JURISDICTION	:	EQUAL OPPORTUNITY TRIBUNAL OF WESTERN AUSTRALIA
LOCATION	:	PERTH
CORAM	:	Deputy President: MR G DONALDSON Deputy Member: MS M. FADJIAR Deputy Member: MS P. EAVES
HEARD	:	11, 12, & 13 JUNE 2003, 17 & 18 NOVEMBER 2003
DELIVERED	:	23 DECEMBER 2003
FILE NO/S	:	ET/2000-000010
BETWEEN	:	ROBINSON ELIEZER Complainant and TOTAL MARINE SERVICES PTY LTD Respondent

Catchwords:

Impairment - discrimination - Victimization

Legislation:

Equal Opportunity Act 1984 (WA), s 5, s 66B, s 67, s 127.

Result:

One complaint of impairment discrimination found.
Compensation of $19,240.47 ordered.

Representation:

Counsel:

Applicant	:	Mr A McDonald
Respondent	:	Mr G Hancy

Case(s) referred to in determination:

McCarthy v Transperth (1993) EOC 92-478
Purvis v New South Wales Department of Education and Training [2003] HCA 62.

Cases(s) also cited:

Nil

DECISION OF THE TRIBUNAL

The complaints

1 Mr Eliezer has made a number of complaints against the Respondent. Some of these complaints allege a number of contraventions of s 66B of the *Equal Opportunity Act 1984* ("the Act"). Mr Eliezer suffers and at all times material to this Inquiry suffered from a perforation of his right eardrum, and in or around 1982 underwent a mastoidectomy[1]. As a result of these matters, Mr Eliezer suffered a loss of hearing and has for many years worn hearing aids or amplifiers.

2 Mr Eliezer's hearing loss is an impairment as defined in s 4 of the Act. Severe hearing loss, as here, is a defect or disturbance in the normal structure or functioning of his body. Mr Eliezer's perforated eardrum is the injury from which this defect arises, within the meaning of s 4. Likewise, the hearing difficulty caused by the mastoidectomy is a disturbance to the normal functioning of his body; the mastoidectomy the consequence of the illness or injury from which the defect arises.

3 Further to these complaints, Mr Eliezer complains that he was victimized, within the meaning and understanding of s 67 of the Act.

4 The Tribunal heard a deal of evidence in its Inquiry into these complaints. As will come to be detailed in these Reasons, in respect of some matters, the evidence was left in a rather unsatisfactory state. As these Reasons develop it will be seen that the Tribunal has resorted to inference in respect of certain matters, rather than require the relevant party to provide further direct evidence. In respect of some matters of fact, the evidence of Dr Graeme Martin, whose role in these matters will come to be understood, would have been helpful. Dr Martin passed away prior to the hearing of this Inquiry, and so, the Tribunal has dealt with the matters to which his evidence would have related as best it can.

Mr Eliezer's first complaint of impairment discrimination

The Respondent's Business

5 The Respondent, Total Marine, operates, and at times material to this Inquiry operated, a business of providing trained personnel and logistical

[1] T24.

support to other businesses involved in off shore oil and gas exploration[2]. The former aspect of its operations is referred to as being a "manning agent". Such a description is apt to mislead in that, as explained by the managing director of Total Marine, Mr Ray Meadowcroft, in fact Total Marine largely engaged the personnel itself. Total's business was not as a recruiter. Rather, as it was explained, Total would enter into a contract with (say) a rig operator to provide labour to the rig, and would do so from its (that is, Total's) employees. The relationship of employer and employee was between the individual and Total, not the individual and the (say) rig operator.

6 By the nature of the off shore oil and gas exploration industry, many employees were highly skilled and experienced. Many had specialist expertise and qualifications. As some rigs were "self-propelled" "off-shore industry mobile units" they were ships within the meaning of the *Navigation Act* and came within the regime of that legislation in respect of minimum complement and the like.

7 Mr Meadowcroft explained that at times Total had a pool of up to 900 employees at any one time. Some employee's employment was specific to a particular rig or job, but up to 400 or 450were "general" employees to be allocated to a job as and when required by Total.[3]

8 One consequence of this arrangement was that, depending upon the state of its business at any particular time, Total might have some employees who were not engaged on a particular job and were awaiting allocation. Again, as Mr Meadowcroft explained, during this period of down time Total would continue to pay wages and salary to these employees. This of course meant, and common sense would suggest, that when Total took a new job to provide staff to a rig, or were engaged to provide a particular type or class of staff member, it was in Total's interest to use existing employees to fill the job if it had suitably skilled and appropriate staff available.

9 Uncontroversial evidence was led to the effect that it was customary in the off shore oil and gas industry for employees on rigs to be engaged to work two weekly shifts, then be on leave for two weeks. This cycle was referred to as a "swing". An obvious consequence of this arrangement is that every job was done severally by two people in consecutive two weekly cycles. It was customary for employees to initially work on a temporary basis. The practice in the industry, and, it

[2] T247.
[3] T33 of 17 November 2003.

was suggested to be reflected in relevant industrial awards, was that an employee could be asked to work two consecutive swings; thereafter the employee was to be offered permanent employment. In effect, what was referred to in the evidence as casual or temporary employment was service of a term of probationary employment.

Mr Eliezer's work history and first dealings with the Respondent

10 Mr Eliezer has various certification as a radio operator for ships. Amongst other qualifications he held at relevant times a Radio Officers General Class Certificate, a Radar Maintenance Certificate, the Australian Marine Safety Authority (AMSA) Global Marine Distress Search and Rescue (GMDSS) General Radio Operators Certificate. In addition, Mr Eliezer has qualifications and experience which enabled him to work in the specialised role of warehouseperson on offshore rigs.

11 From 1979 to 1991 Mr Eliezer worked as a radio operator on ships on the high seas. From 1991 to 1994 he worked as a Marine Superintendent in Mumbai. In or around June 1994 Mr Eliezer moved with his family to live permanently in Perth. Thereafter, from October 1995 to April 1997 Mr Eliezer worked as a purchasing officer with Formulab Neuronetics Corporation. This job involved responsibility for the warehouse and purchasing functions for Formulab Neuronetics Corporation[4]. This was not an offshore position.

