

ANTI-DISCRIMINATION COMMISSION

NORTHERN TERRITORY

COMPLAINANT:

KARINA WINDLER

RESPONDENT:

**OWEN McDERMOTT
GONA NOMINEES PTY LTD**

NUMBER:

1 of 1996

TRIBUNAL:

**DAWN LAWRIE
HEARING COMMISSIONER**

COUNSEL ASSISTING:

SALLY GEARIN

GROUNDS OF COMPLAINT:

**PREGNANCY
FAILURE TO ACCOMMODATE A
SPECIAL NEED**

DATE OF JUDGEMENT :

13 JUNE 1996

INTRODUCTION

On 22 September 1995 a delegate of the NT Anti-Discrimination Commissioner accepted a complaint from Ms Karina Windler alleging discrimination on the basis of her pregnancy and a failure to accommodate her special need against Owen McDermott, a Director of Gona Nominees Pty Ltd, trading as Palmerston News Agency, and the company. Following investigation and an unsuccessful attempt to conciliate the matter, the delegate referred the complaint to the NT Anti-Discrimination Commissioner as Hearing Commissioner, pursuant to S83 of the NT *Anti-Discrimination Act* 1992 (the "Act").

A copy of the referral report dated 25 January 1996 was sent to the respondents.

FACTUAL BACKGROUND

On 22 October 1994 the complainant Karina Windler, commenced employment at the Palmerston News Agency as a casual shop assistant.

There were no set hours and a roster was made up on a weekly basis. Mrs Robyn McDermott was responsible for organising the rosters.

Evidence as to the number of hours worked by the complainant was contained in the time-book of the complainant (exhibit "A") and the wages book (exhibit "B").

Ms Windler's duties included:

- serving customers
- placing magazines on racks
- doing "returns"
- preparing sub-agents order boxes and ensuring the boxes were placed at the rear of the shop for pick-up by the courier (which included some lifting of the boxes).

Evidence from Mr McDermott indicated a distance of approximately four metres from the front of the shop where the orders for "Gulf Mini Mart" were prepared to the rear of the shop where the order was to be left.

THE COMPLAINT OF DISCRIMINATION BASED ON PREGNANCY.

The complainant Karina Windler alleged that prior to going on leave in April 1995 both Mr & Mrs McDermott became aware that she was pregnant, and on her return from leave her hours of casual employment were reduced, and she was treated less favourably in relation to training on the computer. Ms Windler alleged the reduction in hours and less favourable training opportunity was because of her pregnancy.

While Mr & Mrs McDermott agree they were aware of her pregnancy, they deny that on her return from leave Ms Windler suffered any detriment because of the pregnancy.

It was admitted that while Ms Windler was on leave they employed another casual staff member "Donna", on a part time basis, to take over some of Karina's work.

Another new staff member, Anna, who is computer literate, was specifically employed to assist in computerising the stock control system which had previously been manually handled, and she commenced in late June.

Mrs McDermott stated that when Karina returned to work it was her (Mrs McDermott's) decision "not to terminate Donna's hours".

Mrs McDermott said in evidence:

"... I had a situation coming up where Karina was going to be absent from work for - as Karina had said to me, a minimum of three months. Now if I put Donna off because Karina had come back, I then would have to possibly look for someone for three months or, do I make a decision to keep Donna on with a few hours every week so when Karina wasn't there, that at least I had a staff member that was trained and knew what to do and could carry the hours for the three months, and possibly not be required once Karina came back. And that would have been another decision that I would have had to make."

When asked by Counsel Assisting:

"So the hours that were taken from Ms Windler were given to Donna, because you wanted to keep Donna on?"

Mrs McDermott replied:

"I wouldn't say they were specifically given to Donna. I would say that Donna and Karina were possibly sharing - job sharing. We were probably overstaffed at the time, not wanting to have a situation where - it is very hard to employ someone for three months; it takes you a couple of months to train them in what to do."

and further:

"... And at the same time it allowed me to unfocus my brain after trying to work a computer system that I had no previous knowledge of. So the extra staff that were on were certainly assisting me in a bit of stress that I was going through at the time as well"

Mrs McDermott was trying to master the new computer system, and for some time did not feel competent to train other staff.

