

JURISDICTION : EQUAL OPPORTUNITY TRIBUNAL OF
WESTERN AUSTRALIA

LOCATION : PERTH

CORAM : Deputy President: Ms C Tan
Deputy Member: Ms M Fadjar
Deputy Member: Mr R Scaife

HEARD : 6 and 7 September 2004

DELIVERED : 6 October 2004

FILE NO/S : ET/2002-000079

BETWEEN : SUMAN DEWAN
Complainant

and

MAIN ROADS WA
Respondent

Catchwords:

Age discrimination- sections 66V(3) and 66W(1) Equal Opportunity Act 1984- indirect discrimination

Legislation:

Equal Opportunity Act 1984 (WA) s66V(3) and s66W(1).

Result:

Complaint dismissed

Representation:

Counsel:

Applicant : Mr M Finegan – Civil Service Association
Respondent : Mr D Matthews – State Solicitors Office

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

Australian Iron and Steel Pty Ltd v Banovic (1989) 168 CLR 165.

Kemp v Minister for Education (1991) EOC 92-340

Price v Civil Service Commission [1978] ICR 27

Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission
(1997) 80 FCR 78.

Waters v Public Transport Corporation (1991-2) 173 CLR 349

State of Victoria v Schou [2004] VSCA 71

Secretary, Department of Foreign Affairs and Trade v Styles (1989) 23 FCR 251

Commonwealth of Australia v Human Rights and Equal Opportunity Commission and Dopking (No2), (1995) 63 FCR 74,

Australian Medical Council v Wilson (1996) 68 FCR 46

Australian Public Service Association v Australian Trade Commission (1988) BOC 92-228

Howe v Terry (1927) 27 NSW SR 301

Cases(s) also cited:

Bennett v Everitt and Whyalla Fish Factory [1988] HREOCA 7

DECISION OF THE TRIBUNAL

1 This complaint has been made by Mr Dewan against Main Roads WA, more correctly known as the Commissioner of Main Roads. The complaint is of indirect discrimination on the grounds of age, in breach of s66W(1) of the *Equal Opportunity Act 1984* (WA), the relevant portions of which provide that it is unlawful for an employer to discriminate against a person on the grounds of the person's age:

(a) *in arrangements made for the purpose of determining who should be offered employment; and*

(b) *in determining who should be offered employment.*

2 The Complainant's case is that the Respondent indirectly discriminated against graduate engineers over the age of 25 by imposing a requirement or condition that the applicants should be "recent" graduates. The complaint is that a large majority of the recent graduates were under the age of 25 and that this indirectly discriminated against graduate engineers like the Complainant, Mr Dewan, who was aged 45 at the relevant time.

3 The Complainant sought various remedies for the alleged breaches, including an order preventing the Respondent from continuing or repeating the alleged discriminatory conduct, an order for compensation for the lost opportunity to be selected for the relevant graduate programme in 2002 and an order that the Respondent provide employment to the Complainant on terms no less favourable than those offered to successful applicants under the most recent graduate recruitment programme.

Complainant's background

4 The Complainant is a qualified electrical engineer, having graduated with an engineering degree in 1978. He is a Chartered Professional Engineer and has been for about 12 years. He had worked in various positions as an engineer in India and Western Australia. From February 1993, the Complainant was employed as an engineer in the

Western Australian public service with the Water Authority. When his position was outsourced in 1996, he became a redeployee in the Public Service and he continued to receive a salary. In July 1998 he was seconded to the Respondent as a redeployee and in December 1999 he was given a "try out" position as an Asset Management Officer with the Respondent where he worked for about 5 months. The Complainant said that this was a Level 5 position, carrying a salary of around \$58,000 to \$59,000. The Complainant felt that he did not have the appropriate level of skills for the particular position due mainly to his lack of experience in the particular type of engineering work conducted by the Respondent, such as road and bridge building, but said that he would have accepted the permanent position as an Asset Management Officer if he had been offered this by the Respondent. He was not offered the permanent position, the background to which will be discussed below in the context of value of the loss of opportunity. The Complainant then continued as a redeployee, subsequently working with the Waters and Rivers Commission in the information technology area until his employment was terminated, the reasons for which are also mentioned below in relation the value of the loss of opportunity. His employment with the Public Service then ceased in about May 2002 and he was then unemployed.

