

JURISDICTION : EQUAL OPPORTUNITY TRIBUNAL OF
WESTERN AUSTRALIA

LOCATION : PERTH

CITATION : SCHULZE & TUINAPHIANG V THE WESTERN
AUSTRALIAN MINT

CORAM : Deputy President: B DHARMANANDA
Deputy Members: T ACKLAND and Z PAL

HEARD : 20 AND 21 JUNE 2002

DELIVERED : 15 NOVEMBER 2002

FILE NO/S : ET/2000-000026 & ET/2000-000027

BETWEEN : SIRIPHON LINDA SCHULZE
and
JINDA TUINAPHIANG
Complainants

AND

THE WESTERN AUSTRALIAN MINT &
INDUSTRIAL PERSONNEL COMPANY PTY LTD
Respondents

Catchwords:

Equal Opportunity - alleged discrimination on ground of race in area of employment

Legislation:

Equal Opportunity Act 1984 (WA), ss 36 & 37

Result:

Complaints dismissed

Representation:

Counsel:

Complainants : Ms Y Henderson
Respondent : Mr D Ellis

Solicitors:

Complainant : Gibson & Gibson
Respondent : Freehills

Case(s) referred to in judgment:

Australian Iron and Steel Pty Ltd v Banovic (1987) 168 CLR 165
D'Souza v Geyer (1996) HREOC H94/100
Fernandes v State of New South Wales [1999] NSWADT 32
Fletcher Challenge Canada Ltd v Brishish Columbia (Council of Human Rights) (1992) 97 DLR (4th) 550
Macedonian Teachers v HREOC (1998) 160 ALR 489
Waters v Public Transport Corporations (1991) 173 CLR 349

Case(s) also cited:

Fenwick v Beveridge Building Products Pty Ltd (1985) 62 ALR 275
KLK Investments v Riley (1993) 31 ALD 747

JUDGMENT OF THE TRIBUNAL:

Introduction

- 1 By consent, the complaints of Siriphon Linda Schulze and Jinda Tuinaphiang against The Western Australian Mint (**Perth Mint**) were heard together. The two complaints arose from similar circumstances. In each complaint, an allegation is made that the Perth Mint, through its employee, Paul Crowden, engaged in racially discriminatory behaviour, essentially because the Perth Mint "*instructed*" or "*told*" the complainants that they could not speak in their native language (namely the Thai language) in the workplace in about October 1999, in contravention of ss 36 and 37 of the *Equal Opportunity Act 1984* (WA).
- 2 At the hearing, evidence was given by the complainants, Mr Crowden, Ganyella Martino and John Patrick Neri. This evidence will be reviewed and, in the case of factual disputes, findings of fact will be made. But, first, it is necessary to put the matter in its statutory context by referring to ss 36 and 37. Section 37 provides that it is unlawful for an *employer* to discriminate against a person on the ground of that person's race, materially, in the terms or conditions of employment that the employer affords the employee (s37(2)(a)); by dismissing the employee (s 37(2)(c)); or by subjecting the employee to any other detriment (s 37(2)(d)).
- 3 Section 36(1) provides that discrimination on the ground of race occurs if, "*on the ground of*" race, or a characteristic that appertains or is generally imputed to persons of that race, the discriminator treats the aggrieved person less favourable than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person of a difference race. In the Tribunal's view, these words "*on the ground of*", when they occur for the second time, in s36(1) are important and need to be given meaning. There is a significant issue between the parties about whether the Perth Mint requested or instructed the complainants not to speak in the Thai language in the workplace "*on the ground of*" their race or because there was an attempt by Mr Crowden, however misguided, to address issues between staff members. That is a significant factual issue, on which there was dispute.
- 4 Section 36(2) provides that discrimination on the ground of race also occurs if the discriminator requires the aggrieved person to comply with a

requirement or condition:

- (a) *“with which a substantially higher proportion of persons not of the same race as the aggrieved person comply or are able to comply;*
- (b) *which is not reasonable having regard to the circumstances of the case; and*
- (c) *with which the aggrieved person does not or is not able to comply.”*

There is a significant issue between the parties about whether the Perth Mint’s request or instruction to the complainants not to speak in the Thai language in the workplace was *“not reasonable having regard to the circumstances of the case”*. There is also a significant issue between the parties about whether the Perth Mint’s request or instruction to the complainants not to speak in the Thai language in the workplace was a *“requirement or condition”* with which each of the complainants *“does not or is not able to comply”*.

- 5 The Tribunal will return to the legal issues that are thrown up by the above after reviewing the evidence, in some detail.

The evidence

- 6 Ms Schulze gave evidence to the following effect.

- Ms Schulze came to work at the Perth Mint after having heard of an available position there through a friend. She contacted Industrial Personnel Company Pty Ltd (**Industrial Personnel**) to get the job. She went for an interview and successfully completed a written test. Ms Schulze had worked for some 18 years in WA (including in the North-West of WA). She was asked whether she was able to operate machines. Different machines are used at the Perth Mint. When Ms Schulze was interviewed, nobody raised with her any issue about her ability to speak the Thai language in the workplace. She was not told that she couldn’t do so. Ms Schulze started work at the Perth Mint a couple of days after her interview.
- At the Perth Mint, Ms Schulze worked on a number of different tasks and different machines. She worked on the night shift. With some tasks (eg weighing gold), more than one person worked on it at any given time. People of different ethnic backgrounds worked

at the Perth Mint. They sometimes spoke their own native language at the workplace (eg Maori English and Thai was spoken). Ms Tuinaphiang taught Ms Schulze how to use a particular machine, the "*rimmer machine*". Ms Tuinaphiang taught Ms Schulze in the Thai language. Mr Crowden apparently knew that Ms Tuinaphiang taught Ms Schulze in the Thai language. Ms Schulze also taught another Thai person, Ms Ganyella Martino (whom Ms Schulze referred to as "*Kay*") how to use the machines in the Thai language. Apparently Mr Crowden also knew about this.

