

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

ANTI-DISCRIMINATION LIST

VCAT REFERENCE NO. A237/2010

CATCHWORDS

Equal Opportunity Act 1995, direct discrimination because of impairment in the area of employment, whether inferences to be drawn from behaviour of respondent, sections 8 and 14

APPLICANT	Amanda Prentice
RESPONDENT	Greg Sewell Forgings Pty Ltd
WHERE HELD	Melbourne
BEFORE	Noreen Megay, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	3 and 4 March 2011
DATE OF ORDER	31 March 2011
CITATION	

ORDERS

1. Costs reserved
2. Complaint otherwise dismissed



APPEARANCES:

For Applicant	Ms G Jardine of counsel
For Respondent	Mr Z Partos of counsel

REASONS

Background

- 1 The complainant's tenure with the respondent company commenced in February 1996. She was employed as an accounts receivable officer and from about March 1996, she was employed two days per week. Some time about May 1996, her hours were increased to three days per week and payroll duties were added.
- 2 In or around December 1997 she broke both feet while on an overseas vacation. She returned to work but over time the injury was aggravated and in late April 1998 she had to take three or four weeks away from work.
- 3 In 2000, other duties were added to her role and in order to complete her duties, she attended the factory three days per week and did 4-5 hours work at home.
- 4 Around September 2002, the office manager retired and Ms Prentice assumed her role. The extra duties meant that she was working full time but continued to be paid on an hourly basis.
- 5 Management of the company changed in late June 2007. At that time Mr Godfrey Stevens purchased the remaining 50% of the shareholding, thus becoming the sole shareholder.
- 6 In mid-2008 Ms Prentice had a fall and suffered a fractured coccyx. This necessitated an absence from work of approximately nine weeks, after which she returned to work on limited hours, gradually building up to full time. She used sick leave for those nine weeks and possibly some annual leave as well.
- 7 On 29 November 2009 she was involved in a transport accident. Although the Tribunal has no medical evidence it accepts Ms Prentice's evidence that she sustained broken ribs, a bruised sternum, whiplash, a fractured left hand, some form of memory loss and bruising. She took two days off and managed to go to work the next day as it was payroll day. Shortly thereafter she saw her doctor and proceeded to receive intensive treatment including twice weekly physiotherapy and was unable to return to her duties. She and her doctors were working towards a return to work commencing with four hours a day for two days per week; this was to commence after the Labour Day weekend in 2010.
- 8 Sometime in early February 2010 she visited the workplace to tell her colleagues of her return to work plan. According to her evidence she spoke with Mr Powell (the in-house accountant) and Mr Stevens' son. They were supportive but on 4 March 2010 she received a call from Mr Godfrey Stevens, the company's managing director. According to her, he said the company has just lost part of a contract, that he was going to change his off-site accountants who would be doing a lot of her work thenceforth and told her that her services were being terminated.
- 9 Her gross termination pay of \$21,781.60 included long service leave of \$8,785.60 and payment in lieu of notice and other severance remuneration totalling \$12,996.00. In addition the company forgave a loan it had made to her of \$2,100.00.

- 10 For various reasons, the complainant does not accept the reasons provided for her termination. She was disappointed and distressed that her employment was terminated without notice when, in her mind, she had always performed to an extremely high standard and had only been absent from work due to injuries beyond her control.
- 11 She alleges she has been the subject of discrimination due to her impairment and seeks compensation by way of loss of earnings and damages for humiliation pain and suffering.