Ms Windler stated that on her return from leave she met with Mr & Mrs McDermott and complained that her hours had been cut, and that she was not being trained on the computer - she felt she was being "pushed out of her job".

Although Mr & Mrs McDermott did not agree that she was being disadvantaged, some computer training commenced the next day, and Ms Windler was given the specific task of entering "greeting cards".

All parties agreed that Mrs McDermott asked Ms Windler when she would be leaving work - and following the birth of her baby when she expected to be able to return. Ms Windler indicated a possible return three months after the birth.

The Complainant called Kerry McLeod as a witness.

Ms McLeod stated that Ms Windler had complained to her that on her return from leave her hours had been cut back.

Ms McLeod confirmed that there were no set hours for any employee, and that rosters were made up on an ad hoc basis.

Ms McLeod's hours were available, and a chronology of hours worked by the complainant (Ms Windler), Ms McLeod, Donna Lowe and Anna Thomas is as follows:

22 October 1994	Complainant (Ms Windler) commenced working at Palmerston Newsagency as a Sales Assistant as a casual under the Shop Assistant Award. Worked 22 hours.
November	Complainant worked 42, 31, 38.5, 40.5, 38.5 weekly hours that month.
December	Complainant worked 34.5, 36, 38.5, 25.5 weekly hours that month week ending 28/12 included 2 public holidays rostered off.
January 1995	Complainant worked 32.5, 38.5, 33.5, 29.5 weekly hours that month.
February	Complainant worked 33.5, 36, 31.5, 28.5 weekly hours that month. McLeod - 29.5, 37.5, 35, 22.5.
March	Complainant worked 29, 29, 27.5, 24 (1 sick), 20.5 (1 sick). McLeod - 29.5, 35, 34, 34, 34.
April	Complainant worked 17 (2 sick), 34, 13.5 (only worked 2 days this week and then went on leave until 16.05.95). Donna Lowe employed worked 6.5 hours week 27.4.95. McLeod - 26.5, 22.5, 31.5, 30.

May Complainant worked 11 (two days after return from leave that week) 25, 17 (1 sick).
Donna Lowe worked 19, 12, 24, 20.5, 26.
McLeod - 31.5, 33, 33, 30, 31.

June Complainant worked 27.5, 17, 24.5, 22 (no sick days)
Donna Lowe worked 26, 28, 26, 32.5.
Anna Thomas commenced worked 5 hours week 29.6.95.
McLeod - 32.5, 28.5, 32, 33.

July Complainant worked 26.5, 30.5, 15 (left 17.07.95).
Donna Lowe worked 27, 29.5, 24, 34, 34.
Anna Thomas worked 10, 10, 10.
McLeod - 31, 31, 31.5, 33.5.

17 July Complainant left employment.

Mrs McDermott contended that any reduction in Ms Windler's hours was due to either her sickness, or public holidays - casual staff numbers were kept to a minimum on public holidays.

Mrs McDermott prepared a schedule which she stated referred to the number of rostered hours of Ms Windler, demonstrating hours were not reduced, but hours actually worked were less because of sickness.

It was agreed that there was one underpayment, subsequently paid, and the respondents denied any ill feeling on their part.

FAILURE TO ACCOMMODATE A SPECIAL NEED

The complainant also alleged discrimination on the basis of the respondent's failure to accommodate her special need, based on her pregnancy.

Specifically Ms Windler alleged that although Mr & Mrs McDermott were aware of her pregnancy, and complications with her pregnancy, and that she was unable to do any heavy lifting as part of her duties, they failed to adequately accommodate her inability to lift boxes containing orders for collection. In her evidence Ms Windler indicated that it was Mr McDermott in particular who failed to accommodate her special need giving rise to the circumstances in which she left her employment.

