JURISDICTION	:	EQUAL OPPORTUNITY TRIBUNAL OF WESTERN AUSTRALIA
LOCATION	:	PERTH
CITATION	:	BARTH V GREEN AND GREEN
CORAM	:	Deputy President: B DHARMANANDA Deputy Members: C MULVEY and T ACKLAND
HEARD	:	6 JUNE 2001
DELIVERED	:	14 JANUARY 2002
FILE NO/S	:	EOT 28 of 2000
BETWEEN	:	GENEVIEVE BARTH Complainant AND TERRY GREEN AND MITZI GREEN Respondents

Catchwords:

Equal opportunity - dismissal on ground of pregnancy - application of **Jones v Dunkel**

Legislation:

ss 5, 10(1), 11(2), 120 & 127, *Equal Opportunity Act 1984 (WA)*

Result:

Application allowed

Representation:

Counsel:

Complainant	:	Mr A McDonald
Respondent	:	in person

Solicitors:

Complainant	:	Legal Officer, Equal Opportunity Commission
Respondent	:	Nil

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

Allegretta v Prime Holdings Pty Ltd (1991) EOC 92-364
Cook v Lancet Pty Ltd (1989) EOC 92-257
Fenwick v Beverage Building Products Pty Ltd (1985) 62 ALR 275
Jones v Dunkel (1959) 101 CLR 298
KLK Investments Pty Ltd v Riley (1993) EOC 92-525
McCarthy v Metropolitan (Perth) Passenger Transport Trust (1993) EOC 92-478
Moore v Guardianship and Administration Board [1990] VR 902
R v War Pensions Entitlement Appeal Tribunal (1933) 50 CLR 228
Wright v Harrison & Harris t/as Ausmic Environmental Industries (Bunbury), unreported, 23 March 1995, case-note (1995) EOC 92-686

Case(s) also cited:

Capodicasa v Herald & Weekly Times Ltd (1999) EOC 92-969
City of Perth & Ors v DL & Ors (1994) EOC 92-634, at 77,386
Skellern v Colonial Gardens Resort Townsville & Anor (1996) EOC 92-792

JUDGMENT OF THE TRIBUNAL:

Introduction and statutory framework

1 The complainant, Genevieve Barth, claims that in contravention of the *Equal Opportunity Act 1984 (WA)* she was discriminated against on the ground of her pregnancy in the area of employment by the respondents, Mitzi Green and Terrence Green. The complainant claims that she was dismissed by the respondents because of her pregnancy. The respondents deny that they contravened the *Equal Opportunity Act* and say that they dismissed the complainant for other reasons. (Unless otherwise indicated, a reference to a section will be a reference to a section of the *Equal Opportunity Act*.)

2 By s 10(1), discrimination occurs if, on the ground of the pregnancy of the "*aggrieved person*", the "*discriminator*" treats the aggrieved person "*less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who is not pregnant*" and the less favourable treatment is not reasonable in the circumstances. By s 11(2), it is unlawful for an employer to discriminate against an employee on the ground of the employee's pregnancy in the terms or conditions of employment that the employer affords the employee or by dismissing the employee or by subjecting the employee to any other detriment.

3 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. That section 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 2 or more matters that include the particular matter, "*whether or not the particular matter is the dominant or substantial reason for the doing of the act*". Section 120 makes clear that the Tribunal is not bound by the rules of evidence and may inform itself on any matter it thinks fit and "*shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms*".

The evidence

4 In essence, the complainant claims she was dismissed by the respondents because of her pregnancy. It is necessary to consider the evidence and, where necessary, make findings about the credibility of the witnesses.

5 In support of the complainant's case, evidence was given by herself; and the complainant's partner, Tyrone Stacey. For the respondents, evidence was given by the second respondent, Terry Green; Marie Roper and Norma Hodges, both employees of the respondents. The complainant presented as an honest witness. Where there was a contest in the evidence given by the complainant and the evidence given by the second respondent and Marie Roper, the Tribunal preferred the evidence of the complainant. It was more credible.