12 Mr Eliezer's first dealings with Total Marine occurred in late 1997. At this time, along with his close friend and brother in law Mr Constanzio Fernandez and a Captain Palle, Mr Eliezer called at the office of Total Marine and spoke with Ms Trina Vivien. Captain Palle was an employee of Total Marine. Mr Fernandez was an employee of a rival of Total, Reading and Bates, but none-the-less employed in the offshore oil and gas industry. Ms Vivien was at material times the personnel manager of Total Marine.

13 Slightly varying accounts of what occurred at this first meeting emerged from the evidence, but the differences were of detail and of little consequence to this Inquiry. What is of relevance is that at this meeting Mr Eliezer left with Ms Vivien a copy of his then curriculum vitae, explained to her that he was interested in working off shore and that he had qualifications and experience as both a radio operator and warehouse supervisor. Mr Eliezer gave evidence to the effect that at this meeting

[4] T126.

Ms Vivien stated that when the next suitable job came available it would be offered to him[5]. Ms Vivien's evidence was rather to the effect that she did not state that a future job would be offered to Mr Eliezer. Mr Fernandez gave evidence. His recollection was that Ms Vivien stated to Mr Eliezer that although Total did not have a job suitable to Mr Eliezer at that time, Mr Eliezer could expect to hear from her soon[6]. Nothing turns on this difference. These differing recollections of understanding or appreciations are well within the range of what might be expected of entirely honest recollections of people privy to any conversation.

14 Within a matter of weeks of this conversation, in November 1997, Ms Vivien contacted Mr Eliezer and asked whether he was available to fly to a rig – the *ENSCO 56* - off the coast of Karratha the next day to work as a radio operator[7]. The appointment was obviously urgent.

15 Mr Eliezer accepted this offer. It was uncontroversial that this position was a "casual" appointment. By this is meant that Mr Eliezer did not become a permanent employee of Total during the term of this employment, and he was not offered this. As noted above, it was customary in this industry for employees to work approximately two swings before being considered for permanent employment.

16 Mr Eliezer went to the *ENSCO 56* on 3 November 1997. He worked as the radio operator on board for three days. During this three day period the person in charge of the rig learned that Mr Eliezer was also a qualified and experienced warehouse supervisor. Coincidentally, a position as warehouse supervisor on board the *ENSCO 56* was available for the next swing. Accordingly, at the end of the immediate need for a replacement radio operator, being the commencement of the next swing, Mr Eliezer moved directly to the position of warehouse supervisor. This resulted in Mr Eliezer working the balance of one swing (three days) as radio operator and the immediately following swing as warehouse supervisor. Mr Eliezer thereafter continued to work on the *ENSCO 56* as the warehouse supervisor on alternate swings until 19 January 1998[8].

17 Again, it is uncontroversial that during this time Mr Eliezer was employed as a casual or probationary employee.

[5] T28 and T139.
[6] T232.
[7] T29.
[8] T30.

18 It is the circumstances surrounding Mr Eliezer's intended conversion from casual to permanent employment that gives rise to the first complaint.

Mr Eliezer's Efforts to Gain Permanent Employment

19 On 20 January 1998, when Mr Eliezer was in Perth, he attended the Total Marine office and met with Ms Vivien concerning permanent employment. Mr Eliezer was offered a permanent position. Both Mr Eliezer and Ms Vivien on behalf of Total Marine signed a contract of employment[9] by which Mr Eliezer was to be employed as a "warehouseman" on the *ENSCO 56* or elsewhere as nominated by Total Marine. Mr Eliezer's next swing or time on the rig was to commence on 2 February 1998. If all had gone well Mr Eliezer would have returned as a permanent employee.

20 The agreement which Mr Eliezer signed was conditional upon Mr Eliezer "completing and passing a Company Medical Examination with [Total Marine's] nominated Medical Practitioner".[10]

21 There is no real controversy that it was a condition precedent to the employment arrangement contemplated by the agreement that Mr Eliezer complete and pass the medical.

22 Immediately following this interview and the signing of the agreement, Mr Eliezer attended at the surgery of Dr Graeme Martin. Dr Martin was Total Marine's nominated Medical Practitioner.

23 In addition to medical clearance, before returning to the *ENSCO 56* Mr Eliezer was also expected to have undertaken and passed a "HUET course". HUET is an acronym for Helicopter Underwater Evacuation Training. Completion of a HUET course was said in evidence to be a pre-condition to employment. There appears to be nothing in the executed agreement that is exhibit 1 in this Inquiry to this effect. Some suggestion was made during the course of cross examination of Mr Eliezer that it arose from the requirement in the agreement that employees comply with all safety requirements imposed by Total[11].

[9] Which went into evidence as Exhibit 1.
[10] Appendix A of Exhibit 1.
[11] Clause 16.1 of Exhibit 1.

24 In any event, it appeared to have been accepted by Mr Eliezer that he needed to complete the HUET course prior to return to the rig on 2 February 1998.

25 This predicament highlights a matter that will come to assume a significance in these reasons and which need only be observed or noted now; Total appeared to have no difficulty with a person being on the rig as one of its temporary employees without medical clearance and without having passed the HUET course, but medical clearance and HUET training were contended to be "essential" for permanent employees. Mr Meadowcroft had this anomaly pointed out to him during the course of his evidence, and he eventually gave evidence to the effect that the practice in this respect had altered since 1998, and that now all employees, temporary and permanent, had to have passed a medical prior to transport to a rig.

26 The Tribunal found Mr Meadowcroft's evidence in this respect rather unsatisfactory. The fact that Mr Eliezer had undertaken three swings without HUET certification prior to 20 January 1998 is clear evidence to the effect that HUET certification was not a safety *requirement* of Total. Rhetorically, how could it be in light of their continued failure to require it?

27 Mr Eliezer stated in evidence that during the course of his medical examination Dr Martin told him that there was a doubt as to his ability to undertake the HUET course due to his perforated eardrum[12]. According to Mr Eliezer, Dr Martin then stated that he wished to consult with a colleague, a Dr Gill. Each of Dr Martin and Dr Gill had special accreditation from AMSA in respect of the medical examination of seafarers.