- There was another person who worked at the Perth Mint. Her name was Jackie Doherty. In examination in chief, Ms Schulze said that she had "*no problem*" with Ms Doherty. She said that the workplace was a very happy one. Although asked about the workplace and "*relations with other people*" at the workplace in examination in chief, Ms Schulze did not describe *any* issues between her and Ms Doherty. This was contrary to other evidence presented to the Tribunal. Under cross examination, Ms Schulze first reasserted her view that she had no problem with Ms Doherty but then accepted that Mr Crowden told Ms Schulze she had to speak to everybody in the section and this was because there were some people she was not speaking to in the section. Under cross examination, Ms Schulze then gave evidence to the effect that she did have a dispute with Ms Doherty but did not give any details of that dispute.
- Under cross examination, Ms Schulze accepted that there were problems in the workplace and because of this, a document was prepared to try and improve the atmosphere and everyone, including Mr Crowden and Ms Schulze signed the document. The document (**Workplace document**) stated:

"Night Shift Workers

Complaints or issues to do with any other person or person's Must be recorded in writing and given to me. I will not waste my Precious work time and of course your work time on issues. Stealing productivity of my shift is not acceptable. I shall deal with such matters by the end of my shift.

Any gossiping or complaining by certain persons or persons will be Noted by all staff to inform me (NAME) of person only.

If same name is mentioned again and again certain action will be undertaken.

We are here to work, so keep focused on the quality of your productivity.

TEAMWORK IS ACCENTUATING THE POSITIVE

PAUL”

- Under cross examination, Ms Schulze accepted that Mr Crowden’s boss, Phil Kruger, visited the workplace and met with Ms Schulze, Ms Tuinaphiang and Ms Doherty to try and resolve the issues between them. In re-examination, Ms Schulze accepted that there was a dispute between her and Ms Doherty and (finally) said that it related to Ms Doherty complaining to other workers that Ms Schulze had not finished her job - this related to Ms Doherty’s apparent allegation that Ms Schulze had not changed the water in one of the machines, after working at the machine.
- Apparently, in early October 1999, Mr Crowden swore in front of Ms Schulze and Ms Doherty (using the word “f**k” or “f**king”) when one of the machines didn’t operate properly and mistakes had been made with some of the gold, which was “not perfect or underweight”. Ms Schulze complained to Industrial Personnel about this.
- On or about Sunday, **10 October 1999**, Ms Schulze was working on the night shift at the Perth Mint. Mr Crowden called her into his office after the “lunch break”, after about 3am. She was shown a document entitled “Competency Appraisal Form” dated “17/10” by Mr Crowden. Mr Crowden filled out that document and Mr Crowden, giving his view as to Ms Schulze’s performance, had placed ticks in the different boxes. Ms Schulze was asked to sign the document and she did so. At that time, the box at the bottom of the page entitled “Performance summary & recommendations” was left blank. Under cross examination, Ms Schulze said that Mr Crowden did not criticise her performance at any time and he did not pick on Ms Schulze.

- After Ms Schulze signed the document dated “17/10”, apparently Mr Crowden said to Ms Schulze “*By the way, from now on you are not allowed to speak Thai at the workplace*”. He said this was a new rule. Ms Schulze asked whether Mr Crowden was going to tell the other Thai people, Ms Tuinaphiang and Ms Martino, about this new rule. Apparently, in answer to this, Mr Crowden requested Ms Schulze to get Ms Tuinaphiang and Ms Martino to come to his office. Apparently, Mr Crowden did not give any reasons for this new rule.
- It appears Ms Schulze went and got Ms Tuinaphiang and Ms Martino. While she was getting Ms Tuinaphiang and Ms Martino to go to Mr Crowden’s office, Ms Schulze apparently told *another* Thai person, someone called Deng, who was also working on night shift that they were not allowed to speak Thai at the workplace. Ms Schulze emphatically gave evidence that she was not present in the office when Mr Crowden spoke to Ms Tuinaphiang and Ms Martino. Under cross examination, Ms Schulze maintained her version that she was not present when Mr Crowden spoke to them.
- On or about Monday, 11 October 1999, when Ms Schulze said “*hello*” in Thai to Ms Martino during the nightshift, Ms Martino ignored her.
- During the “*next 2 or 3 days*” a further incident occurred. Ms Schulze was working on the bench with Ms Tuinaphiang and Ms Martino. Ms Schulze was sitting next to Ms Tuinaphiang who was sitting next to Ms Martino. Apparently, Ms Schulze heard “*every word*” of the conversation between Ms Tuinaphiang and Ms Martino. Apparently Ms Tuinaphiang told Ms Martino that Ms Tuinaphiang’s husband had said that the new rule was discriminatory. To this, Ms Martino responded by screaming out and requested Ms Tuinaphiang to leave her alone, saying that she did not want to be involved. After that, Ms Martino went and saw Mr Crowden. Then, Mr Crowden took Ms Tuinaphiang into his office and talked to her. Apparently, a Maori person said that they were going to sack Ms Tuinaphiang because she was causing problems. That evening, Ms Martino went home early because she was very stressed. Under cross examination, Ms Schulze denied that the incident occurred because Ms Tuinaphiang was saying rude and offensive things to Ms Martino.