Complainant's evidence about the advertisement and programme offered

- 5 Mr Dewan's evidence, which the Tribunal accepts, is that in July 2002, he saw an advertisement issued by the Respondent advertising positions for Graduates as part of the "*Graduate Development or Professional Development Program*" at Main Roads WA. The advertisement advertised that the positions carried a salary range of \$38,765 to \$59,330 for engineering graduates, depending on qualifications and experience. The advertisement commenced with the words: "*Have you recently completed or will you complete a degree by the end of 2002?*" The Complainant was then 45 years of age and was not a recent graduate, having graduated over 20 years before. His evidence is that his impression of the advertisement was that the Respondent wanted fresh young university graduates, not people like him. His evidence is that he telephoned the Respondent about the advertisement and was told that recent graduation was a requirement. It was common ground that the positions in the relevant programme were only available to graduates who had graduated 3 years or less prior to the advertisement. The Complainant did not apply for one of the positions, as he was not a recent graduate. His

evidence was that if the positions had not been limited to recent graduates, he would have applied. He said that although he was an electrical engineer and would have preferred to work in the area of his expertise, he would not have hesitated to change engineering fields to work for the Respondent, as he was unemployed.

6 The Respondent had produced a document outlining the Respondent's Professional Development Program for graduate engineers, being the programme that was referred to in the advertisement. This document had been produced in conjunction with the relevant professional body, the Institution of Engineers Australia. The programme outlined the training that the successful applicants for the advertised positions would receive. It was designed as a 3 year programme, although it was possible for people to apply for permanent positions with the Respondent and leave the programme before its completion. The Complainant commented that there were aspects of the training programme that would have been of assistance to him in obtaining specific Main Roads experience. He pointed to such things as the rotation through different directorates of the Respondent's operations, learning about techniques, tools and designs specific to the Respondent's operations and about the Respondent's requirements. He accepted that there were other parts of the programme that would not be of much assistance to experienced engineers like himself, such as the parts aimed at generic skills to attain the chartered professional engineer status, and that he may well not have needed to be in the programme for the full 3 years before he would be sufficiently skilled and equipped to apply for a permanent position with the Respondent.

The Respondent's evidence about the requirement of recent graduation

7 Mr Taya, the Executive Director of Human Resources for the Respondent gave evidence. He said that the term "*recent*" graduates meant those who had graduated in the last 2 or 3 years. People who had graduated before that could apply but their application was not likely to be considered. Professional development programs offered by the Respondent were not only for engineering graduates but also for all kinds of graduates. There would be a different focus for different types of professions but the programme was designed for graduates generally. This appears consistent with the advertisement referred to previously which

was not limited to engineering graduates. It was clear however that recent graduation was a requirement or condition for the position and governed who would be offered employment under the programme.

8 It may be that the requirement to be a recent graduate, when applied to the programme for engineers, did not require people to be recent graduates in engineering. Mr Taya's evidence about at least one successful applicant for the position in the engineering program was that he was not a recent graduate in an engineering-related degree but in a commerce degree. The person however had substantial engineering experience and was classified as a graduate engineer by the Respondent when he was employed. The "*recent graduate*" criterion then may not only include recent graduates in that particular discipline but all other recent graduates. One would expect that this would not be usual, but there was no evidence led as to how common that was nor any evidence that the criterion was to be limited to recent graduation in the particular field.

9 The reasons for the requirement and condition of recent graduation that were given by the Respondent's witnesses will be referred to below in the analysis of the reasonableness of the said requirement or condition.

The issues

10 The main issues to be decided relate to whether the Respondent's conduct in limiting the employment pursuant to the relevant programme to recent graduates amounts to indirect discrimination against people of Mr Dewan's age. The relevant section is s66V(3) of the *Equal Opportunity Act*. The relevant parts of this are as follows:

- (a) *For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this subsection referred to as "the aggrieved person") on the grounds of age if the discriminator requires the aggrieved person to comply with a requirement or condition –*

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

11 It was accepted by both parties that the Respondent had imposed a requirement or condition that the applicants were to be recent graduates ie they had graduated not more than 3 years ago. There appears to be no dispute that if this amounted to indirect discrimination, it would be unlawful within the meaning of s66W(1), as referred to above. It was also accepted by both parties that s66V(3)(c) was satisfied in that the Complainant was not able to comply with such a condition. The main issues that arise for decision in this case are whether s66V(3)(a) and (b) are satisfied.

12 It is to be noted that the Respondent specifically said that the Respondent did not wish to rely on s66ZP which in effect provides, inter alia, that nothing in the "*age discrimination sections*" makes it unlawful to do an act for the purpose of ensuring that persons who are of a particular age have equal opportunities with others or to afford persons of a particular age access to opportunities to meet their special needs in employment, education or training. This might be a provision that could allow a special measure for young people who might not otherwise obtain employment for instance. The Respondent however maintains that the requirement or condition of recent graduation has nothing to do with age and that the programme is not one designed to give *young* people access to equal opportunities. The Tribunal is therefore not required to consider the applicability of this section.

Ascertaining the relevant proportions

13 To work out whether the condition of being a recent graduate was one with a substantially higher proportion of persons who are not of the

same age as the aggrieved person comply or are able to comply, it is necessary to decide the basis upon which the proportions are to be ascertained.

14 The Complainant's representative submitted that the relevant base group was all engineering graduates in Western Australia. He submitted that one should measure the proportion of recent graduates who were under 25 to those who were over 25 and that the result would be that a substantially higher proportion of engineering graduates under 25 would be recent graduates compared with the proportion of engineering graduates over 25.

