

JURISDICTION : EQUAL OPPORTUNITY TRIBUNAL OF
WESTERN AUSTRALIA

LOCATION : PERTH

CITATION : ZINNI V COVENTRY GROUP LTD

CORAM : MRS N JOHNSON, QC, PRESIDENT

HEARD : 14 FEBRUARY 2002

DELIVERED : 21 MARCH 2002

FILE NO/S : ET/2001-000002

BETWEEN : MARGARET ZINNI
Complainant

AND

COVENTRY GROUP LTD
Respondent

Catchwords:

Jurisdiction –validity of referral to Equal Opportunity Tribunal

Legislation:

Equal Opportunity Act 1984 (WA), ss 89, 90, 93, 107, 125

Interpretation Act 1984, s 18

Representation:

Counsel:

Complainant: In person

Respondent: Mr D Jones, Chamber of Commerce & Industry WA

Case(s) referred to in determination:

Nil

Result:

Complaint of discrimination on the ground of impairment in the area of employment dismissed.

REASONS FOR DECISION

1. This matter was listed before the Tribunal on 14 February 2002 for the hearing of the Respondent's application that the Complainant's claim of discrimination on the ground of impairment is not properly within the jurisdiction of the Tribunal and should be dismissed pursuant to s125, *Equal Opportunity Act 1984* ("the Act").
2. The Complainant's written complaint against the Respondent alleging discrimination on the ground of impairment in the area of employment was lodged with the Equal Opportunity Commission ("the Commission") on 29 June 1999. On 1 October 1999 the Commission advised the Respondent of the complaint. The Respondent by letter dated 6 October 1999 denied the complaint.
3. On 19 April 2000 the Commission wrote to the Complainant advising that her complaint was dismissed as lacking in substance. The Complainant was further advised that she may, within 21 days of receipt of the Commissioner's letter, by notice in writing, require the Commissioner to refer her complaint to the Tribunal pursuant to s90 of the Act.
4. By letter dated 2 May 2000 but received by the Commission on 18 May 2000, the Complainant wrote to the Commission reiterating her complaint of discrimination on the ground of impairment in employment. She also stated that she believed that she had subsequently been victimized as a result of lodging a complaint with the Commission.
5. On 18 May 2000 the Commission also received a letter from the Complainant dated 17 May 2000 and stated to be in response to the Commission's letter of 19 April 2000. That letter was received some 28 days after the date of the Commissioner's letter advising that the complaint was to be dismissed. In her letter the Complainant disputed the Commission's decision dismissing the complaint, provided arguments in support of her complaint and stated that she did not find her impairment complaint to be frivolous, vexatious, misconceived or lacking in substance. She did not request the Commissioner to refer her complaint to the Tribunal.
6. On 7 June 2000 the Commission wrote to the Complainant requesting that she specifically state whether or not she required her complaint to be referred to the Tribunal. The Complainant was

requested to advise the Commission by 21 June 2000 if her letter of 18 May 2000 (actually 17 May 2000) was intended to be a request for the Commissioner to refer the matter to the Tribunal. The Complainant was also advised that, whilst her complaint of impairment had been dismissed, her complaint of victimization would be pursued.

7. On 21 June 2000 the Commission received a facsimile letter from the Complainant in which she requested her case of "*victimization in relation to impairment discrimination in employment complaint be reviewed*".
8. On 24 August 2000 the Commission received a letter from the Sussex Street Community Law Service on behalf of the Complainant seeking, inter alia, clarification of the status of the impairment complaint. By letter dated 6 October 2000 from the Sussex Street Community Law Service, and following a telephone conversation with an officer of the Commission on 13 September 2000, the Commission was advised that the Complainant wished the impairment discrimination complaint to be referred to the Tribunal.
9. On 22 January 2001 the Commission wrote to the Complainant advising her that her complaint of victimization lodged on 18 May 2000 was dismissed. The Complainant was further advised that she may, within 21 days of receipt of the letter, by notice in writing require the Commissioner to refer the complaint to the Tribunal. On 8 January 2001 the Complainant wrote to the Commissioner requesting that her "*2nd complaint lodged May 18th 2000*" be referred to the Tribunal. Subsequent correspondence from the Commissioner to the Complainant and to the Respondent indicates that it is the victimization complaint which is being referred to the Tribunal. However, the summary of complaint contained in the Commissioner's Report, provided pursuant to s90(2) of the Act, states that the Complainant's complaint is that "*she was unlawfully discriminated against on the ground of impairment and was subsequently victimized as a result of lodging a complaint with the Commission*".
10. During the course of argument before the Tribunal it became apparent that the Complainant believed she had in her possession, or could obtain access to, documentation other than that outlined above which was relevant to a resolution of the issue before the Tribunal. At the conclusion of the hearing on 14 February 2002 the Complainant was given 7 days within which to provide further

documentation. By letter dated 21 February 2002 the Complainant produced to the Tribunal a copy of a telephone record of a conversation which took place on 9 June 2000 between the Complainant and an employee of the Commission. The telephone record is to the following effect: *“Re impairment discrimination complaint – Margaret said she is seeking assistance from [name deleted] – she does want to send to Tribunal – explained we needed written confirmation of that, only one line needed – does not need to be a long letter.”*

