

JURISDICTION : EQUAL OPPORTUNITY TRIBUNAL OF
WESTERN AUSTRALIA

LOCATION : PERTH

CORAM : DEPUTY PRESIDENT: MS C TAN
DEPUTY MEMBER: MS M FADJIAR
DEPUTY MEMBER: PROFESSOR C MULVEY

HEARD : 16- 18 NOVEMBER 2004

DELIVERED : 31 DECEMBER 2004

FILE NO/S : ET2004-000018

BETWEEN : HELEN PARSONS
Complainant

and

SOUTH METROPOLITAN HEALTH SERVICE
Respondent

Catchwords:

Family responsibility- indirect discrimination – s35A(2) and s35B(2) Equal Opportunity Act 1984 (WA)

Legislation:

s35A(2) and s35B(2) and s4 Equal Opportunity Act 1984 (WA)

Result:

Complaint Dismissed.

Representation:

Counsel:

Applicant : Mr A MacDonald - Equal Opportunity Commission
Respondent : Mr A Sefton – State Solicitor’s Office

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

State Housing Commission v Martin, unreported decision of the Full Court of the WA Supreme Court delivered on 7 December 1998 (Butterworths Unreported decisions number BC9806686)
Gardiner v New South Wales Workcover Authority [2003] NSWADT 184 and (2004) EOC 93-314

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 and (2004) EOC 93-328

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

Reddy v International Cargo Express [2004] NSW 218

Cases(s) also cited:

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

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

Howe v Qantas Airways Ltd [2004] FMCA 242

DECISION OF THE TRIBUNAL

The Complaint

1 This matter concerns a complaint made by Helen Parsons, the Complainant, against the Respondent who is her employer, the South Metropolitan Health Service, more properly known as the Minister for Health which is the relevant legal entity. The complaint was on the grounds of indirect discrimination by reason of family responsibility in employment in contravention of s35A(2) and s35B(2) of the WA Equal Opportunity Act ("the Act"). It was alleged that in order to take on the role of Acting Clerical Co-ordinator, the Complainant was required by her employer to comply with a condition that she must start work at 7.30am which, in the terms of s35A(2) of the Act, was a condition:

- (a) *with which a substantially higher proportion of persons not of the same family responsibility... as the aggrieved person complied or were able to comply;*
- (b) *which was not reasonable having regard to the circumstances of the case; and*
- (c) *with which the aggrieved person did not or was not able to comply.*

2 It was said that by imposing such a condition, the employer discriminated against the Complainant employee on the grounds of her family responsibility in breach of s35B(2)(b) that is :

"(b) by denying the employee access, or limiting the access of the employee, to opportunities for promotion, transfer or training or to any other benefits associated with employment. "

3 The reason why the Complainant said she was unable to comply with the condition of starting work at 7.30am was because she was a sole parent of a child who was 8 years old at the relevant time. Her child resided with her at Willagee. She said that her family responsibility was to care for her child and specifically to get him prepared for primary school in the mornings.

4 It was common ground that at the time of the hearing, the Complainant was working for the Respondent as a Secretary of Seniors' Mental Health Service based at Melville. This was part of the South

Metropolitan Health Service. From March 1998 to the end of 2003 the Complainant worked in this same position but was based at the Alma Street Centre at the Fremantle Hospital complex. The Seniors' Mental Health Service moved off-site to Melville at the end of 2003 but is still supervised from the Alma Street centre. The position held by the Complainant was a level 2 position. The working hours that she had negotiated were from 9.15am to 5.15pm 5 days a week. In April 2003, she applied for an advertised position of Acting Clerical Coordinator and was one of 3 people who were successful in obtaining the position. The others were Karen Tamlin and Peter Terrell. The position was to enable someone to act in the position of Clerical Coordinator at the Alma Street Centre when the Clerical Coordinator, Ann Buckle, was on leave. The Clerical Coordinator's role involved the supervision of clerical staff of the South Metropolitan Health Service. The Respondent decided that the position would be rotated amongst the 3 successful applicants and they would be paid at the Clerical Coordinator's rate when performing those duties. The role of Clerical Coordinator was a level 4 position and the Acting Clerical Coordinator would be treated as being at that level when placed in the position.

5 There was some evidence of the concerns that the Complainant had about how she was notified that her application for the position of Acting Clerical Coordinator had been successful. She was on leave when the decision was made and was not advised that her application had been successful until she returned from leave. By that time another successful applicant, Karen Tamlin had already been told that she was successful and arrangements had been made for her to be trained to take up the acting position. The Complainant said that she sensed some favouritism and thought that everyone should have been notified at the same time. Nothing however turns on this issue as the Complainant's case was not based on any suggestion of bias or intentional or direct discrimination. There were no submissions and no evidence led that the requirement for the Complainant to commence work at 7.30am was intended to prevent the Complainant personally from taking up the Acting Clerical Coordinator position or to benefit the other 2 successful applicants.

