

**JURISDICTION** : IN THE EQUAL OPPORTUNITY TRIBUNAL  
OF WESTERN AUSTRALIA

**LOCATION** : PERTH

**CITATION** : PEASE -v- EDUCATION DEPARTMENT OF  
WESTERN AUSTRALIA

**CORAM** : MR ROBERT MAZZA – DEPUTY PRESIDENT  
MS ZITA PAL  
MS PATRICIA HILLS

**HEARD** : 2 JULY 2003

**DELIVERED** : 31 OCTOBER 2003

**FILE NO** : ET 2001-000047

**BETWEEN** : WENDY CATHERINE PEASE  
Complainant  
AND  
EDUCATION DEPARTMENT OF WA  
Respondent

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*Catchwords:*

Equal opportunity – discrimination on the ground of family status in the area of education –  
turns on its own facts – complaint dismissed

*Legislation:*

Equal Opportunity Act 1984 (WA) SS.4, 5, 35A, 35I and 127

**Result:**

Complaint dismissed

**Representation:**

*Counsel:*

Complainant Allan Macdonald  
Respondent Alan Sefton

*Solicitors:*

Complainant	Equal Opportunity Commission
Respondent	Crown Solicitor's Office

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

*Boehringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13  
*Waterhouse v Bell* (1991) 25 NSWLR 99

## JUDGMENT OF THE TRIBUNAL

### The claim

- 1 By complaint filed in the Equal Opportunity Commission on 11 December 2000, Wendy Catherine Pease ("the complainant") has alleged that she was unlawfully discriminated against on the ground of her family status in the area of education contrary to s 35A and s 35I of the *Equal Opportunity Act 1984* ("the EOA").

### Background

- 2 The complainant was born in 1984. In 2000 she commenced Year 11 at the Wyalkatchem District High School ("the school"). During that year and at all relevant times the school principal was Steven Rushforth ("Mr Rushforth"). The respondent is the educational authority responsible for the administration of primary and secondary education in Western Australia. It is not in dispute that the respondent is liable under the EOA for the actions of Mr Rushforth and other employees of the school.
- 3 The complainant's parents, Dennis Pease ("Mr Pease") and Glenda Pease ("Mrs Pease"), owned a number of businesses in the Wyalkatchem area. Those businesses comprised the family farm, a post office agency and a radio communications business. The latter two businesses were operated from premises within the Wyalkatchem townsite.
- 4 The complainant participated in Year 11 in the school's Vocational Education and Training programme ("VET"). As part of that programme the complainant was required to complete a Structured Workplace Learning ("SWL") placement. In essence, SWL was the work experience component of the VET. Every student that participated in the VET programme was required to participate in two SWL placements during the year, one in each of the two school year semesters. The teacher who was appointed to be the VET co-ordinator at the school was Noreen Elliott ("Ms Elliott"). Ms Elliott had been a teacher at the school since 1974 and had been responsible for career education at that school for 15 years. VET had been introduced in the school in 1998 and Ms Elliott had been the co-ordinator of the programme since that time. (TC 113)
- 5 Ms Elliott told the Tribunal that at the beginning of the academic year, students who were participating in the VET programme took part in a two day orientation period. During that orientation period students were

told that insofar as their SWL placements were concerned, they were not permitted to make arrangements directly without first obtaining the approval of the school. The procedure which was put into place allowed a student to identify a particular place where the student would like to work and communicate that preference to Ms Elliott. Ms Elliott would then communicate with the business to ensure that the business was prepared to take the student and to ensure that it was a suitable workplace. If these requirements were met, and Ms Elliott and Mr Rushforth endorsed the proposal, the SWL placement would be approved.

6 The VET programme is a course which is accredited by the Curriculum Council of WA. The effect of this is that each student who participated in the VET programme received a grade of A, B, C or D, which would appear in the student's semester report. (TC 89)

7 The school had in place during 2000 a policy with respect to the SWL entitled "Structured Workplace Learning Policy" ("the policy"). Annexed to these reasons is a copy of the policy as it existed in 2000. Under the heading "Placement", the policy provides as follows:

- *Students are to be placed in a workplace that can meet the assessment and other requirements of the SWL subject.*
- *The requested placements must be endorsed by the Principal and the SWL teacher.*
- *The SWL teacher and the Principal will not endorse SWL placements that:*
  - *are unable to meet the workplace assessment requirements in the subject.*
  - *may compromise the integrity of the assessment programme eg. placement in businesses owned or operated by immediate family members."*

8 It is apparent that under the policy an SWL placement had to be endorsed by the SWL teacher and the school principal. In reality, the SWL teacher made a recommendation as to the proposed SWL placement and that recommendation was approved or not by the school principal.