The evidence

- 12 Mr Robin Powell has been employed by the company since 2006. He made a statement and attended to give evidence. During his evidence it became obvious that he was most confused about dates and gave evidence that was inconsistent with his written statement. It transpired that Mr Powell is seriously ill, he is receiving radiotherapy five days a week in addition to receiving other treatment for his most serious illness. Because of his illness and the obvious inconsistencies of his evidence I have put all of his evidence to one side.
- 13 Mr Greg Sewell also made a short statement but he was too ill to attend and a medical certificate was presented attesting to that fact. His statement does not provide any evidence beyond an expression of his surprise at Ms Prentice's termination.
- 14 Much of the written statement made by Ms Prentice was hearsay and much of her evidence consisted of what was told to her by others and what she inferred from comments attributed to others. For instance she felt she was blamed in some way for some past petty cash disappearance because she was asked questions about it. There is no evidence to support such a supposition and indeed the better inference is that the theft was more likely committed by another staff member.
- 15 Ms Prentice agrees the company was good to work for and conceded that she had a better relationship with Mr Sewell than with Mr Stevens. Mr Stevens for his part conceded that although he chivvied her about her untidiness, he was not generally unhappy with her performance. He agreed she was never subjected to any unsatisfactory performance report. It is clear that, by modern standards, the company runs its affairs reasonably informally and as Mr Stevens put it, "people just did the job expected of them" in an informal framework.
- 16 Mr Arthur Robertson is the senior partner of the accounting firm T H White & Co. He gave uncontested evidence that in September 2009 Mr Godfrey Stevens approached him to give a quotation for taking over the work then being undertaken by another accounting firm. Indeed the quotation dated 14 September 2009 was annexed to his statement. It was eventually accepted and Mr Robertson told the Tribunal he knew this would result in savings for the company. Notwithstanding the early statements made by Mr Stevens, Mr Robertson's firm has not taken over Ms Prentice's duties. From his evidence it is clear that his firm commenced providing

accountancy services some time in mid-2010 and apart from executive salaries, none of Ms Prentice's duties are part of his firm's engagement.

- 17 On 13 September 2010 the Tribunal received an application to strike out the complainant's claim. The grounds for seeking the strike-out (prepared on instructions from Mr Stevens) included the following paragraph:

The applicant's employment was terminated by reason of the genuine redundancy of her position because the respondent no longer wished the job the applicant had been doing to be done by anyone. The respondent had made the decision to change their external accounting firm providers from Bourke O'Brien & Co to T. H. White & Co and at this time the new firm conducted a review of the respondent's accounting requirements and determined that it could do all of the duties of the applicant had been doing as well as other requirements for an approximate annual price of \$25,000. This was a substantially cheaper option for the respondent because the salary that was being paid to the applicant at the time was \$37,544 per annum and the fees being paid to Bourke O'Brien & Co were approximately \$60,000 per annum. The applicant was shown the letter around the time it was received by the respondent so she was well aware of the costs savings that the respondent could make by changing accountants and by terminating her position. The strike-out application did not proceed.

- 18 In like vein the respondent's amended particulars of defence (once again prepared on Mr Stevens' instructions) dated 10 February 2011 at paragraph 5 (c) stated-

The respondent had made the decision to change their external accounting firm providers from Bourke O'Brien & Co to T.H.White & Co and at this time the new firm conducted a review of the respondent's accounting requirements and determined that it could do all of the duties the Complainant had been doing as well as other requirements for an approximate annual price of \$25,000. This was a substantially cheaper option for the Respondent because the salary that was being paid to the Complainant at the time was \$37,544 per annum and the fee being paid to Bourke O'Brien & Co was approximately \$60,000 per annum

- 19 In his statement made on 28 September 2010, Mr Stevens stated:

In or about early 2010, Greg Sewell Forgings had lost a major contract which was worth anywhere from half to one million dollars to the company per year. Whilst this was not the sole reason for making the decision to terminate Ms Prentice's employment, it certainly did not assist the company's financial position and I was forced to look at cost cutting areas where possible. As Greg Sewell Forgings had received the quote from T. H. White & Co in September 2009 indicating that Greg Sewell Forgings could make substantial saving of approximate \$72,544 by moving its accounting work from Bourke O'Brien & Co to T. H. White & Co and also making Ms Prentice's position redundant, the commercial reality is that it was a cost saving that the company could not refuse.