6 There was an issue raised about Karen Tamlin being appointed as Acting Clerical Coordinator and then taking annual leave during that time. There were differing recollections as to the length of time that she took off but this was subsequently resolved by the production of her leave records which showed that she took 4 days' leave plus one public holiday. Kirsty Sheppard said that she covered for the Acting Clerical Coordinator duties during that time. The evidence of the Respondent's witnesses was that

Karen Tamlin was chosen to fill the acting position, despite having arranged leave for part of it, because at the relevant time her substantive position was the easiest to cover.

7 Despite being a successful applicant, the Complainant was not able to take up the role of Acting Clerical Coordinator. Sometime in about August 2003 when there were discussions between the Clerical Coordinator, Ann Buckle, and the Complainant concerning her taking leave to be trained for the position in September 2003 with a view to acting in the position from 22 September 2003, she was told that the position required a starting time of 7.30am. Her evidence was that she was unable to start at that time of the morning due to the requirement to care for her son before school and would not be a position to start prior to 8.45 am at the earliest.

8 There were concerns expressed by the Complainant about not being told when the position was advertised that there was a required starting time of 7.30am. It appears to be the case that the advertisement for the position did not state a starting time and even the successful applicants for the position were not told of the starting time even when they were advised that they were successful, although some of the Respondent's witnesses said that they had assumed that the applicants would know that the hours of the job would be the same as those worked by the Clerical Coordinator. The Complainant was not interviewed for the position and did not ask when the starting time was. Unlike Peter Terrell, another successful applicant, she did not make any inquiries about the starting time for the job. The Complainant said she only found out about the 7.30am starting time later when she was discussing leave relief with Ann Buckle and was then told in the course of that discussion that the position required a 7.30am start. The date of this meeting is not altogether clear but it is likely that it was on about Monday 11 August 2003. It was then that the Complainant advised Ann Buckle that she could not start at that time due to her family responsibilities. The Complainant says that there was then a heated discussion between herself and Ann Buckle and she offered to start at either 8am or 8.30am even though she knew that she could not but she made the offer to "call her bluff". She said she did so as she felt that there was no way that they were going to allow her to take up the position. It was subsequently confirmed to her by e-mail dated 14 August 2003 that the start time was 7.30am and the hours were 7.30am to 4.30pm with a half a day off a week.

9 The Complainant responded by letter dated 18 August 2003 to Ann Buckle and confirmed that she could not change her starting time of

9.15am and said that she could cope with any emergencies in the period between 7.30am to 9.15am via a mobile phone. She pointed out that a person who previously took on the Acting Clerical Coordinator position went on annual leave during that time and the position was not covered for almost 2 weeks. She asked for consideration to be given to overcoming the small obstacle of a starting time one hour forty five minutes after 7.30 am. A meeting was then organised for 21 August 2003 to discuss the issue of the hours with the Respondent's Human Resource Officer. There was some uncertainty in the Complainant's mind as to whether she was expected to attend and was told that morning that she was. The Complainant said that at the meeting she was told that the start time was 7.30am to meet operational requirements. The Complainant said that she did not say much or put forward any suggestions as she had the impression that she was just there to be told the decision. The next day she received a letter from the Respondent's Human Resource Officer, as requested, confirming what she was told, including the fact that the starting time was 7.30am. The letter said that the Coordinator was responsible for finding cover at short notice for staff who advised that they would not attend that day and this had to occur as early as possible to prevent disruption to the service. She was told that the start time of 7.30am was non-negotiable.

10 The Respondent claimed that the duties of Clerical Coordinator were such that it was necessary to be present at the Alma Street Centre from, at latest , 7.45am. It was common ground that there were 3 main areas involving clerical staff in "frontline positions" that needed clerical staffing and the Clerical Coordinator was responsible for organising urgent replacements for anyone who might call in sick for any one of those positions, as well as other positions. The respondent maintained that the role of the Clerical Coordinator was not one that could handled from home and required the Clerical Coordinator to be present at the Alma Street Centre. The evidence relating to these matters will be discussed further below in relation to the issue of reasonableness.

11 The Complainant claimed that the condition requiring a starting time of 7.30am or in fact any time prior to 9.15am was not reasonable in all the circumstances. This was because it was possible to handle any urgent matters that might arise in the morning, primarily arranging cover for staff who might have called in after the previous evening, from home by way of a few telephone calls. The evidence of the Complainant and her witnesses will also be discussed further below in relation to the question of reasonableness.

- 12 The Complainant was offered an opportunity to take up the Acting Clerical Coordinator position again for May 2004 but she declined this because the start time was still 7.30am and she could not take up the offer due to her family responsibilities.
- 13 The Complainant said that as a result of not being allowed to take up the position, she suffered a modest loss of income being the difference between what she would have earned in 2004 when it was her turn to take up the Level 4 position and what she earned in her usual Level 2 position. The quantum of this loss was agreed between the parties as being \$650. The Complainant also sought general damages to compensate her for her hurt, frustration and distress arising from her sense of not being valued as an employee and the loss of opportunity to obtain a promotional position to advance within the organisation.
- 14 The question to be determined is whether there was indirect discrimination on the grounds of family responsibility. This requires the tribunal to be satisfied of all the elements of s35A(2) referred to above, each of which will be examined in turn below. There was no dispute that the onus lay with the Complainant to establish each of the said elements.