6 The respondents operate and are the proprietors of a dry cleaning business trading as Solitaire Drycleaning. In about June 1999, the complainant saw an advertisement in the newspaper advertising a job at the dry cleaning business, and applied for the job. It was for the position of a casual shop assistant. The second respondent said that some 37 applicants applied for the position. The respondents made a short list of 5 and interviewed them.

7 The complainant was interviewed by the respondents. During the interview, the first respondent asked the complainant about the complainant's intentions; whether she intended to go back to school; her age; whether she was living with her parents (to which the complainant provided answers acceptable to the respondent). The first respondent also told the complainant about other applicants for the job. On the complainant's evidence, the first respondent said that another "*girl*" had applied for the job but that she was regarded as unsuitable because she was pregnant. The complainant's evidence was that the first respondent said:

> *"she would've liked to have helped but she felt that -- that people who were pregnant should be working where nobody could see them".*

8 Tyrone Stacey's evidence was that he had been told by the complainant, of the above comment. The complainant told Tyrone Stacey that the first respondent had said "*a lady that had also applied for the same position was pregnant and that she shouldn't be working behind a counter where anyone could see her*".

9 In his evidence, the second respondent said:

> "*One of the ladies that were [sic] interviewed before [the complainant] told my wife [the first respondent] after her interview*

she was pregnant and would -- and would we have a problem with that and my wife said 'No' because her credentials were impressive and we could work around a week or 2 weeks after her child was born but she was 1 out of 5 so we had -- we had to be fair and also interview all the others. So that was the comment made from that lady. That lady was a stranger to my wife, not known to her before.

There were 3 other candidates to be interviewed including [the complainant] and [the] question was to all others being considered for the position 'Are you or do you intend to become pregnant in the short-term?' [The complainant's] response, 'Definitely not. I am only 17 years old'. That's all we needed to hear for we -- we were specifically requiring a long-term employee, long-term, 12 months, 2 years. [The complainant] having given us that assurance -- we were influenced by her adamant answer.

...

... [The complainant] was selected for -- for -- mainly for the fact of her long-term -- plus she was well spoken, positive attitude, and importantly well groomed. Four weeks later, after we -- we put her on, which was the 18th of June, 4 weeks later, she became pregnant, from the doctor's certificate.

...

[The complainant] was involved in the lengthy interview process in which involved three sessions over 3 days to examine the right choice and the right selection. [The complainant] adamantly stated she had no intentions of becoming pregnant. A selection process and then being selected on the grounds of her responses to the questions and answers, she was successful in her application. I asked 'Was [sic] her answers given generally or conniving to use us to suit herself and her only needs?' Over 14 years' experience, we have lost key staff members due to appropriate reasons which are for either obtaining a better position in their occupations or a higher monetary value in their salaries. Of course we were disappointed to be deceived."

10 After her interview, the complainant was telephoned by the first respondent and told that she had been successful. She then started work as a casual shop assistant at the dry cleaning business. Her duties included labelling clothes that were brought in for dry cleaning, filling out dockets for them, tagging them, and dealing with customers. The complainant was given the responsibility of handling money at the dry cleaning business and "*bagging*" the money at the end of each day. The

complainant also had to vacuum the shop at the end of each day and dust the blinds. The complainant's duties were not onerous. The complainant enjoyed her job - she said "*it wasn't a difficult job*".

11 The complainant accepted that there were some small difficulties when she first commenced employment. She was sometimes late for work and sometimes used the telephone on personal calls, particularly to her partner, Tyrone Stacey. Sometimes, the complainant stayed at work longer, for example, when customers rang and said that they needed something dry cleaned - the complainant waited for them. In examination in chief, the complainant's evidence was that her "*work performance*" was not raised with her as an issue. In cross examination, it was put to her that, initially, the first respondent raised her voice and "*told her off*". The complainant accepted this had happened but could not remember exactly why the first respondent had raised her voice. In re-examination, the complainant explained that, after an initial period when the complainant had to learn her job, no issue was taken about her work performance. The Tribunal accepts the complainant's evidence and finds that, after an initial period, no issue was in fact taken about the complainant's performance at work.

