

JURISDICTION : IN THE EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

LOCATION : PERTH

CITATION : EVEREST -v- NEW HAMPSHIRE HOLDINGS
PTY LTD trading as DELUXE CHAUFFERED
CARS

CORAM : MR R. MAZZA – DEPUTY PRESIDENT
MS M. FADJIAR – DEPUTY MEMBER
MR J. McKIERNAN – DEPUTY MEMBER

HEARD : 9 & 10 OCTOBER 2003, 12, 22 & 24
DECEMBER 2003 & 9 JANUARY 2004

DELIVERED : 22 JANUARY 2004

FILE NO : ET/2002-000039

BETWEEN : SANDRA EVEREST

AND

NEW HAMPSHIRE HOLDINGS PTY LTD
trading as DELUXE CHAUFFEURED CARS

Complainant

Respondent

Catchwords:

Equal opportunity – discrimination – marital status

Legislation:

Equal Opportunity Act 1984 (WA) ss.5, 9, 13, 35A, 35D(1)(b)-(d), and 127

Result:

Complaint upheld. Compensation ordered.

Representation:

Counsel:

Complainant Mr R. Carthew
Respondent Mr I. Jones

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

Boehringer v Reddrop [1984] 2 NSWLR 13
Hall v Sheiban Pty Ltd (1989) EOC 92-350
IW v City of Perth (1997) 177 CLR 1
Newland v Department of Housing EOT 2001-00036 17 October 2002
Walley v The State Housing Commission EOT No. 7 of 1999 delivered 30 June 1999
Waterhouse v Bell (1991) 25 NSWLR 99

Case(s) also cited:

Airflite Pty Ltd v Goyal [2003] WASCA 45
Bridson v Kalgoorlie Taxi Car Owners' Association Inc EOT Matter No. 27 of 1995,
8 August 1996
Jones v Dunkel (1958) 101 CLR 298
McIntosh v Hautlieu Pty Ltd t/as Russell Pathology EOT Matter No. 19 of 1998, 9 November
1998.
Re Redger v Department of Social Security (1991) ALD 720

JUDGMENT OF THE TRIBUNAL

The complaint

1 The complainant has alleged in her Points of Claim that she was the victim of discrimination on the ground of marital status contrary to s 9 and s 13(1)(b)-(d) of the *Equal Opportunity Act 1984 (WA)* ("the Act"). At the hearing her counsel added a claim that she was the victim of discrimination on the grounds of family status contrary to s 35A and s 35D of the Act.

2 At all material times the complainant was married to Peter William George Everest. In fact, the complainant and her husband were married in 1971 and have lived together since that time. In or about July 2001 Mr Everest entered into a contract with Ground Transport Services ("GTS") to provide a chauffeur service for and on behalf of GTS.

3 The respondent is a company which, at all material times, carried on a chauffeur business called Deluxe Chauffeured Cars ("Deluxe"). GTS and Deluxe were competitors. On 13 July 2001 the complainant purchased from Ms Anne Marie Lacy what has been described in the proceedings as an Owner Driver and Vehicle Retainer Agreement ("the agreement") and a Ford Fairmont Ghia sedan ("the vehicle"). The respondent consented to Ms Lacy disposing of her interest in the agreement and the vehicle with the effect that the complainant carried out chauffeur work using the Ford vehicle in the name of the respondent. The respondent allocated work to the complainant who was paid via the respondent for the work she performed less a 25 per cent commission payable to the respondent.

4 The complainant alleges that within a short time of commencing her duties the respondent came to know that her husband worked for GTS and following upon this discovery the respondent wrongly imputed to the complainant by reason of her marital relationship that the complainant would disclose confidential information about the respondent's business to her husband. The complainant alleged that as a result she was discriminated against and this discrimination manifested itself in a number of ways, being:

- (a) Failing to provide the complainant with any chauffeur work between 10 and 21 August 2001;

- (b) When compared with the other drivers who worked for the respondent, the complainant was not given the same quantity and quality of work as those other drivers enjoyed; and
- (c) When the complainant attempted to sell her interest in the agreement and the vehicle, the respondent took steps which resulted in the respondent being unable to sell the agreement.

5 The complainant ceased work for the respondent on or about 17 June 2002. The respondent was able to sell the vehicle but has been unable to sell the agreement.

6 The complainant has claimed damages pursuant to s 127(b)(i) of the Act and an order pursuant to s 127(b)(iii) of the Act compelling the respondent to purchase the complainant's agreement for the price she originally paid, \$35,000.

The respondent's defence

7 The respondent denies that he discriminated against the complainant. The respondent has contended that once other chauffeur drivers contracted by it found out about the marital relationship between the complainant and her husband, at least two of them threatened to cease driving for the respondent because they feared that she would disclose to her husband confidential information relating to the prices Deluxe charged to their clients for chauffeur services. According to the respondent, disclosure of Deluxe's prices to its competitors would be to its financial detriment. The respondent's solution to this problem was to suggest to the complainant that her husband should join the Deluxe fleet. This suggestion was not taken up by the complainant, who then offered to sell her agreement and vehicle because she did not want to work with the other drivers if there was likely to be bad feeling between them as a result of her presence. The respondent has answered the complainant's specific allegations of discrimination as follows:

- (a) He did not discriminate against the complainant on the ground of marital status because the relationship of the complainant and her husband caused other drivers to threaten to withdraw their services to Deluxe;
- (b) The respondent voluntarily stood down from work between 10 and 21 August 2001;
- (c) The respondent did not restrict the allocation of work to the complainant because of her marital status. However, the

respondent agreed that the allocation of work to the complainant was restricted by virtue of the complainant's reluctance to work during hours of darkness for reasons to do with her personal security. Nevertheless, the complainant was allocated profitable work at other times; and

- (d) The respondent did not in any way interfere with the complainant's attempts to sell the agreement and the vehicle.
- (e) The respondent says that the complainant is not entitled to receive any compensation nor is she entitled to an order requiring it to purchase the complainant's agreement.

The respondent's business

8 In order to understand the evidence, it is necessary to understand the nature of the respondent's business. The respondent is a company incorporated in Western Australia. Although the relevant records held by the Australian Securities Investment Commission were not tendered, the directors of the respondent at all relevant times were Mr Ivor Jones and his twin sons, Michael and Shaun Jones. It appears that Ivor Jones was the managing director, indeed, he conducted the respondent's case before the Tribunal. Ivor Jones had a hands-on managerial role in the business. For all intents and purposes he was regarded as the person in charge. His sons, Michael and Shaun Jones had a lesser managerial role. On the evidence, it appears that their principle role was to communicate with the drivers and allocate work to them.

9 The respondent had obtained a number of contacts to supply chauffeur services for various government and private entities. These entities included Comcar, the Department of Veteran's Affairs ("DVA") some tourist operators and several funeral directors. In addition, the respondent occasionally provided services to private individuals and some businesses, although the precise extent of such work was not the subject of evidence.

10 The respondent required drivers to perform the work. Drivers were retained pursuant to an agreement known as an Owner Driver and Vehicle Retainer Agreement. Each driver apparently signed such an agreement. Pursuant to the terms of that agreement each driver was required to pay to the respondent a one off contracting fee, which gave the driver the right to be allocated work by the respondent. In order for the driver to receive work, each driver needed to have a vehicle suitable for the work which the

respondent was required to perform. This vehicle was purchased by the driver.