The condition of a start time of 7.30am

- 15 There appears to be no dispute that there was a condition placed by the Respondent on taking up the position of Acting Clerical Coordinator and that was that the person had to commence working from the Alma Street centre site at 7.30am. The Respondent submitted that this was a condition placed on anyone occupying the position of Clerical Coordinator. That conforms with the evidence as there is no suggestion that it only applied to the Complainant or to the acting Clerical Coordinators. Ann Buckle's hours of work at the Alma Street Centre were from 7.30am to 4.30 pm with an afternoon off each week.
- 16 While some of the Respondent's staff such as Mr Zenith Zeeman, the Clinical Manager, and Ms Kirsty Sheppard, the Coordinator of the Mental Health Information System, suggested that they could permit the Complainant to have a later starting time of 7.45am or maybe even for a limited time, 8am, as an exception to the general rule, the evidence reveals that the only acceptable time that was conveyed to the Complainant was a starting time of 7.30pm and the Respondent's letter of 22 August 2003 made it clear that this was non-negotiable. Ann Buckle said she asked the

Complainant if she could possibly start at 8am but the Complainant said that she might be able to start at 8.30, which Ann Buckle in turn advised was not an option. She says she discussed an 8am start time with Zenith Zeeman, and Kirsty Sheppard and the view was that it was too late so no alternative offer was put to the Complainant. The Complainant has a different account of the discussion with Ann Buckle, but nothing significant turns on it as the Respondent has never offered to allow the Complainant the opportunity to start at any time later than 7.30am.

17 Even if a slightly later time was offered, the requirement at very least is that the Acting Clerical Coordinator was required to start no later than 8am. This would not make any difference to the Complainant as her evidence is that she would not have been able to comply with an 8am start.

18 While it might have been preferable if the Complainant had been told of the required starting time at an earlier point in time or even when the position was first advertised, it does not appear that any inference can be drawn that the Respondent had any other starting time in mind other than 7.30am or that it was not a general requirement or condition of the position set by the Respondent.

19 It appears from the evidence that it was the starting time that was non-negotiable from the Respondent's view and there was no suggestion that there was no flexibility at the other end of the day if this had become a relevant issue, that is, it may be that it could have been acceptable if the Complainant wanted to work every day to 3.30pm in order to be able to collect her son earlier in the afternoon, instead of working till 4.30pm and having an afternoon off once a week.

The Complainant's family responsibility and ability to comply with the condition

20 The Complainant is required to establish, in the terms of s35AA(2)(c) of the Equal Opportunity Act, that the condition was one with which she does not or is not able to comply. As pointed out by White J in the case cited to the Tribunal by the Respondent's counsel, *State Housing Commission v Martin*, an unreported decision of the Full Court of the WA Supreme Court delivered on 7 December 1998 (Butterworths Unreported decisions number BC9806686), the inability to comply must be either because of a physical inability to comply or because of some

attribute or imperative related to relevant ground, in that case, related to the cultural imperatives or other attributes of that person's race. In this case the inability to comply would need to be related to the Complainant's family responsibility. It is not sufficient if the Complainant simply chooses not to comply, as a matter of personal choice or for some other reason.

21 The evidence of the Complainant in this case was that it was her family responsibility that prevented her from being able to comply. The main reason for her inability to comply appeared to be the need as a mother to have time to spend with her son in the mornings. It is clear that she could physically start work at 7.30am if she absolutely had to. There was before-school care available and there may not have been much difference in cost between that and the after-school care that the Complainant was utilising, particularly if the Complainant had been able to leave work earlier each afternoon. The Respondent submitted that the compliance required was not a permanent one for the Complainant, but she just had to be able to make arrangements to comply for a short term of several or a few weeks at a time, in circumstances where there was ample notice given to make necessary arrangements.

22 The Complainant's evidence was that her son resided with her and she used to get him ready for school each day. She would then take him from their home in Willagee to his school at Mel Maria in Myaree. This was the school he had attended since pre-primary school. The school did not allow students to arrive before 8.30am and classes started at 8.55am. The Complainant left home to drive her son to school at 8.30am, and settled him into class. If she needed to touch base with the teachers or see anyone in the school office, she would use that time to do so and then she would be at work by 9.15am. She did not have anyone to assist her with these duties of caring for or transporting her son to school.

23 After school ended at 3.15pm or 3.25pm, the Complainant's son was collected by the Brentwood Out of School Care Facility at Moolyeen Road in Brentwood and he would stay there till she collected him after work at about from 5.20pm or 5.30pm.

24 The Complainant said that initially she used to work at the Alma Street centre from 8am to 4pm and had her child in an all day care facility. However towards the end of 2000, her son was experiencing some developmental difficulties so she changed her working hours to be able to wake her son up at 7.30am, provide her son with medication and monitor that in the hour before he goes to school, talk to him in the mornings, take

him to school and touch base with his teachers on a daily basis. She was permitted by the Respondent to change her working hours to start at 9.15am and finish work later at 5.15pm. Her line manager at the time was Kirsty Sheppard and she would have been aware of the reasons for the Complainant's change in hours.