11. The Complainant’s letter of 21 February 2002 also contained an acknowledgment that the Complainant had received the Commissioner’s letter *“approx 19 April 2000”*. The Complainant also took the opportunity to make further submissions as to the proper interpretation of s107 of the Act.
12. It was established through correspondence that no objection was taken by the Respondent to the Complainant’s letter of 21 February 2002 and the annexed telephone record being considered by the Tribunal without the opportunity for further oral submissions.
13. Whilst it may well be necessary to consider the alleged discrimination on the ground of impairment in order to determine the issue of whether the Complainant was, contrary to s67 of the Act, victimized as a result of lodging her complaint with the Commission, it does not follow from the facts outlined above that this Tribunal has jurisdiction to hear and determine a claim of discrimination on the ground of impairment under s66B of the Act.
14. The jurisdiction of this Tribunal to hold inquiries into allegations of discrimination is set out in s107 of the Act. Relevantly, the Tribunal is obliged to hold an inquiry into *“each complaint or matter referred to it under section 90(2)....”*
15. Read literally, it might be argued that the jurisdiction of the Tribunal under s107 is grounded on a referral, irrespective of whether that referral strictly complies with the terms of s90(1). However, such an interpretation would allow the Commissioner, rather than Parliament, to determine the jurisdiction of this Tribunal. It would also allow the Commissioner to circumvent the legislative intention manifest by the inclusion of a fixed time frame in s90(1). That observation is made without any criticism of the Commissioner. It is the fact that circumvention of the legislative intent could occur,

rather than the likelihood of it occurring, which militates against such a construction.

16. It was submitted on behalf of the Complainant as relevant to the issue of jurisdiction that there is in s93(1) of the Act no requirement that the Complainant request a referral to the Tribunal. Whilst it is certainly the case that s93 does not require a Complainant to request referral to the Tribunal that observation does not advance the Complainant's position. Section 93 of the Act confers on the Commissioner the power to refer a matter to the Tribunal if the Commissioner "*is of the opinion that the nature of a complaint is such that it should be referred to the Tribunal*": see s93(1)(c). In the instant case, the Commissioner considered the complaint to be lacking in substance and exercised its power under s89 to dismiss the complaint. Section 90 of the Act creates the only avenue for a complaint dismissed under s89 to be referred to the Tribunal.
17. For the reasons outlined above, the Tribunal rejects the Complainant's submission that "*the Tribunal must accept the referral and cannot question the correctness of the referral*". The Tribunal considers that the proper construction of s107 is that a complaint dismissed pursuant to s89 must be referred to the Tribunal in accordance with the terms of s90(2) before the Tribunal has jurisdiction to hold an inquiry.
18. Section 90 of the Act is in the following terms:
 - "(1) Where the Commissioner has given a complainant a notice under section 89, the Complainant may, within 21 days after the receipt of that notice, by notice in writing served on the Commissioner, require the Commissioner to refer the complaint to the Tribunal.*
 - (2) On receipt of a notice under subsection (1), the Commissioner shall refer the complaint to the Tribunal together with a report relating to the investigation made by the Commissioner into the complaint."*
19. Significantly for present purposes, the Act does not confer on the Commission a power to extend time within which to require the Commissioner to refer a complaint to the Tribunal. Neither does the Act confer on the Tribunal a power to so extend time. Insofar as the Commissioner's letter of 7 June 2000 intended to extend time for compliance with s90(1) rather than clarify whether a request for referral had been made, such a course was, in my view, in excess of the Commission's statutory power.

