

JURISDICTION : EQUAL OPPORTUNITY TRIBUNAL OF
WESTERN AUSTRALIA

LOCATION : PERTH

CORAM : Deputy President: Penelope Keeley
Deputy Member: Pat Hills
Deputy Member: Jim McKiernan

HEARD : 1 July 2004

DELIVERED : 26 July 2004

FILE NO/S : ET/2003-000003

BETWEEN : SAMANTHA GAYE CURRAN
Complainant

and

SKILLED ENGINEERING LTD
Respondent

Catchwords:

Sexual discrimination – Sections 8(1) and 11(1)(b) Equal Opportunity Act 1984
Vicarious liability – Section 161 Equal Opportunity Act 1984

Legislation:

Equal Opportunity Act 1984 (WA) s 8, s 11, s 161

Result:

Application dismissed

Representation:

Counsel:

Applicant : Mr L Edmonds - Australian Manufacturing Workers' Union
Respondent : Mr G Bull - Chamber of Commerce & Industry (WA) Inc.

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

Nil

Cases(s) also cited:

Nil

DECISION OF THE TRIBUNAL

1 The application brought by the complainant alleges that on the
ground of her sex, she was treated less favourably by the respondent than
a man would have been in circumstances which were the same and
therefore such treatment fell within the definition of sexual discrimination
pursuant to s 8(1) of the *Equal Opportunity Act 1984* ("the Act").

2 Pursuant to s 11(1)(b) of the Act it is unlawful for an employer to
discriminate against a person on the ground of the person's sex in
determining who should be offered employment. The complainant,
Samantha Curran, alleges that she was denied employment with Skilled
Engineering Ltd on the basis of her gender.

3 She alleges that this discrimination was exercised by an employee of
Skilled Engineering Ltd, Mr Robert Hollick, at an interview on 3 August
2001. If the complainant proves her case then the respondent, Skilled
Engineering Ltd, will be vicariously liable pursuant to s 161(1) of the Act
unless it was able to establish that the company had taken all reasonable
steps to prevent its employee from doing the act complained of (s 161(2)).

4 Prior to proceeding with the hearing two matters were raised with
counsel for the complainant and respondent.

5 The first was the composition of the Tribunal which included Mr Jim
McKiernan. Mr McKiernan had previously been a member of the Union
by which the complainant was being represented and maintained some
links with that body. No objection was made by the respondent to
Mr McKiernan remaining on the Tribunal.

6 Secondly, the Tribunal raised the matter that the pleadings of the
complainant seemed to include allegations which could be considered to
be of the nature of sexual harassment but for which no claim had been
specifically made. It was confirmed by the complainant that she was not
pursuing an application for sexual harassment as that matter had been
dealt with by the Commissioner for Equal Opportunity.

7 Evidence was given by the complainant, Samantha Curran, that she
had telephoned Skilled Engineering Ltd in February or March 2001
seeking work as a trades assistant. She had spoken to Robert Hollick
whom she described as the consultant for hiring maintenance crews. She
had been told at that time that there was no work for trades assistants. She
gave evidence that she telephoned Mr Hollick several times but was told

there was no work and that she may have sent in a resume although she was not sure when she would have done that.

8 She then said that after a couple of months she had spoken to Mr Hollick again about the possibility of obtaining a job as a truck driver although at that stage she did not have a driver's licence, having previously lost it. She said that Mr Hollick had said that he would write a letter to support her application for an extraordinary driver's licence because he had plenty of work for truck drivers if she had the licence. He wrote the letter and then delivered it to her at her home and suggested that they go and have a coffee. During their coffee he said that he would get into trouble at work if they knew that he was taking her to coffee.

9 The day that Mr Hollick delivered the letter was the first day he had met her.

10 Ms Curran then applied for her extraordinary driver's licence, obtained it and at some time prior to 3 August 2001 she received a telephone call from Mr Hollick that there was a job available at Pannawonica as a truck driver and that an induction would take place on 3 August 2001.

11 Ms Curran was taken to the induction by her friend, Patricia McIlvinney, as the terms of her extraordinary licence were restrictive and did not allow her to drive there. During the course of the induction, at which there were approximately a dozen other potential employees (all male), Ms Curran says that Mr Hollick mentioned that there was a lot of work around and that he had sent "40 blokes up to the mines as trades assistants".