28 On Mr Eliezer's evidence he waited at Dr Martin's surgery for a lengthy period, before Dr Martin advised him that he would send Mr Eliezer to an Ear Nose and Throat specialist, a Mr Jayson Oates[13].

29 What occurred next was a matter of controversy in this Inquiry.

30 Some facts are clear. During the course of 20 January 1998, and obviously after Dr Martin had seen Mr Eliezer, Dr Martin completed and faxed to Total's office a Health Assessment Report[14]. Although the Report has some ambiguity, on its face it notes that Mr Eliezer was "fit"

[12] T35.
[13] T35.
[14] Admitted to evidence as Exhibit 28.

for the position of "Warehouseman" on the *ENSCO 56*. It notes Mr Eliezer's perforated right eardrum and "moderately severe bilateral hearing loss". The Report appears then to note that Mr Eliezer was at that time unfit to undertake the HUET course and that arrangements had been made for Mr Eliezer to see a specialist the next day. This report is handwritten.

31 The essential contents of this Report are consistent with Mr Eliezer's evidence of what he was told by Dr Martin on that day; that he was passed fit but that Dr Martin wished to have a specialist opinion as to whether Mr Eliezer was able to undertake the HUET course.

32 Although it is evident that this Report was made on 20 January 1998 and faxed to the Total Marine office on that day, evidence was led by Ms Vivien that it was not read by anyone at the Total office on that day.

33 From the evidence of Mr Meadowcroft and Ms Vivien, it also emerges that on 20 January 1998 Dr Martin spoke by telephone with Ms Vivien and Mr Meadowcroft about Mr Eliezer. Mr Meadowcroft's evidence was, due to the effluxion of time, understandably somewhat vague in respect of this conversation, but from his evidence it emerges that; he and Ms Vivien had a conversation with Dr Martin on 20 January 1998 and again on 21 January 1998 and that during the course of the former conversation Dr Martin stated that there was a problem with Mr Eliezer's ear and that there was a doubt about Mr Eliezer doing the HUET course.

34 Mr Meadowcroft's evidence was vague as to whether he and Ms Vivien were advised by Dr Martin in this conversation on 20 January 1998 whether Mr Eliezer had passed the examination. Ms Vivien's evidence was more precise about the course of events as she recalled them on 20 January 1998. According to Ms Vivien, on 20 January 1998 she received a telephone call from Dr Martin in which he advised her that Mr Eliezer was medically unfit due to his "hearing problem" and that he was unable to undertake the HUET course. Ms Vivien then spoke with Mr Meadowcroft, and they both phoned Dr Martin who repeated what he had earlier told Ms Vivien. Ms Vivien also stated that Dr Martin said that he was having a report typed, but, knowing the urgency of the matter, he thought it best to ring and advise her that Mr Eliezer had failed the medical examination. Ms Vivien summed up her response as one by which, "we acted on the phone call"[15].

[15] T59 of 17 November 2003.

35 This is of course a very different course of events to that reflected in the Health Assessment Report[16] which Dr Martin evidently filled out and sent to Total on 20 January 1998, the day of these phone calls. Indeed, Ms Vivien's evidence in this respect is totally contrary to the terms of the Health Assessment Report and quite irreconcilable. It is impossible to believe that Dr Martin could have filled out the Health Assessment Report in the terms that he did, dispatch it by fax and at the same time be saying something quite contrary to Mr Meadowcroft and Ms Vivien. As noted earlier, the Health Assessment Report is hand written and so its dispatch did not have to await "typing". On Ms Vivien's evidence, she was not even advised by Dr Martin that he had referred Mr Eliezer to the specialist Mr Oates, yet this is clearly stated in the Health Assessment Report.

36 This incongruity was put squarely to Ms Vivien. She accepted that the Health Assessment Report, which she later saw, was irreconcilable with what she states Dr Martin stated to her on 20 January 1998. She stated that when she first saw the Health Assessment Report her response was, "What is he [Dr Martin] doing to us?"[17].

37 Although Ms Vivien did not present as a wholly untruthful or unbelievable witness, the Tribunal cannot accept her evidence in this respect. There were occasions when her evidence was unclear and vague. She was clearly uncomfortable in giving her evidence and simply could not explain how these events could realistically have occurred. To accept her evidence would require concluding that Dr Martin said one thing to Mr Eliezer, wrote the same thing on the same day to Ms Vivien, yet at the same time said something quite different to her and Mr Meadowcroft.

38 In respect of this difficult issue the Tribunal accepts the evidence of Mr Eliezer, corroborated as it is by the Health Assessment Report.

39 Accordingly, the Tribunal concludes that on 20 January 1998, Mr Eliezer was passed fit by Dr Martin.

40 In continuing narration of the evidence, it is important to observe that what occurred next is again a matter of evidentiary controversy. Mr Eliezer's evidence was to the effect that having waited for a great deal of the day of 20 January 1998 at Dr Martin's surgery, he returned to the Total Marine office to advise Ms Vivien that he would not be taking the HUET course the next day. Mr Eliezer's evidence was that he met with Ms Vivien's assistant, Lyn Stephens. Ms Stephens stated to him that Total

[16] Admitted to evidence as Exhibit 28.
[17] T61 of 17 November 2003.

had already spoken with Dr Martin, and that another person had already been appointed to the job that had earlier in the day been offered to Mr Eliezer[18]. Ms Stephens was not called to give evidence. She was at the time of the Inquiry still employed by Total Marine, though on maternity leave. It was faintly put to Mr Eliezer in cross examination that he might be mistaken about this conversation, but this was denied by Mr Eliezer[19]. Mr Fernandez gave evidence that he was present at this conversation with Ms Stephens and his recollection of it accords with that of Mr Eliezer[20]. Ms Vivien's evidence in this respect was vague but to different effect. It suggested that a replacement would not have been engaged that day, but Ms Vivien accepted that Ms Stevens was responsible for this.