- After Ms Martino went home, Ms Tuinaphiang went to speak to Mr Crowden who said *"it's out of my hands. This is - it's up to the big boss. You were the one that started [the problem]"*.
- Ms Schulze said that after the incident involving Ms Tuinaphiang and Ms Martino, things got worse at the workplace and she started taking her *"lunch break"* in her car. She then contacted Industrial Personnel and said that she wanted to resign because the workplace was no longer pleasant. Under cross examination, Ms Schulze appeared to accept that she started taking her *"lunch break"* in her car partly because *Ms Doherty*, rather than Mr Crowden, had continued to say that Ms Schulze should not speak Thai.

7 The Tribunal will make findings of fact below, after all the evidence is reviewed. However, at this point, it must be noted that the Tribunal found Ms Schulze a somewhat evasive witness who was, in particular, unwilling to explain, with clarity, exactly what had occurred in the workplace between herself and Ms Doherty. Ms Schulze did not appear to give evidence candidly and openly about the nature of the dispute and issues between her and Ms Doherty. Ms Schulze focused on her complaints against Mr Crowden and, in the Tribunal's view, was evasive when giving evidence about her dispute with Ms Doherty.

8 Ms Tuinaphiang gave evidence to the following effect.

- Ms Tuinaphiang came to work at the Perth Mint after having been told about the job by her Thai friend, Dang. She contacted Industrial Personnel, went for an interview, filled in a form and was given the job. She asked to work on the night shift. She started work at the Perth Mint on or about 22 April 1999. At first, her supervisor was Neil McPhee. Mr Crowden replaced him. At the Perth Mint, Ms Tuinaphiang worked on a number of different tasks and different machines. Ms Schulze started work at the Perth Mint after Ms Tuinaphiang. Ms Tuinaphiang had not met Ms Schulze before. They spoke in Thai at the workplace and Mr Crowden was aware of this. Ms Tuinaphiang helped Ms Schulze at the workplace. Other people at the Perth Mint spoke other languages including Maori English.
- Ms Doherty was a fellow worker. Although Ms Tuinaphiang said in examination in chief that a dispute or disagreement did exist with Ms Doherty, she did not give a clear explanation as to the nature of

the dispute. Instead, Ms Tuinaphiang, at one stage suggested that the dispute arose *after* Mr Crowden said that they should not speak Thai in the workplace. Ms Tuinaphiang did say that one of the issues with Ms Doherty was that she complained about Ms Tuinaphiang and Ms Schulze speaking in Thai, to the exclusion of Ms Doherty. Ms Tuinaphiang was somewhat evasive in explaining the nature of the dispute between Ms Schulze and Ms Doherty but she said that it related to Ms Doherty requesting Ms Schulze to assist in changing the water on one of the machines.

- Under cross examination, Ms Tuinaphiang accepted that Ms Doherty was always yelling at Ms Schulze; and accepted that Ms Doherty made negative comments about Ms Schulze speaking in Thai. Under cross examination, Ms Tuinaphiang said that she did have conversations with Ms Doherty when Ms Doherty said that Ms Tuinaphiang should not speak in Thai. Interestingly, without responding to a direct question in this regard, Ms Tuinaphiang said, under cross examination, that "*When I speak Thai I don't talk bad anyone*". (As discussed below, the Tribunal finds that there were disputes or disagreements between Ms Tuinaphiang and Ms Schulze on the one hand and Ms Doherty on the other. As discussed below, the Tribunal draws the inference that Ms Tuinaphiang and Ms Schulze were excluding Ms Doherty, by their exclusionary discussions in the Thai language.)
- Under cross examination, Ms Tuinaphiang accepted that the Workplace document was a way of dealing with complaints or grievances or unhappiness in the workplace. Under cross examination, Ms Tuinaphiang said that there was a meeting between Mr Kruger, Ms Tuinaphiang, Ms Schulze and Ms Doherty, where Mr Kruger attempted to resolve the issues between them, but said that it had nothing to do with Ms Tuinaphiang. Under cross examination, Ms Tuinaphiang did not adequately respond to the questions as to whether Ms Doherty felt that she was being left out by Ms Tuinaphiang and Ms Schulze. Ms Tuinaphiang said that Mr Crowden did not listen to Ms Schulze's version of the facts and accepted Ms Doherty's version.
- Under cross examination, Ms Tuinaphiang denied that she had had a disagreement with Ms Doherty in the car park.
- On or about Sunday, 10 October 1999 or in the early morning of Monday, 11 October 1999, Ms Schulze was called into

Mr Crowden's office. After about 15 minutes, Ms Schulze came out of Mr Crowden's office and asked Ms Tuinaphiang and Ms Martino to go to Mr Crowden's office. Then, Mr Crowden told Ms Tuinaphiang and Ms Martino "*Hey you girls, I don't want you guys to speak Thai here*". Apparently, Mr Crowden did not give any reasons for this. Ms Tuinaphiang said that Ms Schulze was not present during this discussion. Under cross examination, it was put to Ms Tuinaphiang that Ms Schulze was present during her meeting with Mr Crowden and it was pointed out that Ms Schulze had previously signed a document stating this, which had been used in support of Ms Tuinaphiang's complaint. Despite this, Ms Tuinaphiang attempted to evade the question before finally asserting that Ms Schulze was not present during the meeting. Ms Tuinaphiang did not satisfactorily explain why Ms Schulze returned to Mr Crowden's office with Ms Tuinaphiang and Ms Martino if, in the end, on her evidence, Ms Schulze was not present during the meeting. Under cross examination, Ms Tuinaphiang denied that Mr Crowden spoke about Ms Doherty during this meeting.

