduct that Ms. Mastaglia did not at material times contemplate a career or future employment with the Respondent. This was not a factor in refusing Ms. Mastaglia's application. For the purpose of the Act, it matters not that the Respondent may have lawfully rejected Ms. Mastaglia's application for this reason but chose not to do so or was unaware of these facts at the time. What might be understood as the "Rule in *Bell v Lever Bros.*" has no application to the Act, the purpose of which is elimination of discrimination where it actually occurs.

Accordingly, provision of the course by the Respondent for the purpose of identifying competent nursing staff to subsequently be offered employment with the Hospital is the provision of a service within the meaning of s.66K.

Ms. Mastaglia was denied this service by reason of her impairment.

As such, the Tribunal concludes that the Respondent's conduct is unlawful as infringing s.66K(1).

THE EXEMPTION IN SECTION 66K(2) OF THE *EQUAL OPPORTUNITY ACT 1984*

It is then necessary to determine whether the unlawful conduct is excepted by operation of s.66K(2).

In this respect regard must be had to s.123 of the Act. It is of course conventionally the case that administrative Tribunals do not apply a strict onus of proof[2]. With s.123, however, the statutory intention is clear; the discriminator bears an onus of proving the elements of the exemption in s.66K(2).

In this case, the Respondent expressly invoked and sought to rely upon the exemption. It was of course perfectly entitled to do so in the alternative to denying contravention of s.66K. Here also the Respondent was represented at the inquiry by a competent advocate provided by a representative body with broad experience before the Tribunal. Accordingly, the Respondent was aware or will be taken to be aware of the need to prove the elements of s.66K(2) where invoked and the consequence of failure to do so.

In this respect it was necessary for the Respondent to establish that by reason of her impairment Ms. Mastaglia required the service, here being the course, to be provided in a "special manner that without unjustifiable hardship can not be provided or can not be provided except on more onerous terms".

The only evidence led by the Respondent in this respect was that of Ms. Cruikshank. Her evidence was perfunctory. It amounted to nothing more than a bare assertion or

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[2] *McDonald v Director General of Social Security* (1984) 1 FCR 354 at 358, *Bennett v Everitt* (1988) EOC 92-224 at p.77,272.

expression of opinion by Ms. Cruikshank that use of a torch by Ms. Mastaglia in dark or dimly lit areas would be impracticable and would not enable performance of all necessary components of acute care nursing practice.

Bare assertion is not of itself enough to discharge the burden imposed by s.123. Common sense and understanding suggests that there are many tasks that a nurse performs in a hospital that can be adequately undertaken in a dark or dimly lit area with the aid of a torch.

In any event, Ms. Mastaglia gave her opinion that her various eye disorders had not in the past impeded her from practising as a nurse in any of the jobs that she held from the time of the onset of the retinitis pigmentosa until ceasing work with Dr. Savage in 1993. As the Tribunal accepted this evidence, it, in a sense, counters the opinion of Ms. Cruikshank.

Further, Ms. Mastaglia gave evidence that shortly after being refused a place in the course offered by the Respondent she applied for and successfully completed a Nurses Board of Western Australia Renewal of Midwifery Registration Course at King Edward Memorial Hospital.

The fact of successful completion of this course, in the absence of any countervailing credible evidence from the Respondent, makes it impossible for the Tribunal to conclude that the Respondent has discharged the onus, which it bears to establish the elements of the exception provided by s.66K(2).

CONCLUSION - SECTION 66K OF THE *EQUAL OPPORTUNITY ACT 1984*

Accordingly, the Tribunal finds that the complaint of infringement of s.66K of the Act is substantiated.

SECTION 66B OF THE *EQUAL OPPORTUNITY ACT 1984*

As noted earlier a curious aspect of this matter is that the Respondent in its submissions to the inquiry and in its Amended Points of Defence effectively admitted a contravention of s.66B(1)(a) of the Act subject to its conduct being characterised as an "arrangement" or an "arrangement made" within the meaning of s.66B(1)(a). The

consequences of this are somewhat dramatic, as s.66Q does not apply in respect of contravention of s.66B(1)(a).

For a number of reasons the Tribunal does not consider it necessary to deal with the question of whether the Respondent's conduct contravened s.66B(1)(a).

First, Ms. Mastaglia seems to have made no particular or additional complaint as to contravention of s.66B(1)(a) prior to the matter being raised by the Tribunal at the hearing. This is evident from her initial complaint and from the Points of Claim filed. This lack of complaint is no doubt due to Ms. Mastaglia's appreciation that she was not applying for the course seeking employment or ultimately, as the Tribunal has found, wishing to work for the Respondent.

