

IN THE EQUAL OPPORTUNITY TRIBUNAL OF WESTERN AUSTRALIA

Matter No. 18 of 2000

BETWEEN

**CHERRIE TURLAND**

Complainant

- and -

**CAPTAINS GIRL MV PTY LTD**

Respondent

*Delivered: 4 Dec 2001*

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**REASONS FOR DECISION**  
Before Deputy President Donaldson and Deputy Members Ackland and ~~Fadjar~~ <sup>Fadjar</sup>

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**COMPLAINT**

1. On 15 March 1999 Ms. Turland lodged a complaint with the Equal Opportunity Commission alleging contravention of the *Equal Opportunity Act 1984* by the respondent. Ms. Turland alleges that the respondent contravened s.11(2)(a), alternatively (b) and alternatively (c) of the Act, discriminating against her on the ground of pregnancy.
2. In or about July 2000 Ms. Turland's complaint was referred to the Tribunal by the Equal Opportunity Commission pursuant to s.93(1) of the *Equal Opportunity Act 1984*. An inquiry by way of hearing pursuant to s.107 of the *Equal Opportunity Act 1984* took place on 18 June 2001.
3. The respondent did not appear at the hearing.
4. Admitted into evidence by the Tribunal was correspondence between the Commission and the Chamber of Commerce and Industry relating to the complaint. The Chamber of Commerce and Industry, for a time at least, represented the respondent in respect of this complaint. In this

correspondence Ms. Turland's complaints and contentions were put to the respondent in detail. The respondent, through the Chamber of Commerce and Industry, responded in detail.

5. This complaint came before the Tribunal for directions on 10 November 2000. At this time the representative of the respondent from the Chamber of Commerce and Industry advised that the respondent was a "dormant" company; that it had ceased trading in January 1999 and that it had no assets. The representative of the respondent from the Chamber of Commerce and Industry who appeared then submitted "frankly" that he saw "no point" in the complaint proceeding in that nothing was to be gained by it doing so.
6. "Frank" is to misdescribe this submission. It was misconceived. It is patent that there are many laudable, commendable and otherwise very good reasons why complaints of discrimination and contraventions of the *Equal Opportunity Act 1984* ought be inquired into by this Tribunal whether or not any orders for damages that might be made are likely to be met.
7. On 18 December 2000 the Chamber of Commerce and Industry wrote to Mr. McDonald, an officer of the Equal Opportunity Commission who represented Ms. Turland, reiterating the statements and submissions made to the Tribunal on 10 November 2000 and concluding that the respondent would "abandon its involvement in the complaint".
8. On 6 April 2001 the Chamber of Commerce and Industry wrote to the Registrar of this Tribunal reiterating and confirming these matters and stating that the respondent would not "contest" the complaint. The Chamber of Commerce and Industry letter went on to advise the Tribunal that it had ceased to act for the respondent.
9. Accordingly, at the hearing of this matter the respondent did not appear and was not present. The Tribunal had before it detailed submissions and responses of the respondent. These had earlier been conveyed to the Equal Opportunity Commission in the course of the Commission's investigation of these matters. Regard was had to these submissions and the various

contentions of the respondent there expressed were put to the relevant witnesses who gave evidence to the Tribunal.

10. The Tribunal paid particular regard to ensure that the witnesses who gave evidence were tested and examined thoroughly and appropriately. Suffice to say, all of the witnesses called, and in particular Ms. Turland, presented as entirely credible witnesses. The Tribunal has every confidence that the complaint was thoroughly examined and that the truth was presented in evidence.

## FACTS

11. The respondent operated a boat cruise service that operated a boat "Captains Girl". Captains Girl cruised on the Swan River. Helen Ferry was at the times material to this complaint a director of the respondent and the manager of the business of the respondent.
12. Ms. Turland commenced employment with the respondent in or about September 1998. Initially Ms. Turland worked preparing food. For this work Ms. Turland was paid at a rate of \$11.50 per hour. In addition Ms. Turland acted as what was described in evidence as a "hostess" on the cruise boat. This involved serving food and drink to patrons on the boat. The hosting duties commenced on the second day of Ms. Turland's employment. Hosting work was paid at the rate of \$12.50 per hour during the day and \$15.00 per hour for night cruises.
13. Work amongst the hosting staff of the respondent was allocated by way of fortnightly rosters or shifts. For each shift employees were allocated to work. Other employees were designated as being on stand by in the event that an allotted employee was unable to work. Swapping and replacement of shifts at short notice was a common event.
14. In the period from the time that Ms. Turland commenced employment with the respondent until January 1999 Ms. Turland worked as follows:

- In the period 30 September 1998 to 6 October 1998, Ms. Turland worked 21.5 hours by way of kitchen duties and 6 hours by way of hosting duties during the day.
  - In the period 7 October 1998 to 20 October 1998, Ms. Turland worked 3 hours in the office and 29.5 hours by way of hosting duties during the day.
  - In the period 21 October 1998 to 3 November 1998, Ms. Turland worked 37.5 hours by way of kitchen duties and 39 hours by way of hosting duties during the day.
  - In the period 4 November 1998 to 17 November 1998, Ms. Turland worked 32 hours by way of kitchen duties, 43 hours by way of hosting duties during the day and 6 hours of hosting duties during the night.
  - In the period 18 November 1998 to 1 December 1998, Ms. Turland worked 76 hours by way of kitchen duties, 21 hours by way of hosting duties during the day and 7.5 hours of hosting duties during the night.
  - In the period 2 December 1998 to 14 December 1998, Ms. Turland worked 67.5 hours by way of kitchen duties, 1 hour in the office, 16 hours by way of hosting duties during the day and 5 hours of hosting duties during the night.
  - In the period 15 December 1998 to 28 December 1998, Ms. Turland worked 26 hours by way of kitchen duties, 38 hours by way of hosting duties during the day and 3 hours of hosting duties during the night.
  - In the period 29 December 1998 to 11 January 1999, Ms. Turland worked 4 hours by way of kitchen duties, 54.5 hours by way of hosting duties during the day and 4.5 hours of hosting duties during the night.
15. In January 1999 Ms. Turland took 10 days break. This was organised through Michelle Radis who was at the time, *inter alia*, responsible for organizing and allocating the shifts of employees.

16. Several days before Ms. Turland was due to return to work in January 1999 she advised Ms. Radis that she was pregnant.
17. Ms. Radis gave evidence that news of Ms. Turland's pregnancy became a topic of office news and that Ms. Ferry came to know of it shortly after Ms. Turland resumed work. Within a week or two of Ms. Turland's return to work Ms. Ferry instructed Ms. Radis to reduce Ms. Turland's hours. On Ms. Radis asking why this was to occur Ms. Ferry stated that it was because Ms. Turland was pregnant and that as she was going to leave anyway Ms. Turland was to be "phased out".
18. From this time Ms. Ferry took a conspicuous and uncharacteristic interest in the rostering of staff. Ms. Radis was on occasions directed by Ms. Ferry to reduce the number of shifts allocated to Ms. Turland.
19. In the period from the time that Ms. Turland returned to work from leave until 8 March 1999 Ms. Turland's work arrangements were as follows:
  - o In the period 12 January 1999 to 25 January 1999, Ms. Turland worked 14.5 hours by way of hosting duties during the day and 1 hour of hosting duties during the night. It was during this time that Ms. Turland took leave.
  - o In the period 26 January 1999 to 8 February 1999 Ms. Turland did not work.
  - o In the period 9 February 1999 to 22 February 1999 Ms. Turland worked 51.75 hours by way of hosting duties during the day and 3.25 hours of hosting duties during the night.
  - o In the period 23 February 1999 to 8 March 1999 Ms. Turland worked 14.5 hours of hosting duties during the day.
20. Evidence was led that this time of year was a very busy time for the respondent and that other employees worked numerous shifts. This is readily understandable in the business in which the respondent operated. Likewise evidence was led that at this time of year experienced staff were at something

of a premium as many of the respondent's employees were university students working during their vacation. As the end of vacation was nearing student employees were returning to university and not as available to work shifts as at earlier times during the vacation period.

