

JURISDICTION : EQUAL OPPORTUNITY TRIBUNAL OF
WESTERN AUSTRALIA

LOCATION : PERTH

CITATION : MILLER V MILLER

CORAM : Deputy President: B DHARMANANDA
Deputy Members: M FADJIAR and A WILLIS

HEARD : 11 SEPTEMBER 2001

DELIVERED : 11 OCTOBER 2002

FILE NO/S : ET/2000-000019

BETWEEN : PATRICIA MILLER
Complainant

AND

MARIE MILLER
Respondent

Catchwords:

Equal Opportunity - dismissal on ground of impairment

Legislation:

ss 5, 66A, 66B, 66Q, 120 & 127, *Equal Opportunity Act 1984 (WA)*

Result:

Application allowed

Representation:

Counsel:

Applicant : Mr A Macdonald
Respondent : In person

Solicitors:

Applicant : Legal Officer, Equal Opportunity Commission
Respondent : Nil

Case(s) referred to in judgment(s):

Churchill v Town of Cottesloe (1993) EOC 92-503
McCarthy v Metropolitan (Perth) Passenger Transport Trust (1993) EOC 92-546
Pickering v Kevron Pty Ltd (1995) EOC 92-726

Case(s) also cited:

Martin v Cerebral Palsy Association of Western Australia (1999) EOC 92-991
McIntosh v Hautileau Pty Ltd (1999) EOC 92-986

JUDGMENT OF THE TRIBUNAL:

Introduction

- 1 At issue in this matter is whether the respondent, Marie Miller, contravened s 66B(2)(c) of the *Equal Opportunity Act 1984 (WA)* by dismissing the complainant, Patricia Miller, from employment because the complainant suffered from arthritis. Section 66A provides that discrimination occurs if, on the ground of impairment, the discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person who does not have such an impairment. (Unless otherwise indicated, a reference to a section is a reference to a section of the *Equal Opportunity Act*.)
- 2 Section 66B(2)(c) provides that it is unlawful for an employer to discriminate against an employee on the ground of the employee's impairment "*by dismissing the employee*". But, s 66Q(1) provides that s 66B(2)(c) is not contravened:

"if it is reasonable for the employer ... to conclude, on such grounds as having regard to the circumstances of the case and having taken all reasonable steps to obtain relevant and necessary information concerning the impairment it is reasonable for the employer ... to rely on, that the person with the impairment because of that impairment -

 - (a) *would be unable to carry out work reasonably required to be performed in the course of the employment ...; or*
 - (b) *would, in order to carry out that work, require services or facilities that are not required by persons who do not have an impairment and the provision of which would impose an unjustifiable hardship on the employer"*.
- 3 However, it is clear from s 66Q(1) itself that it applies only if the employer reasonably concludes on reasonable grounds that the person with the impairment would be unable to carry out work reasonably required to be performed. Equally, because of s 5, the discriminatory conduct need not be the dominant or substantial reason for the doing of the act, the subject of the complaint. Section 5 provides that a reference to the doing of an act on the ground of a particular matter includes a reference to the doing of an act on the ground of two or more matters that

include the particular matter, “*whether or not the particular matter is the dominant or substantial reason for the doing of the act*”.

The evidence

- 4 Only the complainant gave evidence. Although the respondent could have given evidence if she desired, she was content to rely on the written information she had provided the Tribunal and the Equal Opportunity Commission.
- 5 Having seen the complainant give evidence, the Tribunal was satisfied that she was a credible witness who gave evidence honestly and without attempting to evade the issue or side step difficult questions. The Tribunal accepts the complainant’s evidence. The Tribunal finds, from the evidence, that the complainant has had arthritis in her knees and lower back for several years; at the relevant time she received disability pension for this; but that the complainant has been able to work, despite this “*disability*” and has not experienced any difficulties in her work. The complainant has had arthritis for about 14 or 15 years. She used to take medication for this but now is on “*natural medication*” [see transcript at 5], which she prefers. The arthritis does not, in any material sense, restrict what the complainant can do physically.
- 6 The complainant has had a number of jobs including working in the cash department at Leeds Polytechnic; working as an officer manageress; doing relief work “*on the mines, relief work in the offices and in the kitchens up on the mine sites*” [see transcript at 7]. When doing this work, there were no complaints about her ability to perform because of her arthritis.
- 7 It is common ground that the respondent was at all material times the sole proprietor of the Narrikup Abattoirs canteen. Mr Peter Allan Kinnane swore an affidavit on 30 July 2001, which affidavit was admitted into evidence without objection. Mr Kinnane explains that in about July 1999, the respondent mentioned to him that the respondent was looking for an assistant to help her in the canteen. Mr Kinnane’s wife had previously told him that the complainant was looking for work. He gave the respondent, the complainant’s telephone number.
- 8 The complainant gave evidence that the respondent did telephone the complainant and offered her a job, assisting in the canteen. This telephone conversation was said to have occurred on 22 July 1999. During the telephone conversation, the complainant did inform the