25 The Complainant's evidence was that she did not make any inquiries about finding other form of morning care for her son Peter as she felt that she needed to be with him as his mother. If she was to utilise a system of early morning care, then it would take her another 45 minutes to take him there and get to work. She was concerned however about whether a day care centre would take her child in without him having had his daily medication and whether they would always remember to administer it at a particular time.

26 The Complainant did not know the precise cost of before-school care but assumed it would be about the same hourly rate as after school care. It was later agreed between the parties that there was a Bicton Day Care Centre which provided before-school care from 7am to 9am and the Centre would arrange to drop children at school, including Mel Maria, and the cost per day of such before-school care was \$12, being \$60 per week. If so, it would be similar to what the Complainant said she paid for after-school care.

27 The Complainant denied that she would have been better off by being able to collect her son earlier from the day care centre after school if she started work at 7.30am and concluded at 4.30pm because by the time she got there it would be about 5pm anyway and having the Friday afternoon off work would not make up for 5 missed mornings with her son. This timing estimate however was based on the hours kept by Ann Buckle and there was no discussion of the relative cost of before-school versus after-school care if the Complainant worked till 3.30pm 5 days a week instead of working till 4.30pm on 4 days and having an afternoon off once a week. It is likely that not much turns on the question of relative convenience and cost of before-school or after-school care in relation to the Complainant's ability to comply with the condition as the main point of the family responsibility issue appears to be the need to spend time with her son in the morning. It might also be inferred from the Complainant's evidence that there would be a greater inconvenience in having to get her son up in time to leave for the day care centre and get to work by 7.30am. The Complainant maintained that this responsibility did not only relate to the need to administer medication to her son and that it was not just about his diagnosis. However, it appears that it was

nevertheless an important factor which pointed to the need to spend time with her son in the mornings rather than in the afternoons.

28 The issue is whether the Complainant had a family responsibility which meant that she could not comply with the condition to be at work at 7.30am. The relevant part of the definition of “family responsibility or family status” in s4 of the Equal Opportunity Act is:

“(a) *having responsibility for the care of another person, whether or not that person is a dependant...*”

29 There is a significant question as to how widely one can or should define the Complainant’s particular family responsibility. The Respondent submitted that the relevant responsibility was that of a person who had the dominant responsibility to care for a young primary school-aged child, whether they had a partner living with them or not. The Complainant directed the Tribunal to what was the particular responsibility in the particular case and submitted that one could not just look at theoretical abilities to comply but practical compliance and the intention of the legislature. The authorities support the submission that the “ability to comply” in the context of indirect discrimination is to be assessed in a practical, not theoretical sense. (See *Reddy v International Cargo Express* (“Reddy”) [2004] NSWA 218 at para 59 and authorities cited there). In assessing practical ability to comply, a relevant factor to be taken into account is the beliefs of the carer as to the appropriateness or otherwise of leaving a child to be in the care of another (“Reddy” at para 61). The Tribunal was referred to the case of *Gardiner v New South Wales Workcover Authority* [2003] NSWADT 184 and (2004) EOC 93-314 where the Tribunal in that case found that the Applicant did have responsibilities to care for her 2 youngest children, which included the need to be available to prepare them for school in a relaxed environment and to meet the physical, emotional and psychological needs of her children. If the relevant family responsibility here is taken to be a responsibility as a parent with the sole care of a young child who has certain needs in the morning before school, then this would mean that the Complainant could not comply with a start time of 7.30am. It would also impact on the appropriate base group and comparative groups in relation to the element of whether a substantially higher proportion of people without that responsibility could comply.

30 However because of the findings in relation to the question of reasonableness below, the Tribunal does not need to make a finding on

what the particular family responsibility was, nor whether the Complainant did or could comply with the condition.

Could a substantially higher proportion of people without the family responsibility comply?

31 No statistical evidence was led by the Complainant on the question of higher proportions. The extent to which judicial notice can be taken or common sense inferences can be drawn will depend to a major extent on how one defines the particular family responsibility. If the relevant family responsibility here is taken to be a responsibility as a parent with the sole care of a young child who has certain parental needs in the morning before school, then it is likely that the proportion of people with the same family responsibility who could comply with the starting time of 7.30am may not be great. On the other hand, the proportion of all the people in the group without such family responsibilities who could comply is likely to be a large proportion of that group.

32 As discussed above, as a result of the findings on the reasonableness of the condition, the Tribunal also does not need to decide this issue.

The duties of Clerical Coordinator and reasonableness of the start time of approximately 7.30am.