12 Marie Roper, another employee, gave evidence that the complainant was late to work six or seven times in the first 3 weeks of her employment. She said that the first respondent spoke to the complainant and things improved "*dramatically*". Marie Roper also gave evidence that the complainant used the telephone to make personal calls, increasing significantly the phone bill. In cross examination, Marie Roper accepted that after the issue had been raised with the complainant, the complainant did not continue to "*abuse*" the situation and overuse the telephone. Marie Roper could not confirm, but did not deny, that the complainant had in fact offered to pay for the cost of her personal telephone calls. In any event, at the hearing, the second respondent accepted that it was not because of the excessive use of the phone that the complainant was dismissed. As such, that matter is irrelevant.

13 Although the complainant was issued with a uniform, she only wore it for the first couple of weeks of her employment. The uniform was a "*bit old-fashioned*". The complainant was told by Marie Roper that nobody else wore the uniform (except the delivery driver, Norma Hodges). The complainant became quite friendly with Marie Roper; they had a "*really good working relationship*". That relationship deteriorated from about

January 2000.

14 The complainant discovered she was pregnant in about July 1999. She discussed this with her partner, Tyrone Stacey. He gave evidence that the complainant was "*pretty anxious*" about her pregnancy and she did not want to tell the respondents straight away and hoped they would not notice for a while. She decided not to tell the respondents about her pregnancy until later because she feared that she might lose her job. In November 1999, the complainant told the first respondent she was pregnant. By then, she was about 20 weeks pregnant. Initially, the first respondent did not react badly to this news and this surprised the complainant (given what she had been told at her interview).

15 The complainant gave evidence to the effect that she had been told by Marie Roper that:

(a) the second respondent had told Marie Roper to "*have a chat*" with the complainant and suggest the complainant could do something about her pregnancy, ie, maybe have an abortion. (Tyrone Stacey also gave evidence to this effect, saying that he had been told of this by the complainant.)

(b) the first respondent disapproved of the complainant's dresses (which she had worn before her pregnancy) because they made apparent the fact that the complainant was pregnant. (Again, Tyrone Stacey also gave evidence to this effect, saying that he had been told of this by the complainant.)

16 Not surprisingly, the complainant was upset when she was told these things. In cross examination of the complainant, it was put to her that her whole attitude changed and she "*rebelled*" after she had been told that the first respondent disapproved of the complainant's dresses. It appears to have been suggested that this was one of the reasons why the complainant was ultimately dismissed. The complainant denied that she became rebellious. She gave evidence to the effect that the reason things changed was because the respondents had become aware of her pregnancy. The Tribunal accepts the complainant's evidence.

17 In cross examination of the second respondent, he accepted that the complainant was "*very capable at her job*"; that she was "*a young plant*

who blossomed". The second respondent suggested that the reason why the complainant was dismissed was because of her "*dress code*" and because she "*rebelled*" after being told about the "*problem*" with her dress while she was pregnant. The Tribunal does not accept this explanation. Also, the second respondent accepted that he himself did not have a view about what the complainant was wearing to work. He said that it was the first respondent's issue and the respondents discussed how to deal with what they perceived to be the problem "*tactfully*" by asking Marie Roper to speak to the complainant. The second respondent accepted that the "*problem*" with the complainant's dress only arose after she had become pregnant - he suggested that she did not change her clothing to appropriate clothing when her physical body started to change. In cross examination, the second respondent accepted that no direct warning was given to the complainant about the respondents' alleged difficulties with the complainant's dress. The first respondent did not give evidence.

18 Marie Roper also gave evidence for the respondents to the effect that the complainant's dress was not appropriate during her pregnancy. Marie Roper said that she spoke to the complainant about her dress some two or three times. Norma Hodges gave evidence that during the complainant's pregnancy her dresses had become "*tight*". Norma Hodges said that there was no other relevant change in the complainant's attitude - she remained a cheerful and pleasant person. The complainant said that she never wore clothes which were revealing; she did not wear midriff tops.