The respondents rejected the allegation, and submitted that although they were aware of Ms Windler's pregnancy, they were not specifically advised of any complications. The evidence of Mr McDermott was directed to the claim of a failure to accommodate a special need, and in his defence to the allegation Mr McDermott consistently stated that it was a small office and that they all worked as a team - and that all Ms Windler had to do was ask, and someone would do the lifting (of boxes) for her.

The issue revolves around the compiling of orders for sub-agents of the newsagency , and an order to be made up on a regular basis for Gulf Mini Mart.

The orders were placed in plastic boxes - or crates - and left at the rear of the newsagency for pick-up by a courier.

The sub-agents orders were compiled near the rear of the premises, and carried or dragged a short distance to the courier pick-up area.

The Gulf Mini Mart order was compiled at the front of the newsagency and had to be carried to the rear.

Mr McDermott confirmed that the crates could weigh up to 20 kilos.

Ms Windler stated that before she was pregnant Mr McDermott had asked another employee - Mathew Prendergast - to lift and carry boxes for her - but that Mathew was "sacked", leaving her without that assistance.

Both respondents denied that Mathew was "sacked", and repeated that the office worked as a team and all Ms Windler had to do was ask and some one would lift the boxes for her.

The events of 17 July 1995

Mathew Prendergast was no longer employed at the Palmerston Newsagency, and the complainant, Karina Windler, was responsible for making up the sub-agents orders, and the Gulf Mini-Mart order (which was made up at the front of the shop and needed to be carried to the rear).

On July 17 Ms Windler made up the Gulf Mini-Mart order, but did not carry the box to me rear for courier pick-up. In her evidence Ms Windler stated:

"On July 17 I done up the sub-agent order boxes and I was putting out some magazines for Robyn. And Owen yelled out across the shop that when I did the sub-agent order I was to take the boxes out the back. And he asked me why I hadn't done it and I said I couldn't lift them. And he replied that if I couldn't do the job properly I wasn't to do any more and he took them out the back himself. And he then approached me and asked me again why I couldn't do it. I just told him that I've got enough complications with it - my pregnancy - I didn't want to lift boxes. And then he left me again. I was upset about it, being asked why I should lift the boxes. He came back and he told me that it was all in my head and that if my job was going to interfere with my - if my pregnancy was going to interfere with my job, that may be I shouldn't be working. And I turned around to him and said that if that was the way he felt about it may be he should sack me. And then he left - nothing - he left me. Then when I went up to Robyn and I looked at her and I said to her, Owen's treating me unfairly, I don't deserve this. And she just turned her head the other way. And then I - so, then I grabbed my bag - I think I'd gone back out then and come back in and I grabbed my bag and I said, I'm out of here. And I had some magazines in my hand and I put

them back on the counter before leaving the shop. And then I walked out after that - probably a couple of minutes."

In his evidence, Mr McDermott stated:

"I asked why the boxes weren't at the back door."

"I asked her why she didn't ask someone to take them to the back door for her if she couldn't carry them. There wasn't a problem, I just asked why they weren't at the back door and then I - I was told that she couldn't lift them."

and in response to further questions on this issue:

"I stood from here to there and I just said, Karina why aren't the magazine boxes out the back for Gulf Mini Mart?"

"She said she couldn't lift them and then I went over and I said why didn't you ask someone, the courier won't take them away up here."

It was agreed by both parties in evidence that Ms Windler became distressed and was crying.

Ms Windler then went to another shop - the "shake bar" and confided in the proprietor a Mr Gierke.

Mr McDermott denied having said words to the effect that:

"it was all in (the complainants) head and that if her job was going to interfere with her - if her pregnancy was going to interfere with her job, that may be she shouldn't be working."

But stated:

"I suggested to her that if she couldn't do it we get somebody else to do it. You know, somebody else on the staff, either myself would do it or whatever."

Mr Gierke appeared as a witness for the complainant and gave evidence as to her distress on that day.