15 The evidence led by the Complainant, which was not disputed, was that since the beginning of 2002, the large majority of graduates from the 2 main universities producing engineering graduates, Curtin University and the University of Western Australia, were under the age of 25. No evidence was led as to the numbers and ages of engineering graduates at other institutions in Western Australia, although the Complainant's representative acknowledged that Curtin University and University of Western Australia were not the only institutions producing engineering graduates. Although the Respondent's requirement of "*recent*" graduates would have included people graduating in 1999, evidence was only led about graduates from the 2 main engineering faculties in 2002 and 2003. The Complainant did not lead evidence of the precise number of engineers in Western Australia but there was evidence that the number of members of the Institution of Engineers was over 8,000 and the inference can be drawn that the total number of graduate engineers is likely to be higher than that. No calculations or precise evidence was led by the Complainant about the calculation of the proportions by reference to the base group.

16 The evidence led by the Complainant indicated that of the graduates in civil and mechanical engineering at Curtin University in 2002-2003, 215 out of 311 were aged under 25, that is about 69%. The proportion is higher if one does not count the postgraduate degrees. If one were to add in all of the engineering graduates in 2002 and 2003, one would have a total of 532 aged under 25 compared with a total of 840, that is about 63.3%. Turning to the University of Western Australia, the evidence led by the Complainant showed that for 2002-2003, there were a total of 827

engineering graduates with 665 below the age of 25, that is, just over 80%. These figures demonstrate that clearly for 2002 and 2003, at the 2 main engineering faculties in Western Australia, there was a significantly large proportion of engineering graduates under the age of 25 compared with proportion of engineering graduates over the age of 25.

17 Unfortunately, we do not have the statistics or evidence about the whole pool of recent engineering graduates in Western Australia. The Complainant appears to be requiring the Tribunal to draw an inference on the basis on the evidence led, that the trend would be similar for those graduating in the previous years 1999 to 2001, who, on the Respondent's uncontradicted evidence, would still be considered "*recent*" graduates, and that the trend would be similar to, or at least not outbalanced, by the relevant ages and numbers in other institutions in Western Australia producing engineering graduates. Such inferences are however difficult to draw. It may be possible, for instance, that other institutions could have a larger proportion of mature-aged students and that if these were all included in the equation, the relative figures would change substantially. While the engineering faculties at the University of Western Australia and Curtin University may be by far the largest, although there was no evidence led about relative sizes of faculties, it is still quite possible that the combination of the numbers at all the other faculties could be significant.

18 A further difficulty arises with whether the requirement of "*recent graduation*" should in fact be limited to recent engineering graduates. As pointed out earlier, there is evidence that the requirement was in fact not so limited as a recent commerce graduate was accepted as a graduate engineer under the programme, even though he was not a recent engineering graduate. If the appropriate pool is expanded to include all recent graduates in all disciplines who also hold an engineering degree (recent or otherwise), then the figures could well be quite different.

19 Counsel for the Respondent submitted that it was not possible to work out the appropriate proportions from the raw figures. He said that the appropriate base group was the whole community in Western Australia who were at least of graduating age, that is over 20. He also submitted that the wording of s66V(3)(a) required a comparison of

persons of the "same age" as the Complainant, that is, around 45, with persons who were not of the same age, that is all the relevant people both over and under the age of 45. He submitted that the appropriate calculation for the proportion of people who were of the same age as the Complainant who could comply would be to take the number of all persons who were recent engineering graduates in Western Australia of around the age of 45 and divide that by the number of persons in Western Australia who were around that age. It was likely that the proportion of those who could comply under such a calculation would be very small. The submissions was that the comparison should then be made with taking the number of all persons who were recent engineering graduates in Western Australia who were under and over 45 and divide that by the total population of Western Australia who were under and over 45. It was possible that such a number could be small as well and that it would not be possible to say that a substantially higher proportion of people who were not of the same age could comply. The Respondent did not offer any evidence of the figures described but said that it was not for the Respondent to prove the negative of the s66V(3)(a).

20 Ultimately, as was submitted by both parties, it is for the Tribunal to decide on what the appropriate base pool and calculation of the proportions should be.

21 It is clear that the Tribunal cannot simply judge the proportions by the raw figures of the people who can comply. (*Australian Iron and Steel Pty Ltd v Banovic* ("Banovic") (1989) 168 CLR 165, 178, 185-6, *Kemp v Minister for Education* ("Kemp") (1991) EOC 92-340, at 78,368. It would not be appropriate for instance to simply look at the number of recent graduates who are under 25 and compare those with the number of recent graduates over 25 as that would just be a reflection of the complying group and not shed any light on the indirectly discriminatory nature of the requirement or condition. What is required is to ascertain a suitable "base group" and ascertain the number of complying people of the same age as the Complainant as a proportion of all the people the same age as the Complainant in the base group and compare that proportion with the number of complying people of a different age from the Complainant as a proportion of all the people of a different age group in the base group. (See the approach in *Banovic* at p 178, 186-7, *Kemp* at 78,369 -70.)