19 In cross examination, the second respondent also said that he was "*annoyed*" and felt "*deceived*" when the respondents learnt of the complainant's pregnancy. He suggested that the complainant had deliberately become pregnant because she was "*obviously having unsafe sex*".

20 After the respondents had become aware of the complainant's pregnancy, they did not discuss with the complainant her plans for the future, nor enquire about her health. The complainant carried on with her duties as before, and did not ask for, nor receive, any special treatment. In cross examination, it was put to the second respondent that the complainant did not have any difficulty with performing her duties when she was pregnant. The second respondent accepted this. In cross examination, it was put to the complainant that the second respondent asked the complainant, in about December 1999, whether she wanted to return to

work after her childbirth. The complainant denied this and the Tribunal accepts her evidence.

21 On or about Saturday, 6 January 2000, the complainant was dismissed from her job by the first respondent. On Saturdays, usually, either the first respondent or the second respondent would come to the shop to collect the clothes which had to be dry cleaned that day and the money that had been made the day before. On that Saturday, while the complainant and the first respondent were "*getting the clothes together*", the complainant's evidence was that the first respondent said: "*don't you have a big blouse or something that you can wear over that because it doesn't look very nice?*". The complainant was taken aback at this. She was wearing a skirt and shirt and no bare skin was showing. It was apparent that she was pregnant. The complainant did not respond to what was said to her. Then, just before the first respondent left the shop, on the complainant's evidence, the first respondent said: "*I'd like you to finish work on the 15th as I have someone else to start*". The first respondent then left.

22 The complainant was very surprised when she was given her notice. She felt hurt. She was not given any reason for her dismissal. She felt she had been dismissed because of her pregnancy.

23 The complainant discussed what had happened on the Saturday with Marie Roper on the following Monday. On the complainant's evidence, Marie Roper said that she had already known about the complainant's dismissal. Marie Roper said that the first respondent had initially wanted to dismiss the complainant and make her leave on that Monday. But, after discussion between the first respondent and Marie Roper, it was decided that, to be fair, such short notice was not appropriate.

24 The complainant left work on or about Monday, 15 January 2000. After that, the complainant was telephoned by the first respondent. She was offered an extra 2 weeks of employment but, because the complainant was well aware the respondents had difficulty with her being pregnant, she declined the offer. Because of her dismissal, the complainant felt hurt and she had difficulties at home. The complainant and her partner had to borrow money from family and friends.

25 On these matters, the Tribunal is not satisfied, and does not accept, that there was a difficulty with the complainant's dress during her pregnancy.

Importantly, the Tribunal is not satisfied that any difficulty with the complainant's dress during her pregnancy was the reason why she was dismissed. Equally, the Tribunal is not satisfied that the complainant's alleged "*rebellious*" attitude was the reason why she was dismissed.

26 Also, in a letter of 9 June 2000, from the first respondent to the Equal Opportunity Commission, which the second respondent accepted correctly set out the true position, the first respondent said:

> "*I did not disapprove of any clothes [the complainant] wore, I always stated how neat and tidy she dressed. I did not say that what she wore, 'Does not look nice.' We have a daughter who wears size 16 blouses of which I mentioned to [the complainant] and I would bring them in if she wanted to wear them, which is only a kind and friendly guesture [sic], and not discriminative.*'

27 In January 2000, the complainant went to see a Dr George Hobday. He certified that the complainant was expecting her first baby on 18 April 2000 and "*has been fit and well throughout her pregnancy to date. I see no reason why she should not continue in her present work, which I understand is not heavy, until the end of February 2000 or early March. Most pregnant mothers stop work at 34 wks, ie for this lady 6.3.00*". Tyrone Stacey gave evidence to the effect that the complainant was "*pretty fit*" during her pregnancy and that there were no complications with the pregnancy.

28 The Tribunal finds, as a fact, on the evidence which has been canvassed above, that the main reason for the complainant's dismissal was the respondents' concerns about the complainant's pregnancy being visual.