Ms Windler did not return to Palmerston Newsagency, and subsequently obtained casual employment at two other Newsagencies:

- Parap Newsagency and
- Winnellie Newsagency.

Discrimination is dealt with at *Section 20* of the Act, which states that:

"20. DISCRIMINATION

- (1) For the purposes of this Act, discrimination includes -
 - (a) any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity; and
 - (b) harassment on the basis of an attribute,
in an area of activity referred to in Part 4.
- (2) Without limiting the generality of subsection (1), discrimination takes place if a person treats or proposes to treat another person who has or had, or is believed to have or had -
 - (a) an attribute;
 - (b) a characteristic imputed to appertain to an attribute;
or
 - (c) a characteristic imputed to appertain generally to persons with an attribute,
less favourably than a person who has not, or is believed not to have, such an attribute.

- (3) For discrimination to take place, it is not necessary that -
 - (a) the attribute is the sole or dominant ground for the less favourable treatment; or
 - (b) the person who discriminates regards the treatment as less favourable.
- (4) The motive of a person alleged to have discriminated against another person is, for the purposes of this Act, irrelevant."

Failure to Accommodated a Special Needs is dealt with at *Section 24*, which states:

"24. FAILURE TO ACCOMMODATE SPECIAL NEED

- (1) A person shall not fail or refuse to accommodate a special need that another person has because of an attribute.
- (2) For the purposes of subsection (1) -
 - (a) a failure or refusal to accommodate a special need of another person includes making inadequate or inappropriate provision to accommodate the special need; and
 - (b) a failure to accommodate a special need takes place when a person acts in a way which unreasonably fails to provide for the special need of another person if that other person has the special need because of an attribute.
- (3) Whether a person has unreasonably failed to provide for the special need of another person depends on all the relevant circumstances of the case including, but not limited to -
 - (a) the nature of the special need;
 - (b) the cost of accommodating the special need and the number of people who would benefit or be disadvantaged;
 - (c) the financial circumstances of the person;
 - (d) the disruption that accommodating the special need may cause; and
 - (e) the nature of any benefit or detriment to all persons concerned."

It is for the complainant to prove, on the balance of probabilities, that the discriminatory conduct occurred.

COUNSEL ASSISTING

The Act also allows for the appointment of a legal practitioner to appear at proceedings under the Act to assist the Commissioner (*S94*)

Ms Sally Gearin was so appointed.

The Respondents queried the role of Counsel Assisting, and stated they felt "bullied" by her.

The respondents were advised that the role of Counsel is to assist in bringing out relevant facts and information on which, on the balance of probabilities, the Hearing Commissioner can make a finding - Counsel does not act as advocate for any party.

They were assured that they had no reason to feel prejudiced, either by the way in which Counsel was attempting to draw out relevant facts, or indeed by their statement, which was accepted in good faith as expressing their feelings.

FINDING

Discrimination based on pregnancy. Reduction of Hours - Computer training

Karina Windler was employed by Gona Nominees to work at Palmerston Newsagency as a shop assistant on a casual basis.

There were no "set" hours, and rosters were produced from week to week, prepared by Mrs Robyn McDermott.

Factors influencing the number of hours allocated to an employee included:

- public holidays (both locally and interstate)
- availability/sickness of other staff members
- peak trading times.

Copies of rosters were not kept, and therefore could not be produced, making it impossible to compare the "roster" with actual days worked and paid for as indicated in the wages book.

The complainant's witness Mrs McLeod could not give any weight to "standard hours" of employment, in fact her evidence was that "hours went up and down all the time" "...it just changed, sort of , probably every month or so we'd have new hours".

The evidence of hours worked as shown in the wages book is just that. They do not of themselves indicate if the hours were as originally rostered, on what can only be described as an ad hoc basis, or whether they had varied because of other factors such as filling in for another casual employee, delays in the arrival of stock, or any other relevant factor.