21. In February 1999 Merrilee Wright took over those of Ms. Radis' duties which involved supervision and allocation of shifts. At around this time Ms. Wright asked Ms. Turland how much work she wished to undertake. Ms. Turland advised that she wanted to work as many hours as possible up to 6 weeks before her baby was due on 16 September 1999.
22. Ms. Wright gave evidence that she was at this time happy to give Ms. Turland as much work as possible. Ms. Turland was in Ms. Wright's opinion, and also that of Ms. Radis, a capable, diligent worker. Of course, at around this time other employees were returning to university study and so there were fewer employees available to work shifts. In the course of this conversation Ms. Wright advised Ms. Turland that she would be allocated 5 to 6 shifts per week. A shift was, essentially, a day. If this proposal had been implemented, it can be seen that Ms. Turland would have worked the same if not more hours than she had worked in 1998.
23. On 1 and 2 March 1999 Ms. Turland suffered an illness and was absent from work. To the extent that it is material, this illness was a gastric complaint unrelated to her pregnancy. It was not "morning sickness" often associated with or commonly attributed to pregnancy. On 1 March 1999 Ms. Turland spoke with Ms. Radis. Again on 2 March 1999 Ms. Turland rang the office to advise of her unavailability. On this occasion Ms. Turland spoke with Ms. Ferry. On neither occasion was anything said to Ms. Turland to indicate that there was any difficulty with her being absent from work. As in all workplaces, illness of an employee is a commonly occurring event. Another employee of the respondent worked the shifts on these days that Ms. Turland was unavailable.
24. On 2 March 1999 Ms. Ferry directed Ms. Wright to show her the roster that Ms. Wright had prepared for the ensuing fortnightly period. Ms. Wright had

allotted Ms. Turland approximately 5 shifts per week. This was in accordance with her previous work schedule. Ms. Ferry directed Ms. Wright to remove Ms. Turland from the roster and allocate those shifts to another employee.

25. Ms. Wright protested about this and stated to Ms. Ferry that it was wrong to in effect terminate Ms. Turland's employment for no reason. Ms. Ferry instructed Ms. Wright to tell Ms. Turland that she was not being allocated shifts because she was "unreliable". Ms. Wright surmised that the reason for Ms. Ferry's attitude toward Ms. Turland and the allocation of shifts to her was solely as a result of Ms. Turland's pregnancy. Ms. Wright gave evidence to the effect that Ms. Ferry would not have been in a position at that time to have known specifically of Ms. Turland's absenteeism. Accordingly, the reference by Ms. Ferry to Ms. Turland's "unreliability" was clearly contrived and was understood to be so by Ms. Wright.
26. Ms. Wright was instructed to contact Ms. Turland and advise her of the allocation of shifts. On the evening of 3 March 1999 Ms. Wright telephoned Ms. Turland at her home. Ms. Wright's evidence was to the effect that she was most reluctant to make this call and that she felt most uncomfortable having to do so.
27. In this conversation Ms. Wright advised Ms. Turland that there was no work for her on the roster. In response to Ms. Turland's inevitable query, Ms. Wright advised that Ms. Ferry had formed the view that Ms. Turland was unreliable and was absent from work too often. In this conversation each of Ms. Wright and Ms. Turland agreed that in the time that Ms. Turland had worked with the respondent she had been absent on 3 days and that this was fewer days than other employees.
28. Ms. Turland and her husband gave evidence as to Ms. Turland's reaction to this telephone call. Ms. Turland was extremely upset and tearful after the conversation. Afterward she stated to her husband that she had been sacked and that this had occurred because she was pregnant.
29. It is important to observe that in this conversation Ms. Wright understood that she was in effect terminating Ms. Turland's employment and that at the end of

the conversation Ms. Turland understood that her employment had been terminated.