Second, by reason of Ms. Mastaglia's appreciation, the Tribunal would not, even if contravention of s.66B were established, order damages additional to those in respect of the contravention of s.66K.

Third, for the purpose of s.66B the offending conduct would be that which coterminously contravened s.66K. For this further reason, the Tribunal would not order "additional" damages.

For these reasons, the Tribunal has not gone on to consider whether the conduct of the Respondent offended s.66B(1)(a) of the Act, in addition to s.66K.

COMPENSATION

Section 127(b)(i) empowers the Tribunal to order damages to be paid by the Respondent by way of compensation for loss or damage suffered by Ms. Mastaglia by reason of the Respondent's conduct.

The terms in which the statutory power to award damages compel the following.

First, expressed as it is solely in terms of compensation for loss, no part of such damages are punitive. The Tribunal considers only loss and damage suffered by Ms. Mastaglia. Damages are not to be "increased" by reason of contumelious conduct of the Respondent or "deflated" as a result of innocence. Although not express in the terms of the section loss and damage within the meaning of s.127(b)(i) can be non-

pecuniary. In other contexts this would be understood as general damages in contradistinction to special damages.

Second, s.127(b)(i) requires, by its express terms, a causative link between the offending conduct of a Respondent and the loss and damage of the complainant in respect of which compensatory damages will be ordered.

In respect of each of these matters one or two general observations are apposite.

First, it is almost inevitable that when in a statutory context issues such as "loss and damage" and "causation" arise courts of law and Tribunals presided over by lawyers will look to the understanding of these terms in the Common Law (in the sense of non-statutory law). The inevitability of this has nothing to do with the compelling logic of doing so but rather by reason of an ingrained methodology. Training in the Common Law compels many things. Two of them are respect for and adherence to what has gone before and secondly, an assumption that words or concepts in one context mean the same in another.

Very often terms used in statutes that have a meaning at Common Law are intended to bear the same meaning. Clearly, however, this is not always or invariably so. The now considerable learning that has developed in respect of s.82 of the *Trade Practices Act 1974* teaches this[3].

Often, adoption or adaptation of a Common Law concept or understanding of a concept is based upon a conclusion that the Common Law concept or context is "analogous" to the statutory. All too often ascription of the term "analogous" confuses rather than clarifies and is in fact nothing more than an unreasoned conclusion. Analogy depends entirely upon the tolerance for diffusion. Useful analogous reasoning requires an understanding of why contexts are analogous not simply assertion that they are[4].

In the (relatively broad) context of compensation under equal opportunity or anti-discrimination legislation it is often reasoned that loss and damage is analogous to

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[3] See most recently, *Marks v GIO* (1999) 196 CLR 494.

[4] See a useful discussion of this in a different context in Glover, "Identification of Fiduciaries" in Birks (Editor) *Privacy and Loyalty* (1997) at 270-271.

loss and damage in tort or in respect of some torts, see for instance *Hall and Ors. v A&A Sheiban Pty Ltd* (1989) EOC 92-250 at 77,395 (per Lockhart J)[5].

The position at Common Law in respect of measure of damages in tort or for certain torts is not analogous and is irrelevant to any determination of measure of damages under s.127(b)(i) of the Act. At Common Law in tort, generally, damages are at large. Section 127(b)(i) sets a maximum limit of $40,000. Even in areas of tort where damages have been "capped", for instance in many jurisdictions in respect of liability of employers for injury to employees, the analogy is imprecise. In cases of statutory capping of pre-existing tort liability, the rationale for capping is to limit the quantum of damages. So it is contemplated and to be expected that many awards will attract the maximum capped amount.

This is not the case under s.127(b)(i). The maximum liability pursuant to the section is $40,000 and has been so since the enactment of the legislation.

One consequence of this is that in a case where there is no out of pocket loss (what in other contexts are referred to as special damages), so the Tribunal has only to assess loss and damage in respect of (say) hurt and humiliation (what in other contexts are referred to as general damages), the Tribunal must approach its task on the basis that the Legislature has prescribed $40,000 in respect of the most serious damage. For cases of less serious damage the Tribunal must, as it were, work back from this amount.

The second general observation is that it is too often thought that, when seeking to construe terms used in statutes that have a meaning at Common Law, resort to Common Law mandates a clear and certain response. That is often not so. For instance, it is hardly to be doubted that one of the most difficult issues confronting courts of law is that of causation, see (recently) *March v Stramare* (1991) 171 CLR 506, *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, *Environmental Agency v Empress Car Co* [1999] 2 AC 22, *Chappel v Hart* (1998) 195 CLR 232.

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[5] It is important to observe that the precise question relevantly dealt with by Lockhart J in *Hall and Ors. v A&A Sheiban Pty Ltd* (1989) EOC 92-250 at p.77,395 was whether the measure of damages under s.81 of *Sex Discrimination Act (Cth)* was to be treated as analogous to that in "tort".