- After this, Ms Tuinaphiang informed Industrial Personnel about what Mr Crowden had requested and said she was not happy at work. Industrial Personnel said that they would "*sort it out*".
- Later, Mr Kruger came to the night shift and spoke with Ms Tuinaphiang and others. Apparently Mr Kruger did not do anything about Mr Crowden's request but, instead, told Ms Tuinaphiang to "*go back to work*". After Mr Crowden's request, Ms Tuinaphiang was not happy at work and she did not take her breaks.
- A further incident occurred. Ms Schulze was sitting next to Ms Tuinaphiang who was sitting next to Ms Martino. Apparently, Ms Doherty was sitting next to Ms Martino. Ms Tuinaphiang spoke with Ms Martino and, apparently, said in Thai that she was going to complain about the discrimination. Ms Tuinaphiang said that she spoke in Thai nicely and inquired as to whether Ms Martino would join in the complaint. Ms Martino replied that she did not want to be involved; she cried and went to Mr Crowden. Ms Martino wanted to go home early. Ms Martino did go home early. After that, Ms Crowden said that the matter was out of his hands and it was up to the boss. Before she left work, Ms Tuinaphiang asked Mr Crowden whether he wanted her

to come back to work, to which Mr Crowden said "*it's up to you. You are big trouble-maker*".

- Ms Tuinaphiang contacted Industrial Personnel and asked them what she could do. She did not return to work at the Perth Mint.

9 Again, the Tribunal will make findings of fact below, after all of the evidence is reviewed. However, at this point, it must be noted that the Tribunal found Ms Tuinaphiang a somewhat evasive witness who was underplaying the nature of the dispute with Ms Doherty and underplaying her involvement in the dispute, suggesting that it was a matter between Ms Schulze and Ms Doherty.

10 Mr Crowden gave evidence to the following effect.

- Mr Crowden was at material times a casual full-time worker at the Perth Mint. At the relevant time, he was the acting leading hand on the night-shift. Mr Crowden explained the work that he supervised at the Perth Mint. The work involved the rolling down of gold bars into strips and then "*blanking*" them out into coins (coins which have no rim etc are called blanks) and then putting them through a rimmer machine, which pushes a rim around the edge of the blank. Then, the coins are weighed and pickled in acid.
- Mr Crowden did not receive any formal training before he was made the acting leading hand on the night-shift. Each of Ms Tuinaphiang, Ms Schulze and Ms Martino worked at the Perth Mint when Mr Crowden was the acting leading hand. They were able to speak English relatively well and, generally, understood Mr Crowden's instructions, unless he spoke too fast.
- Mr Crowden said that Ms Tuinaphiang and Ms Schulze were good workers. Mr Crowden gave them a performance appraisal once a month. He dated the performance appraisal when he completed the appraisal, using a "*Competency Appraisal Form*". As to comments under the heading "*Performance summary and recommendations*" in the form, he made these comments after the form had been signed by the person appraised. He did this after the appraisal to make a decision about whether they should get an "*upgrade*" or "*promotion*". Mr Crowden gave evidence that it was his practice to date the form when he completed his review. The form dated "*17/10*" was dated by Mr Kruger on 17 October 1999.

- Trouble developed in the workplace during the night-shift. Mr Crowden reported this to Mr Kruger. Different workers told Mr Crowden *"The ladies are having arguments with each other. They're not getting along."* Mr Crowden gave evidence about different incidents where it was clear that there were disputes between Ms Schulze (and Ms Tuinaphiang) on the one hand and Ms Doherty on the other. Mr Crowden said that Ms Doherty was a new employee who Mr Crowden taught the basics of how to use a particular *"de-pleating"* machine. He then left her to work. When he returned, he saw Ms Doherty and Ms Schulze having an argument about how best to operate the *"de-pleating"* machine. Apparently, Ms Schulze tried to show Ms Doherty some short cuts in using the machine and this confused Ms Doherty. When Ms Doherty said that she wanted to work the machine as Mr Crowden had taught her, an argument arose between Ms Doherty and Ms Schulze.
- In relation to other matters, at some stage, Mr Kruger told Mr Crowden that it was inappropriate for Mr Crowden to say that people would be sacked, referring to a statement Mr Crowden had made about what would happen if people did not do things properly. Mr Kruger also told Mr Crowden that it was inappropriate to swear in the workplace, referring to complaints that had been made about Mr Crowden.
- Mr Crowden said there were ongoing problems between Ms Schulze and Ms Tuinaphiang on the one hand and Ms Doherty on the other. He described them as misunderstandings in the workplace. Ms Doherty complained to Mr Crowden about these problems. Mr Crowden said that Ms Doherty complained about, and at a later stage Mr Crowden personally observed, Ms Schulze and Ms Tuinaphiang talking Thai together in the workplace, *"leaving [Ms Doherty] aside"*, while all three of them were working on the same machine. Mr Crowden also said that their arguments related to disputes they had in *"organising their work"*.
- Lavina Peters, another person who worked on the night shift at the Perth Mint, wrote the Workplace document. Mr Crowden did not write it, even though it appears as if it was a directive from him. Ms Peters wrote it *"because she was getting sick of listening to the bickering between the ladies and that, so she wanted to try and see whether she could actually try to help resolve it as well. So she actually implemented this"*. After Ms Peters had prepared the

Workplace document, she gave it to Mr Crowden. Mr Crowden read it and discussed it with Ms Peters. He decided to endorse it and signed it. He did not think it could do any harm and thought it might improve the situation. Mr Crowden was cross examined at a little length about the contents of the Workplace document and its merit. Mr Crowden maintained that he did not prepare the document but he was willing to use it in an attempt to solve the problems that had arisen.