41 The Tribunal has no reason to doubt the evidence of Mr Eliezer and Mr Fernandez in this respect. Although the evidence of Ms Vivien was different the Tribunal accepts the evidence of Mr Eliezer and Mr Fernandez. Their recollection of this course and series of events was precise. The recollection of Ms Vivien was not so. Indeed, Ms Vivien presented to the Tribunal as a witness somewhat embarrassed by the course of events described. As noted above, at one point in her evidence she stated that her response to Dr Martin's conduct was, "what is he [Dr Martin] doing to us?"[21]. Although the Tribunal does not consider Ms Vivien to have been untruthful, the Tribunal has every confidence that Mr Eliezer's recollection of specific events in this series is more precise and accurate than that of Ms Vivien, and for that matter Mr Meadowcroft.

42 Accordingly, the Tribunal accepts and finds that on 20 January 1998 Mr Eliezer was informed that the position that had earlier that day been offered to him was filled by another, or was at least not available to him.

43 As to precisely why Total would have acted in this way was not explored in the evidence, largely as a result of Ms Stephens not giving evidence and Ms Vivien's evidence being to a different effect than that which has been found.

Whether this conduct contravened s 66B(1) of the Act

44.44 Section 66B(1) of the Act is in the following terms:

[18] XN at T36; XXN at T156.
[19] T156.
[20] T233-234.
[21] T61 of 17 November 2003.

"(1) It is unlawful for an employer to discriminate against a person on the ground of the person's impairment —

(a) in the arrangements made for the purpose of determining who should be offered employment;

(b) in determining who should be offered employment; or

(c) in the terms or conditions on which employment is offered."

45 Section 66B(2) provides:

"(2) 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."

46 The term "discriminate against" in s 66B is understood in the sense of and given meaning by s 66A of the Act. Section 66A relevantly provides that a person is discriminated against on the ground of impairment by another if the discriminator, on the ground of the impairment, treats the 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".

47 This formulae - of differential treatment in similar circumstance - has caused enormous doctrinal difficulty in the context of impairment discrimination. This is typified by the decision of the High Court of Australia in *Purvis v New South Wales Department of Education and Training* [2003] HCA 62.

48 Before considering s 66A it is necessary to determine whether the conduct found to have occurred falls within any of the provisions of s 66B. Only if this is found, does the application of s 66A arise. It is well to bear this firmly in mind. Section 66A does not fall to be considered in a vacuum.

49 The Tribunal has found that on 20 January 1998 Mr Eliezer was offered employment, and the offer was accepted. The agreement that came into effect was conditional upon Mr Eliezer passing a medical examination.

50 These circumstances fall either within the purview of s 66B(1) of the Act or s 66B(2). The former provision applies in circumstances prior to the crystallisation of the employment relationship, the latter provision in respect of employers and employees. Even though s 66B(1) refers to "offers" of employment, a circumstance where an offer in a contractual sense by a putative employer might have been accepted, but conditionally, is not beyond the sections scope. Likewise, for instance, a circumstance of an offer being made by a putative employee comes within the operation of the section. It would be an error to treat the interpretation of s 66B(1) by construing the term "offer" in a limiting or exclusive sense. Although within one particular meaning, the offer of employment had been accepted early on 20 January 1998, due to the conditional nature of the agreement that arose, the conduct of Total during the balance of the day of 20 January 1998 fell within the description of "arrangements made for the purpose of determining who should be offered employment" (within the meaning of s 66B(1)(a)), and also theoretically within the description of circumstances as to "determining who should be offered employment" (within the meaning of s 66B(1)(b)).

51 This being so, identification of the precise act of which complaint is made is essential. In respect of the acts and conduct described thus far in these Reasons, the complaint is that Mr Eliezer was sent by Total to their nominated medical examiner to complete and have the opportunity of passing a Company Medical Examination. On the finding made, this medical examination was completed and passed. As noted above, there was no *requirement* that Mr Eliezer have a HUET certificate, and even if there was, it is difficult to accept that this could properly explain the conduct of Total on 20 January 1998 in peremptorarily employing someone else to perform the job the subject of the agreement of that day with Mr Eliezer. The next swing was not due to start until 2 February 1998. Mr Eliezer had an appointment with Mr Oates, the Ear Nose and

Throat specialist, for 21 January 1998. This appointment was made and arranged by Total's medical examiner.

52 The conduct of Total which calls for consideration in the terms of s 66B(1)(a) and the question which it poses is; whether withdrawing the offer of employment without explanation, where Mr Eliezer had an appointment already made to see Mr Oates the next day (arranged by Total's nominated medical examiner) to determine his capacity to undertake the HUET test, constituted discrimination in the arrangements made for determining who should be offered employment.

53 The conduct of Total which calls for consideration in the terms of s 66B(1)(b) and the question which it poses is; whether, in withdrawing the offer of employment on 20 January 1998, Total discriminated against Mr Eliezer on the ground of his impairment in determining who should be offered employment.

54 In each instance, it is necessary, by reason of and for the purpose of s 66A, to consider whether Total treated Mr Eliezer less favourably than in the same or materially undifferentiated circumstances Total treated or would treat a person without Mr Eliezer's impairment.

55 As *Purvis* illustrates, in this formulae a complex and difficult element is identifying the features or characteristics of the person against whose treatment or putative treatment the actual treatment of (in this case) Mr Eliezer is to be compared. Often times, to simply eliminate the impairment from analysis renders the application of the process chimeric or, as Gleeson CJ expressed it in *Purvis*, "purely formal"[22].

56 One of the difficulties confronting the Tribunal in this case is that the witnesses called by Total were simply unable to give any reasoned explanation for the course of events that unfolded on 20 January 1998. Ms Stephens, who may have been able to shed some light, was not called and Dr Martin had, as noted earlier, passed away.

57 The conclusion is, however, inescapable, that on 20 January 1998 - in withdrawing the offer of employment - Total acted as a result of being advised by Dr Martin that Mr Eliezer had a problem with his ear and that as a result there was a problem with him undertaking the HUET test.

58 No explanation is plausible but that the decision to withdraw the offer of employment made earlier that day, and to deny Mr Eliezer the

[22] *Purvis v New South Wales Department of Education and Training* [2003] HCA 62 @ [12].

opportunity of consulting Mr Oates prior to the offer being withdrawn, was by reason of being so informed. The Tribunal simply does not accept that the explanation for the conduct – put otherwise, the reason why the job was offered to another - was that Mr Eliezer was unable to take the HUET test. For reasons outlined earlier, any suggestion that HUET certification was somehow a crucial safety *requirement* flies squarely in the face of the conduct of Total in dealing with temporary or probationary employees. To draw a distinction in this respect between temporary or probationary employees and permanent employees is disingenuous.