11 The respondent negotiated fees with their customers and once the work was performed the respondent would invoice the customer, who would then pay the respondent the amount claimed in the invoice. Pursuant to the agreement, a driver was entitled to 75 per cent of the amount payable by the customer to the respondent for each job allocated and carried out by the driver. The respondent retained the other 25 per cent, presumably to cover its expenses and earn a profit. The respondent had a number of vehicles at its disposal, being sedans and stretch-limousines. There was some evidence that the respondent also had at its disposal a vehicle known as a "people-mover". At any one time the number of drivers contracted to the respondent varied but the evidence reveals between 2001 and 2002 there were some 10 or 11 drivers on the fleet.

12 The agreements which the respondent had with the drivers were for a period of 15 years. Agreements could be bought and sold on the open market. Further, the respondent itself, from time to time, created new driving positions which were the subject of agreements.

13 In order to facilitate the sale of agreements, whether they had been agreements created by the respondent or pre-existing agreements, a business broker named Allan Brown was inevitably retained for that purpose. The evidence revealed that Mr Brown and Ivor Jones had a very close working relationship.

14 The nature of the work conducted by the respondent meant that drivers may be called upon at any time, day or night, seven days per week. A lot of the night work was pursuant to the Comcar contract, involving the picking up and delivery of Commonwealth officers at the Perth international and domestic airports. The most common work during the day was DVA work, which involved the transportation of persons entitled to veterans health benefits from their place of residence to hospitals and medical appointments and vice versa.

15 Prior to each day all drivers were sent a fax , called a daily roster sheet, setting out the roster for the following day. The driver who was at the top of the list was allocated the most work. Any work which that driver was not able to undertake would be allocated to the driver immediately below him or her, and so on. Each driver took it in daily turns to be at the top of the list. This allocation system was known as the

"point system", as the driver at the top of the list was said to be driving the point position.

The evidence called by the complainant

The complainant – Sandra Everest

16 Ms Everest gave evidence that she had owned and/or managed a number of small businesses in or about Perth and in the country. In June 2001 she and her husband were operating a newsagency in Kellerberrin but had decided to move to Perth. The complainant wanted employment and one day, in or about June 2001, she saw an advertisement in a newspaper lodged by Allan Brown on behalf of Anne Marie Lacy offering for sale her agreement and vehicle.

17 The complainant eventually met Mr Brown, who provided her with a document entitled "Business Brief" (Exhibit 3). This document gave a thumbnail sketch of the history and work of the respondent and contained a statement that a sedan vehicle (Ms Lacy's vehicle was a sedan) could earn "*estimated income is \$50,000, 25% paid to company (sic)*". Under the heading of "General Information" it was stated that a driver would need to work "*average 30 hours/week over 7 days*".

18 In due course the complainant inspected the vehicle and got her accountant to examine earnings figures provided in writing by Ms Lacy for the financial year ending 30 June 2001 (Exhibit 5).

19 Via Mr Brown, Ms Lacy's interest in the agreement and her vehicle were sold for a total of \$65,000. A figure of \$35,000 was allocated to Ms Lacy's interest in the agreement and \$30,000 was the sale price of the vehicle.

20 The contract for the sale of the agreement and car between the complainant and Ms Lacy was signed on 28 June 2001 (Exhibit 6).

21 On 13 July 2001 a meeting took place at Ivor Jones' office. At that meeting the complainant paid the final balance of the monies owing to Ms Lacy and an Owner Driver and Vehicle Retainer Agreement was entered into by the complainant and the respondent (Exhibit 7). Although it appears that the complainant did not actually sign the contract, the complainant is described in Schedule 1 of the agreement as the owner driver, and it is common to the cases of both the complainant and the

respondent that the parties considered themselves bound by the terms of the agreement.

22 According to the complainant, she believed based on the written materials provided to her by Mr Brown, statements made by him and statements made by Mr Jones, that she would earn an income of \$50,000 before expenses and taxation but after deduction of the respondent's 25 per cent by working 30 hours per week over seven days. She believed that she would be allocated work day and night, including work for Comcar, DVA, tourist operators, weddings and funerals and others.

23 After undertaking a driving course and obtaining the necessary licenses and insurance, the complainant commenced work for the respondent on 16 July 2001.

24 Just over a week later, on 24 July 2001, Allan Brown contacted her by telephone and requested a meeting for coffee. The following day Mr Brown and the complainant met at a coffee shop opposite the respondent's offices. The complainant's evidence about this meeting is as follows (transcript page 56, 9 October 2003):

"Question: And in relation to the meeting, who attended that meeting to start off with?"

Answer: Well, I spoke with Allan Brown originally because we ... he told me what the problem was because I asked him. I said, you know "what happens? What (sic) the problem?" and he goes "Your husband works for another company" and it was a huge problem from what I can gather. I was very upset and I said, "Well, how can it be a problem?"

Question: And what was his ...?"

Answer: "We've got nothing to do with each other work-wise" you know. "Why is it a problem?"

25 Later on the same transcript page in answer to a question by the Deputy President, the complainant said:

"...and he told me "Your husband works for another company" and I said to him, "Why is that a problem. We've got nothing to

do with each other work-wise", and he said "Oh, it's", the exact wording I don't remember.

Deputy President: All right. To the effect of?

Answer: But I know he made me feel and he said in his own words that it was a huge problem, that I could take business or pass it on to my husband, or he could view my work sheets and ... I don't know. It just seemed totally unrealistic to me that he should be even bringing this up."

26 The complainant said that she and Mr Brown then walked up to Ivor Jones' office, where she met with Ivor, Michael and Shaun Jones and Mr Brown. Part of the complainant's evidence concerning this meeting is as follows (transcript p 58, 9 October 2003):

"Question: Just taking you back from where we left off, Ms Everest. In relation to your meeting at Mr Jones' office on 25th of July, do you recall exactly who was there at that meeting?

Answer: Michael, Sean (sic) and Ivor Jones, and obviously myself and Allan, but there was another driver in the office at the time, and because I'd been crying, was distressed, I asked if we could just sit out on the seats just outside the office door in the foyer, which he did, and then Ivor told me that he'd found out that my husband worked for another company, it was a huge problem: that I could be a threat to his company. I could pass information on to my husband. If ever they lost a job, I could be blamed for that, and the conversation just proceeded along those lines.

Question: And what did you say in response to that when that was raised?

Answer: Well, I told him I couldn't see what the conflict was. I had no intentions of doing what he was more or less accusing me of, and I never did and never have even since, and I told him I just can't see what the problem is. I told him I didn't want

to be unfairly blamed for anything that I didn't do and I reminded him that I had just spent \$65,000 a couple of weeks earlier. There's no way I was going to jeopardise my investment."

27 The complainant testified that although she felt that she was being dealt with unfairly, she did not want to stay in a workplace which did not want her and she said that she wanted to sell the agreement and her vehicle. According to the complainant, Ivor Jones responded by suggesting that the solution to the problem was for the complainant's husband to join the Deluxe fleet.

28 The complainant told the Tribunal that she continued to work for the respondent between 25 July and 10 August 2001. During this time Mr Jones telephoned her to ask if the complainant's husband had decided to join Deluxe. The complainant told Ivor Jones that her husband would not be joining Deluxe.

29 On 10 August 2001 Ivor Jones telephoned the complainant. During the course of that telephone conversation the complainant confirmed that her husband would not be working for Deluxe. Ivor Jones, according to the complainant, told her that the other drivers employed by Deluxe had made a unanimous decision that the complainant should sell her agreement. The complainant repeatedly told Mr Jones that the situation was totally unfair.

30 Notwithstanding this conversation, the complainant turned up for work. She telephoned Michael Jones and was told that as she was putting her business up for sale she would not be allocated work. She then went and saw Allan Brown.