- 22 To ascertain the base group, it is important to ensure that the group selected is not one which will not mask or entrench the effect of a previous discriminatory practice. (*Banovic* at p179-80,188-9, *Kemp* at 78,371).
- 23 It has been suggested that in some cases, to take the entire population of the state as the base group would be too broad and that a more suitable choice may be to narrow the base to the particular group to whom the requirement is directed. (See for example *Kemp* at 78,370.) In *Banovic* at p187, Dawson J suggested that where the requirement is contained in a published offer of employment, the relevant base group may be made up of those who might be expected to be eligible to take up the employment based upon geographical, educational or other restraints. A similar approach is to consider the "otherwise qualified" potential applicants, such as in the case of *Price v Civil Service Commission* [1978] ICR 27, 31 where job applicants had to have at least one "A" level and be aged between 17-28. The challenge in that case was to the age requirement being discriminatory against women as many in that age group were involved in child rearing and unable to work. The appropriate pools were the men and women with "A" levels.
- 24 On the basis of previous authority, the submission by the Respondent that the base group should be all the people in Western Australia above the graduation age of about 21 is too broad. The submission of the Complainant that the base group should be all engineering graduates in Western Australia is to be preferred as that is the appropriate group from whom applicants for graduate engineering positions could come. There was no evidence led to suggest that there might be any past discrimination on the grounds of age that would distort the comparisons in such a base group as a whole.
- 25 The next issue then is how to defines people of the "same age" as the Complainant, that is whether this means only people aged 45 or around their mid-forties or whether it is just anyone over 25. Given the need to read the Equal Opportunity legislation in a manner which makes sense and does not defeat the purpose of eliminating discrimination on

grounds such as age, race, impairment etc, it is necessary to construe the words "same age" as the Complainant broadly. As an illustration, the relevant part of the legislation could be rendered largely ineffective if indirect impairment discrimination were to require a comparison between relative proportions of people with the particular impairment on the one hand against all other people, comprising those with other equally debilitating impairments as well as those with no impairments, on the other. Similarly, if a condition is one which is discriminatory against most people of a non-European background, it could defeat the purpose of the section if the comparison that was required was between Vietnamese people on the one hand and members of every other race (including all the non-European races) on the other. The appropriate test in this case is that people of the "same age" as the Complainant are those over 25 and those who are not of the same age are those under the age of 25. If that were not the case, an indirect discrimination case by those in their forties may be able to be defeated by the fact that there is also indirect discrimination against people aged in their thirties, fifties and sixties.

26 A decision also has to be made as to the groups of people who can comply with the requirement or condition. The parties both suggested that it was all recent engineering graduates. Given the evidence about the commerce graduate and the fact that the advertisement was about recent graduates, without specifying that they should be recent "engineering-degree" graduates, it may be that the pool could be all the recent graduates with an engineering degree (recent or otherwise), not only recent engineering graduates. If so, no evidence has been led about the ages of such graduates.

27 The lack of evidence about precise figures and the difficulty with drawing some of the inferences sought may however not affect the result in this case. There are authorities which support the view that the Tribunal can take a common sense approach to the issue and draw inferences based on the information provided, even if the precise statistical evidence is missing. (*Kemp* (1991) EOC 92-340.) It may also be that the selection of an appropriate sample may be an acceptable way of calculating the proportions of persons in a larger community who answer a particular description (See *Banovic* per Dawson J at p 191).

28 At a minimum, it is probably acceptable to take judicial notice of the fact that the usual youngest age of engineering graduates will be about 20 or 21. This means that most engineering graduates under 23 or 24 would be recent graduates. Judicial notice can probably be taken of the fact that there is likely to be a large number of engineering graduates over 25 who are not recent graduates. Further, Mr McLoughlin from the Institution of Engineers agreed that there is not much doubt that majority of recent university graduates would be younger people and that the majority of persons in the Complainant's age group, that is around 48 would be highly unlikely to be recent graduates.

29 If the appropriate process was to divide the number of all recent graduates under the age of 25 who have an engineering degree (whether or not the engineering degree is the recent one) by all the engineering graduates under the age of 25, it is likely that the proportion will be a large figure because on a common sense basis, it is likely that a major proportion of engineering graduates under the age of 25 would have gained their degree not more than 3 years ago. The comparative proportion will be with all recent graduates over the age of 25 with an engineering degree divided by all the engineering graduates over the age of 25. Even if, contrary to the Complainant's submissions, the numerator is almost equal to the recent graduates under 25, it is likely that the denominator will be much higher given that it covers all engineers from the age of 25 to 70 or more. This means that the comparative proportion for engineering graduates 25 and over is likely to be a substantially lower proportion.