29 In cross examination of the complainant, it was also put to her that she had refused to provide her taxation number on numerous occasions. The complainant's evidence was she did not refuse to provide her taxation number. She had applied for a taxation number and provided it when she got it. The Tribunal accepts the complainant's evidence. In re-examination, the complainant also gave evidence that no-one had sought to discipline her for the alleged refusal to provide her taxation number.

30 There were other issues which were raised in the evidence (for example there were allegations, explanations and denials about the inappropriateness of the complainant's partner attending at her workplace;

and about a conversation between Marie Roper and the complainant or her partner where apparently it was said that the complainant wanted to extract money from the respondents). These matters were ultimately not pressed by the respondents as the reason why they dismissed the complainant. Given the Tribunal's findings, it is unnecessary for these issues to be explored further.

Consequences of the failure of the first respondent to give evidence

31 Further, as mentioned above, the first respondent did not give evidence. Her failure to give evidence was not adequately explained. In **Cross on Evidence** (Aust ed) at para [1215] the rule in **Jones v Dunkel** (1959) 101 CLR 298 is summarised:

> *"First, the unexplained failure by a party to give evidence, to call witnesses ...may, not must, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted that party's case. ...*
>
> *... the rule has no application if the failure is explained, for example by the absence of the witness coupled with a reasonable explanation for not compelling attendance ... .*
>
> *Secondly, while the rule in **Jones v Dunkel** permits an inference that the untendered evidence would not have helped the party who failed to tender it, and entitles the trier of fact to take that into account in deciding whether to accept any particular evidence which relates to a matter on which the absent witness would have spoken, and the more readily to draw any inference fairly to be drawn from the other evidence by reason of the opponent being able to prove the contrary had the party chosen to give or call evidence, the rule does not permit an inference that the untendered evidence would in fact have been damaging to the party not tendering it. The rule cannot be employed to fill gaps in the evidence, or to convert conjecture and suspicion into inference.*
>
> *Thirdly, the rule only applies where a party is 'required to explain or contradict' something. ... No inference can be drawn unless evidence is given of facts 'requiring an answer'."*

32 It has been accepted that the rule in **Jones v Dunkel** can apply in inquiries before the Tribunal: **KLK Investments Pty Ltd v Riley** (1993) EOC 92-525 at 79,668. This is notwithstanding the fact that by s 120 the

Tribunal is not bound by the rules of evidence. There is no difficulty with the application of the rule in **Jones v Dunkel** to Tribunal inquiries. It has been suggested that even when a tribunal is not bound by the rules of evidence, the rules of evidence cannot be ignored totally: **R v War Pensions Entitlement Appeal Tribunal** (1933) 50 CLR 228 at 256, per Evatt J (in dissent)). Particularly with hearsay evidence, there will always remain an issue of the weight which should be accorded to the hearsay evidence: **Moore v Guardianship and Administration Board** [1990] VR 902 at 912.

33 Only the first respondent could have explained or contradicted the complainant's evidence as to what happened when the complainant was dismissed, and given a clearer direct elucidation of the reasons for the complainant's dismissal. The second respondent accepted at the hearing that he did not have any personal knowledge of the complainant's dress, and was acting on what he had been told by the first respondent.

34 Because the first respondent did not give evidence, it has been easier to make the finding of fact that, on the evidence which has been canvassed above, the main reason for the complainant's dismissal was the respondents' concerns about the complainant's pregnancy. In making this finding, the Tribunal has borne squarely in mind that the onus was on the complainant to prove, on the balance of probabilities, that the *Equal Opportunity Act* was contravened: **Fenwick v Beverage Building Products Pty Ltd** (1985) 62 ALR 275; **KLK Investments Pty Ltd v Riley (No 1)** (1993) EOC 92-525 at 79,666. That is to say, the Tribunal is satisfied, on the evidence which was presented at the hearing, that the main reason for the complainant's dismissal was the respondents' concerns about the complainant's pregnancy. The Tribunal has not used the fact that the first respondent did not give evidence to "*fill gaps in the evidence or to convert conjecture and suspicion into inference*". Instead, the Tribunal has accepted the complainant's evidence.