33 The main reason put by the Respondent for the Clerical Coordinator having to be present at 7.30am or shortly thereafter and which was the subject of most of the evidence, was in order to ensure that the "frontline" positions were filled, and where appropriate, to make arrangements for other clerical positions to be filled in due course. It was accepted by all parties that there was a need to have clerical staff at all times in the "frontline" positions from when the relevant sections were open. These positions were the Triage department, which was like the reception area of an emergency department, the Outpatient's Clinic and the Medical Records Department. The Triage Department opened at 8am so the Triage receptionist had to be there by then. The Outpatients Clinic opened at 8.30am so the Outpatients clerk had to be there by 8.30am at the latest. The Medical Records department had to have someone there by the time Triage Reception was open, ie by 8am but there was a Release of Information Officer who was there at 7.30am each day. The standard working time for the other clerical staff was 8am to 4pm, though flexibility was allowed and the Complainant herself was one who worked different hours. There were 2 members of the staff designated as Clerical

Relievers whose duties were mainly to fill in various clerical positions as required. They were often occupied covering for people on annual leave but were trained to cover in most positions.

34 The Complainant's case was in essence that it was not reasonable in all the circumstances that the Clerical Coordinator had to be present at 7.30am because up until the most recent incumbent, the people holding the equivalent position did not start work until much later and the situation was managed adequately. The Complainant gave evidence that when she started work with the Respondent, there was no Clerical Coordinator position but clerical staff were supervised by the Health Information Officer. The people who occupied that position from when the Complainant commenced with the Respondent until July 2002 when the Clerical Coordinator position was established were Ashleigh Frost, Carolyn Epps, Tanya Beale and Kirsty Sheppard. The Complainant's evidence was that Ashleigh Frost usually arrived at work between 8.15am and 8.45am. Carolyn Epps usually started between 8.15am and 9am. Tanya Beale worked long hours and started at about 7.30am or 8am. Kirsty Sheppard started work between 8.15am and 9am. Pat Ferrara, who was called by the Complainant and had been a Clerk Reliever for the Respondent until about early 2001, said that the usual starting time for the Health Information Officers other than Tanya Beale, who had often been there early, was between 8.30am and 9am. Sharon Brenchley also gave similar evidence in relation to the Health Information Officers' starting times, with a slight variance of about 15 minutes. Gillian Ireland also supported these as the general starting times.

35 Kirsty Sheppard however gave evidence about her own starting time when she was a Health Information Officer as being at 8am, or at latest 8.15am to 8.30am. She then assumed the duties of the LAMHIS project officer in addition to her Health Information Officer duties. She shared an office with someone who used to check on things when she had to be off site with her other LAMHIS duties. That position was to provide assistance to Kirsty Sheppard and no longer existed when the Clerical Coordinator position was created. Kirsty Sheppard said she initially usually spent the first hour at work establishing who was at work and who was not. If there was someone absent from a core position, she would see who was available to cover for that position. She would otherwise touch base with people to see if they had any problems. There were not any other consistent duties that were always performed in the first 2 hours. If there were problems arising from the information systems then she would ensure that the reports were produced.

36 The Complainant said that the procedure when one had to call in sick was to get in touch with the Clerical Coordinator, or in the past, the Health Information Officer. A message could be left on the answering machine or it was common practice to call either Triage or Medical Records to let them know that the person could not come in and one of the staff would tell the Clerical Relievers when they started work to see if they could fill one of the frontline positions until the Clerical Coordinator or Health Information Officer could arrive to deal with the situation. The Complainant said that Kirsty Sheppard instituted a procedure which required staff to contact her if they were unable to attend and to either page her or contact her on a mobile telephone. She said that she thought a mobile phone had been introduced at that stage. Others gave evidence that leaving messages on the answering machine was the standard process to be used, although there was an issue and differing evidence about whether there was an answering machine in place before Kirsty Sheppard introduced it. Regardless of the history of the answering machine, it appears undisputed that there was a system in place from at least 2003 of leaving messages on the answering machine if one could not attend work that day. As far as paging someone was concerned, the paging system was one that only worked on site at the Fremantle Hospital and was not accessible from a person's home.

37 The Complainant said that there was a collaborative group of staff and they helped each other out and would fill in for each other. For the positions other than the "frontline positions" they would usually not be filled if the Clerical Relievers were occupied. Pat Ferrara, Sharon Brenchley and Gillian Ireland generally supported this evidence of the clerical staff arranging to fill any frontline positions themselves prior to the Health Information Officer coming in to deal with it. Often some members of the clerical staff, especially Sharon Brenchley who was typically in early and often received the calls, would assess the needs and take it upon themselves to cover in various positions.

38 Kirsty Sheppard said this was the way it used to work when she first started and that it may have worked in the past, but was not the most desirable method. She said that the practice of reporting that one was unable to attend was not consistent as different people were contacted about it and one was relying heavily on the goodwill of the staff to ensure that positions were filled. It was outside the duties of the various clerical staff, such as the Release of Information Officer, to make decisions and ask others to fill in. She thought that it may have operated satisfactorily with a smaller number of staff but that it was no longer practical.