respondent that she was on a “*pension*” but did not detail that she had an impairment and was on a “*disability pension*” [see transcript at 8].

- 9 The complainant started work on Monday, 2 August 1999. The last day the complainant worked was Wednesday, 4 August 1999. It is common ground that the respondent was not present and did not directly oversee the complainant’s work. The complainant was present at the canteen for no more than an hour or so. There was another employee, Julie Pinchen, who worked with the complainant.
- 10 While working at the canteen, the complainant “*made sandwiches and washed up; cleaned down everything; served people when they came in; made tea and coffee as they needed it and anything that needed doing*” [see transcript at 9]. During the few days she worked at the canteen, no one told the complainant that there were difficulties with the complainant’s work. In fact, Ms Pinchen commented that the complainant would fit in because she had a good sense of humour. The complainant recalls that she told Ms Pinchen, in conversation, that she was on a disability pension and suffered from arthritis in her back.
- 11 On Tuesday, 3 August 1999, the respondent gave a tax form to the complainant and requested her to fill this in. The complainant completed the form on the evening of Tuesday, 3 August 1999 and gave it to the respondent.
- 12 On the evening of Wednesday, 4 August 1999, the respondent telephoned the complainant at home and said that the respondent couldn’t employ the complainant “*any more because I’d got arthritis and she stated that her insurance wouldn’t cover me if I had an accident*” [see transcript at 12]. In his affidavit, Mr Kinnane said on oath that he had asked the respondent “*why [the complainant] wasn’t working for her anymore. [The respondent] replied that she was happy with [the complainant’s] work and thought she fitted in well, but she was concerned that her workers compensation insurance would not cover her because of [the complainant’s] arthritis, and that is why she had to dismiss her*” [see para 7].
- 13 The respondent’s first response to the Equal Opportunity Commission of 6 September 1999 was tendered without objection. The respondent said:
- “[The complainant] was not dismissed because of the arthritis but because she is unsuitable for the position. The position needs someone who can work at a considerable pace and without*

constant supervision. Unfortunately I didn't tell her this because I didn't want to hurt her feelings.

The arthritis is also of particular concern because she told Julie, quote 'I'm on a disability pension because I'm riddled with arthritis.' She also begged Julie not to tell me this.

I am required by law to cover my workers with compensation insurance which I have with [an insurer] who informed me that any accident or injury in which [the complainant] would be the cause would be at my risk.

We work in a canteen kitchen with a deep fryer full of oil that is heated at 180° all day, [the complainant] is unable to lift a basket of fries from it. My concern with that is that if she was to drop the basket back into the oil that not only she but anyone near her would also be burnt. I am not prepared to take that risk."