59 Even if this were not so, the haste in withdrawing the offer of employment, when Mr Eliezer was to see Mr Oates at the direction of Dr Martin the next day, where the next swing was not due until 2 February 1998, compels the conclusion that HUET certification was irrelevant to the thinking of the Respondent on 20 January 1998.

60 The Tribunal is left with no other rational or possible explanation for the conduct of Total in withdrawing the offer of employment on 20 January 1998, and refusing Mr Eliezer the opportunity of conferring with Mr Oates before withdrawing the offer of employment, than that it so acted because its officers had been advised on that day by Dr Martin that Mr Eliezer had a medical problem with his ear. The Tribunal finds accordingly.

61 In so finding and concluding, it is patent that in so acting Total treated Mr Eliezer less favourably than in the same circumstances it would have treated a person who did not have Mr Eliezer's impairment.

62 Accordingly, in so acting Total contravened s 66B(1)(a) and (b) of the Act.

63 This conclusion renders it unnecessary to consider and make findings in respect of the complex web of facts that transpired following 20 January 1998. A great deal of evidence was led as to whether Mr Eliezer's perforated ear drum and attendant hearing loss rendered him a safety risk on board the rig and peculiarly susceptible to poisoning by gas. As it happened, ultimately Dr Martin accepted and certified (again) that Mr Eliezer was fit to work on the *ENSCO 56*. He was eventually engaged again by Total to work on the *ENSCO 56*, as a permanent employee, on 14 April 1998. Accordingly, and quite obviously, all of the matters that were raised during the period 21 January 1998 to April 1998 were ultimately of no substance.

64 The finding that s 66B(1)(a) was contravened, along with s 66B(1)(b), renders it unnecessary to consider the exception provided for in s 66Q. No exception exists in respect of contravention of s 66B(1)(a). For the sake of completeness, however, though without reasoning the matter fully, the Tribunal was not satisfied[23] that it was reasonable for Total to have concluded on 20 January 1998 that Mr Eliezer, because of his impairment, would be unable to carry out work reasonably required to be performed in the course of employment. Nor is the Tribunal satisfied that Total took all reasonable steps to obtain relevant and necessary information concerning the impairment prior to acting on 20 January 1998. Indeed, quite the contrary.

65 In light of these findings, the conclusion is inescapable that had Mr Eliezer not been the subject of unlawful discrimination on 20 January 1998, he would have been employed as a permanent employee of Total on that day and would have so continued.

66 Accordingly, the wages that he would have earned in the period from 20 January 1998, when his employment in effect ceased, and 14 April 1998, when he re-commenced employment as a permanent employee, is income lost by reason of the unlawful discrimination of the Respondent.

67 Uncontradicted evidence was led to the following effect; had Mr Eliezer been employed on 20 January 1998, his employment would have commenced on 2 February 1998. The rate of pay for a permanent employee of Mr Eliezer's job was $4,675.84 per four week swing. In addition, allowances of $472.50 per four week swing was payable as a living away from home allowance. In addition, a superannuation contribution of $467.58 was payable per four week swing. This totalled, $5,615.92 per four week swing. This represents a daily amount of $200.57.

68 The period 2 February 1998 to 13 April 1998 was 10 weeks and one day. The daily amount multiplied by 71 days represents $14,240.47.

69 This is a sum representing compensation for loss and damage to which Mr Eliezer is entitled pursuant to s 127(b)(i) of the Act. Consistent with the decisions in *McCarthy v Transperth* (1993) EOC 92-478 at 79,480 no reduction is made in respect of the possible taxation that might be payable in respect of this amount.

[23] See s.123, which provides that Total bore an onus of establishing the exception.

The Events of May 1998

70 As noted above, Mr Eliezer re-commenced work as a permanent employee of Total on the *ENSCO 56* on 14 April 1998. He worked in this capacity until 12 May 1998.

71 On this latter date Mr Eliezer's employment with Total ceased as Total's contract in respect of the *ENSCO 56* came to an end. Nothing in this Inquiry turns on the circumstances surrounding this matter, other of course than its relevance to questions of loss and damage.

Mr Eliezer Obtaining Employment Elsewhere

72 Shortly after ceasing work with Total Mr Eliezer was employed with Tidewater Port Jackson Marine as a radio operator on another rig, *The Ocean Bounty*, commencing on 8 June 1998. Tidewater Port Jackson Marine had at this time the contract to provide labour for this rig. Tidewater Port Jackson Marine were competitors of Total.

73 Mr Eliezer worked on *The Ocean Bounty* until 19 April 1999. At around this time, the labour contract for this rig was taken from Tidewater Port Jackson Marine and awarded to Total.

74 It is the circumstances in which Mr Eliezer was not offered employment with Total in April 1999 that comprise a further complaint of impairment discrimination and a complaint of victimisation.

Mr Eliezer's second complaint of impairment discrimination

75 This second allegation of impairment discrimination and the allegation of victimisation, within the meaning of s 67 of the Act, arose out of tortuous facts, which will have to be recounted in some detail and prefaced by precedent factual matters, also of some complexity.

76 Before doing so, however, the complaint of further impairment discrimination can be disposed of shortly. There was nothing in the evidence to suggest that the decisions taken and the conduct leading to the decisions of Total in April 1999 not to employ Mr Eliezer (which will be dealt with in detail below) had anything whatever to do with Mr Eliezer's impairment. Common sense would suggest this to be so in any event. As noted above, Total did in fact employ Mr Eliezer on the *ENSCO 56* on 14 April 1998. Dr Martin, eventually accepted that Mr Eliezer's condition presented no impediment to him working on an off shore rig. Indeed,

Dr Martin conducted the medical examination of Mr Eliezer, and obviously passed him medically fit, prior to him being employed on *The Ocean Bounty* by Tidewater Port Jackson Marine. Further to this, Total were aware, or became aware, that Mr Eliezer was an employee of Tidewater Port Jackson Marine on *The Ocean Bounty* and no evidence was led which suggested that he was incapable of performing the job for which he was employed.