- 39 The position of Clerical Coordinator was created in about July 2002. It is common ground that Ann Buckle who has occupied the position since its inception arrived at work at 7.30am. The Complainant's case appeared that this was because the starting time suited Ms Buckle as she could work longer hours each day and take a 9-day fortnight or one afternoon off a week and that it was not because the position required such an early start. Ann Buckle however said that she and Kirsty Sheppard had discussions about the hours when she first obtained the position and Kirsty Sheppard said that someone needed to be there from 7.30am to cover the operational needs of the unit as areas had to be covered and everything had to be put in a position to run smoothly from the beginning of the day. Ann Buckle's evidence was to the effect that the position required a 7.30am start.
- 40 Kirsty Sheppard said that the Clerical Coordinator position was initially trialled as a 9 day fortnight position, with her covering on the day when Ann Buckle was on leave. However that became too much of a struggle so it was changed to Ann Buckle working every morning with an afternoon off each week.
- 41 The Complainant called Kerry Ruljancic to give evidence. She gave evidence of a comment said by her to have been made by Peter Terrell when he was Acting Clerical Coordinator to the effect that he did not believe that the job required a 7.30am start and could start at 8am. Peter Terrell when called by the Respondent said that he made comments to many people in jest about a 7.30am start but his evidence was to the effect that he did think one needed to be present from 7.30am. Either way, the evidence on this particular comment does not take the matter far as the Complainant has said that she could not start at 8am nor even 8.30am.
- 42 The Respondent's position was that it was necessary to have clerical staff in the frontline positions at the beginning of the day, that is by 8am in the case of Triage Receptionist and 8.30am for the Outpatients Clinic and by about 8am for the Medical records section as it was essential that the clients be seen in a timely manner and the areas were all organised to start on time. In the case of the Outpatients Clinic, Ann Buckle said that the telephones get switched over from the main hospital at 8am. Also she said that patients sometimes arrive early for their appointments. Zenith Zeeman, the Clinical Manager at the Alma Street Centre, said that it was very important to have patients processed quickly and that clerical support was essential to providing this service. The need to provide such timely service and for those frontline positions to be filled and ready to start on time was not disputed by the Complainant, but the Complainant's case was that covering these positions in the event that someone was sick could

be handled and organised from home if necessary and it was not essential for the Clerical Coordinator to be physically present in order to do that. Ann Buckle said that the duties in the first hour were to check the answering machine at about 7.30am to see if anyone had rung in sick and if so, she would check the rosters to see where the Clerical Relievers were placed and who could be allocated temporarily and then she would call around to get someone in to relieve. They would not usually be able to arrive until after 9am. Other witnesses of the Respondent, such as Peter Terrell, maintained that it was necessary to contact any replacement workers to come in for the day early in the morning before they leave home to take children to school so they could make arrangements and that it would often be too late to contact them to come in after 9.15am. To make such arrangements, the Clerical Coordinator would go through and telephone people from a list of those who were prepared to be called upon to come in to work. The time taken on the telephone would depend on the availability of those called. Peter Terrell said this could take up to 20 minutes. All the relievers called in were people who worked in the Alma Street Centre and were otherwise on leave or on a rostered day off, that is, they did not bring in relief staff from external agencies.

43 The Respondent's witnesses emphasised the importance of being able to walk around the different areas of the service to assess their workload and see who was best placed to cover for any sick staff. Peter Terrell said that if he could not find anyone to come in to relieve in the position immediately, he would walk around to get someone at work to cover until the relieving person could come in. Kirsty Sheppard and Ann Buckle also gave evidence that this would be done.

44 The Respondent's position was that there was no point in a supervisor being available an hour after most people had left work but not there for the critical time when people were getting ready to commence duties for the day. The picture painted by the Respondent's witnesses which was not contradicted by the Complainant's witnesses was that the early part of the morning was often the busiest part of the day for the clerical staff.

45 Mr Zeeman also gave evidence about the restructuring of the Alma Street centre and also of how the workload of the Alma Street centre had increased substantially since 1998. These changes were in response to the community needs for the services. It was suggested that there were not many extra positions created but it appeared to be the case that there were more staff due to flexible work arrangements. It was also likely that with the increase in the services, the volume of work may have also increased.

The Respondent's witnesses spoke of the fact that the Respondent's clients were people with mental illnesses and it was vital that they should receive prompt and effective service and personal attention.

46 Mr Zeeman said that he and Ann Buckle and Kirsty Sheppard discussed the question of whether the Complainant could start work at 9.15am when in the Acting Clerical Coordinator's position. He said that they considered it at length and had a reasonable amount of discussion about whether they could accommodate that request. They considered allowing her to start at 7.45am or at latest 8am. He said it could not be started at 9.15am as one needed to get the messages from the answering machine at 7.30am to have systems all organised to start the day. This view was supported by Kirsty Sheppard and Ann Buckle.