- 14 The complainant denied that she told Ms Pinchen she was "riddled" with arthritis and the Tribunal accepts her evidence. Although the respondent denied having dismissed the complainant because of her arthritis, as is made clear from her own response of 6 September 1999, she was concerned about the insurance risks posed by the complainant's arthritis. The respondent did not, in the end, put forward any credible evidence to support her arguments that the complainant was not able to lift the deep fryer nor that she could not work without supervision. Ms Pinchen was not called to give this evidence. Unfortunately, the complainant has lost track of her.
- 15 The complainant was questioned about her ability to lift the deep fryer. The complainant gave evidence to the effect that she had no difficulty lifting the fryer but explained that there is a difference between lifting the fryer and "throwing hot chips about" [see transcript at 37]. The complainant honestly explained that she had told Ms Pinchen that she wasn't used to cooking and Ms Pinchen had to teach her. The complainant said she was careful taking hot chips and shaking them before putting them in the tray. In contrast, there was simply no evidence to the effect that, because of her condition, the complainant could not perform at work and could not lift the deep fryer.
- 16 As explained above, the respondent was not present and did not directly oversee the complainant's work and, in fact, another employee, Ms Pinchen, worked with the complainant. This is a significant difficulty

for the respondent's defence. Ms Pinchen was not called to give evidence and the respondent flatly conceded that, without details from Ms Pinchen, it was difficult for the respondent to run her defence. The respondent said she had difficulty cross examining the complainant because she did not know exactly what had happened and could not easily contradict the complainant's evidence. It was Ms Pinchen who saw what had happened but, unfortunately, the complainant has lost track of her and could not call her to give evidence. In the respondent's words [see transcript at 36], "*It's what I've been told, and if I ask [the complainant] that and she says, well, yes, she could do it, what do I do then? I wasn't there. I didn't see her do it. I didn't see the incident. I can't make a comment from a third point.*"

- 17 The complainant said she was devastated by being dismissed; that she was really upset; and she was shocked.

The respondent contravened the *Equal Opportunity Act*

- 18 Given the above findings of fact, the Tribunal considers that, in contravention of s 66B(2)(c), the respondent, as an employer, unlawfully discriminated against the complainant on the ground of her impairment by dismissing her. The complainant was treated less favourably because of her arthritis: see eg **Pickering v Kevron Pty Ltd** (1995) EOC 92-726. This was at least one reason why the respondent dismissed the complainant, and that is sufficient to found liability: s 5. The fact that the respondent was concerned about her insurance risks is not to the point. The respondent treated the complainant less favourably because of her arthritis.
- 19 The Tribunal has considered whether s 66Q assists the respondent. In terms of that section, the question is whether it was reasonable for the respondent to conclude, in the relevant circumstances and "*having taken all reasonable steps*" to obtain all necessary information concerning the complainant's arthritis, that the complainant would be unable to carry out work reasonably required of her at the canteen: see eg **Pickering v Kevron Pty Ltd** (1995) EOC 92-726; **Churchill v Town of Cottesloe** (1993) EOC 92-503.
- 20 First, there was no evidence to support the conclusion that the respondent had taken all reasonable steps to obtain all necessary information to reasonably determine the complainant would, in fact, be unable to carry out work reasonably required of her at the canteen. Second, and in any event, there was no evidence at all to support the conclusion that the

complainant was, in fact, unable to carry out work reasonably required of her at the canteen. The complainant gave unchallenged evidence that she was able to perform what was reasonably required of her at the canteen; and that she was, in this regard, unaffected by her arthritis.

Damages

- 21 By s 127, the Tribunal may order the respondent to pay to the complainant damages for any loss or damage suffered by reason of the respondent's conduct. The relevant principles are not in doubt and the Tribunal needs to compensate to ensure that, among other things, matters of this sort are not trivialised: see eg **McCarthy v Metropolitan (Perth) Passenger Transport Trust** (1993) EOC 92-546.
- 22 The complainant claims \$1,994.85 for some 13 weeks of employment that she says she might have had the benefit of, but for her dismissal on discriminatory grounds. The \$1,994.85 is calculated by multiplying her hourly rate of \$12.58 by the 30 hours she would have worked per week by 13 weeks, and subtracting from that the disability pension she would have received over the 13 weeks of \$2,911.35 (\$447.90 per fortnight). Subject to the next paragraph, the Tribunal considers that this is a fair estimation of the complainant's loss.
- 23 The Tribunal also considers that the complainant is entitled to general damages because she was hurt by what happened. The Tribunal considers that the complainant is entitled to the further sum of \$3,000 by way of general damages. The Tribunal therefore orders the respondent to pay to the complainant damages of \$4,994.85. There will be no order as to costs.