9 In practical terms, a student was required to inform Ms Elliott of his or her preferences for the second semester SWL placement 3 or 4 weeks

before the end of the first semester placement (TC 114). In the complainant's case she had some difficulty in choosing her second semester placement. The complainant's first semester placement was as a gardener with the Wyalkatchem Shire. She enjoyed that placement (TC 10). When it came to her second semester placement, the complainant said that she was looking for something different but she was still interested in outdoor work (TC 11). Exactly how this was to be achieved in the second semester the complainant was undecided.

10 The second semester placement was due to commence on Monday 19 June 2000. In the week prior, Ms Elliott had discussions with the complainant and her mother. The complainant's recollection of these discussions, insofar as she participated in them, was vague. Her mother did not give evidence at the enquiry. The Tribunal is satisfied based on Ms Elliott's evidence that she discussed a number of possibilities with the complainant and, in particular, with her mother in the week prior to 19 June 2000. The complainant or her mother suggested that the complainant might work at the family farm. This suggestion was rejected by Ms Elliott. Ms Elliott suggested that the complainant could secure a placement working for the school gardener at the school or assisting a gardener at the Dowerin Shire Council. These suggestions were rejected by the complainant's mother. The suggestion that the complainant might work at the Dowerin Shire Council was objected to on the ground that the complainant "didn't like working with strangers". Ms Elliott suggested the possibility of obtaining positions at the offices of Elders and Wesfarmers. She also suggested an office position with the Wyalkatchem Shire but all of these alternatives were rejected.

11 It is clear that the position as at 19 June 2000 that Ms Elliott and the school was placed in was very unsatisfactory through no fault of theirs. Confronted with this situation, Ms Elliott made the reasonable suggestion that the complainant defer commencing her second semester SWL placement for a week to find a suitable placement (TC 115). At the time the complainant was studying some subjects by distance education and Ms Elliott thought that 19 June 2000 could be used by the complainant to study those subjects. Ms Elliott's impression was that this arrangement had been agreed upon in a conversation she had with the complainant's mother (TC 116).

#### The events of 19 June 2000

12 On 19 June 2000, the day that the complainant's second semester SWL placement was due to start, nothing had been resolved about where

the complainant was to work. At this point the complainant's father intervened. It emerged from the evidence that Mr Pease thought that an arrangement where the complainant studied her distance education subjects for 1 day was unsatisfactory and as a result he decided that the complainant should do her SWL placement in the family post office and radio communications business. He expressed it this way at TC 48: [all quotations are as transcribed]

*"Well, I rang her [Ms Elliott] initially to say that Wendy had started her second placement with us, which was something that hadn't been arranged but I considered it unsatisfactory to tell Wendy to go home and waste a potential day of that course and, who knows, it may well have happened that the same thing the next week, so I rang Mrs Elliott and I guess I was fairly firm in saying that 'Wendy is doing it with us. Doing that placement with us."*

- 13 Ms Elliott's response to this telephone call was remarkably restrained, given that Mr Pease had, in effect, taken it upon himself to decide the complainant's SWL placement without reference to the school. She went and had a discussion with Mr Pease and Ms Phillips who was employed to manage the post office agency. The complainant was at the premises when the meeting took place but she did not take an active part of the meeting (TC 29). There is some difference in the account of this meeting as between Mr Pease and Ms Elliott. Ms Phillips did not give evidence at the enquiry. The Tribunal took particularly careful note of the evidence of Mr Pease and Ms Elliott. Ms Elliott made notes shortly after her telephone conversation and face-to-face meeting with Mr Pease on 19 June 2000. Mr Pease did not make any notes. In giving evidence, both witnesses came across as confident, intelligent and articulate. However, Ms Elliott undoubtedly had a better recollection for detail as to the conversations, probably because she had the advantage of notes from which she could refresh her memory. Further, it emerged from the evidence of the complainant, Mr Pease, Mr Rushforth and Ms Elliott, that the complainant's father has a dogmatic and somewhat domineering personality, which is consistent with the manner in which Ms Elliott recalled Mr Pease's statements at the face-to-face meeting. In the end, the Tribunal has no hesitation in accepting Ms Elliott's account of this meeting as being both truthful and accurate. Ms Elliott described the meeting as follows (TC 116-117):