- Mr Crowden accepted that he asked Ms Schulze to talk to the other workers. He asked "*everybody to try and get along with each other*".
- Mr Crowden received some talcum powder and aftershave from Ms Schulze as tokens of appreciation. This occurred after everyone signed the Workplace document.
- Mr Crowden heard probably from a Jason Taylor, another co-worker, about an incident in the car park involving Ms Doherty and Ms Tuinaphiang. He heard that apparently Ms Tuinaphiang went into the car park and verbally abused Ms Doherty - "*gave her a bit of a mouthful. That's all*". This occurred at the end of the night shift when everyone was going home.
- Once, Ms Doherty came to see Mr Crowden in tears. She complained about Ms Schulze and Ms Tuinaphiang talking Thai in the workplace, to her exclusion. Ms Doherty said that she could tell from their body language that they were speaking about her and that it was making her feel uncomfortable. Under cross examination, Mr Crowden said that Ms Doherty complained that she felt left out. Under cross examination, Mr Crowden appeared to accept that a person who could not understand the language being spoken by others would always be left out. But, Mr Crowden said that it was more than that which was of concern - Ms Schulze and Ms Tuinaphiang were talking about Ms Doherty or so he thought or was led to believe by Ms Doherty who was very upset by this conduct. Mr Crowden "*sussed*" it out himself and concluded that Ms Schulze and Ms Tuinaphiang were, in fact, talking about Ms Doherty in Thai. Under cross examination, Mr Crowden accepted that he did not enquire of Ms Schulze and Ms Tuinaphiang about whether they were, in fact, talking about Ms Doherty.

- Under cross examination, Mr Crowden said that he tried to resolve the “bickering” between Ms Schulze, Ms Tuinaphiang and Ms Doherty by talking to each of them and getting their different versions of events and trying to get them to get along with each other. Mr Crowden said he also spoke to others about the matter. But, he said he did not speak to anyone in management who was responsible for Equal Opportunity issues before taking the steps described below. Under cross examination, Mr Crowden explained that it was not possible to solve the problem by separating Ms Schulze, Ms Tuinaphiang and Ms Doherty because it was a small area in which they worked.
- In an attempt to resolve the problems, Mr Crowden requested Mr Kruger’s assistance, who came to the night shift and spoke to Ms Schulze, Ms Tuinaphiang and Ms Doherty. Mr Kruger explained that everyone had to get along in the workplace. He asked them to try and be friends and asked them to shake hands and get back to work. This calmed the situation at first for about a week or so. Then, things slowly started to get worse.
- In about October 1999, Mr Crowden had a meeting with Ms Schulze, Ms Tuinaphiang and Ms Martino in his office. He asked them not to speak Thai in the workplace. Mr Crowden described this as a request rather than as a mandatory rule. Mr Crowden said that he explained this was to stop them speaking in Thai to the exclusion of others, particularly Ms Doherty. Ms Martino was called into the office as well as Ms Schulze and Ms Tuinaphiang because, “near the end” Ms Martino had also become somewhat involved in the disputes with Ms Doherty. Not all the Thai workers were requested to stop speaking Thai in the workplace. Under cross examination, Mr Crowden accepted that he was not aware of anyone else trying to resolve disputes of this kind by taking the action he took, but he did not accept that what he did was inappropriate. Under cross examination, Mr Crowden maintained that he did not speak to Ms Schulze separately; he said he spoke to Ms Schulze, Ms Tuinaphiang and Ms Martino together. Under cross examination, Mr Crowden said that he could not recall doing either Ms Schulze’s nor Ms Tuinaphiang’s performance appraisal immediately before this meeting. (This is consistent with his evidence that he dated the “17/10” appraisal form on 17 October, if the other evidence is accepted that this meeting occurred on 10 or 11 October 1999.)

- A few days later, there was another incident. Another co-worker, Jason Taylor, told Mr Crowden that there had been an argument between Ms Schulze, Ms Tuinaphiang and Ms Martino; that they were arguing with each other in Thai. Ms Martino complained to Mr Crowden and said that she had been told that if she did not speak Thai, she would be banned from the Thai community. Ms Martino was very upset. She was crying. Mr Crowden sent her home because she was so upset. Under cross examination, Mr Crowden said that Ms Martino had said that Ms Schulze or Ms Tuinaphiang might have spoken rudely to Ms Martino.
- In relation to this incident, Ms Tuinaphiang said that it was not her fault and that it was Ms Schulze's fault. Ms Tuinaphiang asked Mr Crowden not to sack her, to which Mr Crowden said that it was not in his power to sack her and that the matter was out of his hands. Mr Crowden accepted that he said, "*There's the door*"; in response to Ms Tuinaphiang's enquiry about whether she would be sacked. This was before the "*lunch break*" and Ms Tuinaphiang returned to work after the break. After the break, Ms Tuinaphiang raised the issue of her being sacked again, to which Mr Crowden responded that it was out of his hands and up to Mr Kruger. Under cross examination, Mr Crowden explained what he meant when he said "*There's the door*". By this he meant to indicate that if Ms Tuinaphiang wanted to leave, she should.
- Mr Crowden said that people from several different ethnic backgrounds worked at the Perth Mint (eg people from Singapore, Thailand, New Zealand). He said that he had no problem with anybody using their native language in the workplace, so long as they didn't affect others around them. Under cross examination, Mr Crowden confirmed that he had no difficulty with people talking in their own language in the workplace.
- Under cross examination, Mr Crowden gave evidence that he had received training on occupational health and safety issues; and that he was also made the EO contact officer in the middle of 2000.
- Mr Crowden said that he gave neither Ms Tuinaphiang nor Ms Schulze a hard time.

