



HUMAN RIGHTS

DECISIONS BULLETIN

for the period 1 December 2008 - 31 December 2008

This Bulletin contains summaries of all written reasons for decisions published by the Tribunal in the Human Rights stream for the period 1 December 2008 - 31 December 2008. The full text of decisions and reasons can be found on the Tribunal's website at www.sat.justice.wa.gov.au. If you would like the monthly bulletin emailed to you directly, please enter your email address and details at our subscription page.

EQUAL OPPORTUNITY ACT 1984 (WA)	1
SOELBERG (FORMERLY VAN DROFFELAAR) AND COMMISSIONER OF POLICE [2008] WASAT 305	1
GUARDIANSHIP AND ADMINISTRATION ACT 1990 (WA)	2
PN [2008] WASAT 309	2
CT [2008] WASAT 286	3
FF AND OF [2008] WASAT 288	3
CC AND DS [2008] WASAT 292	4
BJB AND GB [2008] WASAT 307	5

EQUAL OPPORTUNITY ACT 1984 (WA)

**SOELBERG (FORMERLY VAN DROFFELAAR) AND COMMISSIONER OF POLICE
[2008] WASAT 305
23 DECEMBER 2008**

**JUDGE J ECKERT (DEPUTY PRESIDENT), MS K LANG (SESSIONAL MEMBER),
PROF C MULVEY (SESSIONAL MEMBER)**

Police constable - Discrimination alleged in workplace on the grounds of pregnancy, gender and family responsibilities - Allegations of victimisation - Inference of discrimination - Credibility - Insufficient evidence - Jurisdiction - Referral of complaints - Costs - s 88 costs of the Tribunal - Causative link - Causative link - Comparator

The applicant, Ms Janell Louise Soelberg, (formerly Van Droffelaar) was employed by the first respondent, the Commissioner of Police, as a police constable from 1999 to 2007. She complained under the *Equal Opportunity Act 1984 (WA)* that after she became pregnant and notified her officer in charge of her pregnancy in January 2003 her employer treated her less favourably than others in the workplace. Ms Soelberg alleged that the Commissioner of Police (acting through Ms Soelberg's superior officers) subjected her to detrimental treatment, due to her pregnancy, gender and family responsibilities, such as duty restrictions with loss of shift penalties and by placing her on parental leave when she was sick.

Ms Soelberg also claimed that the second respondent (Mr Donald Letts, a retired sergeant) victimised her by writing a damaging and untruthful report about her after becoming aware that she might make an equal opportunity complaint.

Ms Soelberg claimed that her health deteriorated as a consequence of this treatment and she sustained a permanent psychiatric injury. She sought an apology, removal of reports and allegations from her personnel file, damages for loss of earnings and future medical expenses, and retraining. She also sought the maximum allowable award of damages under the *Equal Opportunity Act 1984* (WA).

The Tribunal held that, even at its highest possible interpretation, Ms Soelberg's evidence was not sufficient to prove her claims. Ms Soelberg failed to prove that the Commissioner of Police, through his officers, treated her less favourably than any officer in the same or similar circumstances. Ms Soelberg was unable to prove any causal connection between the grounds of discrimination alleged and the decisions or acts of which she complained. The Tribunal also held that it did not have jurisdiction to hear some of the allegations as they were not referred to it by the Commissioner for Equal Opportunity.

Ms Soelberg also failed to prove that she was victimised by the second respondent, Mr Letts. There was no evidence that Mr Letts intended to cause Ms Soelberg detriment or that there was any causative link between his report on Ms Soelberg and Ms Soelberg's (then) potential equal opportunity complaint.

There was a long history to the proceedings and Ms Soelberg had made numerous allegations against nine respondents. At the beginning of the nine day hearing her counsel advised that Ms Soelberg was proceeding against only three of the respondents and that she did not intend to pursue six of her allegations. In her written closing submissions, Ms Soelberg conceded there was inadequate evidence to proceed with many of the allegations and that her claim related to three central allegations. It also appeared from those submissions that the only remaining respondents were the Commissioner of Police and Mr Letts.

Despite having substantially narrowed her claim, the Tribunal dismissed all of Ms Soelberg's allegations. The Tribunal sought submissions from the parties on costs.