12 After the induction each of the employees was interviewed individually and Ms Curran asked to be interviewed first. During that interview with Mr Hollick she says that she raised with him the statement which he made about sending 40 trades assistants up north and asked why he hadn't offered a job to her. Mr Hollick said that he didn't consider her because she was a woman. He made a number of other comments regarding her unsuitability for the work because she was a woman but also said that if she had been fat and ugly he might have considered it. He is alleged to have said that it was an unwritten rule of the company (the respondent, Skilled Engineering Ltd) that women and someone who had had a worker's compensation claim would not be employed. When Ms Curran said that that was discrimination Mr Hollick is alleged to have said "you can't prove it, you don't have a tape recorder". He is further

alleged to have said that women could be employed as truck drivers because they are careful drivers and keep the truck clean. As Ms Curran left the room he is alleged to have said "I think you look gorgeous when you are mad".

13 Ms Curran says that she was shocked by these comments and went outside and told her friend, Patricia, everything that Mr Hollick had said to her. She was very upset. She also says that she telephoned another girlfriend who had worked at Alcoa to tell her about the statements made.

14 Ms Curran did not complain to Skilled Engineering Ltd at the time because she said she wanted the job and that a complaint might have harmed her chances of a job at a later time. She went north employed as truck driver for Skilled Engineering Ltd and when she arrived there she says that she found she had been misled about a number of things including wages and conditions. She says that she called the office of the respondent in Karratha and spoke to Phil Park. She then saw him and complained to him about the comments which had been made by Mr Hollick as well as the terms and conditions of her employment. She was told that she could take the complaint further but she received nothing from the respondent regarding the complaint. She didn't follow up with the complaint until some time later when she went to her Union.

15 Ms Curran gave evidence that if there had been a shutdown at Tom Price (which is where she alleged Mr Hollick had said he had sent trades assistants) the most likely scenario was that the shutdown was for two or three weeks and she understood that it was possible to gross approximately \$2,000.00 per week as a trades assistant. However different companies paid different amounts.

16 Ms Curran gave further evidence about the effects of the alleged comments on her and that she had felt that she was not getting a job based on her skills and experience but was being treated like "a piece of meat". She felt that men were looking at her when she was working and she was overly aware of how she behaved and that she had lost some self-esteem.

17 She had worked since the job with Skilled Engineering Ltd but was now a full-time mother.

18 Under cross-examination Ms Curran confirmed that she did not know whether or not there had been a shutdown in Tom Price or when that shutdown might have been. She speculated that it may have been April or May. She also gave evidence that she had applied for jobs with many companies during the period in question (from February or March

2001 to August 2001) but had not been able to obtain employment from any of those companies.

19 She thought that she had sent in a resume to Skilled Engineering Ltd but she did not keep a copy of any resume she might have sent in.

20 She was referred to her resume which had apparently been sent by P V Workfind on or about 19 May 2001 to Skilled Engineering Ltd. This was Exhibit 1. She confirmed that she had previously worked for Skilled Engineering Ltd as a truck driver and that her only previous experience as a trades assistant had been between January and March 2001 when she worked on two separate shutdowns during that time.

21 She stated that she filled out an application for employment as a trades assistant with Skilled Engineering Ltd but she did not keep a copy of that application. She also confirmed that on 3 August 2001 she did fill out an application for a job as a truck driver which was Exhibit 8.

22 Ms Curran confirmed that she eventually filed a complaint on 24 June 2002.

23 During re-examination Ms Curran confirmed that trades assistant work was not regular and that sometimes there would be no work for two months at a time if not longer. She confirmed that it was rare that a trades assistant would work all year.

24 Patricia McIlvinney gave evidence that she had taken Ms Curran to the induction on 3 August 2001 and that after she had come from the induction, Ms Curran had been angry and upset because of remarks she said had been made by Mr Hollick. She reported that Ms Curran had said that she had been told by Mr Hollick that if she was fat and ugly he would consider giving her a job but that she would be a distraction to men if she worked up a ladder.

25 Ms McIlvinney referred to a "statutory declaration" which she had signed on 21 November 2001. The document is not a statutory declaration because it has been incorrectly witnessed and was in fact witnessed by the complainant, Samantha Curran. It was accepted into evidence as Exhibit 2 but was accepted simply as a document signed by Ms McIlvinney on the date in question.

26 More importantly, Ms McIlvinney confirmed that Ms Curran had assisted her to write the statutory declaration and that they had helped each other in its preparation and that Ms Curran had told her what had

happened although Ms McIlvinney did say that the document also reflected her recollection. The date of that document is some nearly four months after the event.

27 It would be fair to say that at the time of the hearing Ms McIlvinney had a limited recollection of the conversation with Ms Curran.

28 In response, evidence was given by Robert Malpass, the Operations Manager of Skilled Engineering Ltd. Mr Malpass first gave evidence that Skilled Engineering Ltd had at the time in question a written policy of equal opportunity which was incorporated into several documents called a Code of Ethics, General Harassment and Sexual Harassment and Equal Opportunity and Affirmative Action. These documents were in use by the company at the time in question and Mr Malpass gave evidence that it was the policy that these documents would be handed to employees during their induction. He initially gave evidence that Mr Hollick had signed an induction checklist confirming that he had received these documents during his induction but it became apparent later during his evidence that the reference to equal opportunity was apparently incorporated under the heading "Introduction Letters Issued ... re Quality Assurance".