77 Quite simply, there is nothing whatever in the complaint that Mr Eliezer was discriminated against on the ground of his impairment in not being employed by Total in April 1999. This complaint is dismissed.

Victimisation

78 Mr Eliezer alleges that he was not employed by Total in April 1999, to continue as one of the radio operators on *The Ocean Bounty* when Total assumed the labour contract for *The Ocean Bounty*, on the ground that he had earlier reasonably asserted his rights under the Act; that is the complaint alleges contravention of s 67(1)(e).

79 Clearly not employing Mr Eliezer, when Total otherwise would have done so, is a "detriment" for the purpose of s 67(1) of the Act.

80 The principal allegation is that Mr Eliezer was not employed on the ground that he had "reasonably asserted, or proposes to assert ... rights ... under this Act", within the meaning of s 67(1)(e). The complaint was also put in terms of s 67(1)(a), but as will come to be seen, the same facts are relevant to both provisions.

81 Understanding of this complaint requires further factual elucidation.

82 After the events of January 1998, described above, Mr Eliezer sought the assistance of his union, the Australian Worker's Union. Mr Mike Llewellyn who was the Assistant Secretary of the Union became involved. Having earlier spoken with Mr Meadowcroft, on 16 February 1998 Mr Llewellyn wrote to Mr Meadowcroft concerning Mr Eliezer. This letter was, inter alia, to the following effect:

> *" ... It has been decided ... to follow one of two courses of action.*
>
> *~~1.~~1. unlawful termination 170CK subject to $ threshold earnings, or*

~~2.~~2. State Commission s.44 and Equal Opportunity Commission.

Please contact me to fix this."

83 This letter is to be understood of course in the context that Mr Eliezer was contemplating issuing proceedings arising from the events of January 1998.

84 It is evident from the letter that one of the avenues being contemplated by Mr Eliezer at this time and as communicated to Total was the making of a complaint to the Equal Opportunity Commission, asserting his rights under the Act.

85 As it happened, rather than make a complaint to the Equal Opportunity Commission at this time, in respect of the events of January 1998, Mr Eliezer made an application in the Western Australian Industrial Relations Commission. Some evidence was led to the effect that the Western Australian Industrial Relations Commission ultimately dismissed this application. For this Inquiry, nothing turns on the dismissal of this application, or the reasons for it. As will come to be seen, it is a matter of some relevance that the decision of the Western Australian Industrial Relations Commission was handed down in March 1999.[24]

86 What is to the point is that Mr Meadowcroft confirmed in his evidence that at all times after February 1998, and up until April 1999, when Mr Eliezer was not employed by Total to work on *The Ocean Bounty*, Mr Meadowcroft was aware of the assertion by Mr Eliezer that he had been the victim of discrimination contrary to the terms of the Act.

87 Mr Meadowcroft's evidence in this respect was that he was aware that Mr Eliezer had asserted that he had been discriminated against on 16 February 1998, when he received Mr Llewellyn's fax of that date and that this was asserted on Mr Eliezer's behalf again in March 1999.[25]

88 What emerges from this evidence is that at times material to the allegation that has been made of victimisation, Mr Meadowcroft considered that Mr Eliezer had not, as it were, abandoned his contention that he had been discriminated against by Total by reason of his impairment. Indeed, from the evidence, Mr Meadowcroft was aware that this assertion of discrimination contrary to the terms of the Act had been renewed in March 1999.

[24] T28 of 17 November 2003.
[25] This emerges from the evidence of Mr. Meadowcroft at T29 of 17 November 2003.

89 The Tribunal in this Inquiry has had a deal of difficulty understanding the basis of the decision that was made in April 1999 by Total not to employ Mr Eliezer. Again, as will come to be discussed, the evidence led on this matter by Total, and the explanation provided as to why it acted in the way that it did, has been far from convincing. As such, it is open to infer that the reason proffered was not the motivation for the act.

90 What has, however, been put to the Tribunal is that it is open to infer that Mr Eliezer was not employed by Total *in April 1999* on the ground that he had *in February 1998* asserted (reasonably) or proposed to assert at a time in the future that he had been discriminated against. The Tribunal has also been invited to infer that Mr Eliezer was not employed by Total *in April 1999* on the ground that he had *in March 1999* asserted (reasonably) or proposed to assert at a time in the future that he had been discriminated against.

91 The inference invited in respect of the assertion in February 1998 requires a finding that the Respondent harboured tremendous resentment about Mr Eliezer for a considerable period of time. Not only this, but also that such resentment was harboured during a period when Mr Eliezer had been for a time employed by Total. Of course, the inference invited in respect of the assertion in March 1999 is for obvious reasons more readily open; proximity makes it so.

The events of March and April 1999

92 As noted above, Mr Eliezer was employed with Tidewater Port Jackson Marine as a radio operator on *The Ocean Bounty* from 8 June 1998.

93 All of the evidence led was to the effect that the operator of the rig was happy with Mr Eliezer's work.

94 During the early months of 1999 the "manning contract" for the marine crew on *The Ocean Bounty* was put to tender by the operator of the rig, Diamond Offshore. From the evidence before the Tribunal, it appears to have been the case that Diamond Offshore was unhappy with the service being provided by Tidewater Port Jackson Marine. This was the evidence of Mr Meadowcroft[26] and was certainly the "mindset" of Mr Meadowcroft in assuming *The Ocean Bounty* contract. This matter is significant. Mr Meadowcroft's evidence was to the effect that, (at least)

[26] T265.

his appreciation was that Tidewater Port Jackson Marine were sacked because Diamond Offshore were unhappy with their service. This can be understood as (at least inter alia) being unhappy with the staff provided by Tidewater Port Jackson Marine for *The Ocean Bounty*. The significance of this is that in such a circumstance it was commercially inevitable that in providing staff for *The Ocean Bounty* Total would not simply re-engage the existing staff. Dissatisfaction with them was (at least inter alia) the reason for Total being engaged in the first place.