31 When she arrived at Allan Brown's office he gave her a letter from the respondent addressed to her dated 10 August 2001. The letter was tendered in evidence (Exhibit 12). The first paragraph of that letter is in the following terms:

"After lengthy discussions with you, Allan Brown and our fleet operators, I have decided sadly to accept (sic) your (sic) offer to stand down from our fleet and subsequently your listing of your business with William Shire Business Brokers."

32 The complainant denied that she made any offer to stand down from her position. The gist of her evidence is that this letter seriously

misrepresents her position and distorts the events which had, in fact, occurred.

33 On 10 August 2001 the complainant appointed Mr Brown to sell her interest in the contract and her car. She did this only because she was faced with no other choice.

34 Between 10 and 21 August 2001 the complainant received no work from the respondent. The complainant said that she frequently visited the respondent's office and spoke to one or other of Michael and Shaun Jones about the situation. The complainant says that she spoke to Ivor Jones on 20 August 2001 and on that day he made it clear to her that she was not going to be allocated any work.

35 However, on 21 August 2001 Ivor Jones had an apparent change of heart. He telephoned the complainant and offered her DVA work. Thereafter, the complainant worked for the respondent up to 17 June 2002, however, the work the complainant performed between 21 August 2001 and 17 June 2002 was predominantly DVA work. The complainant kept her own handwritten record of each and every job she performed for the respondent in a ledger analysis book, which was tendered as Exhibit 14. In addition to the analysis book, the respondent provided each driver with a monthly statement that detailed the work the driver performed as well as a calculation of the payment made to each driver by the respondent for that month. The complainant tendered these monthly operator payment statements for her for the period 16 July 2001 to 17 June 2002 as Exhibit 15. The complainant's case was that a combination of Exhibits 14 and 15 provided a precise analysis of the type of work performed by the complainant and the income that she received.

36 According to the complainant, a proper analysis of Exhibits 14 and 15 shows that between 21 August and 6 September 2001 the only work provided to the complainant by the respondent was for the DVA. Between 6 September and 31 December 2001, 131 of 178 jobs she performed were for the DVA. Whilst between 1 January and 17 June 2002 approximately 130 of the 272 the complainant performed were for the DVA.

37 The complainant alleged that she was allocated a much greater proportion of DVA work compared to the other drivers retained by the respondent. What is more, DVA work was barely, if at all, profitable. This was because DVA work often involved travelling long distances and involved a lot of time.

38 In the days and months that followed her return from work on 21 August 2001, the complainant noticed that she was being passed over for more lucrative work, in particular Comcar and funeral work. The complainant also noticed that drivers who were ranked below her on a particular day were being allocated work which ought to have been allocated to her.

39 The complainant told the Tribunal that she was prepared to perform the same work as the other drivers who were retained by the respondent. This included working in the hours of darkness, either late at night or early in the morning. The document which was faxed to each driver before the next days work was known as the daily record sheet. Many of the daily record sheets for the complainant between 28 July 2001 and 3 June 2002 were tendered as Exhibit 17. There were occasions when the complainant faxed back the respondent's office indicating that she was unable to perform some of the work which was allocated to her. The complainant told the Tribunal that there were occasions when she "off-loaded" work but when she did so she off-loaded work for a good reason. Some of the reasons included that she would not have time to get from one scheduled job to another, illness and occasional personal commitments.

40 The complainant told the Tribunal that the efforts made by her to sell her interest in the agreement and her vehicle were thwarted by the respondent and/or its agent Allan Brown. In particular, although the respondent knew from October 2001 that the complainant's agreement and vehicle were on the market, it nevertheless instructed Mr Brown to advertise and sell two new agreements for the same type of vehicle owned by the complainant. Mr Brown did as he was told and sold the two new contracts in October and December 2001, which resulted in the respondent receiving the proceeds of sale.

41 Further, up until 26 March 2002 Mr Brown advertised the complainant's agreement and her vehicle as being for sale to female purchasers when in fact she had given no such instruction to Mr Brown and her own contract was not restricted to only female drivers.

42 The thrust of the complainant's evidence was that Mr Brown was not acting in her best interests but rather took his instructions from Ivor Jones and acted in the best interests of the respondent.

43 The complainant testified that up to date she had been unsuccessful in selling her interest in the agreement. She had more success in selling

her vehicle. In August 2002 she was able to privately sell the vehicle for \$20,000, \$10,000 less than she had paid for it.

Evidence of Graham Miles Swift

44 Mr Swift was another driver on the respondent's fleet. He started work for the respondent not long after the complainant. He told the Tribunal that he recalled attending a meeting at the respondent's office in what he thought was approximately August 2001. He recalls Ivor Jones explaining to him and some of the other drivers that there was a problem with the complainant driving for the respondent because her husband worked for a competitor. Mr Swift recalled Ivor Jones speaking of "a conflict of interest". According to Mr Swift, Ivor Jones told the meeting that the complainant would be "doing Department of Veteran Affairs work".

45 According to Mr Swift, in his experience, DVA work was "certainly unprofitable" because of the distances travelled and the time taken to do the work.

46 As far as the allocation of work was concerned, Mr Swift was always the driver immediately behind the complainant in the point system. He noticed that he was being allocated jobs that should have been allocated to the complainant, even when she was on point. He observed that the complainant was doing DVA work and not receiving much in the way of "cream" work.

47 On 15 July 2002 Mr Swift ceased working for the respondent. He attempted to sell his agreement and vehicle through Allan Brown. Mr Brown was not able to sell either asset. Mr Swift was able to sell his vehicle privately. He has given up attempting to sell his interest in the agreement, telling the Tribunal "I don't believe it's saleable".

Evidence of William Stephen Henshall

48 Mr Henshall entered into a contract with the respondent in January 2002, having purchased an agreement and a vehicle from a man named Ken Ferguson. He performed DVA work and described it as "non-viable". He told the Tribunal that the fee structure was insufficient given the distance that needed to be travelled and vehicle depreciation.

49 From his observations, the complainant was overlooked for work and that he saw her, on occasions, in tears.

50 After he commenced work with the respondent, Mr Henshall discovered that the complainant's husband worked for another chauffeuring company. He told the Tribunal he had no difficulty with this.

51 In or about August 2002 Mr Henshall ceased working for the respondent. He said that he put his agreement and car on the market with Allan Brown but he was unable to attract a buyer.

Evidence of Ross Edward Wilson

52 In or about October 2001 Mr Wilson purchased, through Allan Brown, an agreement to perform work with the respondent. The agreement was sold to him for \$35,000 plus GST. The proceeds of sale were paid to Ivor Jones. Mr Wilson purchased his own vehicle and worked for the respondent until August 2002. It is evident that the agreement purchased by Mr Wilson was the agreement referred to by the complainant as having been issued by the respondent and sold by it in about October 2001.

Evidence of Garry Roy Thackrah

53 In or about December 2000 Mr Thackrah commenced work for the respondent. He worked for the respondent until June or July 2002.

54 He came to know the complainant after she joined Deluxe and became aware that the complainant's husband worked for a competitor. He could not see any conflict of interest arising as a result of the complainant working for the respondent and her husband working for a competitor.

55 Mr Thackrah was of the view that "*corporate work was where the money was*" and that DVA work "*was a lot of k's for not a lot of money*".

56 He observed over a period of between 8 to 12 months that the complainant was being overlooked in the allocation of work and that she appeared "*pretty withdrawn, pretty upset about it all*".

57 Mr Thackrah gave evidence that he had attempted to sell his agreement after he left the respondent's employment, with no success.