29 Mr Malpass said that Skilled Engineering Ltd is a labour hire company whose core business is in trades. He further said that trades assistants were generally sourced from the local area when required as clients have to fly qualified trades people into the mines during a shutdown but want to reduce the costs of unskilled employees where possible.

30 He further gave evidence that Robert Hollick was employed as a non-trades recruitment officer and that he at no time during the period in question had the ability to offer trades assistant positions in the northwest.

31 Mr Malpass had extracted some information from company records as to whom was engaged by Skilled Engineering Ltd for a Tom Price shutdown from 30 July to 1 August 2001. He had established that no trades assistants were sent from Perth for that job. He gave evidence however that at Tom Price there would probably have been shutdowns once per month which would mostly have filled their labour requirements locally but every second month Skilled Engineering Ltd would send people to the site.

32 Mr Malpass produced a number of documents which he had created which were extracts from company records of various types.

- 33 For example Exhibit 5 was a list of employees for a shutdown at Iluka Resources Limited in March 2000 which showed five female trades assistants who had been employed for that job. Mr Malpass produced this document simply as an example of the company having employed female trades assistants. They had been employed by the Bunbury office on that occasion.
- 34 He then produced Exhibit 6 which was a list of the number of employees for one particular client – Rio Tinto – but which was undated and did not identify the number of trades assistants as men or women.
- 35 Exhibit 7 purported to be a list of a number of people employed by Skilled Engineering Ltd who had previous compensation history.
- 36 Mr Malpass gave evidence that the company employed women in the capacity of trades assistant but that trades assistants were a very small part of the business and that the majority of women were employed as plant operators.
- 37 He further gave evidence that it was unusual that Mr Hollick delivered a letter to Ms Curran supporting her application for an extraordinary licence but did confirm that such a letter would assist her in obtaining an extraordinary driver's licence and was probably critical to her employment as a truck driver.
- 38 While being aware of complaints Ms Curran made subsequent to her arrival at Pannawonica regarding rates of pay and conditions of employment, he said that he was not aware of her claim of discrimination until he received notice from the Commissioner.
- 39 He gave evidence that had he been aware of comments as alleged being made by Mr Hollick then Mr Hollick would have been counselled, possibly sent for external counselling and would have received a written warning. He would have been re-inducted internally and could eventually have been dismissed had the circumstances warranted it. He was not aware of anyone being dismissed by the company for breaches of equal opportunity policies.
- 40 He gave further evidence that Mr Hollick's area of responsibility was in the metropolitan area primarily but also for truck drivers in the northwest. Another employee, Justin Bugg, dealt with regional shutdowns.

41 Under cross-examination Mr Malpass confirmed that Mr Hollick had been employed as a field employee in 1998 by Skilled Engineering Ltd but was re-inducted to work in the office after he broke his ankle. He further stated that not only did he believe that Mr Hollick would have been aware of equal opportunity policies from his own induction but that he was supposed to explain those policies to prospective employees at their induction.

42 He confirmed that had someone rung Skilled Engineering Ltd seeking trades assistant work they should not have been referred to Mr Hollick and were they so referred by accident, Mr Hollick should have referred them to Mr Bugg.

43 He also confirmed that in Exhibit 6, of the 84 employees referred to, only three were trades assistants. Mr Hollick finished with the company on 2 September 2001.

44 The respondent then called Robert Hollick to give evidence. He confirmed the evidence of Mr Malpass as to his duties and that he had no authority to employ trades assistants for the northwest.

45 Mr Hollick gave evidence that he recalled that he needed to find 10 Haulpak drivers for Robe River and that he found Ms Curran's name on Skilled Engineering Ltd's computer database or from her resume. He contacted Ms Curran and spoke to her on a number of occasions regarding the job. He did not recall her ever asking him for a job as a trades assistant.

46 Mr Hollick recalled that Ms Curran did not have a driver's licence but he knew that on some sites it was not necessary to have such a licence. He believed that he contacted the site and was advised that the Haulpak drivers did need licences. He prepared a letter for Ms Curran to assist her obtaining an extraordinary driver's licence and drove down with the letter to her. He said that he drove the letter to her because she couldn't pick it up because she didn't have a licence. He further advised that he had wanted to take his new car for a spin which was a further reason why he had delivered the letter to Ms Curran. He recalled writing the letter on 25 May 2001 which was Exhibit 9. He also gave evidence that he had from time to time delivered other items to employees as part of his job as a recruiter.