30 In the circumstances, despite the lack of precise statistics and the problems with some of the Complainant's submissions as to how to calculate the proportions, it is appropriate to find that the requirement or condition of recent graduation is one with which a substantially higher proportion of people, who are not of the same age (ie 25 and over) as the Complainant, can comply.

Reasonableness

31 The other limb in s66V(3) that needs to be satisfied in order to make a finding of indirect discrimination is that the requirement or condition of recent graduation was "*not reasonable having regard to the circumstances of the case*".

32 The parties had different submissions as to who carried the onus of proving that a requirement or condition was not reasonable. The balance of the authorities support the view that the Complainant bears the overall onus of proof as to indirect discrimination, including the onus of proving that the requirement or condition was not reasonable in all the circumstances. (McHugh J in *Waters v Public Transport Corporation* ("*Waters*") (1991-2) 173 CLR 349, 411, *State of Victoria v Schou* ("*Schou*") [2004] VSCA 71 at para [25] and Bowen CJ and Gummow J in *Secretary, Department of Foreign Affairs and Trade v Styles* ("*Styles*") (1989) 23 FCR 251 at p256, *Commonwealth of Australia v Human Rights and Equal Opportunity Commission and Dopking (No2)*, (1995) 63 FCR 74, ("*Dopking No 2*") at p82-3 per Lockhart J; at p96 per Lindgren J; *Australian Medical Council v Wilson* ("*AMC*") (1996) 68 FCR 46, at p62 per Heerey J, at p79 per Sackville J. Einfeld J did express the view in the *Australian Public Service Association v Australian Trade Commission* ("*APSA*") (1988) EOC 92-228 that there was, in the context of the *Commonwealth Sex Discrimination Act*, no formal onus of proof, but parties asserting something would carry at least an onus of leading evidence (see pp77,164-5). Regardless of whether there could be circumstances giving rise to an evidentiary onus of proof on the Respondent, the view that there is no formal onus of proof seems to be against the weight of authority referred to above.

33 As far as the principles, the authorities establish that :

"The Tribunal should weigh all factors, including the nature and extent of the discriminatory effect as against the Respondent's reasons for implementing the relevant requirement or condition. (See Styles p263). It is a case of striking a balance between the Respondent's freedom to impose a requirement or condition and the interests of person's in a protected category. (Waters .at, 379 per Brennan J.)"

- 34 The test of reasonableness is less demanding than necessity, but more demanding than a test of convenience (*Styless*, at p263)
- 35 It is necessary to look at all the circumstances of the case as a condition may not unfair or unreasonable in itself but could be in the particular circumstances if it repeated or continued the effect of past discrimination. (See *Banovic* at p 181 per Deane and Gaudron JJ and p 191 per Dawson J).
- 36 The Tribunal should take into account all the relevant circumstances to ascertain what is reasonable. (*Waters* at p379 per Brennan J, at p 383 per Deane J, at p394-6 per Dawson and Toohey JJ, p410-11 per McHugh J.). This could include the financial or economic or other circumstances of the Respondent as well as the Complainant. (*Waters* p395, APSA at p 77,165.) It can also include such things as the employer's legitimate interests in maintaining a stable workforce or good industrial relations (*Banovic* at p 181, per Deane and Gaudron JJ, *Waters* at p 363 per Mason CJ and Gaudron J). It could also include health and safety requirements, the existence of competitors etc (see *Waters* p395 per Dawson and Toohey JJ). It would include operational requirements (*Schou*, see paras [24] and [34].) The precept of fairness is also another factor (*Styless* at p 264). Another factor may be differing needs and community expectations of the comparative groups (*Dopking No 2* per Sheppard at p86, per Lindgren at p98).
- 37 Other factors to take into account could include whether the condition is appropriate to the activity or transaction and whether there are other means to serve the employer's legitimate interests without any undesirable discriminatory effects. (See *Waters* at p 363 per Mason CJ and Gaudron J, p 378 per Brennan J, p395 per Dawson and Toohey JJ.)
- 38 On the other hand, the majority in the Court of Appeal in Victoria in *Schou* held that while the existence of an alternative could have been adopted, it had to bear upon the reasonableness of the condition or requirement in issue. This did not mean that what would otherwise be a reasonable condition or requirement would not become unreasonable merely because there was an alternative with a less discriminatory effect. (see paras [26]-[27] per Philips JA, with whom Buchanan JA agreed at [47].)
- 39 Something is not unreasonable just because the Tribunal does not believe it was the correct decision in the circumstances or believes the Respondent could have made a better or more informed decision. (See

Sackville J in *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* ("Commonwealth Bank")(1997) 80 FCR 78, at p111-2) There may be differing views in the community about whether people generally like or approve of the condition, but it is a different question to say that it is not reasonable. (See *Dopking No 2* per Lockhart J at p84, per Sheppard J at p87, AMC per Heerey J at p61.).