GUARDIANSHIP AND ADMINISTRATION ACT 1990 (WA)

PN [2008] WASAT 309

10 SEPTEMBER 2008 (WRITTEN REASONS DELIVERED 30 DECEMBER 2008)

MS J TOOHEY (SENIOR MEMBER), MS F CHILD (MEMBER), MS J STANTON (SENIOR SESSIONAL MEMBER)

Administration - Represented person resident in accommodation managed by Disability Services Commission - Finances managed by Disability Services Commission - Internal and external procedures and controls - Whether informal arrangement or administration order in best interests of represented person - Relevant considerations - Appointment of Public Trustee as plenary administrator in best interests in all the circumstances

The Public Advocate asked the Tribunal to appoint an administrator for PN, a 31-year-old man with an intellectual disability who lived in accommodation managed by the Disability Services Commission and whose financial affairs were managed by the Disability Services Commission.

The Disability Services Commission provided the Tribunal with extensive information about management of residents' finances, including about internal and external auditing procedures and recent changes to residents' bank accounts which enabled them to earn interest on their funds.

The Tribunal acknowledged the accountability measures implemented by the Disability Services Commission but considered that PN's best interests were served by the appointment of an administrator who was independent of his carers. Factors the Tribunal took into account included that PN had a relatively large bank balance; there

was the potential for conflict of interest in decisions about matters such as holidays and overseas travel; and PN had no family who might provide some independent scrutiny of the informal management of his estate.

The Tribunal appointed the Public Trustee plenary administrator for PN. The Disability Services Commission indicated it would consider ways of dealing with potential conflicts of interest and so the Tribunal made the appointment reviewable in 12 months.

**CT [2008] WASAT 286
3 DECEMBER 2008
MS F CHILD (MEMBER)**

Guardianship and administration - Review of administration order - Diagnosis of longstanding mental illness - Fluctuating condition - Presumption of capacity not set aside

Following periodic review of an administration order, the Tribunal revoked the order. The order had been made five years before and had appointed the Public Trustee as the plenary administrator of the estate of a woman with a diagnosis of a mental illness.

The Tribunal revoked the order as it was not satisfied that the presumption of capacity set out in the legislation had been set aside by the evidence before the Tribunal in the woman's case.

**FF AND OF [2008] WASAT 288
9 DECEMBER 2008
MR J MANSVELD (MEMBER)**

Guardianship and administration - Legal costs of proceedings - Should the legal costs of a party be paid from the estate of the represented person - Gifts from represented person's estate - Charitable payments from the represented person's estate

The Public Trustee had been previously appointed the administrator for OF, an 87 year old woman who resided in a nursing home. Prior to the appointment of the Public Trustee her son, FF, had managed her estate.

In appointing the Public Trustee the Tribunal had found that FF was not suitable to manage her estate and had questioned the appropriateness of certain transactions he had made.

Subsequent to the decision to appoint the Public Trustee as the administrator for OF, FF sought a review of the order.

As part of the review application, FF asked the Tribunal to approve the payment of his legal costs in respect of the administration proceedings, from his mother's estate. The legal costs amounted to \$3,450.

FF also asked the Tribunal to direct the administrator to make a cash gift from OF's estate to her grandson (FF's son) in recognition of his marriage and to provide OF with a cash allowance to enable her, amongst other things, to give a weekly donation to her church.

The Tribunal decided not to approve the payment of FF's legal fees from OF's estate. The Tribunal had previously found that he had not acted in OF's best interests when managing her financial affairs and it was therefore not considered appropriate for his mother to meet his legal fees from proceedings at which the Tribunal had discontinued his involvement in her estate.

In respect of the gift to her grandson, there was support at the hearing for the gift to be made but disagreement at what the amount of the gift should be. The Tribunal ultimately decided to direct the administrator to make a gift of \$1,000 to the grandson as it was the same amount given to a granddaughter (FF's daughter) on her marriage.

The Tribunal agreed with the administrator that small cash purchases for OF were best arranged through FF who would seek reimbursement from the administrator. The Tribunal decided to authorise the administrator to make charitable payments from the estate of OF to a maximum amount of \$500 per annum to deal with her wish to make weekly donations to her church.