30. After this conversation, and by reason of her understanding that her employment had been terminated because she was pregnant, Ms. Turland consulted her medical practitioner. On 4 March 1999 her doctor provided a note to the effect that Ms. Turland had been unwell on 1 and 2 March 1999 but had fully recovered.
31. Ms. Turland spoke to Ms Wright and advised her of the content of the note on or around 7 March 1999. Ms. Wright gave evidence to the effect that in this conversation she stated to Ms. Turland that she wished to have Ms. Turland working (or perhaps more accurately back working) but that she was unable to do so without speaking first with Ms. Ferry. Ms. Wright undertook to speak with Ms. Ferry and did so immediately thereafter. This conversation was tense and during the course of it Ms. Wright stated to Ms. Ferry that she considered Ms. Ferry's treatment of Ms. Turland was wrong and illegal and that it amounted to sacking Ms. Turland on the basis that she was pregnant. It would seem that Ms. Radis overheard this conversation from her office which at that time adjoined that of Ms. Ferry.
32. Ms. Wright gave further evidence to the effect that Ms. Ferry suggested that Ms. Turland be offered work in the kitchen rather than hosting work. Ms. Wright considered this to be a proposal lacking genuineness. Nothing came of this suggestion in any event.
33. One other factual matter requires elaboration. There was some suggestion in some of the evidence that a reason for Ms. Ferry directing that Ms. Turland be allocated fewer shifts after early March 1999 was a desire on the part of Ms. Ferry to prefer certain friends and that shifts that might have been allocated to Ms. Turland were allocated to other designated employees at the direction of Ms. Ferry because they were friends of Ms. Ferry. Ms. Wright's evidence was that even though directions were made to prefer certain people there was at the material time a considerable understaffing. Accordingly, a desire to prefer friends of Ms. Ferry at the (in a sense) unavoidable expense of Ms. Turland is



not a plausible explanation for the manner in which Ms. Turland was treated. In any event, in light of the decision that the Tribunal has reached, and by reason of the operation of s.5 of the *Equal Opportunity Act 1984*, such an "explanation" is of little relevance.

## DECISION

34. The Tribunal is satisfied that in the circumstances described Ms. Turland was dismissed as an employee of the respondent by the respondent on 3 March 1999. The conversation between Ms. Wright and Ms. Turland on the evening of that day constituted a dismissal within the meaning of s.11(2)(c) of the *Equal Opportunity Act 1984*. Ms. Wright as the relevant officer of the respondent considered that she was dismissing Ms. Turland and Ms. Turland construed it as such.
35. The Tribunal is further satisfied that in so dismissing Ms. Turland the respondent discriminated against her on the ground of her pregnancy. The Tribunal is satisfied that Ms. Turland would not have been dismissed had she not been pregnant. The evidence of Ms. Wright in this respect is clear.
36. The Tribunal is further satisfied that the dismissal of Ms. Turland was not reasonable in the circumstances in which it occurred, within the meaning of s.10(1)(b) of the *Equal Opportunity Act 1984*. There was some evidence given in respect of a statement of Ms. Ferry to the effect that she did not wish to be responsible for the death of Ms. Turland's child.
37. In this respect, Ms. Radis gave evidence that she had worked with the respondent while pregnant. Common sense suggests that there is nothing in the nature of hosting or food and beverage service that is intrinsically or even conceivably harmful to pregnant women.
38. It will be a rare circumstance indeed that the otherwise discriminatory dismissal of a pregnant employee will be "reasonable". It would have to be expected that an employer in such a circumstance would need to establish by overwhelming medical evidence that the continuation of employment would

likely cause injury to the employee or the employee's foetus for a discriminatory dismissal of a pregnant employee to be "reasonable".

39. Accordingly, the Tribunal is satisfied that the respondent contravened s.11(2)(c) of the *Equal Opportunity Act 1984*. The Tribunal does not consider it necessary to determine whether the conduct of the respondent on or around 7 March 1999 in refusing to re-employ Ms. Turland constituted a further contravention of the Act.
40. It is notable that in the period 26 January 1999 to 8 February 1999 Ms. Turland was not allocated any shifts. This was at a time that Ms. Radis was responsible for shift allocation and after Ms. Turland had returned from 10 days holiday. It is recalled that after Ms. Turland returned from holiday and Ms. Ferry having learned of her pregnancy Ms. Ferry instructed Ms. Radis to reduce Ms. Turland's hours or "phase her out" because of her pregnancy. It is to be observed, however, that in the fortnightly shift immediately following that of 26 January 1999 to 8 February 1999 Ms. Turland was allocated 55 hours of work.
41. Be this as it may, the evidence of Ms. Radis to the Tribunal was clear. At this time she was instructed by Ms. Ferry to allocate fewer shifts to Ms. Turland because she was pregnant and Ms. Radis did so.
42. The Tribunal is satisfied that such refusal to allocate shifts during the period 26 January 1999 to 8 February 1999 constituted a denial or limitation of benefit associated with employment within the meaning of s.11(2)(b) of the *Equal Opportunity Act 1984*.
43. The Tribunal is satisfied that in so acting the respondent discriminated against Ms. Turland on the ground of her pregnancy in that Ms. Turland would not have been treated in this manner had she not been pregnant. The evidence of Ms. Radis in this respect is clear.
44. Clearly this treatment of Ms. Turland was not reasonable in the circumstances in which it occurred, within the meaning of s.10(1)(b) of the *Equal Opportunity Act 1984* for the reasons advanced above.