47 Mr Hollick said that once Ms Curran had obtained her extraordinary driver's licence he would have offered her the job by telephone and arranged for her to come up for the induction.

48 Mr Hollick denied discussing northwest shutdowns with Ms Curran or referring to not employing women or those who had previously been on worker's compensation or that he made any remarks as alleged by Ms Curran. He said that he had no reason to refer to the shutdowns or the work that was available as he was only talking to Haulpak drivers in the induction and he had work available for them.

49 He said that the job which was offered to Ms Curran was for eight weeks and that there was the potential for a full-time, permanent position available thereafter.

50 Regarding his one-on-one interview with Ms Curran after the induction, Mr Hollick denied that she ever asked him why he had not offered her employment as a trades assistant and denied that he made the comments as alleged by Ms Curran. He made the further comment that Skilled Engineering Ltd had offered him further employment although he had injured himself while employed by them previously and had received worker's compensation. He said that it would have been inconsistent for him to have made such a statement given that he himself was employed after receiving worker's compensation. He further gave evidence that Ms Curran's resume was that suited to a Haulpak driver rather than a trades assistant. He did not recall Ms Curran contacting him from February or March 2001 and did not agree that he had received a call from her before he contacted her regarding the Haulpak driver's job.

51 Mr Hollick further gave evidence that with respect to the policies of equal opportunity employment of the respondent, he had completed the recruitment course with the Chamber of Commerce and Industry, he had been inducted twice with Skilled Engineering Ltd and he had run inductions for other employees. He was aware of policies of equal opportunity and that he could be disciplined to dismissal if he breached them.

52 He could not recall how he had obtained Ms Curran's telephone number, whether it had been from the records in his computer or a resume he had received.

53 He understood that she had not yet applied for the extraordinary driver's licence when he wrote the letter but that he had taken it down on a Saturday after he had worked in the morning.

54 Mr Hollick said that if she had asked about a trades assistant job he would have referred her to Justin Bugg and put her qualifications as a trades assistant on the company's database. He believed given the nature

of her qualifications that she would have been categorised as a Haulpak driver on the database of Skilled Engineering Ltd.

55 The onus of proof of the complaint lies on the complainant who must prove her complaint on the balance of probabilities. Her complaint is that she was discriminated against in relation to employment as a trades assistant, not in any other capacity.

~~56 Having listened to the evidence the Tribunal finds that Ms Curran has not been able to prove her case to that standard.~~

57 The Tribunal accepts the evidence of Mr Malpass that Mr Hollick was never in a position to offer a trades assistant job to Ms Curran and that it is unlikely that there were those jobs available at the time in question. Indeed Ms Curran herself confirms that she was applying for many jobs at the time and was unable to find any.

58 The only documentary evidence regarding Ms Curran's qualifications for employment, or of the nature of employment she was seeking are three documents which do not support her case. They are her resume which appears to have been sent on 19 May 2001 to Skilled Engineering Ltd and the letter written by Mr Hollick on 25 May 2001. These two documents refer to Ms Curran's experience primarily as a plant operator and her application for an extraordinary driver's licence for the purpose of pursuing that employment. In our view it is likely that the resume was sent to Skilled Engineering Ltd as a result of Ms Curran's interest in the job as a Haulpak driver and this is supported by the preparation of the letter written by Mr Hollick.

59 The only other document is Ms Curran's application for employment as a driver on 3 August 2001.

60 The Tribunal accepts that Mr Hollick was never in a position to offer Ms Curran employment as a trades assistant and is of the view that if Ms Curran enquired regarding such a job, she would have been referred to Mr Bugg. It is clear that if she made such enquiries it was prior to her meeting Mr Hollick.

61 It is therefore clear to the Tribunal firstly that Mr Hollick was not in a position to offer Ms Curran employment as a trades assistant and therefore could not have discriminated against her in the offer of such employment. Secondly the Tribunal accepts the evidence of Mr Malpass that there were unlikely to have been any such jobs available during the

period in question and therefore, again, the company was not in a position to discriminate against Ms Curran as no jobs were available.

62 The Tribunal is inclined to accept the evidence of Ms Curran regarding aspects of the interview with Mr Hollick on 3 August 2001. On the basis of Ms Curran's evidence and that of Ms McIlvinney the Tribunal accepts that it is likely that Mr Hollick made comments of a nature which could be seen as sexual harassment. However, as that is not a complaint which is before the Tribunal, nothing flows from those comments in this circumstance.

63 As a result it is the Tribunal's finding that there was no discrimination by the respondent towards the complainant and the complaint is therefore dismissed.



PENELOPE KEELEY

DEPUTY PRESIDENT