40 In the case of government or statutory authorities, policy objectives could be taken into account in assessing reasonableness. (*Waters* per McHugh J at p410.)

41 The Complainant contended that the requirement was not reasonable because the requirements of the Respondent's business and function would be favoured by getting the most competent and experienced engineers. Its function was not to provide jobs and training to recent graduates. The limitation of the programme to recent graduates unreasonably deprived non-recent graduate engineers of employment and the opportunity to learn specific skills associated with the work of the Respondent. The Complainant's submission was that with a reducing number of young people in the workplace, it was important to make better use of experienced workers and to retrain them rather than just concentrate on recruiting and training young workers. The Complainant's case was fresh blood and ideas and knowledge of recent techniques and technology did not only come from recent university learning but could come just as much from workplace experience. It was said that graduates aged under 25 could apply for mainstream positions with the Respondent but this programme gave them 2 "bites at the cherry" which was not necessary and gave an unfair preference.

42 The Respondent relied on various grounds for saying that it was reasonable to have a programme for recent graduates only. These were :

"To obtain access to and inject into the organisation the most recent learning on technology and ideas that recent studies enabled students to learn."

43 The programme was only one specific form of recruitment and training and there were other mainstream recruitment processes and training for experienced engineers. These mainstream positions were

harder for new graduates to obtain as experienced people were usually favoured.

44 To fulfil a public obligation to provide employment and training to recent graduates, and to assist them to obtain the competencies and qualifications of a chartered professional engineer.

45 The criterion of being a recent graduate did not exclude any recent graduate who was older, that is it was not based on age. There was evidence that people over 25 had been employed under the scheme.

46 The programme was not designed for experienced engineers who already held chartered professional engineer status.

47 In relation to the issue of access to recent learning and ideas, there was evidence led by the Respondent through Mr McLoughlin, the National Assessor of the Institution of Engineers Australia, that engineering courses had to be re-assessed and accredited every 5 years. One of the issues considered in accreditation was to see if the universities were keeping up with changes in technology. He conceded that it was possible that some universities may fall a bit behind in that regard, but did not have the immediate experience to be able to comment on the particular courses.

48 Mr Taya said that one of the reasons for seeking recent graduates was to bring into the organisation the most recent learning and most recent techniques and best practice that you only get from an academic type of background. While he did not know of the details of cutting-edge technology covered in engineering courses and was not an engineer himself, he sat on committees with qualified colleagues who were aware of these things and had told him that the universities were teaching new ideas and technologies. He recognised that it was important to have a workforce with a diversity of knowledge and training and that the Respondent tended to have employees who had been there for a long time and could otherwise develop insular thinking if not for the injection of new ideas. He accepted that experienced graduate engineers can also gain up to date knowledge in other ways such as through professional development, from workplace experience with new technology, through technical courses and other means, and there were centres of excellence within the Respondent's organisation.

49 It was pointed out as well by the Complainant's representative that one of the successful applicants only had a recent degree in commerce which would not have led to advanced knowledge of recent technology in engineering.

50 It would be a concern if this ground was the only basis relied on for the reasonableness of limiting the recruitment of recent graduates. No doubt, recent academic learning could well give some familiarity to new technology and concepts and this would be a factor to take into account when deciding which applicants to select. However if the requirement was otherwise indirectly discriminatory against people over the age of 25, it would not be reasonable to use this factor to simply exclude all non-recent graduates from consideration. It is not reasonable to assume that non-recent graduates will not have learnt about the most recent technology and ideas through other means.

51 Mr Taya gave evidence that the Professional Development Program was only one programme for recruitment used by the Respondent. Most positions came through the "*mainstream recruitment process*" where positions were offered and open to all engineering graduates. During the period in which the Professional Development Program for recent graduates had been running, from about 1996 to date, there had been 80 engineers engaged through the "*mainstream process*" and that the people engaged ranged widely in ages, with an average age of 42 across the board for all recruits and the average age of engineers would also have been in the region of about 42. The mainstream recruitment was available for more experienced people like Mr Dewan. There had been a significant recruitment through this mainstream process as the Respondent had changed its approach of outsourcing much the work and there had been a process of rebuilding the capacity of the Respondent by recruiting people as employees instead. He said that the program for recent graduates was only a small component of the overall recruitment. Although 7 applicants were selected for the recent graduate programme in 2002, this was unusual due to the high calibre of applicants and the needs of the organisation at the time. The evidence showed that there were only 3 selected in the first half of 2003 and no evidence of any further intake later that year.

52 The Complainant was eligible to apply for mainstream positions and gave evidence that he had applied for 2 electrical engineering positions and for other engineering positions with the Respondent but had been unsuccessful.