95 Evidence was given by Mr John Drysdale, who was as at April 1999 the senior officer of Diamond Offshore on *The Ocean Bounty*, that when the decision was made to change from Tidewater Port Jackson Marine to Total he was concerned to maintain some of the previous Tidewater Port Jackson Marine personnel. Mr Drysdale stated that he was told by Diamond Offshore officers who spoke with the officers of Total arranging the changeover that Total "were receptive to taking some of the [Tidewater Port Jackson Marine] men on if they were recommended by [Diamond Offshore]"[27].

96 As a consequence, a list was prepared, and the Tidewater Port Jackson Marine crew given a rating. Mr Drysdale was involved in this rating exercise. Mr Drysdale was quite clear in his evidence that Diamond Offshore did not expect that all of the people whom they wished to retain would be retained[28].

97 The list was put into evidence[29]. Mr Eliezer was rated as four out of a possible five. There were many ratings below this. It was evident and confirmed by Mr Drysdale that Mr Eliezer was a person whom Diamond Offshore wished to retain.

98 Mr Meadowcroft gave evidence to the effect that he would have seen the list but would have conveyed it immediately to Mr Paul Nunn, who was the officer of Total with the immediate responsibility of finding personnel to staff *The Ocean Bounty*. The evidence is to the effect that Mr Nunn, not Mr Meadowcroft, was solely responsible for the conduct and decisions of Total in respect of Mr Eliezer in April 1999 *re The Ocean Bounty*.

99 Mr Nunn's evidence in respect of these matters was wholly unconvincing. Mr Nunn, by his demeanour in the witness box, was clearly uncomfortable in giving evidence. He did not convey the

[27] T171.
[28] T173.
[29] As exhibit 19.

impression from his demeanour that he believed the words falling from his mouth.

100 Mr Eliezer was clearly an applicant for the radio operator's position on *The Ocean Bounty* once Total took over the contract. He was not employed. Rather two others, Mr Anthony Spring and Mr John Wright were employed. Neither of Mr Spring or Mr Wright were at the material time current employees of Total; that is, they were both hired by Total specifically for the radio operator's job on *The Ocean Bounty.* It was evident from Mr Nunn's evidence that he had a scant knowledge of both Mr Spring and Mr Wright prior to hiring them. The question which obviously arises from a brief recitation of these facts is; why was Mr Eliezer not employed? At the time, he had the support of the relevant Diamond Offshore personnel, and there seemed to be no difficulty with the quality of his work.

101 The explanation given by Mr Nunn to this simple question was totally unconvincing; indeed, the Tribunal has little difficulty in concluding that his evidence in this respect was a fabrication. In his evidence Mr Nunn stated initially that Mr Eliezer was not approached because he was at the time, "an employee of Tidewater Port Jackson Marine and hence not available for [Total]"[30]. Mr Nunn was simply unable to give any coherent response when it was put to him that Total in hiring staff for *The Ocean Bounty* in fact employed a number of Tidewater Port Jackson Marine employees[31]. Why Mr Eliezer was considered beyond approach when others were approached could not be answered.

102 Mr Nunn then sought to explain that Mr Wright and Mr Spring were engaged before Mr Nunn was aware that Mr Eliezer was available[32]. This evidence was clearly false. Mr Wright was engaged after 12 April 1999, as is evident from correspondence sent by Mr Nunn to Diamond Offshore[33]. Likewise, the employment forms signed by both Mr Wright and Mr Spring were dated 13 April 1999 and 19 April 1999 respectively. Mr Nunn was aware from 31 March 1999, when he was handed the list referred to above, that Mr Eliezer was a person whom Diamond Offshore wished to maintain.

103 Evidence was led by Mr Drysdale of a teleconference in which he participated to discuss Mr Eliezer. Mr Drysdale's evidence was that

[30] T279.
[31] See the exchange at T284-285.
[32] T285.
[33] See Exhibit 36.

Mr Nunn was present[34]. According to Mr Drysdale the meeting was tense and the matter that caused tension was trying to determine how it was that Diamond Offshore had become aware that Mr Eliezer had earlier brought proceedings in the Western Australian Industrial Relations Commission against Total.

104 Mr Nunn denied that any such conversation took place[35]. This denial followed a series of answers by Mr Nunn in his evidence where he deliberately sought to obfuscate in respect of this matter. Although Mr Drysdale gave his evidence to the Tribunal by telephone, the Tribunal formed a favourable impression of Mr Drysdale. There was of course no reason why Mr Drysdale would not tell the truth to the Tribunal, and his evidence was in all respects forthright and patently truthful. The same can not be said of Mr Nunn. The Tribunal has no difficulty preferring the evidence of Mr Drysdale in this respect. Quite clearly, there was a discussion involving officers of Diamond Offshore and Mr Nunn at which earlier proceedings involving Mr Eliezer were discussed. Quite obviously Mr Nunn, and thereby Total, were concerned about this and quite obviously concerned of an impression being formed that Mr Eliezer was not being employed as some form of retribution.

105 Mr Nunn's falsity in this respect is telling. The Tribunal is convinced that in his evidence in this respect he knowingly sought to convey a falsehood. Unfortunately the range of possible truths is such that this falsehood does not necessarily infer that Mr Nunn, and thereby Total, acted in the way that it did because Mr Eliezer had in February 1998 or necessarily even March 1999 asserted rights under the Act, within the meaning of s 67(1)(e). Other inferences are available. A possible inference is that Total acted in the manner that it did out of spite for the making of the application to the Western Australian Industrial Relations Commission. It will be remembered that the decision dismissing Mr Eliezer's claim was handed down in March 1999.

106 The Tribunal has in this Inquiry been greatly troubled by this matter. It would be quite wrong to simply draw the inference in favour of Mr Eliezer and adverse to Total because of the wholly unsatisfactory way in which Total presented its case in this respect. Likewise, it would be wrong to draw the inference simply because the Tribunal is convinced that Mr Eliezer was treated abominably in April 1999 when he was not employed by Total.

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[34] T176.
[35] T299.

107 It must be observed, however, that whatever inference is drawn, or not drawn, it was evident that the explanation advanced by Mr Nunn as to why Mr Eliezer was not employed was false, and that Mr Eliezer was obviously not employed by Total in April 1999 by reason of base motives on the part of Total.