That much of this "law" is rather imprecise and unhelpful is clear from *Chappel v Hart* (1998) 195 CLR 232. In that case a relatively simple[6] question of causation resulted in each of five High Court justices delivering a complex and difficult judgment, with a bare majority decision.

It may be that in Equity, at least as regards linking breach of fiduciary duty to a fiduciary's gain, causation is different again. But again, perhaps the only matter that is clear here is the certainty of its complexity[7].

EVIDENCE IN RESPECT OF LOSS AND DAMAGE

Ms. Mastaglia gave evidence that as a result of the actions of the Respondent she thereafter felt dreadful, devastated, that her confidence had been undermined and her professional and personal self esteem diminished.

Ms. Mastaglia gave further evidence that as a result of the actions of the Respondent she sought professional counseling from a counselor at the Women's Health Care House. Ms. Mastaglia's evidence was that she attended four sessions; on 19 January 1999, 1 February 1999, 2 February 1999 and 23 August 1999.

As is evident from the recitation of dates, sessions commenced fully nine months after the unlawful conduct of the Respondent.

Ms. Mastaglia was cross-examined entirely appropriately but with some vigour as to the effects on her of the actions of the Respondent. It was put to Ms. Mastaglia that her evidence on this matter was incredulous and that her traumatised state of mind had other causes. Ms. Mastaglia accepted that there were other issues that were discussed during the counseling sessions at the Women's Health Care House but refused to disclose these matters. The Tribunal did not compel Ms. Mastaglia to answer these questions. These were obviously sensitive issues and Ms. Mastaglia was upset at this point of her evidence.

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[6] Simple in the sense that it did not involve multiple parties or causes.

[7] See for instance *Day v Mead* [1987] 2 NZLR 443, *Canson Enterprises Ltd v Boughton and Co.* (1991) 85 DLR (4th) 129 at 149-150, *Re Dawson* (1966) 84 WN(NSW) 399, *Maguire v Makaronis* (1997) 188 CLR 449 at 467, Handley, "Reduction of Damages" in Finn (Editor) *Essays on Damages* 113 at 126-127, Finn, "Comment" in Oakley (Editor) *Trends in Contemporary Trust Law* 211 at 213, Davies, "Equitable Compensation: Causation Forseeability and Remoteness" in Waters (Editor) *Equity Fiduciaries and Trusts* 297 at 317.

Having paid conscientious regard to the manner in which Ms. Mastaglia gave her evidence in respect of this matter, the Tribunal considers it entirely improbable that the conduct of the Respondent did in fact cause great trauma to Ms. Mastaglia or the great trauma claimed by Ms. Mastaglia. The Tribunal accepts that Ms. Mastaglia felt disappointed, hurt and humiliated by the conduct of the Respondent. She was after all the victim of unlawful discrimination.

The Tribunal does not, however, accept that the conduct of the Respondent caused deep seated psychological damage to Ms. Mastaglia or in this sense that conduct of the Respondent caused Ms. Mastaglia to attend counseling. In this respect it is to be borne in mind that after the unlawful conduct of the Respondent Ms. Mastaglia successfully completed the King Edward Memorial Hospital course. Further, Ms. Mastaglia's completion of the course occurred prior to the counseling sessions noted above. Further, evidence was given as to successful tertiary studies undertaken by Ms. Mastaglia after these events. Further, shortly after the unlawful conduct of the Respondent Ms. Mastaglia's registration under the *Nurses Act 1992* was confirmed. Further, the counseling sessions commenced some nine months after the events and the last of the sessions concluded some nine further months later.

Having regard to all of these matters and to the manner in which Ms. Mastaglia gave her evidence in respect of this matter, the Tribunal does not accept that, even if Ms. Mastaglia in the period January 1999 through to August 1999 (being the period of the counseling sessions) was suffering from a severe psychological trauma, this was by reason of the conduct of the Respondent, within the meaning of s.127(b)(i).

Lest it be misunderstood, the Tribunal's reasoning in this respect arises simply as a matter of fact and inference based on the evidence presented[8].

The Tribunal accordingly considers it appropriate in this case to order that the Respondent pay to Ms. Mastaglia the sum of $1,500 by way of compensation. None of this sum relates to the four invoices for $35.00 each in respect of physological counselling on 19 January 1999, 1 February 1999, 2 February 1999 and 23 August 1999.

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[8] Applying the nomenclature of Professor Stapleton in "Perspectives on Causation" in *Oxford Essays in Jurisprudence (Fourth Series) (2000)* p.60 – this conclusion arises from a "first level enquiry".