*"Mr Sefton: So come the Monday when the placements were due to start, did you receive a telephone call from Mr Pease?*

*Ms Elliott: Yes. At about 2 o'clock in the afternoon I had a call from Mr Pease to say that Wendy had commenced working in his business. As a result of that, I was a little bit disturbed because (a) I hadn't had the ability to think through the position, you know, and just make sure it was alright; (b) you know, considering the last I'd heard Wendy was still possibly looking at outdoor I thought she might've been in the communications side of the business which would have meant, you know, outdoor work obviously, which would have possibility interested her, but I hadn't had time to think it through and I had been told that she had already commenced it and I thought, 'Right', so I said 'Look, I'll come down and talk about it', went down and talked about it and Mr Pease said that Rhonda Phillips would be her trainer/assessor, so it then became apparent that she was going to do the placement in the business, in the office segment, and I thought, well, that was fine and I thought, 'Oh, well, we've reached some'... you know, 'we're going to work together on this' and that seemed...everybody seemed happy, but I did point out that the placement was different from the one that Wendy's sister had been involved in because it was a graded subject and the training and assessing was different now, and so we sat down and went through the skills list with Rhonda and then Mr Pease was sitting there as well, then we went through the different nature of marking it off, doing the assessments and that.*

*Mr Sefton: And once you had gone through that, what else happened?*

*Ms Elliott: Well at that stage I felt everybody must've been comfortable with it. I don't know, but I thought they were, but as I left Mr Pease made a comment*

*to me ... during it he had made a few comments to me that were a little be negative about the Education Department and having to cross t's and dot i's and things like that, so I was a little bit defensive.*

*Mr Sefton: Sorry, just to clarify it, do you recall what the reference to crossing t's and dotting i's was about?*

*Ms Elliott: I think it was just in general terms to Education Departments and the way things could be done. I don't think... it was just a general sort of thing, I think.*

*Mr Sefton: Yes?*

*Ms Elliott: But as I was leaving he made some comment to me that set me back a little bit, along the lines that ... I can't remember word for word, this is back 3 years now, but it went something like 'Well, ultimately as I'm the boss, this is my business, I will be responsible for the assessment' and I was taken aback and I thought 'Well, I'm not going to enter into it here now. I want some my advice from my superiors on it' because I didn't feel comfortable with it, because on one hand we were giving Wendy the opportunity – because in a small community there aren't many opportunities of placements ..."*

14 A number of things emerge from this evidence. First, notwithstanding the unsatisfactory way in which the placement had been arranged, Ms Elliott was prepared to approve the placement on the basis that Rhonda Phillips was the trainer and assessor. Second, Ms Elliott only became concerned when Mr Pease said that he would be responsible for the complainant's assessment.

15 Ms Elliott's concern about Mr Pease's statement that he would be responsible for the complainant's assessment was heightened by the fact that the complainant was now going to be working indoors under Ms Phillip's supervision when she had previously believed that she would be working outdoors with her father. In other words, as a result of Mr Pease's statements, Ms Elliott was concerned that Mr Pease would be



supervising the complainant's assessment in circumstances where he had not been the complainant's trainer. She put it this way at TC 117:

*"... When Mr Pease said that it raised alarm bells because I thought if I wasn't comfortable with an assessment that was made by her trainer or by Dennis over the trainer, I wouldn't have a leg to stand on. I wouldn't see that it was fair, and I knew that we had a policy in place to ensure that fairness so I went back and I saw the Deputy first up and he said 'No, you go straight to the boss'."*

16 The evidence revealed that Ms Elliott went to see Mr Rushforth.

17 Mr Rushforth's recollection of that meeting was as follows (TC 88):

*"Mr Sefton: And can you explain what it was that Mrs Elliott said to you her concern was about the proposed placement?"*