11 Again, the Tribunal will make findings of fact below after all of the evidence is reviewed. However, at this point, it must be noted that the

Tribunal found Mr Crowden an honest witness who attempted to give evidence, as best as he could, of the events in issue.

12 Ms Martino gave evidence to the following effect.

- Ms Martino started work at the Perth Mint in about September 1999. She finished work in about December 1999. When she started, the complainants were already working at the Perth Mint. Ms Martino had not met Ms Tuinaphiang before but she had previously met Ms Schulze. Mr Crowden was also there and Ms Martino said he treated everyone equally. Mr Crowden did not give some people harder tasks.
- Ms Martino gave evidence that one night Mr Crowden called the complainants and her to his office. He asked them to speak English in the workplace. He apparently asked “*nicely*”. His request was related only to the workplace. Ms Martino thought “*somebody*” must have complained. Ms Martino said that somebody may have misunderstood or got angry about them speaking Thai. Ms Martino said that she was able to speak Thai during her breaks. Under cross examination, Ms Martino denied the suggestion that there was a separate meeting with Ms Schulze; she said Mr Crowden spoke to all three of them together. She also denied that this occurred on the same night that Mr Crowden did their performance appraisals. She said appraisals were done the night before.
- Apparently, that same night, Ms Martino said that, after awhile, Ms Tuinaphiang began to speak in Thai to Ms Martino and said rude or disrespectful things to Ms Martino in Thai. Ms Martino found it difficult to translate exactly what Ms Tuinaphiang said; but said that it meant something like “*You got scared until your hair grey*”. It may be that this was a rude suggestion to the effect that Ms Martino was a coward. But, it is difficult to tell, because Ms Martino could not translate what had been said to upset her so much. Under cross examination, Ms Martino explained, “*I don't know to translate in English, but in Thai very very rude. I never speak people like that in my life*”. Ms Martino also said “*I bite tongue to death that night, because I'm afraid I do something. ... I might hit her too, because that's very rude. [Ms Tuinaphiang tell me] 'you scared [Mr Crowden] to sack you or scared you lost you job. You not speak Thai. You got short hair, grey hair. You're scared to death', but like a word, very rude. I don't know how to translate ...*”. Ms Martino was made to cry because of what

Ms Tuinaphiang said. She went to Mr Crowden and begged him to allow her to go home early and she was allowed to do so. This permission was granted.

- Ms Martino said that Ms Tuinaphiang asked Mr Crowden whether Ms Tuinaphiang would be sacked by him and effectively followed him around, with some defiance. Ms Tuinaphiang put her hands on her hips and effectively taunted Mr Crowden, enquiring whether she would be dismissed. She asked repeatedly, "*You want to sack me? You want to sack me?*"
 - Ms Martino was hesitant in giving evidence about the dispute between Ms Schulze and Ms Doherty. She did say, though, that she thought Ms Doherty was the "*whole lot problem and I know one thing, you know, [Ms Doherty] she doesn't like work too much. She talk a lot. She just like talking. She doesn't work. She will talk with anybody at work anywhere.*"
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- Under cross examination, Ms Martino said that she had overheard Ms Tuinaphiang and another person talk about their issues with Ms Doherty and Mr Crowden.

13 The Tribunal found Ms Martino a witness who was generally reliable but who was unwilling to give evidence about the issues between the complainants and Ms Doherty for fear of getting too involved.

14 Finally, Mr Neri gave evidence to the following effect.

- At material times, Mr Neri was a consultant at Industrial Personnel. Industrial Personnel is a hire recruitment company. It supplied casual labour to the Perth Mint. It interviewed potential casual employees and paid these employees. Between February 1999 and July 2000, Mr Neri's job at Industrial Personnel was to fill orders for casual labour, principally from the Perth Mint. Mr Neri had an ongoing relationship with the casual work force and saw them usually once a week.
- If casual workers had an issue at the Perth Mint, they could contact Industrial Personnel and raise their concerns. Problems at the Perth Mint did arise in about October 1999 and complaints were made. A meeting was organised with representatives from Industrial Personnel and the Perth Mint. It was decided that Mr Kruger

would go in on the night shift and talk to the other workers in an attempt to calm the situation and solve the problem.

- 15 The Tribunal found Mr Neri to be an honest and reliable witness.
- 16 It is now possible for the Tribunal to make findings of fact, doing the best it can to weigh the evidence given by the witnesses, having seen and heard them give evidence. As appears from the above detailed summary of the evidence, there were a number of differences about the factual position and a number of slightly different versions of material events. In the end, however, the Tribunal considers that not much turns on these factual differences. As explained above, the Tribunal found the complainants to be somewhat evasive witnesses; found Mr Crowden to be an honest witness, generally speaking; found Ms Martino to be an honest witness except in relation to her evidence about the nature of the dispute that existed as between the complainants and Ms Doherty; and found Mr Neri to be an honest and reliable witness. Given this, the Tribunal makes the following findings of material fact. Where the Tribunal does not specifically make findings below, it is because those facts appear to it to be either uncontroversial or immaterial.
- 17 The Tribunal find that:
- There were disputes or disagreements at the workplace involving the complainants and Ms Doherty and, at a later stage, the dispute extended to Ms Martino. The Tribunal does not accept the complainants' down playing of this dispute. It was a serious matter. In this regard, the Tribunal prefers Mr Crowden's evidence on these issues - he was far more willing to candidly give evidence about them.
 - The Tribunal draws the inference that the complainants excluded Ms Doherty, by their exclusionary discussions in the Thai language. Mr Crowden gave evidence to this effect but he could not say with absolute certainty that the complainants talked about Ms Doherty in Thai. On the basis of the evidence presented to it, the Tribunal draws this inference. That is the reason why Ms Doherty complained - she felt she was being excluded and the Thai language was, to an extent, being used as an exclusionary device. The Tribunal does not accept the complainants' evidence to the contrary and accepts Mr Crowden's evidence on this issue. The Tribunal also draws the inference that, at times, the

complainants spoke about Ms Doherty, in her presence, in Thai and that Ms Doherty was correct to draw this conclusion, evidence of which was given by Mr Crowden. The Tribunal finds that Ms Doherty and possibly others told Mr Crowden of these matters.