108 In seeking to determine this matter, the Tribunal is mindful of the terms of s 5 of the Act. The section is in the following terms:

> *"A reference in Part II, IIAA, IIA, IIB, III, IV, IVA or IVB to the doing of an act on the ground of a particular matter includes a reference to the doing of an act on the ground of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act. "*

109 Section 67 is in Part V of the Act and so does not fall within the range of provisions to which s 5 expressly relates. This is not *necessarily* to say that the same result as that expressed in s 5 can not arise in respect of the causative element of s 67. Nonetheless, the exclusion of s 67 from the scope of s 5 clearly connotes, applying conventional technique of statutory interpretation, that the causative link between assertion of right under the Act, within the meaning of s 67(1)(e) and detriment - in this matter, refusal to employ - be other than that prescribed by s 5. When s 5 and s 67 are considered together, the Act's effect is to require that the Tribunal be satisfied that victimisation, as defined in subsections (a)-(f) of s 67(1), be the dominant or substantial reason for the imposition of the detriment. In one sense, this requirement does not affect the reasoning to be followed by the Tribunal in drawing the proper inference from the untruthful evidence given by Mr Nunn. Yet, such a stringent causative requirement is consistent with the seriousness and gravity of inquiries into contravention of s 67. As this Tribunal has expressed elsewhere, 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.

110 Such gravity requires that an inference ought only be drawn that a putative victimiser has acted on the ground of one of the matters specified in (a)-(f) of s 67(1) where such inference is clear, obvious and verging upon inescapability.

111 In this matter, the Tribunal reluctantly concludes that the inference that Total did not employ Mr Eliezer to work on *The Ocean Bounty* in April 1999 on the ground that he had earlier (whether in February 1998, or March 1999 or both) reasonably asserted that he had been discriminated against, on the standard prescribed above for the drawing of such inference, cannot be drawn. As noted, an inference equally open is that Mr Nunn, and thereby Total, acted in the manner that it did in refusing to employ Mr Eliezer in April 1999 out of sheer spite by reason of his earlier complaint to the Western Australian Industrial Relations Commission.

112 It might be thought that this reasoning highlights an unsatisfactory lacunae in the legislative scheme of the Act and in s 67 in particular. If so, the solution is legislative.

113 On these grounds, the Tribunal dismisses the complaint made under s 67 of the Act.

Conclusion

114 Accordingly, the Tribunal finds that Total contravened s 66B(1)(a) and (b) of the Act. The finding in respect of s 66B(1)(a) renders consideration of s 66Q unnecessary, for the reasons outlined earlier.

115 Again, as outlined earlier in these reasons, had Mr Eliezer not been the subject of unlawful discrimination on 20 January 1998, he would have been employed as a permanent employee of Total on that day and would have so continued until 13 April 1998. The sum to which Mr Eliezer is entitled in respect of this loss is $14,240.47, the calculation of which is made earlier in these reasons.

116 The Respondent contended that, as a matter of law, being a matter of the proper construction of s 127(b)(i) of the Act, the Tribunal is unable to award any further sum in respect of the hurt and humiliation that Mr Eliezer might have suffered as a result of this unlawful discrimination.

117 Mr Hancy, who appeared for Total, reasoned that damages in respect of such head of damage is not available at Common Law and so, it must be reasoned, is not encompassed by the term "loss or damage" in s 127(b)(i).

118 Such a contention is fallacious for a number of reasons. There are many cases in this Tribunal, Tribunals administering equal opportunity and anti-discrimination legislation elsewhere in Australia of similar terms

and effect, and decisions of Courts on appeal contrary to such a contention[36]. Resort to the reasoning in many of these cases demonstrates the reasoned basis of the fallacy. Suffice to say that the contention proceeds on an assumption of legal meaning to the words "loss or damage" that is immutable, coterminous, co-extensive and directly correlative in all areas of law. There is no logical basis for such an assumption, even if such reasoning can be adopted in respect of legislation dealing and principally concerned with financial loss, such as (say) the *Trade Practices Act 1974*. The conclusion urged by the Respondent in this respect, and the reasoning which underpins it ignores the objects of the Act as enshrined in s 3.

119 Clearly, damages are able to be awarded in this Tribunal in respect of non-financial loss or damage suffered by complainants. The loss of confidence, loss of self-esteem and self-worth, loss of a feeling of community, damage to family and personal relations caused by unlawful discrimination can be in every sense as real and substantial as wages forgone.

120 In this case both Mr Eliezer and his wife Mrs. Nancy Eliezer gave evidence as to the effect that these events have had on Mr Eliezer. It was evident to the Tribunal from Mrs. Eliezer's evidence in particular that these events have had a terrible effect on Mr Eliezer. Both Mr and Mrs Eliezer was examined and cross examined most sensitively in respect of these matters, but the humiliation that Mr Eliezer has suffered, the loss of self esteem that he has endured and the loss that he has felt was palpable.

121 If is important in tis respect to note that in this Inquiry not all complaints have been made out, and so to the extent to which Mr Eliezer has felt humiliated and distressed by the dismissed matters, strictly no award of compensation is payable. It was pointed out by the Respondent that "shortly" after the events of January 1998 Mr Eliezer was in fact employed and so his loss was putatively rather short lived. Such a submission ignores the reality that the consequences of unlawful discrimination are not necessarily "cured" in the short term, or by immediate response.

122 It is patent that the unlawful discrimination to which Mr Eliezer was subjected in January 1998 triggered a process of self doubt and loss of self esteem that did not abate over the succeeding material period.

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[36] See, for instance *Allders International Pty Ltd v Anstee* (1986) 5 NSWLR 47 @ 65, *McCarthy v Transperth* (1993) EOC 92-478 at 79,481. Numerous other authorities could be cited.

123 Although Mr Eliezer led no specialist psychiatric evidence, the Tribunal is satisfied that Mr Eliezer has suffered greatly from the unlawful discrimination to which he was subjected. It is of course the case, and has been stated many times in this Tribunal, that calculation or determination of a sum by way of compensation in respect of such loss and damage is imprecise and difficult.

124 Be that as it may, the Tribunal is of the view that a sum of $5,000.00 is appropriate compensation in respect of this loss and damage.

125 Accordingly, the Tribunal awards the sum of $19,240.47 as compensation pursuant to s 127(b)(i) of the Act.