47 The Respondent's witnesses also pointed to the need for the Clerical Coordinator herself to help out with hands on work if the other clerical staff were extremely busy. Ann Buckle said that she would usually help out until a reliever could come in. Mr Zeeman said that the expectation was that the Clerical Coordinator would be able to baby-sit a position until someone could come in. Kirsty Sheppard said that as a last resort if cover could not be provided, they would expect that the Clerical Coordinator would work in the role. Peter Terrell said that he did help out although he was not told that it was expected of him. The Complainant's witnesses had disputed that this happened to any real extent. Pat Ferrara denied seeing the Clerical Coordinators provide actual assistance and said that they were not trained to do so. Sharon Brenchley said that nine times out of ten the positions would be handled without needing the Health Information Officer to relieve in any duties. Her evidence was that Ann Buckle, the Clerical Coordinator also rarely assisted with work in the Medical records section when she was there, other than maybe a little bit of filing. Sharon Brenchley said that Ann Buckle might have only assisted once or twice before 11am when she was there. It may have been different in the time when she was off work on compensation. Ann Buckle gave evidence that Sharon Brenchley was very organised and it was mainly while Sharon Brenchley was away on compensation that she had to slot in.

48 The parties both submitted the calendars for a period in 2003 showing when there were clerical staff on sick leave. It was not possible to distinguish between which of these were absences notified urgently that morning and which may have been for treatment notified in advance. These show that there were not many occasions in which there were

“frontline” staff absent, though this did occur from time to time and on the rare occasion, there were 2 frontline staff away sick at the same time.

49 The Complainant said that the alternative options that were put forward were the fact that she could deal with emergencies between 7.30am and 9.15am by mobile phone. The Complainant said that she would have been prepared to deal with all supervisory matters, not only emergencies on the telephone and she knew people well enough to be able to find replacements and make decisions about them. She believed that she could deal with matters adequately at home prior to leaving to drive her son to school and even during the drive if she had a hands free mobile telephone. She said she could ring around the various departments if necessary and would not need to walk around to see them all. She thought that in most cases it would only need about 2 calls. The Complainant did not address the issue of finding other staff to come in as relief staff for the day. However when she was asked, she did say that she would have been willing to handle all matters, not only emergencies that came up during the early morning period. It is still not clear as to the extent to which the Complainant would have been prepared to spend a major part of her morning if necessary dealing with things that might arise at work instead of caring for or talking to her son.

50 Mr Zeeman, Ms Sheppard and Ms Buckle all said that the mobile phone option suggested by the Complainant was considered and discussed. Mr Zeeman said that his concerns were that this meant that the Complainant would have to be paid an on-call allowance and the position was not funded for that. He also considered that it was unrealistic to make calls via a mobile phone without being able to get a sense of what was happening at various parts of the service. Naturally the mobile phone option would also not enable the Acting Clerical Coordinator to help with the work in the meantime. Kirsty Sheppard and Ann Buckle expressed similar concerns as well. Other concerns were said to be the cost of the phone and the confidentiality of staff home telephone numbers being taken out of the Centre. Kirsty Sheppard also mentioned that if one could not check the answering machine, one would have to rely on staff ringing in on a mobile and that would not be an appropriate way of managing it. Ann Buckle also thought it would not be practical for the Complainant to be taking and making calls when trying to get a child ready for school.

51 Peter Terrell also gave evidence that in his view it would not be practical for him to organise replacement staff by mobile telephone. The main reasons he gave were to the effect that it would be an intrusion on his home life as he could be getting calls any time of the night or morning

which would be disruptive and it would not be clear when his working day started or ended.

52 The Complainant also suggested that she put forward an option of having Sharon Brenchley, the Release Information Officer, take telephone calls and relay them to her. However the Complainant was not able to say when she made such a proposal and she did not put this in writing in the letter. Sharon Brenchley gave evidence that she had a copy of a letter dated 28 August 2003 to the Respondent saying that she would be prepared to assist by covering the telephones until the Complainant arrived at work. She could not recall if she posted it or whether she just gave it to the Complainant. It is therefore not clear that this was an option that was specifically discussed with the Respondent's staff in or prior to the relevant events complained of in August 2003.

53 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* (1991-2) 173 CLR 349, 411, *State of Victoria v Schou* ("Schou") (2004) EOC 93-328 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, at p82-3 per Lockhart J; at p96 per Lindgren J; *Australian Medical Council v Wilson* (1996) 68 FCR 46 , at p62 per Heerey J, at p79 per Sackville J.

54 The test of reasonableness is less demanding than necessity, but more demanding than a test of convenience (*Styles*, at p263). 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).

55 The case of *Schou* raises similar issues to this case in relation to working from home rather than on site. In that case the Victorian Court of Appeal held that the condition requiring the parliamentary Hansard sub-editor to attend on site in Parliament on sitting days rather than perform part of her duties from home using a modem was reasonable in all the circumstances. Sub-editors had reporters assigned to them and they liaised with them to produce reports in final form. This work had to be done

quickly because of the demands of the job there was a need for interaction between all staff and members. Sub-editors also had the role of directing reporters in their duties and of performance management. The applicant proposed a modem which would not require her attendance and would enable her to work from home. Phillips JA who wrote the leading judgment said in effect that the issue was whether the condition of attendance was reasonable and the fact that a viable alternative existed did not make it unreasonable as the alternative was not equally suited to the requirements of the job (see paras 26-27). The conclusion was that the requirement to attend was reasonable and appropriate and adapted to serve the end it was intended to serve (see paras 24 and 25).