- 20 Mr Stevens gave viva voce evidence; he agreed with counsel for the complainant that he as a "big picture man". From his evidence I deduce that he had little idea of

the complainant's duties and I also deduce that the assertions in the strike-out application and the amended defence (set out above) were largely untrue. There is no evidence that the new accounting firm ever considered Ms Prentice's duties and Mr Stevens' statement that no one else knew about the approach to the new firm is in stark contrast to his suggestion that he showed the quotation to Ms Prentice.

- 21 In his words, Ms Prentice and Mr Powell "got the work done" and as long as that occurred, he had no reason to concern himself with the minutia of particular staff members' duties although he quibbled with the number of hours said to be spent on some of the tasks. He told the Tribunal he knew roughly what work was done by Ms Prentice and Mr Powell collectively and was not concerned with who did what as long as the work was done.

The statute

- 22 This being a claim of direct discrimination, the prohibition is found in section 8 of the *Equal Opportunity Act* 1995 ("the Act") as follows:

(1) Direct discrimination occurs if a person treats, or proposes to treat, someone with an attribute less favourably than the person treats or would treat someone without that attribute, or with a different attribute, in the same or similar circumstances.

- 23 One of the attributes referred to in section 6 of the Act is "impairment" which is, in turn, defined in section 4 of the Act. There is no medical evidence before me that goes to the impairment but as the matter was not queried by the respondent I accept the proposition that the complainant possesses the required attribute of impairment.

The case law

- 24 Like so many of the redundancy/termination cases brought to the Tribunal, a finding of discrimination is seldom available as a product of obvious action. People do not often overtly discriminate. The more likely scenario is one where there exists a set of circumstances that give rise to an unavoidable inference that discrimination has occurred because no other explanation will suffice. The principles to be applied in drawing such inferences were set out by Fullagar J in the Victorian Supreme Court in *Department of Health v Arumugam* [1988] VR 318 (at 325, 327, 330 and 331). Notwithstanding subsequent changes in the legislation, the principles enunciated by his Honour are still applicable and are invariably followed by the courts and by this Tribunal. *Arumugam* was a case where the allegation was one of discrimination on the ground of race occurring in the context of appointment procedures for a professional psychiatric position. At p.330 his Honour referred to the burden of proof required and, in citing *Briginshaw v Briginshaw* (1938) 60 CLR 336, stated that "the burden of proof lying on the complainant was of the standard applicable in civil cases, although of course, the degree of satisfaction must be up to the seriousness of the allegations in all the circumstances." His views were that –

- Discrimination is a serious allegation and should not be inferred lightly;

- Whilst the civil standard of proof rests on the complainant the degree of a tribunal's satisfaction with the evidence must reflect the seriousness of the allegation; and
- Discrimination will not be inferred when a more probable and innocent explanation is available on the evidence.

25 The final headnote to the case reads as follows:

If all that is proved, by inference or otherwise, in the absence of explanation, is less than all the elements of proof required for a complaint of [racial] discrimination to succeed, neither a total absence of explanation nor the non-acceptance by the tribunal of an explanation proffered can by itself provide a missing element of proof.

Discussion

- 26 Counsel for the complainant submitted that inferences should be drawn from the variability of Mr Stevens' evidence particularly as the reason he gave to Ms Prentice was not entirely accurate. The new accountants do not perform her duties and they were never invited to do so. She submitted that his description of her termination as a redundancy was not credible in circumstances where he did not know the precise details of her duties. She submitted it did not make sense to have the qualified accountant (Mr Powell) performing menial duties, that Mr Stevens had failed to consider any other possibilities in the nature of part-time work, that there were no performance issues and that because the reasons given by Mr Stevens were false, that naturally gave rise to an unavoidable inference that her impairment was the real reason for her termination. As she put it Mr Stevens was "recklessly indifferent" to the fact the T H White were not performing her duties.
- 27 It is not in dispute that the company lost a valuable client, nor is it in dispute that it subsequently purchased another business. There is no reason for the Tribunal to doubt Mr Stevens' evidence that he saw a need to cut costs and that the ultimate result of Ms Prentice's termination and the change of company accountants resulted in a future savings package of \$70-80,000.00. It is not of any relevance whether or not her termination was the result of a genuine redundancy as might be described in industrial relations or otherwise – that is an argument for another forum.
- 28 Ms Jardine also made much of the paucity of Ms Prentice's salary compared with the company's annual turnover but I did not find that comparison particularly useful. The fact that Ms Prentice's salary might be described as a mere trifle given the company's substantial turnover is entirely irrelevant. Turnover has little to do with profitability. Similarly it is not of particular moment that turnover figures did not differ markedly in the 2009 and 2010 financial years.
- 29 The anomalies in Mr Stevens' various statements were put to him by counsel for the complainant and he conceded he "should have been more careful" with his statements. Whilst I thought much of his evidence was unsatisfactory and that his