The *Equal Opportunity Act*, ss 10 & 11 were contravened

35 The applicable principles in this area are well settled. With respect, they were well summarised in **Wright v Harrison & Harrison t/as Ausmic Environmental Industries (Bunbury)**, unreported, 23 March 1995, case-note (1995) EOC 92-686:

- The onus is on the complainant. In the absence of direct evidence, the complainant may use in support inferences drawn from the primary facts but discrimination cannot be inferred when more probably innocent explanations are available on the evidence.

- The state of being pregnant, as well as the state of having the capacity to be pregnant, are distinctive qualities of women. The characteristics of pregnancy cover the signs and symptoms of that condition. So, it would be unlawful to dismiss a woman because she has a large stomach and this is considered unsightly or because an employer assumes that all pregnant women become sick and incapable of performing their job competently. A comparison can be drawn between the situation of the complainant and the situation of a notional person in the same or a non-materially different set of circumstances.

- It is unnecessary to establish deliberate discriminatory conduct. What needs to be established is a causal connection between the discriminatory act and the circumstances of the complaint. (See also **Cook v Lancet Pty Ltd** (1989) EOC 92-257; **Allegretta v Prime Holdings Pty Ltd** (1991) EOC 92-364; **McCarthy v Metropolitan (Perth) Passenger Transport Trust** (1993) EOC 92-478.)

36 The Tribunal considers that there was a contravention of s 11(2) by the respondents. By dismissing the complainant because she was pregnant, they treated the complainant less favourably than they treated or would have treated a person who was not pregnant. This less favourable treatment was not reasonable in the circumstances. On a balance of probabilities, the Tribunal finds that the respondents did not show there was any sufficient reason to dismiss the complainant.

37 By s 127, the Tribunal may order the respondents to pay to the complainant damages for any loss or damage suffered by reason of the respondent's conduct. In the **Wright** case, it was said:

> *"Previously decided cases, including **Allegretta v Prime Holdings Pty Ltd** (1989) (supra), established that discrimination cases should be treated as a species of tort and hurt feelings may be a factor in the assessment of damages. The Tribunal subsequently noted in **McCarthy v Metropolitan (Perth) Passenger Transport Trust** (supra) that the scope of awards under anti-discrimination*

legislation is both different in nature from and much wider than, the scope of damages awards in tort. It is important that awards aimed at compensating for injured feelings should not be minimal because that would tend to trivialise or diminish the respect for public policy. These principles were subsequently affirmed when that decision of the Tribunal was taken on appeal. See ***McCarthy v Metropolitan (Perth) Passenger Transport Trust*** *(1993) EOC 92-546."*

38 The complainant claims $2,579.77 for the 10 weeks she would have been able to be employed (namely until 27 March 2000 - 3 weeks before the expected date of her child's birth). This was calculated using the complainant's average weekly gross earnings of $241.10 for 10 weeks, and adding to that superannuation at 7% of $168.77. There is an issue as to whether the complainant would have been able to work until 27 March 2000. On this, there is very little evidence. As mentioned above, Dr Hobday, who was not called to give evidence, had certified in January 2000 that the complainant could have continued work until "*the end of February 2000 or early March*" and said "*Most pregnant mothers stop work at 34 wks, ie for this lady 6.3.00*". The Tribunal is not satisfied that it has been shown that the complainant would have continued to work, in all probability, until 27 March 2000. The Tribunal considers that the complainant's loss should be calculated on the basis that she would have worked for 7, not 10 weeks. This means her financial loss is $1,805.84 ($241.10 for 7 weeks [$1,687.70], plus superannuation at 7% [$118.14]).

39 The Tribunal also considers that the complainant is entitled to general damages because she was hurt by what happened. By reference to the previous authorities (cited above) and an analysis of the evidence presented, the Tribunal considers that the complainant is entitled to the sum of $3,500 by way of general damages. The Tribunal therefore orders the respondents to pay to the complainant damages of $5,305.84. There will be no order as to costs.