CC AND DS [2008] WASAT 292

10 DECEMBER 2008

MS D DEAN (MEMBER)

Applications for guardianship and administration - Need for a guardian - Need for an administrator - Application for revocation of enduring power of attorney executed by the represented person - Allegations of misappropriation of represented person's monies - Conflict about where the represented person should live

DS was an elderly woman with advanced dementia. She had four adult children from her first marriage. She married for the second time approximately five years ago. Prior to moving into nursing home care she lived at home with her husband RS and daughter CC in CC's home.

CC made an application to the Tribunal for a guardianship order and proposed herself as guardian. Evidence was provided at the hearing that there was a significant level of conflict between CC and RS who had formally separated from DS since her move into nursing home care. There was disagreement between CC and RS about the most suitable nursing home accommodation for DS.

Although there was no overt disagreement about medical treatment it became apparent in the hearing that the medical treating team were not consulting or involving family in medical treatment decisions.

All parties agreed that CC was the most appropriate person to take on the role of decision-maker for DS in relation to her welfare and medical treatment. The Tribunal appointed CC limited guardian to make decisions in relation to medical treatment, accommodation and services to which DS may have access.

CC also made applications to the Tribunal for an administration order and for the Tribunal to revoke an enduring power of attorney executed by DS in which she appointed RS as her attorney. CC made the applications on the basis that she believed that RS was misusing his powers under the enduring power of attorney and proposed that she be appointed administrator of DS's estate.

Evidence was provided at the hearing that both CC and RS had inappropriately accessed DS's bank accounts and were both holding monies belonging to DS. The Tribunal found that the enduring power of attorney was not operating in DS's best interests and revoked it. Based on its finding that it was in DS's best interests to have an administrator independent of the family appointed, the Tribunal appointed the Public Trustee plenary administrator of DS's estate.

Both the guardianship and administration orders were to run for five years.

**BJB AND GB [2008] WASAT 307
23 DECEMBER 2008
MS F CHILD (MEMBER)**

Guardianship and administration - Application to intervene in an enduring power of attorney - Donor with diagnosis of dementia - Applicant son recently settled with the donees his claim against the donor's estate now seeking access to documents including those related to the legal costs of the donor incurred in respect of the applicant's claim - Applicant found not to have a proper interest - Application dismissed

One of the sons of an elderly woman with a diagnosis of dementia applied to the Tribunal for orders intervening in an enduring power of attorney his mother had executed in 1999 by which she appointed one of her daughters, the sister of the applicant, and son-in-law her attorneys or donees.

The application was brought to the Tribunal following the settlement of a legal dispute in which the applicant had claimed an interest in the property of his mother. The donees had sought legal advice on the woman's behalf following a caveat being placed on her property by the applicant which prevented its sale. The applicant said that in opposing his claim on his mother's property, the donees had acted in their own interests rather than the interests of his mother the donor. He sought records of transactions kept by the donees, in particular details of the legal costs associated with the legal advice obtained in respect of the disputed claim about his mother's property, in an effort, he said, to reassure himself that his mother's interests were protected.

The Tribunal decided that although the legal dispute was now settled it was not appropriate that the applicant have access to the personal financial records of the donor, particularly those records associated with legal advice (or the costs of that advice) obtained on her behalf by her donees in relation to the dispute with the applicant.

The donees had on their appointment accepted statutory obligations to act with 'reasonable diligence to protect the interests of the donor'. On the facts of the case, as put to the Tribunal by both the applicant and the donees, the discharge of that duty must have included, at a minimum, obtaining legal advice on her behalf.

Nothing in the evidence put by the applicant supported his contention that the donees were in a conflict position when they sought legal advice regarding his claim on his mother's property and apparently followed that advice. The applicant made no other specific allegations in relation to the performance of the donees.

That his sister, (one of the donees) was a beneficiary, with her other siblings, named in the will of their mother, did not of itself bring her into conflict with her role as donee.

Three of the other four children of the donor supported the role the donees had played. The donor herself, during the hearing questioned why the applicant should have access to her records.

The Tribunal found that the applicant's interest in obtaining access to the records maintained by the donees arose from the legal dispute, which had now been settled, and not from concern about the performance of the donees in respect of the management of the donor's estate. The Tribunal determined that the applicant did not have a proper interest in the matter and dismissed the application.