53 Mr Taya said the Respondent did not have a particular need for more electrical engineers at that time. They tended to be looking primarily for general civil engineers and, in 2003, for people with environmental disciplines. This would be reflected in the type of applicant they were looking for in the mainstream and also the professional development programmes.

54 As far as the public duty of providing employment and training to recent graduates, Mr McLoughlin said that the Institution of Engineers wished to facilitate recent graduates to satisfy the required generic competencies to achieve the chartered professional engineer status. Programmes such as that offered by the Respondent were there for the purpose of facilitating this in an orderly way. The competencies taught were tied to the required national competencies to achieve the chartered professional engineer status. The programme was not designed to assist experienced engineers to change disciplines. There were other ways of doing that such as by further studies at university or specific courses or training in the course of employment. He also acknowledged that employers often found it easier to recruit experienced people than to train inexperienced ones but that employers realised that they had to employ new graduates and train them and could not just *"feed off the rest"*.

55 Mr Taya also said that the aim of the programme was to assist a recent graduate to develop in a professional capacity. He said that as a public sector organisation they had a role to give positions and training to recent graduates. This is particularly as the general preference is to take people who are already skilled. He said that recent graduates often did not *"get a look in"* for the mainstream recruitment of the Respondent as experienced people were favoured for such positions. The evidence was that most of the recruits in this programme received the base salary of around \$38,765. He was questioned about the ones with a higher salary as

being an indication that the positions could take into account a greater experience. His response was that there was one recent graduate who was an experienced engineer with direct road building knowledge. That person received a large salary but this was exceptional. The person concerned only stayed on the programme for 6 months and obtained another position and left the programme. Mr Taya said that the others who received higher salaries had either had higher qualifications or greater prior experience.

56 The evidence points to the programme being designed to give new engineering graduates experience, training and mentoring. A major, though not mandatory aim was to get graduates the required competencies that would fulfil the requirements to achieve chartered professional engineer status. While all seemed to accept that there may have been some matters that might have assisted the Complainant in improving some skills and knowledge, particularly of the type of work the Respondent did, it is clear that it was not designed for people in the Complainant's position, that is to re-train experienced engineers in different disciplines or in the Main Roads-specific work.

57 The principle of having schemes and programmes to assist new graduates to receive professional qualifications and practical workplace training is not unknown in other professions. In the legal profession in Western Australia, there are articulated clerkships and an articles training programme for such articulated clerks. This is designed for recent graduates who are not already admitted as legal practitioners. It is not designed for experienced litigation lawyers to be re-trained as commercial lawyers, for instance, even though a clerkship in a commercial firm and the commercial elements of the training programme may assist such re-training.

58 There was no evidence to suggest that the aim of the recent graduate condition was to obtain graduates of any particular age range.

59 There was a question about whether the 2005 programme had changed to remove references to "recent" graduates. However the advertisement which was in evidence showed that there was still a

mention of recent graduates and Mr Taya said that this was still the aim of the programme, even though he did not know why the wording on the formal programme had removed the word "recent". There is insufficient evidence to suggest that the requirement or condition has changed.

60 The question then is whether the provision of a recruitment and training programme for recent graduates only was not reasonable in all the circumstances of the case.

61 The Complainant's submissions about an aging population and the benefits of training and retaining older workers are all good reasons why it would be reasonable to have programmes to assist older workers to obtain new skills and enhance their employability. It may also be reasonable to have special measures to enable older workers to find employment. However the fact that there may be good reasons to recruit and assist older and experienced workers or applicants does not mean that it is not also reasonable to have programmes designed to recruit and assist recent graduates, young or old. This situation may be different if the only recruitment programme was for younger recent graduates but the undisputed evidence was that the program was only part of the Respondent's overall recruitment and it also did not necessarily lead to a permanent position. While it is unfortunate for the Complainant that the Respondent did not also have a programme designed to assist and retrain the non-recent graduates or experienced engineers in the Complainant's position, this is not something which the Equal Opportunity Act requires.

62 No party was able to refer the Tribunal to any authorities in which the "reasonableness" factor involved a consideration of special programmes to assist a class of people or altruistic factors rather than commercial interests of the employer. There is no clear limit to the circumstances which can be considered to judge whether a requirement or condition is reasonable. Policy factors and public obligations to provide employment and a means of training for recent graduates are certainly factors weighing in favour of a finding of reasonableness. The cases clearly demonstrate that a condition is not to be considered unreasonable just because there may have been better alternatives or alternatives that may have been of greater assistance to a group that struggles for an equal opportunity.

63 In consideration of all the circumstances of the case, the conclusion is that the requirement or condition is not found to be unreasonable.

The Complainant's loss -loss of opportunity

64 For the reasons set out above, the Complainant's case has not been made out and the questions of appropriate levels of compensation do not need to be considered. However as there was evidence led about the value of the loss of opportunity, and for completeness, the following comments are made.