treatment of Ms Prentice was callous in the extreme (but noting the generosity of the pay-out) I do accept the following:

- During Ms Prentice's absence in the busy months at the end of the year he observed that all the work was being done without assistance from anyone else; his evidence was that Mr Powell seemed to be managing well and that there was no hiatus in work flow caused by her absence;
- Most of her duties were now performed by Mr Powell but some had been shared out among other staff;
- During Ms Prentice's absence Mr Stevens had enquired whether Mr Powell was coping without further assistance and was assured he was;
- He had no particular knowledge of the complainant's injuries although he knew she had sustained some fractures and had physical injuries;
- The firm had never asked her for medical certificates to support her absence;
- Ms Prentice has not been replaced by any new member of staff;
- Her position had not been advertised;
- Mr Powell was qualified and Ms Prentice was not. Had she been qualified, Mr Powell's tenure might have been at risk instead of hers.

30 The complainant in a case such as this bears the burden of establishing that she has been the victim of unlawful discrimination and in establishing this, she may, in the absence of direct evidence, use in support inferences drawn from the primary facts. (See *Fenwick v Beveridge Building Products Pty Ltd* (1985) 62 ALR 275) In that case, referred to by Fullagar J in *Arumugam*, it was alleged that a male supervisor of the respondent had subjected the female complainant to various, and more or less, arduous, duties and obligations to which he did not subject the male employees of the same class. The Commission, presided over by Dame Roma Mitchell, said at p.283:-

The reasons advanced by the respondent for the dismissal of the complaint have been contradictory and unsatisfactory. We do not believe we have been told the whole truth. We think it probable that the clashes between the complainant and Mr Smythe led to her dismissal. She sought help from Mrs Etheridge. That was not forthcoming. We believe those in authority supported Mr Smythe in preference to the complainant. Nevertheless, we do not find it established that it was because she was a woman, or because of her imputed characteristics as a woman, that Mr Smythe was supported in the conflict between him and the complainant. Neither do we believe that he discriminated against her within the meaning attributed to the word 'discrimination' in the *Sex Discrimination Act*.

31 In my view there are similarities to be drawn between that case and this. I felt that much of Mr Stevens' evidence was careless and frankly disrespectful, but I am unable to draw an inference that would lead me to an inescapable conclusion that his

decision had anything to do with Ms Prentice's impairment. Mr Stevens was under no obligation to consider part-time solutions and the absence of any unsatisfactory performance assessments does not lead me to conclude that her impairment must have been a motivating and primary factor in her dismissal. I accept that her termination and the outsourcing of the accounting services constituted a substantial future saving for the company and I accept Mr Stevens' unequivocal evidence that during her absence over a busy period, her work was being done satisfactorily by others without the need for replacement staff. That explanation, along with the cost saving, strikes me as "*a more probable and innocent explanation*" for the steps he took.

- 32 It is not necessary for me to consider the matter of a suitable comparator because I am not satisfied that the reason for the complainant's termination was the product of any discriminatory conduct on the part of the respondent.
- 33 The complaint fails and the matter of costs is reserved.