56 The evidence in this case reveals good reasons for needing the Clerical Coordinator and anyone acting in that position to be present to start work at 7.30am or around 7.45am. The position was not one where the work can be done by a person in their own time without any great need to interact with others. There was evidence of the need to fill frontline positions at short notice early in the morning in the case of the relevant frontline clerical staff calling in sick and there is also the need to fill other clerical positions as well. The Respondent has set up a system whereby the Clerical Coordinator is the one responsible for organising this and this responsibility in fact appears to be one of the major roles of the Clerical Coordinator in the first 2 hours of the morning. While there was evidence that it could work satisfactorily without the Clerical Coordinator being present until later in the morning and had worked that way in the past, that method of dealing with it was *ad hoc* and depended very much on the dedication and goodwill of the clerical staff to take on duties that were not part of their role. In the past the Health Information Officers may have arrived later than 7.30am but they were all usually there by about 8.30am. The Respondent's intent was to set up a new system for handling this and to designate the Clerical Coordinator as the person to be responsible for this. The intent was to provide a good and efficient service to clients and the Respondent sought to put in a place proper procedures to ensure that this occurred, rather than leave it to chance and goodwill. There was good evidence that the urgency of duties of the Clerical Coordinator at the beginning of the day were greater than the duties that could be undertaken later. That was why it was preferable for Ann Buckle to work each morning and take an afternoon off than miss a morning. There was evidence that the Clerical Coordinators were also expected to fill in and help out when short staffed and that it was useful for the Clerical Coordinators to be able to walk around the Centre to assess what workloads were and who was available to take on other duties

and that this was better able to be done in person. Whether this was necessary and whether the Clerical Coordinators in fact helped out that much may not be all that important if the aim was to have someone who could fulfil that role if necessary. It would also appear to be reasonable to want the Clerical Coordinator to be present at work at the time which, on the evidence, appeared to often be the most hectic time and when there were the most clerical staff present to coordinate and supervise.

57 It appears from the leave records that on most days there would not be a need to fill a frontline position on an urgent basis. However such contingencies do occur and it was not unreasonable for the Respondent to have systems in place to deal with them if and when they did happen.

58 It is unfortunate that the Respondent did not have full discussions with the Complainant to explore all alternative possibilities. The Complainant put forward the option of dealing with matters by way of mobile phone instead. Although this matter was discussed amongst some of the Respondent's staff, they did not discuss the concerns with the Complainant nor give her the opportunity to deal with or respond to any concerns. For instance, there was a concern about the costs of the Complainant having to be paid for the earlier hours when she was on call and about the costs of servicing and maintaining the mobile telephone. This was not put to the Complainant and the Tribunal was not given any indication of whether there might have been ways around those concerns and whether arrangements could be made so as not to increase the overall cost to the Respondent. The Respondent's staff also made assumptions about whether the Complainant would be in a position to care for her child and deal with telephone calls in the mornings but this was not discussed with the Complainant and she was not given a chance to put forward ways in which she could deal with that. Concerns were stated about whether people could call at all times of the night on the mobile phone when there would appear to be little difference between leaving a message on a mobile phone and on an answering machine. There was no consideration given by any party as to whether there could have been a system of job sharing the Coordinator's position or having someone else take on extra duties in the early part of the morning. There was no consideration of the possibility of letting the Complainant have a trial of any of the alternatives. There does not appear to have been any serious attempt on the part of the Respondent to explore with the Complainant various options to enable her to take up the position. These are all factors that might raise questions about the reasonableness of the condition in all the circumstances. On the other hand, there are always issues of the practicalities of setting up new systems just for a short period for one

particular Acting Clerical Coordinator. The discriminatory effect on the Complainant of missing out on acting in higher duties for a limited period about once every 3 years cannot be said to be as significant as in other cases like *Reddy* or *Gardiner* where the person concerned was prevented from continuing in employment. However whether there were any factors that could make the alternatives equally suited to the requirements of the job is a matter of speculation and on the evidence before the Tribunal, it is not possible to be satisfied that the condition of a starting time of around 7.30am was not reasonable in all the circumstances. The Respondent is entitled to require conditions to ensure that the operational requirements are best able to be satisfied in an effective and systematic way.

59 The Respondent had led evidence of flexible working arrangements being approved for other positions and the Complainant's current position was one such example of flexible hours being permitted where the work could be done as effectively with a later starting time or on a part-time basis. On the evidence before the Tribunal, the particular role of Clerical Coordinator does not appear to be such a position, at least as far as being present in the early part of the morning is concerned. The Complainant remains as one of the people amongst whom the Acting Clerical Coordinator position is able to be rotated and there is no suggestion that she will not continue to be offered the chance to take up the position in future when it is her turn. It may be that her circumstances could change in future depending a range of factors, including the timing of the period of acting and the arrangements that might be made then.

60 In the circumstances, the complaint must be dismissed.

Candice J...
Deputy President