**COMPENSATION**

45. Section 127(b)(i) of the *Equal Opportunity Act 1984* makes no distinction between what the Common Law designates as special and general damages. This of course gives rise to an absurd consequence when regard is had to the limitation of damages able to be ordered pursuant to the section of \$40,000. There may well be cases where the victim of discrimination who has suffered an enormous hurt and humiliation by reason of such discrimination (and which would in the manner of the Common Law give rise to an award of general damages) recovers nothing in respect of it because they have suffered an actual financial loss as a result of the discrimination exceeding \$40,000 (which would in the manner of the Common Law give rise to an award of special damages).
46. It is difficult to conceive of any coherent public or other policy which is advanced by precluding appropriate and adequate compensation in such a circumstance. The terms appropriate and adequate in this sense are not emotive or applied without regard to the clear evaluative connotation that these terms carry in some contexts and senses. It is patent, however, as a matter of logic, that in the circumstance outlined above, this Tribunal may in some cases award inadequate compensation. Such a circumstance is patently inimical to the objects of the Act.
47. In this case, because Ms. Turland was dismissed from employment in contravention of the Act she suffered financial loss, being entitlements she would have received had she not been dismissed. Further, for one fortnightly shift, in the period 26 January 1999 to 8 February 1999, Ms. Turland was not allocated shifts in contravention of s.11(2)(b) of the *Equal Opportunity Act 1984*.
48. As noted above Ms. Turland was paid on an hourly basis in respect of the shifts that she worked. On the evidence that was presented to the Tribunal, it is proper to infer that had Ms. Turland not had her employment terminated she would have expected to have been allocated at least 5 shifts per week until she ceased employment in ordinary course. Shifts were of variable duration. In

determining an average number of hours, the Tribunal has inferred that the average hours that Ms. Turland worked prior to being the victim of discrimination would likely have been the average hours that she would have worked had she not been the victim of discrimination. As outlined above, in the period from when Ms. Turland commenced employment with the respondent to 12 January 1999 Ms. Turland worked as follows:

- In kitchen duties – 264.5 hours in 8 fortnightly rosters, being an average of 33.06 hours per fortnightly roster.
- In hosting duties during the day – 247 hours in 8 fortnightly rosters, being an average of 30.88 hours per fortnightly roster.
- In hosting duties at night – 26 hours in 8 fortnightly rosters, being an average of 3.25 hours per fortnightly roster.

49. This analysis gives rise to an average number of hours worked during a putative fortnightly roster of approximately 67 hours.
50. It is evident from the details of Ms. Turland's work history outlined above that toward the end of her employment with the respondent she was engaged almost exclusively in the more remunerative hosting duties. Accordingly, it is appropriate to infer that had Ms. Turland not been the victim of discrimination she would have continued to be engaged exclusively in the more remunerative hosting duties. In this respect daytime hosting duties were paid at the rate of \$12.50 per hour and night cruises at the rate of \$15.00 per hour. In determining the appropriate "blend" between night and day duties for the purpose of the assessment, the Tribunal has noted that the percentage of daytime hours bears to the whole of the hours work on hosting duties prior to Ms. Turland being the victim of discrimination was 30.88 out of 34.13, that is roughly 90%.
51. Accordingly the Tribunal has proceeded on the putative basis that had Ms. Turland not been the victim of discrimination she would worked in a fortnightly shift a total of 67 hours; that 60 of these hours would have been in day time hosting at a rate of \$12.50 per hour; that 7 of these hours would have

been in night time hosting at a rate of \$15.00 per hour. This is a total remuneration of \$855 per fortnightly roster.