*Mr Rushforth: Yes. Mrs Elliott came back to me and explained to me that she was concerned about the placement, being as it was with a close family member. She ... we have a policy of not placing the students with close family members if at all possible. That is our policy position, and we have cancelled a number of students in this regard previously. She came to me with similar concerns over this placement.*

*Mr Sefton: Alright, and what did she say, if anything to you about what the nature of the proposed placement was for Wendy?*

*Mr Rushforth: She said that the proposed placement that Mr Pease had explained to her was with him in his business and that she was concerned about that. She had said to me that Mr Pease had said to her that he would use an employee of his, a Rhonda Phillips, to mark off the competencies concerned but she would be working with him.*

*Mr Sefton: In relation to the business, did you understand from your knowledge of Wyalkatchem what the business was that Mr Pease operated?*

*Mr Rushforth: My understanding was that she was going to work in one aspect of the business that Mr Pease was running and that was the outdoor aspect in terms of going out and fitting electronic equipment like TV antennas and the like.*

*Mr Sefton: And what was your understanding of what the other aspect or aspects of the business were at the time?*

*Mr Rushforth: Mr Pease also owned the ... or ran the post office situation and that is the area in which Mrs Rhonda Phillips was working."*

18 Mr Rushforth telephoned Mr Pease to discuss the situation. Mr Rushforth took notes of this conversation, whereas Mr Pease did not. The Tribunal is satisfied that Mr Rushforth's account of the conversation is a more accurate and complete account than Mr Pease's. Mr Rushforth told the Tribunal (TC 94/95):

*"Mr Sefton: Mr Rushforth, can you as best as you can recollect, without refreshing your memory from the notes, indicate which placements you discussed with Mr Pease and what his response was in relation to those placements?*

*Mr Rushforth: Yes. We had ... there were two possible placements at the school. One was with the gardener and Mr Pease's response to that was that she didn't want to work at the school. My recollection is that it was something along the lines of didn't want to be seen by her peers to be working at the school. The second was an offer at the office. His response to that was that she didn't want to do office work, that she wanted to do outside work. We next talked about a placement at the shire, which from my memory I think it was the Dowerin Shire rather than the Wyalkatchem Shire, and Mr*

*Pease's response was that he felt that she wouldn't get anything out of a placement at the shire. There were two other placements at livestock companies – Elders and Wesfarmers. There was a range of opportunities within those companies to do outdoors type work. Mr Pease's response to that was that Wendy didn't like working with people that she didn't know, to which I responded that that was probably one of the objectives of the programme, to place our students in situations where they didn't know people and that was one of the advantages of the programme, to learn to work with others. Mr Pease's response to me was that he knew when to push Wendy and I didn't know when to push Wendy so his ruling on that was accurate.*

*Mr Sefton: Sorry, you had just referred to I think an issue about Mr Pease indicating that he knew whether it was appropriate or when to push his daughter and...?*

*Mr Rushforth: Yeah, he knew his daughter ... basically, along the lines of he knew his daughter much better than I did and he would know that it wasn't a good idea to put her into situations where she didn't know the person that she was working with.*

*Mr Sefton: Did you discuss with Mr Pease whether or not he would agree to try and negotiate another placement that was agreeable to everyone?*

*Mr Rushforth: I suggested that we talk about another placement and look at alternatives. Mr Pease's response to me was that it was his place or nowhere else."*

19 It is plain that at this point Mr Pease's mind was made up and the matter was beyond compromise.

### Mr Rushforth's letter to Mr Pease dated 22 June 2000

20 On 22 June 2000 Mr Rushforth wrote to Mr Pease. Prior to the commencement of the hearing the parties agreed that this and some other correspondence could be admitted into evidence by consent. The letter contains the following paragraph:

*"My policy position of not endorsing the placement of students with close family members is based on the principle that it is best for all stakeholders to avoid questions related to the integrity of the programme."*

21 The reference to "my policy position" is clearly a reference to the Structured Workplace Learning Policy referred to earlier in these reasons.