20. The Commissioner's power and statutory obligation to refer a complaint to the Tribunal is circumscribed in s 90(2) by the inclusion of the phrase "*on receipt of a notice under subsection (1)*". The resolution of this application therefore depends on whether a notice under subsection (1) is simply a notice requiring the Commissioner to refer the complaint to the Tribunal or is a notice received by the Commissioner within 21 days. The former interpretation requires the Tribunal to ignore the plain language of the section and renders meaningless the reference to the 21 day time period. When considering the legislative intention, it is also important to consider the effect on a Respondent of permitting an unfettered right of referral to the Tribunal. The uncertainty that would result has the potential to cause significant disadvantage to Respondents.
21. For these reasons the Tribunal considers that, relevant to the circumstances of this case, the proper interpretation of ss90 and 107 is that the Tribunal has jurisdiction to hear only those complaints referred to it under s90(2) in which the request to the Commissioner to refer has been made, in writing, within 21 days after receipt by the Complainant of the notice under s89 of the Act.
22. It can be seen that there are three distinct aspects which must be satisfied before a complaint which has been dismissed under s89 can be heard by the Tribunal:
- (i) There must be a request by the Complainant to refer the matter;
 - (ii) The request must be in writing;
 - (iii) The request must be received by the Commissioner within 21 days of receipt of the notice of dismissal.
23. It should be noted that the very wording of s90 contains a degree of uncertainty as to the commencement of the relevant time period. Unlike the position with s83A of the Act, which requires the Complainant to be served and states that time shall run from the date of service, s89 does not require that the notice to the Complainant be served. Consequently, with the variability of delivery times and the possibility that the notice was not, in fact, received by the Complainant, it is not always easy to determine the date from which time should commence to run and, hence, whether a request to refer to the Tribunal has been made within time.

24. It was submitted on behalf of the Respondent that, even if the letter of 17 May 2000 could be construed as a request to refer, it was not received within time. The Respondent invited the Tribunal to draw the inference that in the normal course of postage the Commissioner's letter of 19 April 2000 would have been received two days later and hence the Complainant's letter of 17 May was received outside the 21 day period. It was further submitted that, even if 4 days were allowed, the response would still be out of time. Of course, the Respondent's submission is predicated on the assumption that the Commission's letter was, in fact, posted on 19 April 2000.
25. The Tribunal has serious reservations about determining issues of jurisdiction based on assumptions as to the administrative practices of the Commission and the efficiency of the postal services. However, in this case, there is no need to make either assumption in order to resolve this application.
26. In her letter to the Tribunal of 21 February 2002 the Complainant acknowledges that she received the Commission's letter "*approx 19 April 2000*". In circumstances where the Complainant has been given every opportunity to dispute receipt of the Commissioner's letter within a time frame which would render her reply of 17 May 2002 out of time, the Tribunal finds that the Complainant received the notice under s89 within a few days of the date of 19 April 2002. Accordingly, the Complainant failed to comply with the 21 day time period imposed by s90(1) of the Act.
27. Although it is not necessary to do so in order to dispose of this application, the Tribunal further finds that the Complainant's response of 17 May 2002, even if it were within time, did not constitute a request to the Commissioner to refer the complaint of impairment discrimination to the Tribunal.
28. In reaching that conclusion the Tribunal is mindful that, in some cases, the form of words used by an unrepresented Complainant in response to the notice of the Commissioner under s89, makes it difficult to determine whether the Complainant does indeed require the matter to be referred to the Tribunal. The Act is beneficial legislation and must be construed so as to promote its object or purpose: *Interpretation Act 1984*, s18. Therefore, where these difficulties occur some latitude is properly given to a Complainant in determining whether a request for referral has, in fact, been made.

29. The Complainant asserted, both in her written and oral submissions, that her intention in writing the letter of 17 May 2000 was to have the matter referred to the Tribunal. She did, however, concede that her intention "*wasn't perfectly clear*" from the content of that letter. Indeed, the complainant, when asked by the Tribunal, was unable to identify any portion of the letter which was intended by her to constitute a request to refer her claim to the Tribunal.
30. The Respondent submitted that the letter of 17 May 2000 could not, on any reasonable interpretation, be construed as a request to refer the impairment discrimination claim to the Tribunal. Further, the Respondent directed the Tribunal's attention to parts of the Complainant's letter which indicated that she had the capacity to understand and reproduce some of the content of the Commissioner's letter. Reference was made to the third paragraph of the letter of 18 April 2000 in which the Complainant, in disputing the conclusion reached by the Commissioner, reproduces with some precision the words used by the Commissioner herself in dismissing the impairment discrimination complaint. The Respondent argued that by so doing the Complaint displayed sufficient faculty to simply reproduce the words used by the Commission in advising of the right to request the matter to be referred, if the Complainant was, in fact, making a request to refer. There is certainly some substance in that submission.
31. Even allowing the latitude appropriate to an unrepresented litigant when dealing with beneficial legislation, the Tribunal is unable to discern from the Complainant's letter of 17 May 2000 a request to refer her complaint of impairment discrimination to the Tribunal. In essence the letter simply disputes the decision of the Commissioner and provides additional material in support of the merits of the complaint of impairment discrimination.
32. For these reasons the Tribunal finds that the Complainant failed, as required by s90(1) of the Act, to request, by notice in writing served on the Commissioner within 21 days, that the Commissioner refer the complaint to the Tribunal. Accordingly, the Tribunal has no jurisdiction to hear the complaint of discrimination on the basis of impairment in the area of employment made against the Respondent and that aspect of the Complainant's claim is dismissed. There is no impediment to the claim of victimization proceeding to inquiry.