Evidence of Peter William George Everest

58 Mr Everest is the husband of the complainant. He told the Tribunal that he commenced work with GTS in or about July 2001. He said that one of the key people at GTS was a Mr Maff. Mr Maff learnt that the complainant was contracted with another chauffeuring company. According to Mr Everest, the fact that his wife worked for a competitor had no effect upon the work that he was given at GTS. Mr Everest said that information given to him by GTS was not confidential and that rates for DVA work were not secret. In any event, he did not discuss such matters with his wife. Whenever faxes were sent to Mr Everest or the complainant, the faxes were put into separate folders. He did not look at his wife's folder and, as far as he was aware, his wife did not look at his folder.

The respondent's witnesses

Evidence of Ivor Verdun Jones

59 Ivor Jones told the Tribunal that the complainant joined the respondent *"on a female operators contract"*. There was only one such contract in effect. For the sake of balance it was important that if the female contract was disposed of, the purchaser must be a female.

60 According to Ivor Jones, in July 2001 he received a telephone call from one of the other drivers on the fleet, Mr Ken Ferguson, in which he complained of seeing the complainant *"sitting in a car which was identified as a vehicle belonging to Ground Transport Services, our biggest competitor"*. After he made subsequent enquiries, the gentleman's car turned out to be Sandra Everest's husband's. According to Ivor Jones, Mr Ferguson was very angry with what he had seen and he informed Ivor Jones *"that there would be trouble on the fleet unless I did not (sic) resolve the issue of our biggest competitor's wife working for our company"*.

61 Ivor Jones then took advice from his solicitor, who apparently told him to be *"very wary because of the Equal Opportunities Act"*. He also took the advice of Allan Brown.

62 On 25 July 2001 Ivor Jones met with the complainant and Mr Brown. The effect of his evidence is that the complainant acknowledged the dilemma which was facing him and that she volunteered to put her agreement and her vehicle on the market and move

on. He said that he tried to help her by suggesting that her husband could join the respondent's fleet. The complainant did not give an immediate answer to this suggestion. During the next 14 days Ivor Jones said that he contacted the complainant on a number of occasions seeking her response to his suggestion. Ivor Jones was at pains to inform the Tribunal that he was trying to resolve the issues in a satisfactory way to placate Mr Ferguson and the complainant. On 10 August 2001 he telephoned the complainant. During that telephone conversation the complainant told him that her husband was not joining the respondent's fleet. She told him that she had decided to sell her agreement via Allan Brown and that she was standing down from the fleet voluntarily. Ivor Jones confirmed this arrangement in a letter addressed to the complainant dated 10 August 2001 (Exhibit 12). He says that this letter correctly sets out the complainant's position and the fact that she did not respond in writing or by telephone to it confirms that it accurately sets out the situation.

63 According to Ivor Jones, just before the complainant stood herself down, he had a meeting with three drivers, Ken Ferguson, Steve Lesk and John Hanscombe. They told him that they were concerned about daily job sheets being faxed to the complainant because those sheets included the names of Deluxe's clients and the rates charged to them. Apparently they believed that this information could be made available to Mr Everest, whom they assumed would pass it on to GTS. Ivor Jones saw no other way to allay these concerns other than to propose to the complainant that her husband join the Deluxe fleet.

64 Between 10 and 20 August 2001 Ivor Jones says he heard nothing from the complainant. On 20 August 2001 she rang him and said that he thought about the situation overnight and on 21 August 2001 she returned to the fleet.

65 Ivor Jones said that thereafter the complainant performed work for Deluxe up to 17 June 2002. He said that the complainant limited the work that she was prepared to perform by refusing to do work in the hours of darkness.

66 Ivor Jones said that he instructed his sons to compensate the complainant's lack of night hours by giving her higher paying DVA jobs. Ivor Jones agreed that for a period of time up to September 2001 after the complainant returned to the fleet, she performed only DVA work. Thereafter she performed a greater mix of work but with an emphasis on jobs for DVA. His view was, and remains, that DVA work, including the longer DVA trips, is profitable.

67 Ivor Jones told the Tribunal that from his individual point of view, he trusted the complainant and did not believe that she would disclose confidential information. He said that DVA was the respondent's biggest client and he was unconcerned that she received information which if communicated to a competitor might see the respondent's DVA contract lost. Ivor Jones said he had no concerns about the complainant but the other drivers, in particular Ferguson and Lesk, did. Ivor Jones took the course that he did because he thought that to do otherwise would lead to drivers withdrawing their cars from the fleet with the effect that the business and the livelihoods of those in it would be jeopardised. He told the Tribunal that the only drivers who lodged complaints were Ferguson and Lesk, whose attitudes generally were "*unhelpful*" and "*antagonistic towards the owners of the business*". Ivor Jones told the Tribunal that the complainant was not allocated night work because she frequently off-loaded it. According to him, the complainant off-loaded a far greater number of jobs than any other driver. As a result, the complainant was unlikely to earn the same level of income as other drivers. Further, Ivor Jones told the Tribunal that other drivers were able to earn more money by developing relationships with clients who would call on their services personally or by operating a particular vehicle with two drivers. The complainant did not develop business relationships nor did she put on an extra driver to maximise her income.

68 Ivor Jones made a particular point to the Tribunal that by June 2002 the complainant was getting a substantial amount of non-DVA work and that this illustrates that the respondent was not discriminating against the complainant.

69 Ivor Jones told the Tribunal that he was not aware of the complainant being unhappy until he received a letter from the complainant on 26 March 2002, which was dated 27 February 2002 (Exhibit 20). He immediately replied (Exhibit 21). The complainant's letter informed the respondent of her concerns, including allegations that her income was lower than other drivers, she was being overlooked in the allocation of certain work and Mr Brown had been unsuccessful in selling her contract. The complainant informed the respondent that she believed that she had been treated unfairly and discriminated against "*in accordance with the Family Status Act (sic)*".

70 The respondent's reply to the complainant's letter denies any discrimination. It alleges that she refused to carry out work late at night or early in the morning and that she had not been allocated certain work because she had not been able to foster business relationships with clients

and some work was allocated to particular drivers at the specific request of customers. As to the sale of the complainant's interest in her agreement and her vehicle, it was stated that the respondent would support her if she went through another broker and that although her agreement was for a female owner operator, the respondent was prepared to consent to a transfer to a male.

71 Ivor Jones testified that the complainant did not reply to his letter. He asserted that her failure to reply amounted to an acceptance of the matters contained in the letter he sent to her.

72 With respect to the sale of the complainant's agreement and vehicle, Ivor Jones agreed that towards the latter part of 2001 he instructed Allan Brown to list two more agreements to be sold with the operators to supply their own vehicles. These agreements were issued by the respondent and the respondent received the proceeds of sale. Ivor Jones told the Tribunal that the contracts were sold because Goran Zec and his brother Zoran Zec had left the fleet and needed to be replaced to fulfil the respondent's obligations to the DVA. Ivor Jones told the Tribunal that the difference between what was being offered by the respondent and the complainant was that the complainant was selling both the agreement and the vehicle, whereas the respondent was only selling an agreement. The particular purchasers of the agreements issued by the respondent wanted a new car. Further, at that time Ivor Jones regarded the complainant's agreement as a female agreement and could only be disposed of to another woman. Ivor Jones denied the allegation that he unfairly restricted the complainant in her efforts to sell her interest in the agreement and her vehicle.

73 From Ivor Jones' point of view, while it is agreed that the last time the complainant worked was 17 June 2002, she never gave the respondent formal notification of her intention to leave. Indeed, the respondent had to write to the complainant to find out what her position was: see Exhibits 33 and 34. Neither of those letters received a reply. Those letters show, according to Ivor Jones, a willingness on the part of the respondent to try and solve whatever difficulties were being experienced by the complainant.