52. In respect of the contravention of s.11(2)(c) of the *Equal Opportunity Act 1984* arising from Ms. Turland's dismissal, in determining the putative number of fortnightly rosters that is appropriate assess, Ms. Turland gave evidence that she intended to work up to 6 weeks before her baby was due to be born on 16 September 1999, i.e. 2 August 1999. As Ms. Turland's employment was terminated on 3 March 1999 this creates a putative 11 fortnightly cycles.
53. This analysis gives rise to a total income that Ms. Turland would have received, had she not been dismissed, of \$9,405.
54. To be added to this is a further sum of \$855 representing the sum which Ms. Turland would have earned in the period 26 January 1999 to 8 February 1999 had she not been discriminatorily denied work during this period in contravention of s.11(2)(b) of the *Equal Opportunity Act 1984*.
55. It should be noted that no claim has been made by Ms. Turland in respect of any period after what might have been an expected return to work after the birth of her baby. Likewise no claim has been made in respect of the fortnightly shift immediately following that of 26 January 1999 to 8 February 1999 during which Ms. Turland was allocated 55 hours of work. It might have been thought that a claim might have been maintained for a sum representing the difference between these allocated hours and the average putative hours of 67. In any event, as claims in respect of these matters were not advanced, the Tribunal will not assess compensation in respect of them.
56. The compensation to which this analysis gives rise is a sum of \$10,260. Subtracted from this is the sum representing Ms. Turland's actual income during the relevant periods. The Tribunal accepted evidence to the effect that in this period, Ms. Turland received income and social security payments of \$3,775.
57. Accordingly, the compensation in respect of these matters totals \$6,485.

58. 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.
59. It is evident that Ms. Turland suffered a great deal of distress and hurt as a result of her treatment by the respondent. Ms. Turland's evidence in this respect was understated, though undoubtedly, she was deeply affected by these events. Ms. Turland's husband gave evidence as to Ms. Turland's reaction on the evening that she was dismissed. Ms. Turland was upset and tearful.
60. Of course, this is of little surprise. Ms. Turland's treatment by the respondent was shameful. In particular, for Ms. Ferry to have in a most cowardly way personally avoided dealing with Ms. Turland and forcing this perfidious task upon others must have caused additional humiliation to Ms. Turland. Further, the manner in which the respondent has sought to simply ignore this inquiry has doubtless added significantly to Ms. Turland's distress. It can be inferred that the sentiment expressed by the representative of the respondent from the Chamber of Commerce and Industry when this complaint came before the Tribunal for directions on 10 November 2000 to the effect that there was "no point" in the complaint proceeding, doubtless added to Ms. Turland's distress.
61. In the circumstances of this case, the Tribunal has resolved that a sum of \$10,000 ought be ordered to be paid by the respondent to Ms. Turland in respect of this hurt and humiliation.
62. As noted, the respondent has not participated in this inquiry. A copy of these reasons will be sent to the registered office of the respondent and to the Chamber of Commerce and Industry who previously acted in this matter for the respondent; the latter in the expectation that the Chamber of Commerce and Industry will forward a copy of these reasons to the respondent.
63. It is a matter of grave concern to the Tribunal that the respondent has sought to simply ignore this inquiry. Patently the conduct of the respondent and its officers in the treatment of Ms. Turland and the response to this inquiry displays an unacceptable ignorance of basic obligations of employers and

responsibilities of civilized members of society that ought to be clearly understood.

64. Accordingly, pursuant to s.127(b)(i) of the *Equal Opportunity Act 1984*, it is ordered that the respondent pay to Ms. Turland damages of \$16,485.
65. Further, pursuant to s.127(b)(iii) of the *Equal Opportunity Act 1984*, it is ordered that:
  1. The respondent procure that Ms. Helen Ferry attend before this Tribunal at 9.00 am on 18 December 2001 for the purpose of having these reasons read to her by the Tribunal.
  2. In the event that the respondent is unable to procure that Ms. Helen Ferry attend before this Tribunal at 9.00 am on 18 December 2001 for the purpose of having these reasons read to her by the Tribunal, a director of the respondent shall attend before the Tribunal at this time to explain the steps taken by the respondent to have procured that Ms. Helen Ferry attend before this Tribunal.