### Mr Pease's letter in reply dated 26 June 2000

22 Mr Pease replied to Mr Rushforth's letter on 26 June 2000. Amongst other things, Mr Pease stated:

*"Furthermore, your 'policy position' clearly discriminates against Wendy and other students who happen to be in the 'unfortunate' situation of having parents who own businesses."*

### Mr Rushforth's reason for concern

23 Mr Rushforth in his evidence set out the matters that caused him to have concern over the proposed placement (TC 96):

*"Mr Sefton: In relation to the proposed placement of Wendy at Mr Pease's business as you understood it, what, if any, circumstances surrounding that caused you concern about whether you should approve the placement.*

*Mr Rushforth: Firstly, in terms of the family placement. Secondly, if, as it was suggested at some stage, that Ms Phillips be the supervisor of that placement, that meant that it would have changed direction dramatically in terms of the industry placement from an outdoor-type situation to an office situation, and that would have caused me concern to question that.*

*Lastly, I had some concerns about the placement for Wendy in terms of the type of situation that she was going into and I felt that that was not an entirely appropriate position to go into.*

*Mr Sefton: In what respects were you concerned that it wasn't an appropriate position?*

*Mr Rushforth: In terms of some of the things Mr Pease had actually talked about himself. In terms of Wendy's self-confidence, in terms of her ability to talk with and deal with other people, to work in teams, her interpersonal skills, I would have had some concerns about the particular anyhow (sic)."*

### The aftermath

24 In the end, the complainant did her second semester SWL placement at the post office business. Although Mr Rushforth had informed Mr Pease that the complainant would not receive a grade for her second semester placement, in fact, at the end of the year she was given a C. As the Tribunal understands it, a C grade amounts to a pass.

25 The complainant did not go back to school in Year 12. She commenced work in her family business where, by all reports, she is doing well. She has completed or is in the process of studying at TAFE.

### Analysis of the facts

26 The situation which confronted Ms Elliott and Mr Rushforth on 19 June 2000 was most unfortunate. Notwithstanding Ms Elliott's efforts, the complainant and her parents did nothing to provide the school in ample time with suggestions as to where she should be placed in the second semester. Ms Elliott made a number of helpful suggestions as to how the situation might be dealt with but she was met with an unreasonable refusal to come to a solution.

27 The Tribunal finds that on 19 June 2000 Mr Pease took it upon himself to impose upon the school his own solution. He presented the school with a fait accompli. Once Mr Pease had made the decision that the complainant was to work in his business, he would not be persuaded

to come to some other arrangement. His attitude is best illustrated by his statement to Mr Rushforth that it was "his place or nowhere else".

28 Having said this, the Tribunal must focus on the reasons why the complainant was refused permission to work at her father's business in her second semester SWL placement.

29 The Tribunal finds that a number of factors were considered by Ms Elliott and Mr Rushforth when deciding whether to permit the complainant permission to work at her father's business in her second semester SWL placement. Those factors were as follows:

- (i) Ms Elliott and Mr Rushforth were both concerned that Mr Pease intended to have ultimate responsibility for the complainant's assessment, when the best and most appropriate person to make that assessment was her immediate supervisor, Rhonda Phillips. Mr Pease's statement that he would be responsible for the assessment because he was ultimately the boss gave Ms Elliott and Mr Rushforth a fear, or at the very least, created a perception that Mr Pease may over-ride or improperly interfere with Ms Phillips' assessment of the complainant.
- (ii) Ms Elliott and Mr Rushforth were concerned that the complainant had indicated a preference to outdoor work but that preference had suddenly changed to indoor work.
- (iii) Given that the complainant had expressed to both her parents a lack of confidence in working with people she did not know, it was thought, by Mr Rushforth in particular, that the complainant's self-confidence would be better developed in a workplace away from her family, where she could learn to work with strangers.
- (iv) There was an underlying issue of the school's authority. The school had the responsibility to ensure that SWL placements were safe and appropriate. As a result, procedures were put into place which were explained to students during the orientation period as to how the placements were to be arranged and approved. From the school's point of view, Mr Pease had taken it upon himself to ignore the procedures and had undermined the school's authority.
- (v) The policy was undoubtedly a matter on the minds of both Ms Elliott and Mr Rushforth. This was borne out in their evidence and in Mr Rushforth's letter to Mr Pease dated 22 June 2000.