On her return from leave, Ms Windler's hours varied greatly and it was agreed that some of the variation was due to sickness on her part. I note that the week preceding her departure Ms Windler's worked 30 hours, which is at the higher end of the scale.

It is for the complainant to prove, on the balance of probabilities that unlawful discriminatory conduct occurred.

I have taken account of the evidence relating to the employment of Donna and would have expected further evidence, or submissions, on the related hours of all other casual staff, however the evidence presented was inconclusive in as much as it simply highlighted the ad hoc or erratic nature of the way in which staff were rostered for work.

Addressing the issue of computer training for Ms Windler, I accept that on her return from leave, she was not immediately offered training, but I also accept the evidence of Mrs McDermott that she was having difficulty in mastering the computer herself and was not coping well at that time.

Ms Windler was subsequently offered training, and on the evidence before me any delay would appear to be due to re-rostering following her return from leave and not because of her pregnancy.

It follows therefore, that I dismiss the claim of discrimination by a reduction in working hours and computer training on the basis of pregnancy.

FAILURE TO ACCOMMODATE A SPECIAL NEED

The complainant Karina Windler claimed that:

- she informed Mr & Mrs McDermott that she was pregnant
- she advised them there were complications with her pregnancy
- Owen (Mr McDermott) told her to ask Mathew Prendergast to lift any heavy boxes for her
- When Mathew was "sacked" no formal mechanism was put in place to ensure she did not have to lift heavy weights - that is her special need, on account of her pregnancy, was not accommodated.

For their part, the respondents agreed they became aware that Karina was pregnant but disputed the evidence as to how they were told of her pregnancy and denied that she had raised with them "complications" with the pregnancy, and consistently stated that all staff worked as a team, and all Karina had to do was ask and the heavy lifting would be done for her. They also gave evidence regarding Mathew Prendergast's departure from their employ.

I find the issue of whether Mathew Prendergast was "sacked" or left for any other reason irrelevant, what is not in dispute is that Mathew Prendergast left on 1 June 1995.

There was no evidence put before me to indicate any other staff member was specifically detailed to assist Karina Windler in the lifting of heavy articles, on the contrary the respondents, were clear in their belief that the "teamwork" expected from the workforce would suffice.

Was there a special need?

There is no doubt that:

- Karina Windler became pregnant while in the employ of Mr & Mrs McDermott
- her duties including the making up of orders which could weigh up to 20 kilograms
- the orders needed to be taken to the rear of the premises for collection by a courier.

Whether or not Ms Windler formally advised the McDermotts of any complications with her pregnancy, a matter of dispute between the parties, I find that because of her pregnancy a reasonable person would assume there was a special need to ensure Ms Windler did not have to lift heavy weights (boxes) of up to 20 kilos. I find Mr McDermott's statement: "I don't know, is pregnancy an illness?" in answer to a question as to whether lifting boxes is contra-indicated in pregnancy, to be illustrative of his lack of concern.

From my observations of Mr McDermott, and having carefully considered his evidence, I find that Mr McDermott considered that "teamwork" was sufficient and did not put in place any mechanism to accommodate Ms Windler's special need. In particular I note that on June 17 Mr McDermott made no effort to ensure the Gulf Mini Mart order would be carried by some-one other than Ms Windler to the rear of the premises. This failure precipitated an acrimonious exchange between Mr McDermott and Ms Windler culminating in Mr McDermott carrying the order to the rear himself and Ms Windler leaving Palmerston Newsagency distressed and in tears.

On the evidence put before me, I find that it would not have caused undue hardship, or expense, for Mr & Mrs McDermott to have accommodated Karina Windler's special need by putting in place a formalised system to ensure she did not have to lift heavy weights in the course of her duties.

I find that Owen McDermott discriminated against Karina Windler by failing to accommodate her special need - due to her pregnancy - contrary to S. 24 of the NT Anti-Discrimination Act.

VICARIOUS LIABILITY

Although neither party addressed me on the issue of any vicarious liability of Gona Nominees for the actions of Mr McDermott as its employee, I had the benefit of Counsel Assisting addressing me on the issue.