Evidence of Allan Clive Brown

74 Mr Brown told the Tribunal that he is a business broker and was at all material times a business broker with William Shire Business Brokers. One of his areas of activity was to act as a business broker on behalf of

anyone who wanted to sell an agreement with the respondent, whether the vendor be a driver or the respondent itself.

75 Mr Brown testified that Ms Lacy put her contract and vehicle on the market using his services. Ms Lacy's business was advertised seeking "a lady operator".

76 Mr Brown said that shortly after the complainant acquired Ms Lacy's business, he received a telephone call from Ken Ferguson. Mr Ferguson expressed some difficulty with the complainant because she had been observed with her husband, who was working for another company, whilst waiting for work at Hollywood Hospital. According to Mr Brown, there was a meeting at Ivor Jones' office on 25 July 2001 at which he, the complainant and Ivor Jones attended. His recollection of what occurred at that meeting is as follows (transcript pages 31 and 32, 10 October 2003):

"There was discussion on the, what you would refer to as, conflict of interest between two people in the one family operating with two companies that were in competition with each other and what came out of the discussion was that ... well, what was mentioned during the discussion was that Sandra's husband could join the company and he was offered a place on the company with his vehicle and a contract to work. That was one solution that was offered. The other solution was that Sandra could, if she ... if she didn't see that working she could put her contract on the market for sale. I recall she didn't see a conflict of interest in that information from two companies was going to one fax machine with different work and those jobs were priced and the client's names were on them and there was a concern by New Hampshire Holdings that that information would go to the competition and cause problems within the industry, especially within his own company."

77 Mr Brown said that the complainant stated during the meeting that she wanted to be a driver and that she did not see a problem with any perceived conflict of interest.

78 On 10 August 2001 Mr Brown said that he received a telephone call from the complainant asking for an appointment to list her business for sale. Mr Brown said that he made the appointment on that day and later on the complainant attended to sign the necessary documentation.

79 Neither on 25 July nor on 10 August 2001 did Mr Brown recall the complainant saying that she would stand down from work.

80 Mr Brown said that in discussions that he had with the complainant, the complainant told him that she *"couldn't work in the sensitive area because of the conflict of interest that was discussed at the meeting with private clients and pricing ...(and) that she didn't feel comfortable working with the company now and that's the reason she was selling"*.

81 Mr Brown also gave evidence that in discussions he had with the complainant she told him that she did not feel comfortable driving at night time for security reasons.

82 Mr Brown gave evidence of his unsuccessful attempts to sell the complainant's business. There was apparently some interest in the complainant's business expressed by a couple of people in 2001 and 2002 but in the end that interest did not lead to a sale.

83 Mr Brown agreed that he sold two contracts issued by the respondent company and that he sold Ken Ferguson's contract in early 2002. He explained that at the time Ferguson's contract was sold the complainant's was not offered for sale to the eventual buyer of Ferguson's contract because the complainant's contract was a female contract.

84 According to Mr Brown's records, since January 2002 he has listed several contracts for sale but no sales have eventuated.

Evidence of Shaun Ivor Jones

85 Shaun Jones gave evidence that he was a director of New Hampshire Holdings during the period between July 2001 and June 2002. It is apparent from his evidence that he and his twin brother Michael worked in the office of the respondent and his chief duty was to allocate work to the drivers retained by the respondent. Shaun Jones told the Tribunal that the complainant made it very clear that she didn't want to do late evening and early morning work. He said that she told him this on at least half a dozen occasions.

86 Shaun Jones told the Tribunal that the complainant did not keep in proper touch with the office and that she was not as hard-working as her predecessor, Ms Lacy.

87 Shaun Jones denied discriminating against the complainant because of marital status.

88 Shaun Jones recalled that the complainant was stood down from her duties on 10 August 2001 but he could not recall why. He agreed that on

or about 21 August 2001 the complainant recommenced work for the respondent following a decision by Mr Ivor Jones that the majority of work to be provided to the complainant was DVA work. Shaun Jones thought that DVA work "*was higher paying work*".

Evidence of Michael Stephen Jones

89 Michael Jones agreed that he was a director of the respondent at all relevant times.

90 Michael Jones told the Tribunal that about three weeks after the complainant joined the respondent's fleet, she informed him that she did not like to work in the early hours of the morning or late at night.

91 Michael Jones denied that the complainant was stood down from the fleet between 10 and 21 August 2001. His recollection was that the complainant had a two-week break because she was on holiday.

92 Michael Jones, like his twin brother and father, were of the view that DVA work "*was a good paying job*".

93 Michael Jones denied discriminating against the complainant because of her marital status and never discussed with the complainant the issue of her husband working for GTS.

94 Michael Jones said that he had difficulty on occasions contacting the complainant on her mobile phone.

95 Michael Jones told the Tribunal that other drivers were allocated more work late at night and early in the morning only because the complainant was not prepared to work those hours.

96 Michael Jones recalled that two drivers had "*problems with Sandra Everest*" but "*they obviously couldn't prove anything and we continued giving her work*".

97 Michael Jones recalled that there was a meeting at the respondent's office attended by Ken Ferguson and one other driver, either Stephen Lesk or John Hanscombe. He recalled that they raised a concern about the complainant's husband working for a competitor and that one of the drivers threatened to stop working for the respondent. He told the Tribunal that the respondent was not prepared to terminate the complainant's agreement because her husband was working for a competitor.

Evidence of Goran Zec

98 Mr Zec was a driver on the respondent's fleet. He was there for a period of approximately two weeks after the complainant started work in July 2001. He was present in the office one day when he overheard a discussion between Ivor Jones and either Michael or Shaun Jones, during which he heard that the complainant was to be put off the fleet "*because her husband was working for an (sic) opposition*". Although he did not take part in the conversation, he was able to hear some of what was being said by Ivor Jones and the other person who was either Michael or Shaun Jones. He said that the discussion, in part, was that they were worried about the circumstances of the complainant's relationship with her husband and that they were worried about a conflict of interest which would lead to their business being lost.

99 Mr Zec told the Tribunal that after wear and tear, there was little profit in DVA work.

Relevant statutory provisions

100 The complainant's claim was pleaded in the points of claim on the basis that the respondent had discriminated against her contrary to s 9 and s 13(1)(b)-(d) of the Act. Counsel for the complainant at the start of the hearing also sought to allege discrimination on the grounds of family status contrary to s 35A(1)(c) and s 35D(1) of the Act. The complainant's counsel in his oral closing submissions observed that the case was really focused on the allegation that the complainant was discriminated against as contract worker on the ground of marital status relying on s 9(1)(c) and s 13(1) of the Act. In light of the way that the case was run before the Tribunal, this observation was entirely appropriate and the Tribunal has proceeded on the basis that the case is in reality one based on s 9(1)(c) and s 13(1) of the Act.

101 Section 9(1)(c) of the Act provides:

"For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this sub-section referred to as the "aggrieved person") on the ground of marital status of the aggrieved person if, on the ground of—

(c) a characteristic that is generally impused to persons of the marital status 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 of a different marital status."

102 Section 13(1) of the Act provides:

"It is unlawful for a principal to discriminate against a contract worker on the ground of the contract worker's sex, marital status or pregnancy –

- (a) in terms or conditions on which the principal allows the contract worker to work;*
- (b) by not allowing the contract worker to work or continue to work;*
- (c) by denying the contract worker access, or limiting the contract worker's access to any benefit associated with the work in respect to which the contract with the employer is made; or*
- (d) by subjecting the contract worker to any other detriment".*

103 The words "contract worker" and "principal" are defined in s 4 of the
Act.

104 A contract worker is defined as meaning:

"A person who does work for another person pursuant to a contract between the employer of the first-mentioned person and that other person."