30 Not too much should be made of Mr Rushforth's letter. It was not designed to give a detailed explanation of the decision. It was plain to the

Tribunal that consideration to more than just the policy was given by Mr Rushforth.

- 31 The Tribunal finds, that by far, the most important factor which led Ms Elliott and Mr Rushforth to refuse the complainant's SWL placement was her father's statements to Ms Elliott at the conclusion of their meeting on 19 June. It is evident from Ms Elliott's testimony that she was prepared to approve the SWL placement up to that point. It is very likely that Mr Rushforth would have approved the placement based on Ms Elliott's approval.

The statutory provisions relating to family responsibility or family status

- 32 Section 35A of the EOA provides as far as is relevant to this case:

*"(1) For the purposes of this Act, a person (in this sub-section referred to as the 'discriminator') discriminates against another person (in this sub-section referred to as the 'aggrieved person') on the ground of family responsibility or family status if, on the ground of—*

*(a) the family responsibility or family status of the aggrieved person;*

*(b) a characteristic that appertains generally to persons having the same family responsibility or family status as the aggrieved person; or*

*(c) a characteristic that is generally imputed to persons having the same family responsibility or family status as 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 does not have such a family responsible or family status."*

- 33 "Family responsibility or family status" is defined in Section 4 EOA defines "family responsibility or family status" as meaning:

*"(a) having responsibility for the care of another person, whether or not that person is a dependant, other than in the course of paid employment;*

- (b) *the status of being a particular relative; or*
- (c) *the status of being a relative of a particular person."*

34 Section 35I of the EOA provides:

*"(1) It is unlawful for an education authority to discriminate against a person on the grounds of the person's family responsibility or family status –*

*(a) by refusing or failing to accept the person's application for admission as a student; or*

*(b) in the terms or conditions on which it is prepared to admit the person as a student.*

*(2) It is unlawful for an education authority to discriminate against a student on the ground of a student's family responsibility or family status –*

*(a) by denying the student access or limiting the student's access to any benefit provided by the education authority;*

*(b) by expelling the student; or*

*(c) by subjecting the student to any other detriment.*

*(3) Nothing in this section applies to or in respect of bona fide benefits, including concessions, provided to a person by reason of his or her family responsibility or family status."*

### **The complainant's contentions**

35 In essence, the complainant says that the respondent has breached s 35A(1) and s 35I(2)(a) and (c).

36 The complainant says that she has been discriminated against because she sought an SWL placement in a business operated by her father and that because the business was operated by her father she was denied access to an SWL placement or at the very least subject to detriment in that the school ignored her performance in her father's business when grading her for the VET programme.



37 The complainant alleges that the respondent, via Ms Elliott and Mr Rushforth, imputed to her the characteristic that close family members will treat other members of the same family more leniently and that family members are incapable of undertaking an objective assessment of the work performance of other family members.

### The respondent's contentions

38 Mr Sefton, who appeared as counsel to the respondent, submitted that in reality the decision that was made had nothing to do with family status and was made because there was a fear that the complainant's assessment may be actually compromised by Mr Pease. Further, it was in the interests of the complainant and the proper management of the school that the placement be refused.

39 Neither counsel has been able to point to any authority which may assist the Tribunal in dealing with an allegation of discrimination on the ground of family status in the area of education. The Tribunal notes that the EOA was amended in 1992 to include s 35A and s 35I, but since that time there would appear to be no decided case in which these sections have been applied.

40 Mr Sefton submitted that the Tribunal could find some guidance from the cases of *Boehringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13 and *Waterhouse v Bell* (1991) 25 NSWLR 99. Each of those cases dealt with unlawful discrimination on the ground of marital status. In *Boehringer Ingelheim Pty Ltd v Reddrop*, the respondent, applied for a position with the appellant. Her husband worked for a competitor. The respondent did not obtain the position and complained that she had been discriminated against on the ground of marital status. Before the Equal Opportunity Tribunal the respondent succeeded but on appeal the Tribunal's decision was reversed. Mr Sefton pointed out that the members of the Court held that if, as a matter of fact, the marriage of the respondent and her husband caused real difficulty to the appellant, the refusal to employ the respondent was lawful. However, if the respondent did not obtain the position because of characteristics imputed to married couples generally without reference to the respondent's individual characteristics, such a decision would amount to unlawful discrimination. The decision in *Boehringer Ingelheim Pty Ltd v Reddrop* was affirmed in *Waterhouse v Bell*.