- The Workplace document evidences the fact that there were significant disputes and disagreements in the workplace. However misguided, the Workplace document was an attempt to solve the problems in the workplace. It did not work.
- The Tribunal finds that Mr Crowden asked the complainants and Ms Martino to refrain from speaking in Thai in the workplace. The Tribunal finds that Mr Crowden gave some general explanation for this direction - he said that he thought Thai was being used to exclude others. The Tribunal prefers Mr Crowden's and Ms Martino's evidence on this issue, subject to the following comments. The Tribunal finds that Mr Crowden gave this direction at a joint meeting with the complainants and Ms Martino.
- As stated above, the Tribunal found Mr Crowden an honest witness who attempted to give evidence, as best as he could, of the events in issue. Mr Crowden did, however, attempt to draw a fine distinction between requesting the complainants not to speak in Thai in the workplace and telling them they could not do so. The Tribunal does not accept Mr Crowden himself drew such a distinction when he spoke with the complainants and Ms Martino.
- But, importantly, the Tribunal unreservedly accepts that the *sole* reason Mr Crowden directed the complainants and Ms Martino not to speak Thai in the workplace was to try and resolve the dispute that had arisen as between the complainants and Ms Doherty. In passing, the Tribunal notes that the manner in which Mr Crowden handled the issues that confronted him were less than optimum but, in the Tribunal's view, Mr Crowden's actions were occasioned by his desire to solve the workplace disputes and disagreements that had arisen and were not occasioned by a sudden urge to treat the complainants less favourably (because of their race).
- The Tribunal finds that Ms Tuinaphiang did speak rudely to Ms Martino and this was the reason she started crying when the incident between them occurred and this resulted in Ms Martino going home early. It is difficult to make findings about exactly what Ms Tuinaphiang actually said but, in the Tribunal's view,

nothing turns on that matter. It is sufficient to say that Ms Tuinaphiang was being rude to Ms Martino and then defiantly asked Mr Crowden whether she was going to be sacked, indicating that Ms Tuinaphiang herself recognised that her actions had caused the situation to escalate. The Tribunal prefers the evidence of Ms Martino and Mr Crowden on these issues.

- 18 It is difficult to pin down with any certainty, exactly when the above incidents occurred. The witnesses gave differing versions of events and differed about dates and times. The Tribunal considers it unnecessary, even if it were possible, to make findings about the exact dates and times involved.

The legal issues & analysis

- 19 Given the above findings of fact, it is now possible to return to the legal issues that are thrown up by these complaints. To recap:

- s36(1) provides that discrimination on the ground of race occurs if, “*on the ground of*” race, or a characteristic that appertains or is generally imputed to persons of that race, the discriminator treats the aggrieved person less favourable than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person of a different race;
- s36(2) provides that discrimination on the ground of race also occurs if the discriminator requires the aggrieved person to comply with a requirement or condition:
 - (a) with which a substantially higher proportion of persons not of the same race as the aggrieved person comply or are able to comply;
 - (b) which is not reasonable having regard to the circumstances of the case; and
 - (c) with which the aggrieved person does not or is not able to comply.

- 20 A number of arguments were raised about the alleged applicability or inapplicability of the above provisions to the circumstances of this case. The Tribunal has not, in the event, found it necessary to deal with all of these arguments. This is because the Tribunal considers that s36(1) does

not apply to the present circumstances because the complainants did not prove, the onus being on them, that they were treated less favourably "*on the ground of*" race. Equally, as to s36(2), the Tribunal considers that the complainants did not prove that any requirement or condition imposed on them was a condition with which each of them "*does not or is not able to comply*". That is to say, the Tribunal considers, on a balance of probabilities, that there was neither direct nor indirect discrimination.

21 The authorities support the above conclusions. In **Waters v Public Transport Corporations** (1991) 173 CLR 349, the High Court explained that the words "*on the grounds of*" in a similar context to s36(1):

- "*had to be given meaning and connoted a material differential treatment "based on" status (per Mason CJ and Gaudron J at 359-360);*
- "*did not cover a material differential treatment if not effected on the ground of status but for economic reasons (per Brennan J at 373); and*
- "*required that the differential treatment to have been actuated by the status (per McHugh J at 400-401)."*

22 The alleged discriminator's motive is irrelevant to the enquiry but there has to be a *causal connection* between the race of the complainant and the differential treatment for the differential treatment to have arisen "*on the ground of*" race: **Macedonian Teachers v HREOC** (1998) 160 ALR 489 at 504; **Fernandes v State of New South Wales**, unreported, [1999] NSWADT 32 at para [58].

23 In the present case, the Tribunal considers that the sole reason why Mr Crowden directed the complainants and Ms Martino not to speak Thai in the workplace was to resolve disputes and disagreements in the workplace, not because of, or "*on the ground of*", the race of the complainants or any relevant characteristic. Mr Crowden's approach may have been misguided and, in the events that transpired, that appears clearly to have been the case. However, it does not follow that there was less favourable treatment on the ground of the complainants' race or any relevant characteristic.