105 "Principal" means in relation to a contract worker:

"A person for whom the contract worker does work pursuant to a contract between the employer of the contract worker and that other person."

106 In this case the evidence establishes beyond doubt that the complainant was a contract worker and that the respondent was her principal.

107 Marital status is also defined in s 4 of the Act. Relevantly for the
purpose of this hearing marital status means the status or condition of
being married.

108 The onus is upon the applicant to prove on the balance of
probabilities that she was discriminated against in her capacity as a
contract worker by virtue of her marital status, that is, by virtue of her
being married to Peter Everest.

Analysis of the Acts said to contravene s 9(1)(c) and s 13(1) of the Act

109 The conduct which is said to contravene the Act by the complainant
has already been set out in paragraph 4 of these reasons. The Tribunal has
considered these allegations carefully and makes the following findings.

Failure to provide the complainant with work between 10 and 21 August 2001

110 As to the allegation that the respondent failed to provide the
complainant with any chauffeur work between 10 and 21 August 2001, it
is common cause that the complainant did not in fact perform any
chauffeur work for the respondent between those dates. The complainant
alleges that the respondent refused to give her work during that period,
whilst the respondent alleges that the complainant stood herself down.

111 The Tribunal does not accept that the complainant would have
voluntarily stood herself down. The complainant is an experienced,
mature businessperson who invested \$65,000 to purchase the agreement
and vehicle with a view to earning an income. The undisputed evidence is
that she commenced work on 16 July 2001 and it is highly unlikely that
she would, barely three weeks after starting, voluntarily cease working for
a period of 11 days with the inevitable effect that she would have no
income during that time.

112 The Tribunal finds that it is much more likely than not that the
respondent, faced with the threats apparently made by Messrs Ferguson
and Lesk, decided to not allocate the complainant work in order to placate
Ferguson and Lesk. It is clear from the evidence of Ivor Jones that he felt
compelled to be seen to be taking action against the complainant to allay
any fears that Messrs Ferguson and Lesk had with respect to the
complainant. Ivor Jones and his sons controlled the allocation of work
and used that control to prevent the complainant working.

113 The respondent's decision to allow the complainant to resume work on 21 August 2001 was, in the Tribunal's view, more likely to have been caused by the departure of Goran Zec and Zoran Zec from the fleet. Although Goran Zec was unsure as to precisely when he left the fleet, it was certainly no later than September 2001. The operator payments of Zoran Zec, which formed part of Exhibit 35, indicated that he ceased work on or about 17 August 2001. The departure of the Zec brothers would have made it extremely difficult for the respondent to service the DVA contract. The Tribunal finds that the respondent had little choice but to allow the complainant to return to work in order to fulfil its obligations to the DVA.

The allegation that the complainant was not given the same quantity and quality of work as the other drivers

114 The Tribunal had before it a substantial amount of documentation which detailed the work performed by the complainant and the work performed by other drivers. The Tribunal was able to compare the type and value of the work and the income received by the complainant and compare it with against the other drivers. This was achieved by comparing the records of operator payments made to the complainant (Exhibit 15) with the operator payments made to the other drivers on the fleet (Exhibit 35).

115 There can be no doubt that most of the work performed by the complainant between 21 August 2001 and 17 June 2002 was for the DVA. When compared with the other drivers, it is evident that the complainant was allocated more DVA work than the other drivers. To put it another way, the other drivers received more non-DVA work than the complainant.

116 The respondent has not called evidence nor made any submission which suggests that the complainant received the same or a similar amount of DVA work when compared with the other drivers. Rather, the respondent explained this apparent anomaly by asserting the following:

- (a) The complainant refused to work during the hours of darkness and to compensate she was given DVA work;
- (b) She continually, without justification, off-loaded work;
- (c) She was often difficult to contact on her mobile phone;
- (d) She was unable to cultivate a clientele of her own; and

(e) She was not as enterprising as her predecessor, Ms Lacy.

117 Much evidence was put before the Tribunal as to whether or not the complainant refused to work during the hours of darkness. Specifically, it was alleged that for security reasons the complainant would not work either late at night or early in the morning. Notwithstanding the evidence of Ivor Jones, his sons and Allan Brown, the Tribunal does not accept that the complainant refused to work during the hours of darkness.

118 The Business Brief provided to the complainant by Mr Brown makes it clear that the respondent provided a 24 hour service. It is a notorious fact within the industry and the complainant well knew before she joined the respondent's fleet that she would be required to work late at night and early in the morning. The Tribunal has already observed that the complainant made a substantial financial investment to acquire the right to drive under the banner of the respondent and it is highly unlikely that she would have restricted herself to daytime work, which would have substantially curtailed her income earning capacity.

119 Further, the complainant's own records as contained in Exhibit 14 showed that she was on occasions allocated work either late at night or early in the morning and that she performed it. The volume of this late night or early morning work was not great but was sufficient to indicate that the complainant was not adverse to working at those times.

120 The Tribunal is not convinced that the complainant off-loaded more work than other drivers and thus could not earn the same income as the other drivers. There is no doubt that the bundle of daily record sheets relating to the complainant (Exhibit 30) showed that there were occasions where the complainant off-loaded work. It is patent from those sheets that the complainant had good reason, on a number of occasions, to off-load work. For example, on 7 August 2001 she was unable to perform a booking because the passenger did not turn up. On 7 February and 3 April 2002 the complainant had the day off. Given that theoretically drivers were supposed to be on-call 24 hours a day, seven days a week, it was not unreasonable for a driver to occasionally have a day off. On or about 14 May 2002 the complainant was sick with influenza.

121 The Tribunal was not given documentation which indicated how frequently other drivers off-loaded work. Accordingly, it is difficult to gauge whether or not the complainant off-loaded work more frequently than her colleagues. The impression that the Tribunal gained from the complainant's evidence and the evidence of other drivers called by her,

was that she was a hard-working driver and that she was unlikely to have repeatedly off-loaded work without good reason.

122 Quite a deal of the evidence at the hearing was taken up with the issue of how contactable the complainant was on her mobile phone. The respondent alleged that the complainant's mobile phone was often turned off or she could not be contacted for one reason or another. The complainant denied this. In the end, it seems evident that the communication system put in place by the respondent was inadequate. This is not to criticise the respondent because it seems that its drivers were reluctant to foot the cost of a proper communication system. Communication by mobile phone in the Perth metropolitan area is notoriously uncertain. In the circumstances of this case, the Tribunal is not prepared to draw the conclusion that the complainant made herself deliberately difficult to contact.

123 The Tribunal is prepared to accept that the complainant was unable to cultivate clientele of her own and had she been able to do this she would have improved her income earning capacity. Having said this, given that the complainant was allocated mainly DVA work, it was extremely difficult for her to cultivate her own clientele. Accordingly, the respondent's criticism of the complainant on this point is unjustified.

124 The respondent's contention that the complainant was not as enterprising as Ms Lacy is largely irrelevant. The evidence suggests that Ms Lacy was exceptional and that she had the assistance of her husband which meant that her vehicle could be driven for longer periods. In the Tribunal's view, it is not apt to compare the complainant's performance with Ms Lacy but rather the proper comparison should be between the complainant and the other drivers who worked on the fleet with her.