41 Mr Sefton submitted that by analogy the principles set out in *Boehringer Ingelheim Pty Ltd v Reddrop* and *Waterhouse v Bell* applied

to the current situation. He submitted that the respondent's decision to refuse the complainant an SWL placement with her father's business was because the fact of their relationship gave rise to a real difficulty in that Mr Pease said that he would be responsible for the assessment because he was ultimately the boss in circumstances where his daughter should have been assessed by Ms Phillips, her immediate superior.

### **Section 5 EOA Does Not Apply**

42 Neither counsel referred the Tribunal to s.5 EOA. The Tribunal has nevertheless carefully considered whether the existence of the policy and the fact Ms Elliott and Mr Rushforth gave consideration to it tainted the school's decision and made it discriminatory. The Tribunal is of the view s.5 EOA does not apply to this case because neither Ms Elliott nor Mr Rushforth slavishly adopted the policy. It was in truth a decision based on the circumstances and not the policy.

### **The Complainant's Claim Fails**

43 Had the respondent's decision to refuse the complainant the SWL in her father's business been based on the policy and nothing more, the Tribunal would have upheld the complaint. Implicit in this policy is the notion that family members will either consciously or subconsciously favour other members of their family by giving an assessment which would be more favourable than a student would receive if that student was not a family member. To put it another way, the policy stereotypes close family members as being unable to deal with each other without imposing some kind of unfair advantage when compared with others who do not have a close family link. The respondent should carefully review the policy and any others like it.

44 However, in this case both Mr Rushforth and Ms Elliott testified that the policy was not inflexible: see Mr Rushforth at TC 96 and Ms Elliott at TC 117. The complainant's SWL placement in her father's business would have been permitted had Ms Phillips been her supervisor and in charge of her assessment.

45 Adopting the principles of law set out in *Boehringer Ingelheim Pty Ltd v Reddrop*, the Tribunal finds that the decision made by Ms Elliott and Mr Rushforth not to allow the complainant's SWL in her father's business was not unlawful discrimination on the ground of family status. Ms Elliott and Mr Rushforth did not apply stereotypical reasoning to the decision. Both looked at all the circumstances and made a decision based

on those circumstances. They were legitimately concerned about Mr Pease's role in the complainant's assessment combined with the other factors mentioned earlier in this judgment. Whilst regard was had to the policy, Ms Elliott and Mr Rushforth did not regard the policy as inflexible and were in fact prepared to allow the SWL on the basis that the complainant would be assessed properly, that is, by Ms Phillips. Unfortunately, Mr Pease's statements led both Ms Elliott and Mr Rushforth to the view that a proper assessment of the complainant's SWL was in jeopardy. The complainant was not discriminated against because the proposed SWL placement was judged on its merits and the school was correct in not allowing a situation to develop where the complainant's assessment was not going to be done by the person best positioned to do it, Ms Phillips.

- 46 Had the Tribunal found in favour of the complainant, it would have exercised a discretion not to take any further action in the matter; s.127(b)(v) EOA. Briefly, the situation which confronted Ms Elliott and Mr Rushforth was not of their making. Rather, the situation arose because the complainant and her parents had done nothing to organise her SWL placement despite the best efforts of the school. The situation could have been simply solved by the complainant undertaking another SWL placement which the school was working to obtain. The Tribunal is not convinced that the complainant would have gone onto Year 12 but for this dispute as was alleged. The evidence indicated that she was lukewarm at best regarding her progress into Year 12 in 2001 and was finding it difficult to keep up in some of her subjects in Year 11. The evidence did not indicate in a convincing way any real disadvantage to the complainant. She in fact received a pass grade in her VET for 2000 and has since progressed well in her work at her parents' business. The complainant sought an apology from the respondent. In light of the way this dispute was created the Tribunal would have regarded an apology as inappropriate.

### The result

- 47 In light of the abovementioned reason, the Tribunal orders that the complaint be dismissed.

*Richard M. J. J.*

31/10/03.