24 Discrimination on the ground of race can occur if a person is disallowed to speak their native language but this is not always necessarily the case: **D'Souza v Geyer**, unreported, (1996) HREOC H94/100; **Fletcher Challenge Canada Ltd v British Columbia (Council of Human Rights)** (1992) 97 DLR (4th) 550. It has been suggested that sometimes it may not be inappropriate for an employer to request its employees to refrain from speaking in their native language. In a different context, the New South Wales Administrative Decisions Tribunal said in **Fernandes v State of New South Wales**, unreported, [1999] NSWADT 32 at para [50]:

“The Tribunal regards it as totally acceptable for 2 employees in the workplace to have a private conversation in a language other than English. If the conversation had occurred as part of a broader group discussion, or in proximity of a third employee who felt that s/he were being discussed, then Mr Lucre’s request [in that case Mr Lucre apparently said to people speaking in Spanish ‘Speak English mate, you are in Australia not in the bloody country where you came from’] may have had some justification. This was not the case. Even if it had been, Mr Lucre’s raised voice and reference to the place of birth of the participants was offensive.”

25 In the present case, Mr Crowden directed the complainants and Ms Martino not to speak in Thai *because* they were speaking in Thai to the exclusion of Ms Doherty. The Tribunal has drawn the inference that the complainants, at times, spoke about Ms Doherty, in her presence, in Thai. For these reasons, the Tribunal has concluded that the Perth Mint did not “*on the ground of*” race or any relevant characteristics, treat either of the complainants less favourably in contravention of s37(2), by reason of the operation of s36(1).

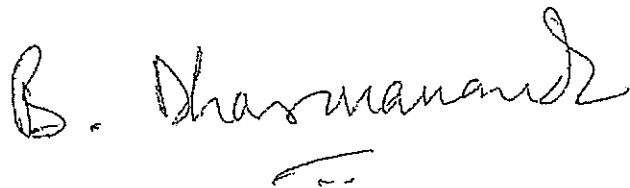
26 Next, it is necessary to deal with the issue of whether s37(2) was contravened by reason of the operation of s36(2). A number of somewhat difficult questions arise as to the proper interpretation of s 36(2). Those issues include whether, in the present case, the Perth Mint required the complainants to comply with a “*requirement or condition*” “*with which a substantially higher proportion of persons not of the same race as the [complainants] comply or are able to comply*” (s36(2)). Interpreting provisions similar to s36(2)(a) often poses difficult legal and factual questions: eg **Australian Iron and Steel Pty Ltd v Banovic** (1987) 168 CLR 165. In particular, it will be necessary to identify the group, which is said to have a substantially higher proportion of persons who comply or are able to comply with the subject requirement or condition. No

evidence was proffered directly on this issue. However, the Tribunal does not need to express any view on it because of the conclusions it has drawn about the inapplicability of s36(2)(c), as explained below.

- 27 In passing, an argument raised by the Perth Mint should be noted. It was argued that s36(2) dealing, as it does, with indirect discrimination could not possibly be at issue in the present case because “*In the context of s 36(2) ‘requirement or condition’ involves an apparently non-discriminatory, general provision applicable to a group of persons, which has a discriminatory effect. Any direction in the present case does not fall within s36(2)(a) because it was directed towards three specific persons. No persons other than the complainants and Mrs Martino could comply or not comply, because any direction does not apply to any other persons.*” As authority, **Australian Iron and Steel Pty Ltd v Banovic** (1987) 168 CLR 165 at 168-169, 177 and 187; and **Waters v Public Transport Corporations** (1991) 173 CLR 349 at 357 and 402 were cited. Although the Tribunal sees some force in this argument, the Tribunal does not need to express any view on it, as explained below.
- 28 Another issue which arises is whether, in the present case, the Perth Mint required the complainants to comply with a “*requirement or condition which is not reasonable having regard to the circumstances of the case*” (s 36(2)(b)). The concept of reasonableness has been considered by the High Court and, by a majority, it was concluded that “*reasonable*” in a similar context referred to what was reasonable in all the circumstances of the case: **Waters v Public Transport Corporations** (1991) 173 CLR 349. Again, the Tribunal does not need to express any concluded view on whether any requirement or condition imposed by the Perth Mint was not reasonable in all of the circumstances.
- 29 The important issue, on which the applicability of s36(2) turns in the present case, is whether the Perth Mint required each of the complainants to comply with a “*requirement or condition with which [each of the complainants] does not or is not able to comply*” (s36(2)(c)). This, in the Tribunal’s view, is the fatal flaw in the complainants’ arguments to the effect that s 37(2) was contravened, by reason of the operation of s36(2). In the Tribunal’s view, it cannot be said that the Perth Mint required each of the complainants to comply with a requirement or condition with which each of them does not or is not able to comply. Each of the complainants was able to comply with Mr Crowden’s direction to not speak Thai in the workplace. Each of them was able to speak English in

the workplace. For s36(2) to operate, it is necessary for the complainants to show, on a balance of probabilities, that each of its elements contained in s36(2)(a), s36(2)(b) and s36(2)(c) were satisfied. In the Tribunal's view, the element contained in s36(2)(c) was not shown by the complainants to have been satisfied. It must be remembered that this was not a case where an employer had an indirectly discriminatory rule in its employment policies, which it applied in hiring staff. Here, the Perth Mint introduced a rule to regulate three workers' conduct, when faced with workplace disputes; each of the three workers was able to comply with the rule and they were not dismissed on account of non-compliance. There was no credible evidence to support the view that the complainants were dismissed.

30 For all of the above reasons, each of these complaints must be dismissed.

Handwritten signature of B. Dhasmanand in cursive script.