125 The Tribunal finds that DVA work was the least profitable category of work available to drivers of the respondent's fleet. The witnesses called by the complainant, namely Messrs Swift, Henshall and Thackrah, amply justify this finding. Even Goran Zec, who was called to give evidence by the respondent, found DVA work barely profitable. The Tribunal was readily able to see why DVA work was so unattractive. The distances which had to be travelled to perform DVA work were often considerable. Once the time taken to perform the work and the cost of petrol and depreciation were taken into account, it is evident that the profit margin, if any, was very slim. Ivor Jones and his sons gave evidence that they believed that the DVA work was profitable. While Ivor Jones occasionally drove, they were all predominantly working in the

respondent's office and did not have the day-to-day experience of the complainant and the other drivers. It may be that Ivor Jones and his sons honestly believed the DVA work was profitable for the drivers but the reality was different.

126 The Tribunal finds that the respondent, on occasions, deliberately overlooked the complainant when allocating work. In this regard, the Tribunal accepts the evidence of the complainant and notes that her testimony was confirmed on this point by Messrs Swift, Henshall and Thackrah.

Attempts by complainant to sell her agreement and vehicle

127 The Tribunal finds that the respondent and its agent Mr Brown conducted themselves in such a way as to unfairly impede the complainant in her attempts to sell her interest in the agreement and her vehicle.

128 From 10 August 2001 up to 26 March 2002, the complainant's attempts to sell her business were thwarted by the respondent and Mr Brown by restricting the sale of the business to women applicants only. While the respondent may have wished to keep Ms Lacy's position on the fleet for a female driver, the agreement which the complainant entered into with the respondent had no such restriction. Mr Brown's evidence indicates that instead of acting in the best interests of the complainant, who was after all his client, he chose to take instructions from the respondent and restricted potential buyers of the complainant's business to women only.

129 It was apparent from the testimony of Mr Brown that he regarded himself as primarily the beholden to the respondent. It was evident that Mr Brown and Ivor Jones had a close relationship and that this relationship resulted in a conflict of interest between Mr Brown's obligations to the complainant and his perceived obligations to the respondent. There is little doubt that Ivor Jones, via Mr Brown, controlled the way that the complainant's business was marketed.

130 The decision by the respondent to instruct Mr Brown to sell two new contracts after the Zec brothers left the respondent's fleet showed that the respondent had little concern for the complainant and was not prepared to do anything to ensure that the complainant could profitably dispose of her business. Rather, the emphasis was on attempting to maximise the financial return to the respondent at the expense of the complainant.

131 The Tribunal finds that the complainant was plainly discriminated against by the respondent. She was treated less favourably than the other drivers on the respondent's fleet. The respondent's actions contravened s 13(1)(b), (c) and (d) of the Act.

What was the reason for the respondent's behaviour towards the complainant

132 Of course, for the complainant to succeed in her claim she must not only demonstrate that she has been discriminated against but she must also demonstrate that a reason for the respondent's behaviour towards her was a characteristic that is generally imputed to persons of the marital status of the aggrieved person. The complainant does not have to demonstrate that this imputation was the dominant or substantial reason for the discriminatory acts. It is enough that the imputation was in some way a reason for doing those acts: s 5 of the Act.

133 The Tribunal finds that the reason for the respondent's behaviour towards the complainant was an unfounded fear on the part of the respondent that by virtue of the complainant's marriage to Peter Everest she would betray confidential information to him. At the hearing Ivor Jones said that he had no such fear and only acted as he did because of the behaviour of Messrs Ferguson and Lesk. The Tribunal finds that while Messrs Ferguson and Lesk may have voiced concerns, Ivor Jones and Michael and Shaun Jones themselves held the same views. The evidence of the complainant, Mr Brown and Goran Zec is compelling in this regard.

134 Although the Tribunal did not hear from Messrs Ferguson and Lesk, there is some evidence that those men voiced strong objection to the complainant being an operator on the respondent's fleet when she was observed speaking with her husband at the Hollywood Hospital. It may be that Messrs Ferguson and Lesk feared that the complainant would convey confidential information to her husband, who worked for the respondent's competitor, GTS. It may also be that Messrs Ferguson and Lesk approached Ivor Jones and threatened to withdraw their services unless he did something to alleviate the situation. None of this assists the respondent.

135 There is simply no evidence to suggest that if Messrs Ferguson and Lesk regarded the complainant's relationship with her husband as a commercial danger, there was any basis in fact for such a fear. Rather, Messrs Ferguson and Lesk were operating under a stereotypical assumption that

the complainant would as a matter of course disclose confidential information which she received from the respondent to her husband.

136 What is strange about Ivor Jones' approach to the behaviour of Messrs Ferguson and Lesk is that he did not simply tell them that he as managing director of the respondent, he was not prepared to take any action against the complainant without evidence that the marital relationship of the complainant and her husband was the cause of real difficulty. This is especially so as Ivor Jones seemed to have a poor regard for both men.

137 Instead, the respondent attempted to solve the dispute by suggesting that the complainant's husband join the Deluxe fleet. This seems to the Tribunal to be an unfair imposition on both the complainant and her husband, who had clearly spent a large sum of money in purchasing his contract with GTS. Even if the Tribunal takes the most charitable point of view to the respondent, that is, that it acted as it did to deal with the threats of Messrs Ferguson and Lesk, it nevertheless allowed itself to adopt unjustifiable stereotypical assumptions about how the complainant may behave when given confidential commercial information. The respondent may have sincerely believed that it had no choice but to act in the way that it did. However, the Tribunal's finding is that the way it treated the complainant was tainted by its unfair stereotypical assumption about the complainant stemming from her marriage to Peter Everest. In time this fear abated to some extent and thus she was given some non-DVA work. There remained however a level of distrust sufficient to ensure her continued disadvantage.

Summary of Findings

138 The Tribunal is of the view that the evidence compellingly establishes that the complainant was unfairly discriminated against by virtue of her marital status. The discrimination manifested itself in the manner described in paragraphs 112 to 139. The Tribunal finds that the complainant was clearly treated in a less favourable way than a person of a different marital status. This is amply demonstrated by the way the complainant was treated compared with the other drivers on the Deluxe fleet.

139 The Tribunal has had regard to the decisions in *Boehringer v Reddrop* [1984] 2 NSWLR 13 and *Waterhouse v Bell* (1991) 25 NSWLR 99. Both of these decisions were comprehensively analysed in *Newland v Department of Housing* EOT 2001-00036 17 October 2002 at par 12 to

par 21. The Tribunal finds that there was no real possibility that the complainant would have disclosed confidential information to her husband. Rather, the respondent imputed to her the general characteristic that one spouse will disclose confidential information acquired during his or her employment to the other spouse when that other spouse is employed by a competitor.

140 The Tribunal finds for the reasons referred to above that the complainant has been unlawfully discriminated against contrary to s 9(1)(c) and s 13(1) of the Act.

Relief – s 127(b) of the Act

141 The complainant has sought relief pursuant to s 127(b)(i) and (iii) of the Act. Those sub-sections empower the Tribunal to require the respondent to pay to the complainant damages not exceeding \$40,000 by way of compensation for any loss or damage suffered by reason of the respondent's conduct. Further, the Tribunal may order the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant.

142 The complainant has submitted a loss schedule (Exhibit 28) which is attached to these reasons. Essentially, the complainant seeks an order for compensation in the sum of \$40,000 to take into account loss of earnings, hurt and humiliation, the expenses she incurred when she started working for the respondent, advertising expenses in attempting to sell her interest in the agreement and loss that she suffered when she sold her car.