65 The Complainant submitted that compensation or damages could be awarded for the loss of opportunity. The Tribunal was referred to the case of *Howe v Terry* (1927) 27 NSW SR 301 where damages for loss of opportunity were awarded for the breach of an agreement about the lease of a racehorse. The Tribunal accepts that compensation can be awarded for the loss of opportunity.

66 It was submitted on behalf of the Complainant that he had at least a 36% chance of receiving a placement in 2002. This was on the basis that 7 out of the total of 19 applicants (ie over 36%) received a position. It was submitted that due to his experience, the Complainant would have stood a good chance of receiving a position. The Complainant was earning at the top of Level 5 when he was previously working for the Respondent as an Asset Management Officer and submitted that he would have started at that level due to his previous experience, that is, a salary of around \$59,330. On that basis the full salary lost was said to have been \$98,883 over the 20 months to date. The salary that it was submitted was earned by the Complainant since July 2002 was \$21,600 and if this is deducted the figure amounts to \$77,233. 36% of this figure comes to \$27,803 which is what the Complainant said was the appropriate level of compensation, that should be awarded. The Complainant was not seeking any general damages component.

67 The submission by the Complainant fails to take into account that if there was no requirement that applicants be recent graduates only, the number of applicants could be substantially larger than the 19 applicants in 2002. It is not known how many applications may have been received from non-recent graduates like the Complainant, but Mr Taya in his evidence said that one reason for limiting the applications to recent graduates was because initially, when the Respondent did not have requirement of recent graduation, the Respondent was receiving hundreds of applications and it was a "nightmare" as they were receiving applications from people with 20 and 30 years of experience, such as people who had been out of the workforce for a while. The fact that the pool of applicants may have been much larger naturally means that the chance of the Complainant obtaining a placement out of the limit of about 7 places was likely to have been a lot less than 36%.

68 There were other factors which may have reduced the Complainant's chances of success in obtaining a position. One of these relates to Mr Taya's evidence, which was not challenged, that the Respondent was not seeking electrical engineers but was looking more for civil or structural engineers or those with environmental skills. This may have meant that qualified civil or structural or environmental engineering graduates may have had a greater chance of receiving a placement under the professional development programme than electrical engineers. No evidence was led by the Complainant as to whether any of the successful applicants were electrical engineers or whether any electrical engineers would have gained a position, the evidence from Mr Taya suggested that most of them would have been civil engineers.

69 Another factor relates to the Complainant's past employment with the Respondent. Evidence was led about the Complainant's failure to receive an offer from the Respondent when he was being considered for the permanent Asset Management Officer position. Mr Taya had been under the impression that the Complainant had been recommended for the permanent position but had indicated that he did not wish to accept the position as it was not in his area of expertise and that he preferred to remain as a redeployee, on his existing salary, to wait for an electrical engineering position to come up. When shown an e-mail by the Complainant to the Manager of Road Asset Planning, in which the Complainant said that the e-mail was not a refusal to accept the job, Mr

Taya conceded that the impression he had may have been wrong. The Complainant said in his evidence that he had been honest about his lack of knowledge about the area of work, in particular about the Respondent's assets such as roads and bridges, and that his skills were not suitable for doing the job properly, but would not have refused the position if it had been offered. This evidence may well be accepted. However, even though that e-mail was not a refusal to accept the position, it does give the impression that the Complainant was not enthusiastic about working in an area other than electrical engineering. His e-mail did not have the tone that would be expected of someone who was trying to obtain a position. He specifically outlined his expertise as an electrical engineer and said "*I would like to get back to my area of specialisation at the earliest opportunity even after joining this job.*" Given the lack of many electrical engineering opportunities in the Respondent's organisation, it may well be that this could be a factor that would reduce the Complainant's chances of being offered a Professional Development Program position as it may be feared that he would still seek to leave for an electrical engineering position as soon as one became available.

70

Another possible negative factor is that the Complainant had previously been dismissed from the Waters and Rivers Commission position for disciplinary reasons. The Complainant gave evidence that this was to do with a misunderstanding in which he believed that he had been given permission to work in another position during his long service leave. The Complainant said he would have disclosed the termination and the reasons for it in the form headed "*Graduate Development Program Application Form (External)*", one of the standard forms provided for the Professional Development Program. Mr Taya agreed that it is likely that the Respondent would have inquired about and taken into account the full reasons for the dismissal in considering the application. The Complainant's submission was that the circumstances of his termination should not have prevented the Complainant from receiving a position. It may be that this would not have been sufficient to disqualify the Complainant from receiving the position, but it may have been another factor that would have to be weighed against the Complainant receiving a position if he had been eligible, so that the value of the loss of opportunity would be reduced further due to this contingency.

71 In the circumstances, the value of the loss of opportunity should probably be substantially less than 36%. In the light of the decision on whether there has been a breach of the Act, there is no need to ascertain the precise value of this loss.

Conclusion

72 For the reasons set out above the complaint is dismissed.

Cassidy Jm
Deputy president