The Anti-Discrimination Act 1992 does not make specific reference to the issue of vicarious liability, as is the case with equivalent Commonwealth and interstate legislation.

However, this does not mean that employers are not vicariously liable for the discriminatory actions of its employees. *Section 88* of the Act, states:

“88. ORDERS AFTER HEARING

- (1) If, after the hearing of a complaint, the Commissioner finds the prohibited conduct alleged in the complaint is substantiated, the Commissioner may make one or more of the following orders:
 - (a) an order requiring the respondent not to repeat or continue the prohibited conduct;
 - (b) an order requiring the respondent to pay to the complainant or another person, within a specified period, an amount, being an amount not more than that prescribed, that the Commissioner considers appropriate as compensation for loss or damage caused by the prohibited conduct;
 - (c) an order requiring the respondent to do specified things to redress loss or damage suffered by the complainant or any other person because of the prohibited conduct;
 - (d) an order declaring void all or part of an agreement made in connection with the prohibited conduct, either from the time the agreement was made or subsequently.
- (2) In this section, the specified things a respondent may be required to do, include, but are not limited to the following:

- (a) employing, reinstating or re-employing a person;
 - (b) promoting a person;
 - (c) moving a person to a specified position within a specified time.
- (3) In this section, "damage", in relation to a person, includes the offence, embarrassment, humiliation, and intimidation suffered by the person.
- (4) If, after the hearing of a complaint, the Commissioner finds the prohibited conduct alleged in the complaint is not substantiated the Commissioner shall make an order dismissing the complaint”

It is implicit from a reading of *Section 88* that some of these things can only be done by an employer, such as re-instatement. As I can only make an order against a party to a complaint, it is clear that employers can be parties to complaints, ie that they can be held vicariously liable for the prohibited conduct of their employees.

Section 19 of the *Interpretation Act* also sets out that a ‘person’ includes a body corporate, so the references to a ‘person’ engaging in prohibited conduct in the *NT Anti-Discrimination Act 1992*, such as practising discrimination or failing to accommodate a special need, includes a body corporate, acting through its servants or agents.

I also note that Mr McDermott, in addition to being an employee of Gona Nominees, is also a Director of that company, and the ordinary principles of agency apply to his actions in any case.

COMPENSATION

On leaving Palmerston Newsagency, Ms Windler obtained employment at:

- Parap Newsagency
- Winnellie Newsagency

and worked from 17.7.95 to 24.11.95, thereby minimising the loss of earnings she otherwise would have incurred and mitigating damages. Ms Windler tendered her wage records for that period which total \$4776.00.

Had there been clearer evidence of consistency in rostered hours for Ms Windler at Palmerston Newsagency, a comparison between anticipated earnings at Palmerston Newsagency and actual earnings from Parap and Winnellie Newsagencies from 17.7.95 to 24.11.95 would have provided a firm base for calculation of wages lost, however such a precise calculation is not possible in this case.

However, on the figures tendered by the McDermotts in their defence to the points of claim a conservative estimate of the hours that would have been worked by Ms Windler had she remained at Palmerston Newsagency would have been 23 hours per week, and her earnings would have been \$5462.00.

I am required to consider this issue of her humiliation distress and intimidation in assessing damages, which may be awarded up to a limit of \$60,000.00.

From my observation of the parties to this matter, and on the evidence placed before me, I have no doubt that the complainant, Karina Windler, suffered humiliation and distress because of the failure of Mr McDermott to accommodate her special need, and was intimidated by him.

I find Gona Nominees Pty Ltd are vicariously liable for the actions of Mr McDermott, and make the following order pursuant to *S.88* of the *NT Anti-Discrimination Act 1992*.

That Gona Nominees Pty Ltd pay Karina Windler:

\$690.00	loss of wages
\$3,500.00	hurt, humiliation and distress
\$4,190.00	Total

DAWN LAWRIE

Commissioner

13 June 1996