143 It is important to note that whatever induced the complainant to purchase her agreement and her vehicle, it was not any conduct proscribed by the Act. As much as the complainant may wish it, the Tribunal cannot compensate her for any misrepresentations which may have been made by any one or more of the respondent, Allan Brown and Ms Lacy. Accordingly, the Tribunal is not prepared to order the respondent to pay the complainant loss of earnings calculated on the basis of what the complainant would have earned over an 11 month period had she earned \$50,000 per annum, as was set out in the Business Brief. Nor should the respondent have to repay the complainant's start up expenses as those expenses were incurred before any discriminatory conduct occurred. However, the complainant is entitled to compensation for loss of earnings calculated another way. The Tribunal finds that as a result of the respondent's discriminatory conduct, the complainant was not given the

opportunity to earn income at the same rate as other drivers on the respondent's fleet.

144

The complainant's counsel prepared a schedule which analysed the earnings of the complainant on the one hand and other sedan drivers on the other hand based on material in Exhibit 19. The table in so far as is relevant is as follows (there were some mathematical errors in it):

Employee	Months Worked	Total Income	Average Monthly Income
Graham Swift	10.75	\$29,335.34	\$2,728.87
Edward Wilson	7.75	\$23,819.86	\$3,073.53
Stuart Peacock	6.5	\$18,174.74	\$2,796.11
Stephen Lesk	10.5	\$30,831.31	\$2,936.32
Andrew Della Torre	11	\$30,132.62	\$2,739.33
Gary Thackrah	11	\$30,822.71	\$2,802.06
John Hanscomb	11	\$33,974.06	\$3,088.55
Ken Ferguson	5.5	\$18,568.89	\$3,376.16
Averages			\$2,942.62

Sandra Everest	11	\$22,629.00	\$2,057.18
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For the approximately 11 month period that she performed work for the respondent, the complainant earned \$22,629 (Exhibit 28) at an average per month of \$2,057.18. Compared with the average earnings of other drivers in the same 11 month period, other drivers who drove similar types of vehicle to the complainant earned on average \$2,942.62 per month. The Tribunal finds that had the complainant been given the same opportunities to work as the other drivers, she would have earned at least the average of her colleagues. Accordingly, the Tribunal is prepared to award the complainant, by way of loss of earnings, the sum of \$9,739.84. This sum is made up of the difference between the average monthly earning of the other drivers and the complainant, being \$885.44 multiplied by the number of months she worked for the respondent, that is, 11.

145 The complainant claims advertising expenses of \$400 in attempting to sell the rights to her contract agreement. It is not clear to the Tribunal when and in what circumstances these expenses were incurred. In the absence of more detailed evidence, the Tribunal is not inclined to order the respondent to pay this expense.

146 With respect to the claim that the respondent should pay a sum of \$10,000 to the complainant for the loss she sustained when she sold her car in August 2002 for \$20,000 compared to the cost of acquiring the vehicle in July 2001 of \$30,000, the Tribunal declines to make such an order. Plainly, cars are depreciating assets and the complainant had the use of the vehicle for a period of approximately 13 months between the time that she acquired it and the time that it was sold. During that period of time she derived an income from the vehicle albeit a lesser income that she should have received. The respondent's discriminatory conduct is not the cause of the complainant obtaining a lesser sum for the vehicle upon its sale than when she purchased it. In the circumstances, the Tribunal declines to order the respondent to pay any sum alleged by the complainant to constitute a loss when it was sold in August 2002.

147 In relation to the complainant's claim for compensation for hurt and humiliation, the Tribunal accepts that the respondent's behaviour was deeply distressing to her. The Tribunal heard evidence from both the complainant and other drivers retained by the respondent to the effect that she was tearful and upset. Other drivers on the respondent's fleet noted that the complainant was being mistreated and overlooked in the allocation of work by the respondent. Doubtless, the complainant would have been humiliated in the eyes of her colleagues by such behaviour. An important point is that the discrimination occurred over a long period of time and this must have prolonged and exacerbated the complainant's feelings of hurt and humiliation.

148 Awards for injured feelings should not be minimal because that would tend to trivialise and thereby undermine the aims of the Act: *Hall v Sheiban Pty Ltd* (1989) EOC 92-350. In the particular circumstances of this case the Tribunal is of the view that a sum of \$7,500 is proper compensation for the very considerable hurt and humiliation suffered by the complainant.

149 This leaves the complainant's claim pursuant to s 127(b)(iii) of the Act. The complainant asks the Tribunal to make an order which will require the respondent to in effect buy back the complainant's contract at the same price that she paid for it, \$35,000. There can be no doubt that

the provisions of s 127 are remedial and should be construed broadly: *IW v City of Perth* (1997) 177 CLR 1 and *Walley v The State Housing Commission* EOT No. 7 of 1999 delivered 30 June 1999. In *Walley v The State Housing Commission* the Tribunal decided that the provisions of s 127(b)(iii) of the Act were wide enough to order the respondent to reinstate a tenancy which had been terminated. Whilst the relief in this case sought by the complainant is unusual and without precedent, it does not follow from those factors alone that the Tribunal should not order the relief sought by the complainant if it is justified.

150 The discretion given to the Tribunal in s 127(b)(iii) of the Act is limited to requiring a respondent to perform any *reasonable* act or course of conduct to redress any loss or damage suffered by the complainant. The evidence before the Tribunal indicates that whatever might have been the position in 2001 and 2002, at present, the respondent's business has deteriorated to the point where it is unlikely to have the ability to purchase the complainant's agreement. Further, even if the Tribunal was minded to grant the complainant the order that she seeks, it would only do so on the basis of the current market value of the agreement. There is no evidence before the Tribunal of that value. The evidence of Allan Brown and some of the other drivers strongly suggests that the agreements currently have no commercial value. In the circumstances, the Tribunal is not persuaded that it should compel the respondent to purchase the complainant's agreement.

Conclusion

151 The Tribunal makes the following orders:

1. The complainant's claim is substantiated; and
2. The respondent pay to the complainant by way of compensation \$17,239.84.

Rabe M 33

EVEREST V NEW HAMPHIRE HOLDINGS PTY LTD

EOT/000039 OF 2002

SCHEDULE OF LOSS¹

SANDRA AMELIA EVEREST				
PURCHASE PRICE	ACTUAL v REPRESENTED EARNINGS	START-UP EXPENSES	ADDITIONAL LOSS	TOTAL LOSS
Costs Car \$30,000.00 Contract \$35,000.00	Represented Earnings \$50,000.00 per annum (before taxation & expenses) (30 hour week)	Transfer of Licence and Third Party Insurance Policy \$1,213.15 Omnibus Licence \$17.42 Medical \$71.70	Advertising Expenses	
Recoveries Car (\$20,000.00) Contract (\$0.00)	("with 25% commission paid to the company).	Comprehensive Vehicle Insurance \$847.00 Public Liability Insurance \$475.20 Drivesafe Defensive Driving Course \$176.00		
TOTAL LOSS	Actual Earnings \$22,629.00 (July 2001- June 2002) Annual Equivalent: (\$24,686.00) Difference – Annual \$26,314.00 Actual Difference (17 July 2001 – 16 June 2002)			
\$45,000.00	\$24,121.34	\$2,800.47	\$400.00	\$72,321.86

¹ These calculations do not include amounts for distress caused to the Complainant as a consequence of the actions of the Respondent.

Equal Opportunity Tribunal

Matter Number: ET/2002-000039

In the matter of a complaint by

SANDRA EVEREST

Complainant

Against

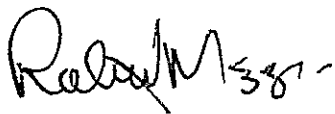
NEW HAMPSHIRE HOLDINGS PTY LTD trading as DELUXE CHAUFFERED
CARS

Respondent

ORDERS

1. The Tribunal finds that the complaint is substantiated.
2. The Respondent pay to the Complainant by way of compensation \$17,239.84.

Dated this 22nd day of January 2004



Mr Robert Mazza
Deputy President